



**Submission by the
Financial Rights Legal Centre and Consumer
Action Law Centre**

ASIC Consultation Paper 317: Unsolicited
telephone sales of direct life insurance and
consumer credit insurance, July 2019

29 August 2019

About the Financial Rights Legal Centre

The Financial Rights Legal Centre 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. Financial Rights took close to 25,000 calls for advice or assistance during the 2017/2018 financial year.

About Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Introduction

Thank you for the opportunity to comment on the Australian Securities and Investments Commission's (**ASIC's**) plan to ban unsolicited telephone sales of direct life insurance and consumer credit insurance. The Financial Rights Legal Centre (**Financial Rights**) and Consumer Action Law Centre (**Consumer Action**) strongly support this proposal. Consumer Representatives have advocated for a ban on unsolicited sales of these types of insurance products in multiple consultations including:

- Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**) – Insurance Hearings (2018);
- Parliamentary Joint Committee on Corporations and Financial Services: Inquiry into the Life Insurance Industry (2016); and
- Senate Economics References Committee: Scrutiny of Financial Advice Inquiry: Additional terms of reference on the life insurance industry (2016).

We have also advocated repeatedly for greater regulation around the sale of all add-on, Consumer Credit Insurance (**CCI**), accidental death and injury and funeral insurance products.

Unsolicited selling is an outdated and abusive practice with a significant risk of mis-selling people products they don't want, need or understand.

We strongly support ASIC's proposed use of its modification powers and support ASIC making the best use of its full regulatory tool box in order to protect consumers from harmful sales practices.

Ban unsolicited selling

There is overwhelming evidence on the need to ban unsolicited selling of insurance, and other financial products.

The existing anti-hawking laws in the *Corporations Act 2001* (Cth) have failed to stop inappropriate selling. ASIC recently reported on the significant harm caused by direct sales of life insurance, finding high cancellation rates and high claim decline rates.¹ The ClearView and Freedom case studies at the Royal Commission showed the significant harm caused by unsolicited sales of life insurance, including:

¹ ASIC, *The Sale of Direct Life Insurance*, Report No 587 (2018).

- **Sales to vulnerable people:** Cold-calling is a particularly harsh practice when it involves vulnerable people who may not understand the products or feel able to say no to the seller. Many people targeted by cold-calls have no need for the products being sold.
- **Targeting people who could not afford it:** ClearView targeted people on disability pensions and others with lower financial means for cold-call sales of insurance. This increases the risk of unsuitable sales and cancellations due to non-payment of premiums.
- **Poorly-designed, low-value products:** Insurance products sold via cold-calling, particularly accidental death and accidental injury insurance, are not valuable products. This is evidenced by their very low claims rates and ratios;
- **Insurers not complying with unsolicited selling laws:** ClearView, which had significant cold-calling operations within its business, may have breached the existing anti-hawking provision—a law integral to its business operations—more than 300,000 times.²

As the Final Report observes about the witness that appeared on behalf of ClearView:

The most telling general point to emerge from the case study was Mr Martin’s frank acknowledgment that he found it difficult to see how it would be possible to sell life insurance in outbound sales calls in a way that is both financially viable and legally compliant. As he rightly said, it is difficult to see how a customer can come to a view in a phone call that lasts 20 minutes about ‘a fairly complex sort of area of financial services.’³

In addition to the problems exposed at the Commission, our services have seen people suffer severe financial harm as a result of the finance sold with products which are sold through cold-calling and unsolicited meetings. These products include timeshare schemes and products sold door-to-door, such as solar panels sold with unregulated credit.⁴ We also regularly hear complaints about unsolicited sales of consumer leases, particularly among Aboriginal and Torres Strait Islander communities. We do not see unsolicited sales deliver benefits to consumers. Generally, the products sold are expensive and poor value. Frequently, they are sold to people who cannot afford them.

We strongly recommend an economy-wide ban on unsolicited selling.

² Royal Commission Final Report, Volume 2: Case Studies, p 298.

³ Royal Commission Final Report, Volume 2: Case Studies, p 301 (internal citations omitted).

⁴ For more information, see Consumer Action Law Centre & ors, *Knock it off! Door-to-door sales and consumer harm in Victoria*, November 2017, available at: <https://consumeraction.org.au/wp-content/uploads/2017/11/Knock-it-off-Consumer-Action-Law-Centre-November-2017.pdf>.

Feedback on the Proposal

The Royal Commission recommended a simple and clear ban on the hawking of insurance to retail consumers: Recommendation 4.1. The Proposed Ban as outlined by ASIC in CP317 is a stop-gap to provide some protection to consumers until that recommendation is legislated.

We welcome the interim protection for consumers from particularly egregious sales practices in relation to particularly poor value products. Modifying the anti-hawking provisions is the best way for ASIC to provide this protection using currently available powers while consumer await legislative change.

Nevertheless, we strongly submit that legislative changes recommended by the Royal Commission, and agreed to by Government, remain essential. Without those legislative changes, the Proposed Ban risks becoming simply another technical and complicated exception buried within an already technical and complicated regulatory framework, raising the inevitable risk of non-compliance.⁵ In the absence of the promised broader reform, the Proposed Ban would not accord with Recommendation 7.3:

As far as possible, exceptions and qualifications to generally applicable norms of conduct in legislation governing financial services entities should be eliminated.

C1Q1 Do you have any feedback about our intention to use the modification power to prohibit unsolicited telephone contact to offer issue or sell direct life insurance?

We strongly support ASIC's plan to use the modification power to prohibit unsolicited telephone contact to offer, issue or sell direct life insurance, including funeral insurance.

These insurance products all provide:

- limited to nil value to consumers
- low claims ratios and high cancellation rates
- the use of terms that significantly limit a successful claim
- targeting of vulnerable consumers who cannot afford them
- inappropriate distributions channels or techniques, and
- demand driven by the seller rather than genuine consumer need.

As the evidence presented at the Royal Commission showed, the anti-hawking provisions of the *Corporations Act 2001* have not prevented inappropriate, unsolicited sales of insurance. While anti-hawking laws do place strict restrictions around the sales of insurance with cold calls, insurers get around these laws via loopholes: they can obtain a customer's consent in

⁵ see the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report 2019, Volume 1 at 283
<https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf>

some form such as an innocuous ticked box on an unrelated sales document or by making two calls where one is to obtain the consent and the follow up call to make sales. Unsolicited sales in insurance should be banned entirely and all loopholes closed.

The Proposed Ban removes the scope for insurers and their agents to lawfully make unsolicited telephone sales of life insurance and CCI by complying with the technical and largely procedural requirements of section 992A(3), that is calls between certain hours, the provision of written disclosure, raising the availability of a Do Not Call register etc). The closure of this loophole, which significantly counteracted the protective function of section 992A for consumers, is welcome.

However, the Proposed Ban will not ameliorate the existing ambiguity as to what is meant by “unsolicited”. The Royal Commission Final Report⁶ suggested that this ambiguity could be addressed by inserting a statutory definition of “unsolicited” into the *Corporations Act*, that codifies the approach set out in ASIC Regulatory Guide 38 (RG 38) that a meeting or telephone call is unsolicited “unless it takes place in response to a positive, clear and informed request from a consumer”. We would expect this to be implemented in legislation by Government by 30 June 2020 as announced under the Royal Commission Implementation Roadmap.⁷

Further, the Proposed Ban relates only to telephone calls – it does not seek to prohibit unsolicited online contact leading to the sale of life insurance or CCI. A financial services provider will still be able to make unsolicited contact through any other medium to ‘encourage’ consumers to ‘request’ future meetings or telephone calls.⁸ Again this is an issue that goes beyond the Proposed Ban. In the absence of regulations, section 992A(3) is limited to telephone contact and meetings. Consideration should be given to using the regulation-making power in s.992A(3)(ab) to extend the scope of the section and the Proposed Ban to capture unsolicited online contact (such as Facebook advertisements etc.) in direct life insurance.⁹

For these reasons, the Proposed Ban is unlikely to prevent the kind of tick-a-box “consent” practices we have seen used to avoid the anti-hawking provisions. Financial Rights and Consumer Action of course argue that merely ticking a box in a survey or competition consenting to be contacted does not meet ASIC’s guidance that contact is unsolicited unless it results from a “positive, clear and informed request”; but the need to argue the point leaves consumers vulnerable.

⁶ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report 2019, Volume 1, pp 283-284.
<https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf>

⁷ Restoring Trust in Australia’s Financial System, Financial Services Royal Commission Implementation Roadmap August 2019, https://treasury.gov.au/sites/default/files/2019-08/399667_Implementation_Roadmap_final.pdf

⁸ ASIC Regulatory Guide 38, at A1.3

⁹ see the problems identified in ASIC Report 622: Consumer credit insurance: Poor value products and harmful sales practices at 16)

Deferred Sales

It is not entirely clear how the Proposed Ban will interact with either the Australian Banking Association's (ABA's) current deferred sales model¹⁰ or the planned implementation of Royal Commission recommendation 4.3 (or, for that matter, how the deferred sales model will interact with the more wholesale reforms to the anti-hawking provisions recommended by the Royal Commission). However, we assume that an uninvited telephone call from a bank to its customer four days after taking out a personal loan to sell CCI would, without more, be unsolicited and therefore fall foul of the Proposed Ban.

Financial Rights and Consumer Action believe CCI should not be able to be sold on an unsolicited basis, including after a deferral period via a telephone call. ASIC has proposed that communication about CCI following a deferral period should be only via a single electronic communication be it an email or in-account online communication or offer¹¹:

the consumer should be able to access information online ... that is designed to help them to make informed decisions;

the consumer should only be able to be sold the product if they have indicated a preference to do so through the online portal; [and]

product providers should develop screening or 'knock out' questions so that consumers are not offered products where they are unlikely to benefit (either because the likelihood of a claim is very low or because the amount they would receive in the event of a claim is insignificant)

According to ASIC's proposal, if the invitation is accepted, any subsequent contact will not be unsolicited. We consider that further consultation should be done on the interaction between this proposal, and recommendations 4.1 (No hawking of insurance) and 4.3 (Deferred sales model for add-on insurance) from the Royal commission Final Report.

Recommendations

1. Consideration should be given to using the regulation-making power in section 992A(3)(ab) to extend the scope of the section and the Proposed Ban of direct life insurance to capture unsolicited online contact (such as Facebook advertisements etc.).

¹⁰ Clauses 67-68 Banking Code of Practice, <https://www.ausbanking.org.au/wp-content/uploads/2019/06/Banking-Code-of-Practice-2019-web.pdf>

¹¹ see ASIC's Module 6 submission to the Royal Commission at [92]; see also ASIC Consultation Paper 294: *The sale of add-on insurance and warranties through caryard intermediaries* at [179]-[186]

C1Q2 Do you have any feedback about our intention to use the modification power to prohibit unsolicited telephone contact to offer, issue or sell CCI?

We strongly support ASIC's intention to prohibit unsolicited telephone contact to offer, issue or sell CCI. We do so for all of the same reasons, and with the same reservations detailed above. From our advice and casework experience, and Consumer Action's DemandaRefund.com, it is clear that CCI products provide little value for consumers, whether they are sold as an add-on at point of sale or at a later point through outbound telephone contact. Since its launch, we estimate that 1,267 letters of demand have been generated from DemandARefund.com in respect of CCI, totalling \$1.92 mil in claims. ASIC expects over \$300 mil in remediation. For too long, unscrupulous sales practices have been the go-to way to flog this junk insurance. Banning outbound phone sales of consumer credit insurance is an essential part of preventing future problems.

C1Q3 Is there a risk of causing inadvertent consumer harm by banning unsolicited telephone contact to offer, issue or sell direct life insurance and CCI?

We do not believe there is a risk of inadvertent consumer harm by banning unsolicited telephone contacts to offer, issue or sell direct life insurance and CCI. We do not believe that this modification will lead to large numbers of uninsured consumers. The vast majority of consumers in Australia have life insurance through group policies in their super, and as ASIC's copious amounts of evidence has shown it is not useful for consumers to end up with insurance products that are illusory, unsuitable or unaffordable. In our experience CCI, funeral and accident policies are often so limited in the benefit they offer or the circumstances where a successful claim can be made, as to be useless.

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 Drew MacRae, Policy and Advocacy Officer at Financial Rights on (02) 9212 4216.

Kind Regards,



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