



ASIC
Australian Securities &
Investments Commission

REPORT 701

Response to submissions on CP 346 The hawking prohibition: Update to RG 38

September 2021

About this report

This report highlights the key issues that arose out of the submissions received on [Consultation Paper 346](#) *The hawking prohibition: Update to RG 38* (CP 346) and details our responses to those issues.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC may exercise specific powers under legislation
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the credit legislation and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see [Regulatory Guide 38](#) *The hawking prohibition* (RG 38).

Contents

A	Overview/consultation process	4
	Responses to consultation.....	5
B	Key issues raised in submissions on CP 346.....	7
	Forms of contact subject to the hawking prohibition	7
	Nature of the consumer's consent.....	9
	Establishing the scope of the consumer's consent	12
	Tracking consumer consent.....	15
	Right of return	16
C	Feedback raised on other issues.....	18
	Who and what the prohibition applies to.....	18
	Obligations of superannuation trustees to contact members	19
	Appendix: List of non-confidential respondents	21

A Overview/consultation process

1 Schedule 5 to the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Financial Sector Reform Act) amended the existing prohibitions on hawking in the *Corporations Act 2001* (Corporations Act), consolidating them into a single hawking prohibition (the revised hawking prohibition). The revised hawking prohibition covers a range of products, including superannuation and insurance products.

Note: In this report, references to sections (s) are to the Corporations Act, unless otherwise specified.

2 The legislation implements Recommendations 3.4 and 4.1 of the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission).

Note: See Financial Services Royal Commission, [Final report](#), February 2019.

3 The revised hawking prohibition commences on 5 October 2021.

4 On 21 July 2021, we sought feedback on our proposed updated guidance on the revised hawking prohibition, and released for consultation:

- (a) [Consultation Paper 346](#) *The hawking prohibition: Update to RG 38* (CP 346); and
- (b) draft updated Regulatory Guide 38 *The hawking prohibition* (draft updated RG 38).

Note: The draft updated RG 38 was released as an attachment to [CP 346](#).

5 The consultation was open for a period of four weeks, between 21 July 2021 and 18 August 2021.

6 We received four confidential and 15 non-confidential responses to [CP 346](#). Respondents represented a diverse range of stakeholders, including from sectors such as credit, superannuation and insurance, as well as consumer groups and professional service industry associations.

7 In addition to receiving written submissions, we met informally with a number of stakeholders to give them the opportunity to raise questions and share their feedback before making a written submission.

8 The submissions have informed our final guidance in [Regulatory Guide 38](#) *The hawking prohibition* (RG 38). We are grateful to respondents for taking the time to provide their feedback.

- 9 For a list of non-confidential respondents to CP 346, see the appendix. Copies of these submissions are currently on the [CP 346](#) page on our website.
- 10 This report highlights the key issues that arose out of the submissions received on [CP 346](#) and the draft updated RG 38, and our responses to those issues. This report is not meant to be a comprehensive summary of all feedback received. It is also not meant to be a detailed report on every question from [CP 346](#). We have limited this report to the key issues raised and a summary of significant changes made to the draft updated RG 38.
- 11 In addition, our final guidance reflects that the *Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021*, which were made on 5 August 2021, amend the *Corporations Regulations 2001* (Corporations Regulations).

Responses to consultation

- 12 The feedback in response to [CP 346](#) and the draft updated RG 38 was generally supportive and confirmed the strong demand for guidance.
- 13 Respondents appreciated the inclusion of examples throughout our guidance. In particular, we received positive feedback on the realistic nature of conversational exchanges in the examples provided.
- 14 Most respondents requested that we include further examples in our guidance. In response, we have increased the number of examples within the guidance from 18 to 30.
- 15 Some respondents indicated areas where they considered further guidance may be appropriate. This feedback is detailed in Sections B and C of this report.
- 16 The main issues raised by respondents in the written submissions and meetings are summarised in Table 1.

Table 1: Main issues raised in feedback

Topic	Key issues	Where to find our responses
Forms of contact subject to the hawking prohibition	<p>The application of the hawking prohibition to modern communication methods (including pop-up messages on mobile phone applications, contact through chat-bots and text messages).</p> <p>Requests that additional examples be provided relating to traditional methods of communication (including welcome calls, service calls and pop-up stalls).</p> <p>The distinction between 'offer', 'request' and 'invitation'. In particular, the difference between inviting and providing information or advertising.</p>	Section B, paragraphs 17–27
Nature of the consumer's consent	<p>Clarification on:</p> <ul style="list-style-type: none"> obtaining consent; and withdrawing consent. 	Section B, paragraphs 28–36
Establishing the scope of the consumer's consent	<p>Clarification on:</p> <ul style="list-style-type: none"> 'so closely related'; and consent in the context of bundling or cross-selling. 	Section B, paragraphs 37–48
Tracking consumer consent	Challenges identified in relation to keeping records of consumer consent.	Section B, paragraphs 49–54
Right of return	Clarification on a number of practical aspects of the right of return.	Section B, paragraphs 55–59
Who and what the prohibition applies to	<p>The application of the hawking prohibition in light of the amendments to the Corporations Regulations.</p> <p>The application of the hawking prohibition to buy now pay later products.</p> <p>The application of the hawking prohibition to business models that use insurance brokers or banking relationship managers.</p>	Section C, paragraphs 60–64
Obligations of superannuation trustees to contact members	How different distribution model reforms might operate simultaneously.	Section C, paragraphs 65–66

B Key issues raised in submissions on CP 346

Key points

This section outlines the responses we received on the following aspects of our proposed guidance and our approach to those responses:

- forms of contact subject to the prohibition;
- nature of the consumer's consent;
- establishing the scope of the consumer's consent;
- tracking consumer consent (including the keeping of records); and
- the right to return a product and receive a refund.

Forms of contact subject to the hawking prohibition

17 In [CP 346](#), we proposed to update our guidance to include further information on the forms of communication that are subject to the hawking prohibition. This included providing guidance on real-time interactions that are in the nature of a conversation or discussion.

18 We sought feedback on:

- (a) the forms of communication currently used, or foreseen to be used, with consumers, and whether respondents anticipated any practical issues raised by the hawking prohibition in respect to these;
- (b) whether additional or alternative guidance would help respondents design and monitor methods for communicating with consumers; and
- (c) whether respondents use unsolicited real-time contact to advertise or provide consumers with information about products, the types of information provided and how it is communicated.

Stakeholder feedback

Method of communication

19 Respondents supported our 'technology neutral' approach to guidance and considered the guidance should reflect a variety of current communication methods and be able to adapt to future technological developments.

20 Many respondents requested further guidance demonstrating the application of the hawking prohibition to modern methods of communication—in particular, these respondents suggested that we provide guidance in respect of pop-up messages on mobile phone applications and contact through chat-bots and text

messages. These submissions sought clarity on whether these methods of communication may be considered ‘real-time’ communication.

- 21 Some respondents identified that many consumers are still heavily reliant on traditional methods of communication. They requested that we be mindful of any unintended consequences of guidance that is too focused on modern methods of communication.
- 22 Some respondents asked for additional examples relating to traditional methods of communication, including welcome calls and service calls made to consumers who have just acquired a new product, and promotional pop-up stalls.
- 23 We also received suggestions that our guidance should:
- (a) provide that consumers should be asked to choose the specific method of contact; and
 - (b) clarify that, if a consumer receives contact outside the method specified, it would amount to a breach of the hawking prohibition.

ASIC's response

The hawking prohibition is technology neutral, and our guidance reflects this by demonstrating how we consider the hawking prohibition will apply across a variety of media: see RG 38.36–RG 38.38.

We have included an example involving an in-app pop-up and retained references to chat-bots and artificial intelligence: see Example 10 in [RG 38](#) and RG 38.36–RG 38.37.

We have updated our guidance to include that whether text messages constitute real-time interactions for the purposes of s992A(4) will depend on the circumstances. Some exchanges through text message may be in the nature of a discussion or conversation and create an expectation of an immediate response, while others may not: see RG 38.38.

In addition, we have retained examples and guidance that pertain to traditional forms of communication and added examples on welcome calls and promotional pop-up stalls: see Example 7 and Example 8 in [RG 38](#).

Our guidance provides that if a consumer's consent indicates a particular form of contact, an offeror may only contact the consumer in that form, reflecting s992A(5)(f): see RG 38.108–RG 38.110.

Offer, request or invitation

- 24 Many respondents sought clarification on the distinction between ‘offer’, ‘request’ and ‘invitation’. In addition, they asked for guidance on the difference between inviting and providing information or advertising.
- 25 A number of respondents requested the guidance clarify the scope of information that can be provided to a consumer where there is no expectation of a real-time response.
- 26 A number of respondents requested that further guidance and examples be provided regarding permissible information-giving or advertising practices. Some of these respondents suggested that any advertisement should be permissible if it does not give rise to a real-time interaction in the nature of a discussion or conversation.
- 27 Some respondents queried how consumer responses to advertising should be treated if they take place in the same or subsequent engagement following real-time advertising.

ASIC’s response

We have made updates to [RG 38](#) in response to this feedback.

In particular, we have:

- introduced a new section on offers, requests and invitations (see RG 38.39–RG 38.47); and
- added an example to demonstrate the differences between information-giving practices and the making of an offer, request or invitation (see Examples 7–10 in [RG 38](#)).

We have also included further guidance on our approach to advertising or giving information, including making clear that the existence, function and purpose of the product can be discussed, so long as an offer, request or invitation is not made: see RG 38.43.

Nature of the consumer’s consent

- 28 In [CP 346](#), we proposed 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 in line with the revised hawking prohibition, including:
- (a) that the consent must be positive and voluntary;
 - (b) that the consent must be clear and 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; and
 - (d) what we expect from an offeror in relation to a contact, including the time period following consent within which the contact can be made.

- 29 We sought feedback on:
- (a) whether respondents anticipated any practical issues in seeking consumer consent; and
 - (b) whether additional or alternative guidance would assist respondents with designing internal policies and processes to ensure compliance with the revised hawking prohibition.

Stakeholder feedback

Obtaining consent

- 30 Respondents did not generally focus on practical issues arising from our proposed guidance on the requirement for consent to be positive and voluntary.
- 31 We received positive feedback from some respondents on our proposed guidance on the requirement for consent to be clear and reasonably understood. In particular, the feedback supported our guidance that an offeror can confirm the nature of a consumer's consent in real time after contact has begun, if it is not clear what the consumer is seeking, or the offeror has doubts over the nature of the consent.
- 32 Respondents generally supported our guidance on consumer-initiated contact, but many respondents asked us to clarify our approach to consent in scenarios where solicited contact is underway for a particular financial product and the consumer asks about a second or subsequent product. A number of respondents noted that consumers may not always disclose or express the entirety of the purposes of their contact at the beginning of an interaction.
- 33 Some respondents also asked that we consider aligning our guidance about consent with the Consumer Data Right (CDR) rules.
- 34 Some respondents asked that we clarify that a partially filled, unsubmitted online form would not constitute consent.

ASIC's response

Our guidance includes that clarifying the scope of a consumer's consent would be unlikely to amount to a breach of the hawking prohibition: see RG 38.79–RG 38.80.

We have updated [RG 38](#) to clarify that a consumer may raise additional product(s) of their own accord in the course of a contact. Provided this is done entirely of their own initiative, and the consent meets the criteria of being positive, voluntary, clear and capable of being reasonably understood, an offeror can make offers in respect of the additional product. We consider this to be consistent with the object of the regime, which is to give

consumers greater control over their decisions to purchase financial products: see RG 38.81–RG 38.83 and paragraph 5.4 of the [Explanatory Memorandum to the Financial Sector Reform \(Hayne Royal Commission Response\) Bill 2020](#) (Explanatory Memorandum).

In giving this guidance, we also observe that offerors may not rely on consent that has been elicited from the consumer to make offers, requests or invitations: see RG 38.84 and paragraph 5.57 of the [Explanatory Memorandum](#).

Whilst the CDR Rules define elements for consent relating to data, they do not define consent in the context of the hawking prohibition. Section 992A(5)(d) and (e) provide that, for the purposes of the hawking prohibition, consent must be positive, voluntary, clear and such that a reasonable person would have understood that the consumer consented to the contact. Our guidance is reflective of this.

We have also clarified that a consumer filling out an online form, but not submitting it, is not a reasonable basis for considering that the consumer has consented to contact: see RG 38.74.

Withdrawing consent

- 35 Some respondents suggested that if consent can be withdrawn through social media channels, we should provide guidelines in terms of the scope and extent of monitoring required.
- 36 Other respondents suggested that guidance should provide that:
- (a) consumers must be provided with information on how to withdraw consent; and
 - (b) when consumers use a price comparison website, their consent to contact must be able to be withdrawn through that price comparison website, rather than having to separately withdraw from each associated offeror.

ASIC's response

Section 992A(6) provides that a consumer may vary or withdraw their consent at any time, and that the variation or withdrawal may take any form, regardless of the form of the consent. Our guidance does not prescribe how businesses are to monitor or track consent, including withdrawals and variations. We consider this is a matter for industry.

However, we have updated RG 38 to note that as a matter of best practice, where a person or entity has obtained consumer consent on behalf of an offeror, a process or system should be made available by which consumers can withdraw their consent to be contacted by the offeror: see RG 38.117.

Establishing the scope of the consumer's consent

- 37 In [CP 346](#), we proposed to revise our guidance to clarify that an offeror can only offer to a consumer (or invite or request a consumer to apply for) financial products reasonably within the scope of their consent—in line with the revised hawking prohibition. We also set out how the new prohibition applies to situations of product cross-selling or bundling.
- 38 Paragraph 5.67 of the [Explanatory Memorandum](#) provides that it is possible for a consumer's consent to be broad enough that it may reasonably apply to more than one product. Paragraph 5.66 of the [Explanatory Memorandum](#) notes situations in which a reasonable person should consider a financial product to be within the scope of the consumer's consent. This includes the product being 'so closely related to the product that the consumer consented to being contacted about that the consumer would reasonably expect to be offered that product'.
- 39 We sought feedback on:
- (a) whether respondents agreed with our proposed approach to guidance on offering products that are within the reasonable scope of a consumer's consent;
 - (b) practical issues relating to products that are commonly cross-sold or bundled together for sale or issue, and guidance that would be useful in this regard; and
 - (c) whether additional or alternative guidance would be useful for the designing or updating of processes and procedures to identify products that are within the scope of a consumer's consent.

Stakeholder feedback

'So closely related'

- 40 Many respondents sought further guidance and clarification on determining the scope of the consumer's consent, and what could reasonably be included within that scope in a range of common scenarios.
- 41 Specifically, respondents asked us to clarify and provide further examples on the types of products that would likely be 'so closely related' to each other that a reasonable person would expect to be offered them.
- 42 Some respondents raised the potential for our guidance to inadvertently encourage the offer of products that they considered may represent poor value for the consumer.

- 43 A number of respondents asked for further guidance on the interaction between the deferred sales model regime for add-on insurance products and the revised hawking prohibition. In particular, some respondents observed that the deferred sales model applies to add-on insurance products and sought clarity as to whether these products would generally be reasonably within the scope of consumers' consent.
- 44 We were also asked to clarify that an insurance product that is not specifically linked to a principal product or service, and that is capable of operating independently of a principal product or service, is not an add-on insurance product—and is captured by the hawking prohibition and not by the deferred sales model regime.

ASIC's response

We have clarified at RG 38.87–RG 38.89 some factors that industry may consider in determining whether a financial product is 'so closely related' that a consumer 'would reasonably expect to be offered' it. The specific factors and the relative weight assigned to these will vary depending on the facts and circumstances of each case.

We have provided a new example of how these factors may apply to a given situation, substituting an existing example that related to travel insurance. The new example relates to home building insurance being offered where a consumer is applying for a home loan, which was the product combination we received the most requests for clarity on: see Example 23 in [RG 38](#). We removed the travel insurance example in response to feedback received and in favour of an example where it is more clear-cut how the law would apply.

In [RG 38](#) we have confirmed that where an add-on insurance product is exempt from the deferred sales model regime (such as by s12DX or 12DY of the *Australian Securities and Investments Commission Act 2001*), the hawking regime will apply to it: see RG 38.22. Offerors must then consider whether the product is reasonably within the scope of the consumer's consent (per s992A(5)(a)(ii) and (b)(ii)).

Consent in the context of bundling or cross-selling

- 45 Many respondents gave feedback about the effect of our guidance on commercial practices, such as the offering of multi-policy discounts. Both in relation to the discounts and more generally, respondents questioned what would reasonably be within the scope of a consumer's consent.
- 46 These respondents generally suggested that, when solicited offers are made for certain types of products, bundles incorporating those products should be able to be offered to the consumer. This is because of the potential link between the initial product and the products within the bundle.

- 47 Some respondents suggested that we clarify that when consumers are given information about products (such as in a pamphlet) beyond those that the consumer initially sought to discuss, that this would not constitute consent for offers, requests or invitations for those further products.
- 48 One respondent asked for guidance on the interaction between the hawking prohibition and the product design and distribution obligations, specifically in relation to bundled products. Under the design and distribution obligations, a single target market determination (TMD) may cover different products when they are offered as part of a bundle. The respondent sought clarity on whether, when a bundle is dealt with in a single TMD, the consent given by a consumer for the purposes of the hawking prohibition may extend to the whole bundle of products.

ASIC's response

Our guidance explains that a consumer may be offered more than one financial product during a contact if the consumer consented to being contacted about multiple products before the contact, or the consumer's consent is sufficiently broad so as to reasonably apply to more than one product: see RG 38.92.

Based on the feedback received on bundling or cross-selling, we have clarified our guidance in [RG 38](#) and included an example relating to multi-policy discounts: see Example 25 in [RG 38](#).

In particular, we have provided guidance that offerors cannot rely on consent in respect of an additional product where the consent may have been elicited in the course of explaining the discount to make further offers, requests or invitations. This does not prevent an offeror from providing information in relation to the additional product, so long as no offer, request or invitation in relation to the product is made, and the consumer is left to consider whether they wish to recontact the offeror: see RG 38.97.

We recognise that some products offered may only be obtained as a bundle. Our guidance provides that whether or not the products are independently obtainable, the relevant test remains that the consumer's consent reasonably applies to each of the products offered: see RG 38.100. When an offeror is in doubt, we remind offerors at RG 38.43 that they are always able to provide consumers with information about products during the interaction.

We have added guidance that where a consumer is handed information about a product without any context and asks what it is about and why they have been given it, this is not a reasonable basis for considering the consumer to have consented to contact: see RG 38.74.

We have also included guidance on the operation of the hawking prohibition and the design and distribution obligations, to the effect that consent given by a consumer for the purposes of the hawking prohibition may not extend to the whole bundle of

products, even where that bundle is dealt with in a single TMD: see RG 38.99–RG 38.100. This is because the housing of two or more products within a single TMD does not impact the nature of a consumer’s consent.

Tracking consumer consent

49 In [CP 346](#), we proposed to provide guidance on records that an offeror may need to keep to demonstrate compliance with the new hawking prohibition.

50 We sought feedback on whether any additional or alternative guidance relating to the creation and maintenance of records, including practices that may help offerors meet their obligations, would be useful.

Stakeholder feedback

51 Some submissions outlined potential practical issues with the creation and maintenance of records, and the tracking of consent, particularly where distribution is done by third parties.

52 Some respondents also identified challenges in recording all consumer interactions because of the *ad hoc* nature of some of these interactions, for example interactions in bank branches or at pop-up stalls in shopping centres. Further, when the interaction arises by way of an inbound call, submissions suggested that not all industry participants record these calls.

53 We also received requests that guidance should indicate the minimum amount of time for which records should be kept.

54 A number of submissions from industry raised concerns around costs that may be incurred in setting up and maintaining systems to track and record consumer consent.

ASIC’s response

In [RG 38](#) we have confirmed that the keeping of records is likely to help offerors comply with their obligations (and demonstrate that compliance), regardless of whether or not the contact was initiated by the offeror: see RG 38.122–RG 38.123. It is a matter for industry to determine how they choose to keep or maintain records.

While we acknowledge the concerns raised by respondents about not prescribing a minimum period for keeping records, we consider that this period may vary depending on the circumstances, and that industry is best placed to determine how long their records should be kept: see RG 38.124.

Right of return

55 In [CP 346](#), we proposed new guidance on the consumer remedy, which provides that a consumer has a right to return a product issued or sold to them and to be refunded if the offeror has breached the hawking prohibition. This consumer remedy is similar to that found previously in s992A(4).

56 We proposed to include guidance on:

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

57 We sought feedback on:

- (a) whether the payment of refunds for financial products raises any practical issues;
- (b) how financial product issuers currently comply with the existing rights of return, any challenges faced in meeting those obligations; and
- (c) whether any additional or alternative guidance would help offerors to meet their obligations to allow consumers to return products and provide refunds.

Stakeholder feedback

58 Respondents asked for clarity in the guidance on practical aspects of the right of return, including:

- (a) whether the right of return applies where a claim has been paid or whether claims payouts can be deducted from the refund amount;
- (b) how, in the case of superannuation, the refund is to be paid where a consumer does not indicate a fund into which the refund is to be paid; and
- (c) how the consumer will be aware of the right, and how they might obtain evidence to assert that right.

59 Some respondents suggested that our guidance should provide that there be a right of return and refund if there is a breach of the hawking prohibition, regardless of the timeframes in s992AA.

ASIC's response

In [RG 38](#) we have reiterated that under s992AA(1)(b), a consumer may exercise the right of return within one month and 14 days from the date that the product was issued or sold. If a statutory cooling-off period applies to a product under s1019B, under s992AA(1)(a) the consumer can return the product and

obtain a refund within one month after the expiry of the cooling-off period: see RG 38.132–RG 38.133.

[RG 38](#) also reminds offerors of other remediation obligations AFS licensees have and how these apply beyond the hawking regime: see RG 38.146.

We have not provided further guidance on how refunds should be calculated. Our guidance reflects the ordinary meaning of the term ‘refund’ as used in s992AA(1): see RG 38.139.

For superannuation product refunds, our guidance has been updated to remind trustees of existing requirements in place under the Corporations Regulations for the payment of refunds to consumers: see RG 38.142.

In [RG 38](#), we confirm that it would be best practice to alert consumers to their rights, and investigate whether hawking may have occurred when a consumer makes contact to return a product: see RG 38.130–RG 38.131.

C Feedback raised on other issues

Key points

In response to [CP 346](#), we received feedback on additional issues. This section outlines some additional areas respondents suggested that we clarify or provide guidance on, including:

- who and what the prohibition applies to; and
- the obligations of superannuation trustees to contact members.

Who and what the prohibition applies to

60 The [Explanatory Memorandum](#) identified that there would be exemptions from the hawking prohibition provided by regulations: see paragraphs 5.91–5.95 of the [Explanatory Memorandum](#).

61 However, [CP 346](#) and draft updated RG 38 were released before the *Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021* were made. These regulations amend the Corporations Regulations. As a result, we received a number of submissions seeking clarity as to the application of the Corporations Regulations to the hawking prohibition.

Stakeholder feedback

62 Many respondents queried the application of the hawking prohibition to:

- (a) basic banking products;
- (b) lapsed products and renewals; and
- (c) stockbrokers.

63 We also received submissions that queried the application of the hawking prohibition to buy now pay later products.

64 In addition, some respondents asked for guidance on the application of the hawking prohibition to business models that use insurance brokers or banking relationship managers. Some respondents:

- (a) suggested that the six-week consent period ought not apply to these models, on the basis that there is an ongoing relationship between the consumer and the product offeror; and

- (b) considered that there is a consumer expectation that individuals operating within these models would make unsolicited contact to offer products that would be suitable for the consumer (these respondents suggested that these models should not be subject to the hawking prohibition).

ASIC's response

In light of the amendments to the Corporations Regulations, we have updated our guidance in [RG 38](#) to include a summary of products that are exempt from the hawking prohibition under the Corporations Regulations: see RG 38.23–RG 38.33.

We have also added specific guidance on:

- offers of basic banking products where contact is consumer initiated (see RG 38.24–RG 38.25 and Example 1 in [RG 38](#));
- the renewal of recently lapsed products (see RG 38.27–RG 38.28 and Example 3 in [RG 38](#)); and
- the application of the exemptions to stockbrokers in relation to reg 7.8.21A(a)–(c) (see RG 38.26, RG 38.29 and Example 4 in [RG 38](#)).

We have also included additional examples to provide clarity on the above three areas.

Under s992A(1), the hawking prohibition applies to 'financial products' within the meaning of the Corporations Act. The hawking prohibition in s992A does not apply to credit products (except when they are also financial products). As such, we think the law is clear that credit products and buy now pay later products are not subject to this prohibition.

In [RG 38](#), we recognise that some business models or practices involve ongoing and proactive contact with offers tailored to the consumer's financial circumstance and needs (for example, relationship managers and insurance brokers). We have clarified that the time limits imposed by s992A(5)(g) apply equally to these models: see RG 38.114.

Obligations of superannuation trustees to contact members

Stakeholder feedback

65 Respondents from the superannuation sector sought clarification on how different distribution reforms and the hawking prohibition might operate simultaneously. The reforms include:

- (a) the retirement income covenant;
- (b) the 'Your Future, Your Super' reforms;

- (c) the Australian Prudential Regulation Authority's member outcomes reforms;
- (d) the Future of Financial Advice (FOFA) reforms;
- (e) the breach reporting obligations;
- (f) the Financial Accountability Regime; and
- (g) the product design and distribution obligations.

66 In particular, respondents queried how the hawking prohibition may apply to the obligations contained within the retirement income covenant. Specifically, they asked how the hawking prohibition might operate in situations where trustees are required to contact members to discuss retirement products where the member is approaching retirement age.

ASIC's response

We acknowledge that several legislative reforms have affected the distribution of superannuation products. We note that at this stage, the form of retirement income covenant is not yet settled.

In [RG 38](#), we have clarified that offerors, including superannuation trustees, are able to discuss products with consumers, and are able to provide information: see RG 38.43–RG 38.45. This includes discussions about possible retirement options.

However, we have made clear that superannuation trustees are prohibited from making unsolicited offers, requests or invitations in relation to financial products, including retirement products: see RG 38.102–RG 38.106.

Our guidance notes that it is only when superannuation trustees have a statutory obligation that requires them to make an offer, request or invitation to a consumer that they may do so without breaching the hawking prohibition: see RG 38.31 and Example 5 in [RG 38](#).

Appendix: List of non-confidential respondents

- AIA Australia Limited
- Australian Banking Association Inc.
- Australian Institute of Superannuation Trustees
- Connect Health & Community
- Consumer Action Law Centre
- Customer Owned Banking Association
- Financial Services Council Ltd
- Industry Super Australia Pty Ltd
- Insurance Council of Australia Limited
- Law Council of Australia
- Legal Aid Queensland
- Stockbrokers and Financial Advisers Association
- The Association of Superannuation Funds of Australia Limited
- The Australian Timeshare Holiday Ownership Council Limited
- The Royal Automobile Club of WA (Inc.)