Article Information

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ASIC to target car yards in newest proposed use of the product intervention power

ASIC has proposed to use their product intervention power again to target add-on insurance and warranties sold at car yards.

ASIC has again consulted on exercising its product intervention order power, this time targeting add-on insurance and warranties sold at car yards.

On 1 October 2019, ASIC released Consultation Paper 324 *Product intervention: The sale of add-on financial products through caryard intermediaries* (CP 324) to seek consultation on three factors:

a. introducing a deferred sales model for add-on insurance products and warranties by caryards;
b. having additional deferred sales model obligations such as 'knock out' questions and prohibiting warranty sales that provide low levels of cover; and
c. collecting data from insurers and warranty providers so that ASIC can monitor whether an intervention is operating as intended.

The product intervention power may only be used if ASIC reasonably believes that a product, or class of products, has or is likely to result in significant consumer detriment. CP 234 identifies the detriment of these products broadly as:

- redundant or duplicated insurance cover;
- policies under which the likelihood of an insured event occurring is remote (e.g. guaranteed asset protection insurance where the consumer paid a substantial deposit on purchase of the car);
- consumers being sold an excessive level of cover;
- lack of rebates when policy terminated early due to early payout of credit contracts;
- consumers being sold products under which they are ineligible to claim;
- lack of competition increases price of add-on insurance;
- overlap between insurance cover and statutory warranties;
- poor product design and low payout rates; and
- sales processes such as design fatigue and unfair sales practices.[1]

Affected products and persons

The products to be affected by the next proposed use of the product intervention power include add-on motor vehicle insurance and warranty products. Add-on insurance products are defined to be:

1. consumer credit insurance;
2. guaranteed asset protection insurance (difference between amount owing on loan/lease and maximum amount that the vehicle is insured for);
3. loan/lease termination insurance (difference between amount owing on termination of loan/lease and market value of vehicle);
4. mechanical breakdown insurance;
5. purchase price protection insurance (difference between amount that vehicle is insured for and purchase price of vehicle);
6. tyre and rim insurance; and
7. extended warranty products which are defined to be a contract under which either the dealer or a third party

agrees to rectify, or arrange for another person to rectify defects with a vehicle but only if it issued to retail clients.[2]

However, the products listed above are not affected if they are arranged or issued for no consideration, following a provision of personal advice to the client by a licensee or an exempt person or as a consequence of an extension to the term of a motor vehicle loan or lease.

The affected persons are those who issue affected products through an intermediary and intermediaries who arrange for retail clients to apply for or acquire affected products.

Conduct obligations

An affected person must not, in connection with the purchase/lease of a motor vehicle issue through an intermediary, or arrange for a retail client to apply for or acquire an affected product, unless the following conditions are met:

- the client has entered into a contract to purchase/lease a motor vehicle or applied for a motor vehicle loan/lease (to prevent pre-emptive sales before the consumer has even acquired a vehicle);
- an "online consumer roadmap" has been made available to the client and three calendar days have passed since the consumer was provided with the online consumer roadmap (the **deferral period**) (i.e. not before the fourth day after the consumer was provided with the online roadmap);
- the client expresses an intention to apply for or acquire the product through a facility in the online consumer roadmap before the end of the deferral period;
- the intermediary must not initiate contact with the client about an affected product during the deferral period;
- the intermediary has identified by class the persons who it reasonably believes would not benefit from an affected product or option within that product, and the product/option is not made available in the online consumer roadmap to persons that the intermediary reasonably believes to fall within that class (i.e. there must be some information gathering by the intermediary to determine whether or not the client is within the class of people who would not benefit from the product);
- the intermediary has not engaged in unconscionable or manipulative sales conduct including, without limitation, representing to the client that if they do not acquire the product, they might be required to make payment from their own monies (or getting them to sign an acknowledgement to that effect); and
- for mechanical risk product (extended warranty product and mechanical breakdown insurance):

i. the cover provided by the affected product does not overlap with the manufacturer's warranty or any statutory warranty;
ii. the maximum individual claim amount is not less than $2,000;
iii. the product has a right of cancellation and pro rata refund for the client;
iv. the product does not require the vehicle to be serviced by the seller/lessor or its associates; and
v. for new motor vehicles and used vehicles less than 10 years old, the product does not include a servicing requirement more onerous (including as to frequency) than that required by the manufacturer's warranty.

There are other obligations that must be met as well. These include maintaining a record of the date on which the online consumer roadmap was made available to the client and for an issuer of an extended warranty product, to provide data to ASIC on requested by them and to ensure that any outsourced warranty administrator does the same and to reasonably assist any outsourced warranty administrator to do the same.

An "online consumer roadmap" is in relation to an affected product defined as an online portal through which the client can apply for or acquire the product, decline to apply the product or request more information about the product. The draft legislative instruments prescribes specific disclosure requirements. ASIC is welcoming submissions in response to the consultation until 12 November 2019.[3]

ASIC has previously proposed to use their product intervention power to address consumer detriment in the short term credit industry and for binary options and contracts for difference. This will therefore be ASIC's third proposed use of power for add-on financial products sold with cars.

ASIC first exercised their power in September 2019 in relation to short-term credit models by releasing the ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2019/917. This order is currently being challenged in the Federal Court by Cigno Loans Pty Ltd, one of the businesses affected by the order.

In August 2019, ASIC publicly consulted on their proposal to use their product intervention power to ban the issue and distribution of over-the-counter (**OTC**) binary options and impose conditions on the issue and distribution of OTC and contracts for difference to retail clients.[4] However, the order has yet to be legislated.

[1] CP 324 [50].
[2] Ibid [90].
[3] ASIC, 'Consultation papers – CP 324 *Product Intervention: The sale of add-on financial products through caryard intermediaries*', media release, 1 October 2019.
[4] ASIC, 'Consultation papers – CP 324 *Product Intervention: OTC binary options and CFDs*', media release, 22 August 2019.