



AUSTRALIAN INSTITUTE of
SUPERANNUATION TRUSTEES

18 August 2021

Stephen Garofano
Strategic Policy Adviser
Strategy Group
Australian Securities and Investments Commission

By email to: hawking.submission@asic.gov.au

Dear Mr Garofano,

Consultation Paper 346 – The hawking prohibition: Update to RG 38

In brief: AIST supports the proposed updates to RG 38 to protect consumers from being sold unwanted products. Further guidance is suggested to assist licensees meet the proposed obligations in areas such as technology, consent, underperformance, generic approaches to a fund, and helping members choose products like insurance. Additional scenarios that should be captured by the hawking prohibitions are identified.

AIST also recommends further guidance on the relationship with pending changes such as the Retirement Income Covenant and the provision of assistance to members reaching retirement.

The Australian Institute of Superannuation Trustees (AIST) is a not-for-profit organization whose membership consists of the trustee directors and staff of industry, corporate, and public sector superannuation funds.

As the principal advocate and peak representative body for the \$1.5 trillion profit-to-members superannuation sector, AIST play a key role in policy development and is a leading provider of research.

AIST advocates for financial wellbeing in retirement for all Australians regardless of gender, culture, education, or socio-economic background. Through leadership and excellence, AIST supports profit-to-member funds to achieve member-first outcomes and fairness across the retirement system.

Summary

AIST welcomes the opportunity to respond to Consultation Paper 346 and is responding by addressing specific questions under each proposal. AIST calls for further guidance or clarity on these key elements:

- Guidance on keeping up with new technology
- Helping members choose the right insurance cover
- Providing assistance to members approaching retirement (notwithstanding the capacity to provide general advice)
- Members making generic approaches to a fund
- Members responding to an underperformance letter
- Further guidance on consent

B1 We propose to update our guidance to include further information on the forms of communication that are subject to the prohibition. This includes providing guidance on real-time interactions, which are in the nature of a conversation or discussion. This also includes providing guidance on advertising and information-giving practices.

B1Q1 What forms of communication do you currently use, or foresee using, with consumers, and do you anticipate any practical issues raised by the prohibition in respect of those forms?

- Funds use all available forms of communications to communicate with their members. These include direct mail, email, SMS, WhatsApp, chat bot and website Live Chat.
- As new forms of technology become available, these will be utilised by funds. Real-time interactions in the nature of a conversation or discussion will become increasingly commonplace.
- It is important ASIC guidance is as technology-neutral as possible, and that it does not inadvertently put roadblocks in the way on communication channels that improve engagement with members. ASIC should also provide principles-based guidance on the use of technologies to ensure that the regime is able to capture and adapt to technological developments.
- Some funds use chat bots on their websites to provide answers based on pre-set questions. When a question is asked, the chat bot will provide the prepared answers, and may provide links to the fund website or to a Live Chat agent.
- Draft RG 38 specifically references a chat bot as providing 'real-time' interaction:
- "the hawking prohibition also extends to other real-time interactions that are in the nature of a discussion or conversation, including instant messages, as well as through media that use artificial intelligence such as chat bots." (RG38.34). ASIC further explains that the hawking prohibition applies if the chat bot makes any offer, request or invitation to the consumer (RG38.35).

- AIST seek that ASIC provide further information and examples on:
 1. how the chat bot may comply with the hawking prohibition by providing factual information;
 2. what will happen when the 'discussion' is passed on to a live chat agent, how the hawking prohibition applies, especially when the consumer 'contacts' the live chat agent; and
 3. if there is an offer, request or invitation made during this 'conversation' with the live chat agent, is there a breach of the hawking prohibition?
- 'Real time' communications are generally in response to questions from members and are unlikely to raise anti-hawking concerns. However, as expectations from members about how communication with them expands, consideration of the hawking prohibition will be required.
- As members become more familiar and comfortable with chat bots and the like, they will increasingly expect real time responses to their questions and issues. However, the nature of real time interactions means the conversation can change quickly. The prohibition could mean that funds are unable to respond to interactions in a way that meets the client's needs.

B1Q2 Is there any additional or alternative guidance you think would be useful in helping you design and monitor communication methods with consumers?

AIST anticipates ASIC monitoring and assessment of super fund communications with their members and other consumers on a routine and ongoing basis, with further learning and guidance produced in response. For example, ASIC could note that unsolicited offers, invitations or requests made to members following dispatch of Your Future, Your Super underperformance letters would not be permissible under the hawking regime – just as it would not be in other circumstances.

In addition, there is seemingly a contradiction between the draft RG and consultation paper (CP) 346: the RG states that advertising/providing information is not prohibited as long as it is not in real time and no offer is made. The CP states, however, that advertising/providing information is not prohibited as long as it is not in real time or no offer is made. We seek for this to be clarified and believe that the RG should be clear that information can continue to be provided in real time without being subject to hawking prohibitions unless an offer is being made.

Clarity is also sought on what constitutes an offer, invitation or request in a superannuation context. For example, most superannuation fund PDSs include an application form (given it must be accompanied by a PDS).

Furthermore, it would be beneficial to see more guidance on the new concept of 'request or invite the consumer to ask or apply for a financial product or to purchase a financial product'. For example, what constitutes a 'request' or 'invite' is not defined in the Corporations Act; and

although s992(A) of the Act outlines '8 consent requirements', these do not address the lack of clarity on what constitutes a 'request' or 'invite'.

The EM to the Act has some explanation of the concept but is not completely clear. It includes an example in which *"Gary is leaving the information session Ros hands him an application form for the Very Good MySuper product and asks him to fill it out. Ros has breached the hawking rules because Gary did not consent to being invited to apply for a superannuation product before Ros gave him the application form and asked him to fill it out"*.

It is unclear if merely handing out an application form was the 'invite' or 'request' or was it because he was asked to fill it out.

Further guidance and clarification will assist licensees in meeting their obligations.

B1Q3 Do you currently use unsolicited real-time contact to advertise or provide consumers with information about your products? If so, what types of information do you provide, and how do you communicate it?

We acknowledge the personal financial advice exemption. AIST highlights the real risk, however, of unscrupulous behaviour by providers that will not be subject to the hawking provisions once the nexus is broken and call on ASIC to be explicit that the hawking prohibitions should apply to these operations. For example:

- Cold calling organisations make unsolicited contact with members of the public, offering a free review of their super. In some cases, the cold calling is done via a referral arrangement with a financial adviser (of which the referred may receive a commission). Once it is established where their super is held, the third party contacts the super fund (with the member conferenced in) and requests verbal third-party authority to seek further information about their accounts.
- After attaining this information, the member is then briefly transferred to a financial adviser (at a separate organisation) to confirm basic information before being transferred back to the cold-calling organisation.
- A Statement of Advice is developed in a very short time and a recommendation to switch superannuation products is made, along with a large initial advice fee.
- The cold-calling organisation uses pressure selling tactics and make false claims to convince the member to take up the financial advice and switch superannuation funds. Claims include unrealistic projections comparing current situation to taking up advice.

B2 Reflecting the reforms, we propose to revise our guidance on the nature of the consent that is required from a consumer who wishes to be contacted about a financial product, including:

- (a) that the consent must be positive, voluntary, and clear;**

(b) that a reasonable person would have understood that a consumer consented to the contact;

(c) that the consumer can vary or withdraw the consent and the implications of doing so;

(d) what we expect from an offeror in relation to a contact, including the time period following consent within which the contact must be made; and

(e) the records that an offeror may need to keep.

B2Q1 Do you anticipate any practical issues in seeking consumer consent? Please give details

In relation to the 'Nature of the consent required for contact', AIST submit that ASIC should give funds additional 12 months to make system changes to reflect the new requirements for recording consent. Updating systems to be able to record consent for 6 weeks is exceedingly challenging. Currently, systems that record consent generally show simple yes or no. These may or may not be connected by the system to the date on which the consent was collected (even though it may be in system logs). System changes to automatically 'turn off' consent after six weeks will be costly.

B2Q2 Is there any additional or alternative guidance you think would be useful to help you design internal policies and processes to ensure compliance with the new prohibition? Please give details.

ASIC's regulatory guidance should clarify that not only should consent be positive and voluntary, but it must also be not contrived. The prohibition affects the ability of providers to make offers as part of a cross-sale, during cold-calls or unsolicited real-time interactions, as this may not be reasonably within the scope of the consumer's consent. The draft RG makes it clear that positive consent involves an active step by the consumer, such as initiating contact with the offeror through a telephone call or online form.

The Explanatory Memorandum (paragraph 5.76) addressed one area of contrived consent when it made it clear that consent cannot be provided in response to a leading question or assumed on the basis of a consumer failing to ask for no future contact.

On the same basis, it would be a contrivance for a consumer to be asked to provide consent, and for the product-provider to subsequently contact the consumer to offer a product to them. ASIC should specifically address this situation and make it clear that it is covered by the prohibition.

B2Q3 Do you anticipate any practical issues associated with your implementation of our guidance on the creation and maintenance of records, including practices that may help offerors meet their obligations?

We have called for a 12-month period to allow for system changes to reflect the new requirements for recording consent (see B2Q1). AIST considers this appropriate given the time required to develop, test, and implement new technology that will capture the dynamic statuses of consumers arising from the new obligations. In addition, concurrent impositions of other obligations such as the Retirement Income Covenant will require the capture of additional data points that funds currently do not have access to. Allowing for a reasonable timeframe to develop or enhance technology solutions will only benefit members by ensuring quality in data standards.

B3 We propose to revise our guidance to clarify that we expect an offeror to offer, issue or sell to a consumer (or invite or request a consumer to purchase or apply for) only financial products that are reasonably within scope of what the consumer has consented to, including offers of cross-sold or bundled products.

B3Q1 Do you agree with our proposed guidance on offering products that are within reasonable scope of a consumer's consent? If not, why not?

RG 38.77 attempts to provide guidance on consent for different classes of superannuation interests, but more clarity is needed. It states that *“Although consumers are unlikely to ask about MySuper products by name, they may ask about products with characteristics that MySuper products exhibit such as a ‘low cost’ product or the ‘default’ product”*.

For instance, Example 14 under RG 38.77 outlines how an offeror has breached the hawking prohibition by contacting the consumer by phone and offers a choice product when the consumer holds a defined benefit interest.

The example does not shed light on how the fund could manage this contact or seek further information from the consumer. We recommend that guidance be clear on the fact that the fund can seek clarification from a consumer as to the type of product being sought.

Whilst the example of a defined benefit member being offered a choice product may be useful in some cases, it is relatively few members that have a defined benefit interest, and for those that do, it will almost always be in their interests to maintain that interest.

AIST notes that an example of an accumulation member nearing retirement, and the extent to which a fund can proactively assist members in considering their retirement product options, be provided. We note that the anti-hawking regime allows funds to provide general advice to members about this this, but further assistance on how far this extends would be useful.

This further guidance should also flag the possible implementation of a Retirement Income Covenant and concomitant obligations to assist fund members with product information in line with the fund's retirement income strategy. This may require a change to ASIC's anti-hawking

guidance. For instance, Example 17 highlights withdrawal of consent, but it would be beneficial if it could be clarified that as an existing member, for example, 'Big Super' can still contact Zhang, the consumer, to provide guidance as they approach retirement.

In addition, RG 38.77 makes the assertion that a member asking for a low-cost product is asking for a 'default' product or a product that exhibits the characteristics of a MySuper product. It is highlighted that this assertion relies on an assumption that will not always hold true – other investment options may actually be cheaper, for example, and low-cost may not always imply default. Clarity on this point would be beneficial.

Overall, the anti-hawking guidance should be regularly reviewed and changed over time to reflect technology, product and policy developments.

B3Q2 What products do you commonly cross-sell or bundle together for sale or issue? Does the prohibition raise practical issues for these practices?

Group insurance cover is generally offered as a default product within superannuation, and in the context of superannuation, it is not a *separate* financial product. We ask that ASIC include an example on insurance.

B3Q3 Is there any additional or alternative guidance you think would be useful to help you design or update your processes and procedures for your staff to identify the products that are within the scope of a consumer's consent?

We note that in Example 9, if a consumer asks to invest in a fixed deposit product from the bank, the bank will be prohibited to offer income protection insurance.

AIST seek that ASIC expand on this example to clarify that an offer of a managed investment scheme would also be prohibited if a consumer asks to invest in a fixed deposit product (notwithstanding the exclusion of managed investment schemes from the anti-hawking regime).

ASIC makes it clear that MySuper and Choice products are separate financial products. We ask that ASIC include an example on investment options to address a member switching from a MySuper product to a Choice product.

C1 We propose to include guidance in RG 38 on:

- (a) the consumer remedy giving a consumer the right to return a product and receive a refund when the hawking prohibition has been breached; and**
- (b) how this remedy will operate for different financial products.**

C1Q1 Does the payment of refunds for financial products raise any practical issues?

Superannuation funds are already restricted in the ability to provide a refund of a product (under cooling-off) because of preservation rules, and in such circumstances the member has the option only to transfer the account to another superannuation fund. This same restriction would apply, i.e. the member would have the right to withdraw their investment, and transfer to another superannuation fund.

C1Q3 Is there any additional or alternative guidance that you think would help offerors to meet their obligations to allow consumers to return products and to provide refunds?

AIST seeks ASIC's expectations on the payment of refunds for financial products within the constraints of preservation rules and further guidance on this matter.

Additional guidance

Draft RG 38 outlines ASIC's view that where superannuation products are the subject matter when contacting employers in relation to a choice of an 'employer default superannuation fund', that this will not be subject to the new hawking prohibitions on the grounds that employers are not 'retail clients'. The Corporations Act, s761G(6)(b), regulation 7.128AA of the Corporations Regulations and ASIC RG 175.38 (Table 4) all treat employers as 'retail clients' and consequently an incongruence arises between the Draft RG 38 and existing law.

Noting ASIC's assertion in Appendix 1 to the draft RG that it will be reviewing all legislative instruments relevant under the old hawking prohibition, will the incongruence of the treatment of employers as 'retail clients' be addressed for the purposes of the hawking prohibitions when the subject matter concerns the choice of 'employer default superannuation' products?

Additionally, ASIC is excluding employers as 'retail clients' when the subject matter concerns 'employer default superannuation' products because 'employers do not typically acquire an interest in the fund. An employer selecting a superannuation fund as a default fund does not constitute the issue of sale of a financial product to that employer.'

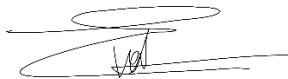
It is highlighted that the same argument would also apply for 'superannuation clearing house' products because the nature of these products is that the employer does not hold any tangible beneficial interest in it. These products are simply payment facilities that receive funds from employer banking facilities and pass them through to the banking facilities held by superannuation funds for allocation to member accounts. From the time cash funds leave the employer banking facilities, the employer effectively has no beneficial interest in those funds unless the cash funds representing a Superannuation Guarantee contribution for an employee cannot be allocated to a member superannuation account and the funds are to be returned to

the employer. Equally, these products are not used to hold any tangible beneficial interest (e.g. cash funds owned by the employer) by employers as they are simply payment facilities.

We ask that ASIC consider applying the same approach that it is using for 'employer default superannuation' products towards clearing houses and enable the exemption of the hawking prohibitions in respect of these products.

For further information regarding our submission, please contact David Haynes, Senior Policy Manager, at [REDACTED].

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Eva Scheerlinck', with a large, sweeping flourish above the name.

Eva Scheerlinck
Chief Executive Officer