



31 October 2019

Darien Williams  
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Australian Securities and Investments Commission (ASIC)  
Via email: [unsolicited.sales@asic.gov.au](mailto:unsolicited.sales@asic.gov.au)

Dear Darien Williams

## **Ban on unsolicited sale of direct life insurance and consumer credit insurance: Draft legislative instrument, and revised Regulatory Guide 38: The hawking provisions**

Thank you for the opportunity to comment on ASIC's proposed ban on unsolicited sale of direct life insurance and consumer credit insurance, and revised *Regulatory Guide 38: The hawking provisions*. This submission provides:

- Comments on the draft legislative instrument; and
- Comments on the Revised Regulatory Guide 38

### **Comments on draft legislative instrument**

The draft ASIC Corporations (Hawking—Life Risk Insurance and Consumer Credit Insurance) Instrument 2019/839 (**Draft Instrument**) will prohibit the unsolicited telephone sale of consumer credit insurance and life risk insurance products to retail clients in the absence of personal advice (**Proposed Ban**). As set out in the submission by the Financial Rights Legal Centre and Consumer Action Law Centre dated 29 August 2019 (**CP 317 Submission**), this is a welcome stop-gap while law reform is progressed. This submission should be read together with the CP 317 Submission.

### **Hours of contact/"No Contact/No Call" register**

The law currently permits the offering and sale of consumer credit insurance and life risk insurance products because of an unsolicited telephone call, if the offeror follows the procedure set out in s.992A(3)(a)-(e) of the *Corporations Act 2001*. Clause 5 of the Draft

Instrument replaces all of the requirements in s.992A(3)(a)-(e) with the single proviso that the consumer be provided with personal advice. We submit that the Draft Instrument should retain the requirements in s.992A(3)(a) and (b) in relation to consumer credit insurance and life risk insurance products. That is, the Draft Instrument should provide, in addition to the requirement for personal advice, that:

- the hours of contact are limited to those prescribed by the Corporations Regulations 2001;
- no contact is made if the consumer is on the offeror's "No Contact/No Call" register;
- an opportunity is provided to register on the offeror's "No Contact/No Call" register; and
- an opportunity is provided to select the time and frequency of any future contacts.

Weak though they might be, there is no reason for these consumer protections to be removed in relation to the unsolicited sale of consumer credit insurance and life risk insurance products. It would be a perverse outcome if the enactment of the Draft Instrument led to consumers receiving unsolicited telephone calls about life insurance on Christmas Day or late at night, or being contacted about consumer credit insurance despite being on the offeror's "No Contact/No Call" register. Given offerors already have to comply with s.992A(3), no additional regulatory burden is imposed by preserving these requirements in the Draft Instrument.

### **Provision of PDS**

It is our understanding that the requirements currently imposed by s.992A(3)(c)-(e) (provision, etcetera, of the Product Disclosure Statement (PDS)) will in effect be replaced by the disclosure requirements pertaining to products sold with personal advice, contained in Part 7.9 of the *Corporations Act* (and in particular, the requirement in s.1012A that the PDS be given at or before the time when the advice is provided). In addition to provision of the PDS, it is also our understanding that consumers receiving personal advice would receive a Statement of Advice; such statement to be provided, at the latest, before any consumer credit insurance or life risk insurance product is issued to the client: s.946C(1), and see ASIC Regulatory Guide 175.163. It would be useful if this could be confirmed in ASIC's feedback report on submissions.

### **Other financial products**

We remain concerned that a number of financial products known to cause consumer detriment are not covered by the Proposed Ban as embodied in the Draft Instrument (see our CP 317 Submissions at pages 3-4). In particular, we are concerned that sickness and accident general insurance policies are not covered. It may be an unintended consequence of the Draft Instrument that insurers will be incentivised to shift their unsolicited sales business towards sickness and accident general insurance policies, because these will not require the provision of personal advice. These policies are often complex and of limited value to consumers. Consumers are unlikely to appreciate the distinction between these policies of general insurance, and life risk insurance products; at least not without the benefit of personal advice. For this reason, we submit that the Draft Instrument should extend to sickness and accident insurance products, as defined in regulation 7.1.14 of the Corporations Regulations 2001.

We also note that, while ASIC Consultation Paper 317 proceeded on the basis that funeral-expenses-only policies were not to be covered by the Proposed Ban, passage of the draft Financial Services (Improved Consumer Protection) (No. 1) Bill 2019 in the near future will have the effect that these policies are covered by the Proposed Ban. The Draft Instrument defines “*life risk insurance product*” by reference to s.764A(1)(e) of the *Corporations Act*, which cross-references the meaning given to the term “*life policy*” in the *Life Insurance Act 1995*. Section 764A(1)(e)(iii) of the *Corporations Act* excludes life policies to the extent they provide for the provision of a funeral benefit. The draft Financial Services (Improved Consumer Protection) (No. 1) Bill 2019 will clarify that a funeral expenses facility is not a funeral benefit. Given the harm caused by funeral-expenses-only policies (as to which, see the Consumer Action Law Centre, Financial Rights Legal Centre, Victorian Aboriginal Legal Service, Financial Counselling Australia and CHOICE joint submission to Treasury dated 22 October 2019 regarding the exposure draft legislation providing for the removal of the exemption for funeral expenses policies), we submit it is imperative that these products are brought within the remit of the Draft Instrument as soon as practicable.

### **Unsolicited sales other than over the telephone**

The Draft Instrument does not address unsolicited online contact leading to the sale of consumer credit insurance and life risk insurance products (see page 6 of the CP 317 Submission). First, we would be grateful if ASIC could include any information about the decision not to address online contact in the Draft Instrument in its feedback report. Secondly, were ASIC at some point in the future to prescribe unsolicited online contact pursuant to its power in s.992A(3)(ab), we submit the Draft Instrument will need to be reviewed to ensure that any such extension is also applied to consumer credit insurance products and life risk insurance products.

### **Comments on draft Regulatory Guide 38**

The draft revised Regulatory Guide 38 (**Revised RG 38**) largely republishes the information that appears in the current version of Regulatory Guide 38, with minor amendments to reflect the impact of the Draft Instrument, and to modernise the appearance of the Guide.

#### **Guidance on Proposed Ban**

Paragraph 46 of ASIC Consultation Paper 317 foreshadowed that Revised RG 38 would provide updated guidance dealing with the Proposed Ban. We have been unable to identify any specific guidance in Revised RG 38 dealing with the Proposed Ban, other than the descriptive note appended to RG 38.45. We submit that such guidance is required.

In particular:

#### ***Bundled products***

No guidance has been provided in relation to bundled products i.e. products comprising elements of both life risk insurance products and other products. We submit Revised RG 38 should clearly state that the Proposed Ban prohibits the unsolicited offer or sale, without personal advice, of any product containing any element of consumer credit insurance or life risk insurance.

### ***Different product to that initially requested by consumer***

No updated guidance has been provided in relation to the offer of a different product to that initially requested by a consumer, where the original product discussed and/or the product ultimately offered, falls within the scope of the Proposed Ban. We are aware of instances where a consumer has contacted an insurer to discuss obtaining an income protection policy, and agreed to a follow-up call. The consumer then does not obtain income protection policy (either because the consumer cannot afford it, or because the insurer declines to provide cover), and the insurer instead contacts the consumer to offer another product, such as funeral insurance or a sickness and accident general insurance policy.

We submit the return call from the insurer is relevantly unsolicited and:

#### *Life risk products*

To the extent the “substitute” product offered is a life risk insurance product (such as a funeral insurance policy), cannot be offered or sold without personal advice pursuant to the Proposed Ban, and

#### *Non-life risk products*

To the extent the “substitute” product is not a life risk insurance product:

1. offerors should still provide personal advice, because offerors who fail to provide proper personal advice will be in real danger of breaching either the legislative requirements governing such advice, or the general consumer protection provisions of the *Corporations Act* and the *Australian Securities and Investments Act 2001* (see Revised RG 38.8-9), or both. This danger arises because of the complexity of the products involved, and the implicit message conveyed by the return phone call that:
  - a. the “substitute” product offered is similar to, or meets the same needs as, the product initially sought (we consider there will almost inevitably be consumer confusion, given the difficulty of explaining the difference between a life risk insurance product and, for example, a sickness and accident general insurance policy)<sup>1</sup>, and
  - b. the offeror has considered whether the product to be offered is suitable for the individual circumstances of that consumer; and
2. in any event, any “substitute” product which is not a life risk insurance product cannot be offered or sold without complying with the extant (i.e. unmodified by the Draft Instrument) provisions of s.992A(3).

We submit guidance along these lines should be included in Revised RG 38. We also submit that additional examples addressing situations of this type should be included either in

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<sup>1</sup> As discussed above, our primary position is that sickness and accident general insurance policies should be brought within the remit of the Draft Instrument. These submissions in relation to Revised RG 38 proceed on the basis that position is not embraced by ASIC.

paragraph 38.40 (dealing with the scope of the consumer's request) or together with the guidance dealing specifically with the Proposed Ban. Such examples could be as follows:

**“Example 4: Offer of an alternative life risk insurance product**

A consumer telephones an insurer after seeing an advertisement on television for income protection insurance. The consumer discusses the policy with the insurer, and agrees to a follow-up call. The insurer subsequently calls back to advise that it cannot offer the consumer income protection insurance, and instead offers a funeral insurance product. The subsequent telephone call would be unsolicited for the offer of funeral insurance.

**Example 5: Offer of an alternative product**

A consumer telephones an insurer after seeing an advertisement on television for income protection insurance. The consumer discusses the policy with the insurer, and agrees to a follow-up call. The insurer subsequently calls back to advise that it cannot offer the consumer income protection insurance, and instead offers a general insurance sickness and accident policy. The subsequent telephone call would be unsolicited for the offer of a general insurance sickness and accident policy.

***Deferred sales model***

We note that Revised RG 38 does not provide any guidance on how the Proposed Ban will interact with the Australian Banking Association's Banking Code of Practice deferred sales model (see paragraphs 67-68 of the 1 July 2019 release of the Code). Such guidance would be welcome (see page 6 of the CP 317 Submission).

**General guidance**

We submit the following changes could be made to strengthen and clarify ASIC's general guidance as to the meaning of "unsolicited":

1. Revised RG 38.13 states: *"For example, an unsolicited letter may contain a reply slip for a consumer to specifically request that the offeror telephone them at a future time and date convenient to the consumer. If the consumer returns the reply slip requesting a telephone call from the offeror, the telephone call requested in these circumstances is not unsolicited merely because the original letter was unsolicited."* We submit ASIC should:
  - a. insert at the end of the first sentence the words *"to discuss a particular financial product or class of financial product"*;
  - b. include underneath Revised RG 38.13 a note in the following terms: *"Note: offerors contemplating using unsolicited communications to procure a request for contact should refer to RG 38.26-38.29, which contains guidance on the need for requests for contact to be clear and informed, including ensuring consumers are provided with enough information to allow them to carefully consider whether to request the meeting or telephone call, and RG 38.38-38.40, which contains guidance on determining the scope of the consumer's request."*

2. Revised RG 38.23 states: "*A positive request involves an active step by the consumer. As a matter of good practice, we suggest that offerors ensure that meetings or telephone calls are positively requested. A request should involve some conscious decision by the consumer.*" We submit ASIC should replace "*As a matter of good practice, we suggest that offerors ensure*" with "*Offerors should ensure*". Given ASIC's position that a telephone call will generally be unsolicited unless it takes place in response to a positive, clear and informed request from the consumer (Revised RG 38.20), ensuring that calls are positively requested is not simply a matter of good practice for offerors: it is necessary in order to comply with the anti-hawking provisions.
  
3. Revised RG 38.25 states: "*A meeting or telephone call is not solicited merely because the consumer fails to request that the meeting or telephone call not take place after being given an opportunity to do so. For example, the fact that a consumer did not opt out of receiving future telephone calls when given an opportunity to do so on an application form usually does not mean that subsequent telephone calls from the offeror are solicited. A consumer's failure to opt out usually does not constitute a positive act of requesting a meeting or telephone call.*" We submit that failure to opt-out is never be enough to make communication with a consumer solicited. It is not clear how failure by a consumer to opt-out meets ASIC's own criteria of positive consent. Given that, we submit ASIC should delete the word "usually" from the second and third sentences of this paragraph.

## Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact Financial Rights on (02) 9212 4216.

Kind Regards,



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## About Financial Rights

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters.