# ISA submission to ASIC consultation paper Hawking prohibition: Update to RG 38

## Executive Summary

ISA supports the reforms to the hawking prohibition and welcomes the opportunity to provide feedback on Consultation Paper 346 *Update to RG 38* (CP 346).

ISA recommends:

- ASIC provide further examples showing the use of non-traditional communications platforms, such as personal banking and finance applications. These will continue to grow as a primary means of consumer activity and interaction with financial service providers.
- ASIC actively monitor the evolving nature of consumer interactions and ensure its regulatory guidance remains effective, helpful, and fit-for-purpose.
- ASIC provide further examples of when advertising, offers and interactions through digital platforms used by consumers are more or less likely to breach hawking prohibitions.
- ASIC point to the overriding conduct obligations on all AFS licensees highlighting that even if conduct doesn't breach the hawking prohibition, it may still breach other licensee obligations.

### Hawking and the Your Future, Your Super measures

ISA's feedback on CP 346 is focused on the implementation of the hawking reforms in the superannuation sector, particularly in the context of the *Your Future, Your Super* (YFYS) measures. These measures may provide an incentive for some super funds to engage in inappropriate selling practices to try and ensure that:

- their fund is the fund a member is "stapled" to, and
- members of existing funds are moved into products that are not subject to a performance test.

The impact of the stapling measures and the uneven application of the new performance test on the competitive dynamics of member acquisition, through alternative marketing activities for example, should not be underestimated. These changes amplify the need for the hawking prohibition to be effectively implemented and monitored to prevent the sort of behavior exposed by the Financial Services Royal Commission, now and in the years ahead.

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## About Industry Super Australia

Industry Super Australia (ISA) is a research and advocacy body for Industry SuperFunds. ISA manages collective projects on behalf of a number of industry super funds with the objective of maximising the retirement savings of nearly five million industry super members.

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## Technology neutral

***Feedback questions B1Q1 and B1Q2***

The consultation paper stresses that the hawking prohibition is technology neutral but does not provide adequate guidance for the use of new, emerging and growing forms of communications.

Many of the examples provided outline a binary situation which complies or does not comply with the hawking prohibition. While these are important, more helpful to industry would be examples that deal with:

- grey areas which will arise, and
- likely situations that span a continuum of conduct or communication.

For example, there are no examples supporting RG 38.37 that envisage and differentiate between marketing and hawking that takes place on emerging digital communications platforms.

While we acknowledge reference to the use of artificial intelligence and chat bots (see RG38.35), this does not extend to providing an example or examples of situations constituting (or not constituting) contacts and offers that would likely be subject to hawking prohibitions.

ISA recommends ASIC provide further examples showing the use of non-traditional communications platforms, such as personal banking and finance applications. These will continue to grow as a primary means of consumer activity and interaction with financial service providers.

As noted above, the YFYS measures will staple a member to their existing fund when they switch jobs, unless they choose otherwise.  The law is designed so that even funds which do not pass the performance test may still be a member's stapled fund.

There is considerable risk these reforms create a perverse incentive for funds to sign up new members as early as possible, even before they start their first job. ASIC should take this into account in its monitoring activities to ensure the hawking prohibitions are effectively enforced to protect members' interests and minimise consumer harm.

One risk arising is the bundling of superannuation products with other products. For example, banks may seek to provide new customers with a free superannuation account at the same time they open their first bank account.

For example:

**POSSIBLE EXAMPLE 1**

Billy, 14, goes to the bank to open his first bank account in a branch of Star Bank. Billy tells the Star Bank teller he would like to open his first bank account. The teller proceeds to open the bank account and says to Billy "would you also like to open your first superannuation account?". Billy agrees.

**POSSIBLE EXAMPLE 1.1**

Billy, 14, goes online to Star Bank's website to open his first bank account and provides clear consent to be contacted by the bank about its other products including superannuation. 24 hours later Billy receives a phone call asking if he also wants to sign up for a free superannuation account which he'll be able to view alongside his bank account on his flash new banking app.

Billy, feeling very grown up, agrees and opens up a super account.

## Advertising or giving information

***Feedback questions B1Q1 and B1Q2***

Differentiating between marketing, making an unsolicited offer, and real time contact will continue to be an area requiring constant oversight as interactions between financial service providers and consumers take place across multiple communication platforms, more often, and in different ways.

Consumers are engaging with their financial service providers increasingly online and through digital applications where the line between marketing, real time interaction and what constitutes an unsolicited offer is easily blurred. Regulatory guidance should endeavor to make it clear whether offers made through these platforms that require a time-limited response or action on the part of the user constitute advertising or a real-time activity that is likely to be captured by the hawking prohibition.

For example:

**POSSIBLE EXAMPLE 2**

John logs in to his personal banking app to check the real-time balance of his bank accounts. An advertisement for a Fun Super product pops up inviting John to open a "free top performing superannuation account in minutes" by "clicking here". The ad also says those who join could win a free iPad but that the offer is limited to those who join before a certain date.

John clicks on the pop-up ad and is taken to the Fun Super product page where he proceeds to sign up for the product.

**POSSIBLE EXAMPLE 2.1**

Rather than a pop-up advertisement, John is greeted by an AI generated message that pops up asking John to click on it to start a conversation if he is interested in opening up a new superannuation account. John clicks on the bot and the following conversation begins:

Bot: Thank you for seeking more information about our simple, low-cost super product. Do you agree to provide your clear consent to start the process to see if you are eligible to sign up for this offer?
John: yes.

John proceeds to sign up for the product as a result of the original pop up chat bot. John was targeted for this communication because of his age and salary determined from data obtained through his bank.

ISA recommends ASIC actively monitor the evolving nature of consumer interactions and ensure its regulatory guidance remains effective, helpful, and fit-for-purpose.

ISA recommends ASIC provide further examples of when advertising, offers and interactions through digital personal banking and financial services applications used by consumers are more or less likely to breach hawking prohibitions.

## Required consent for different classes of superannuation interests

***Feedback questions B3Q2***

The draft guidance around the nature of consent highlights that the prohibition may still not prevent unnecessary selling of financial products to members.

For example, it does not remove the possibility for super funds to obtain the required general consent during the on-boarding process of new members, after which the fund has a six-week window to cross or up sell that new member into a higher fee  product or one that is not subject to a performance test (noting the performance test being introduced in 2021 only applies to MySuper products, and other but not all products from July 2022).

New design and distribution obligations are unlikely to prevent this kind of cross-selling if the products are selected or designed for this type of activity and targeted at particular member cohorts. There is no guarantee these members would be better off should this cross or up selling occur; previous ISA research suggests they are not likely to be.[1] Further, while it may be beyond the scope of this consultation, it would not be consistent with the objectives of the hawking prohibition (i.e., to protect vulnerable members from being sold into products they do not need) should this type of cross selling occur.

For example:

**POSSIBLE EXAMPLE 3**

Andrea recently joined Grey Super because she was seeking a simple, low-cost super product. As part of the online on-boarding process Andrea ticked a box saying she would like to be contacted by Grey Super about other products they may have. The box was in a clear position on one of the several pages that are part of the fund's induction process for new members.

Two weeks later Grey Super contacts Andrea to tell her about a superannuation product that is different to the one Andrea signed up to but has investment options and features Andrea may find appealing. Grey Super does not explain to Andrea that the new product has higher fees. Andrea switches to that superannuation product as a result of Grey Super contacting her.

The product Andrea signs up for has higher fees than her original product and is not subject to a performance test.

[1] ISA research, April 2018, shows fund-level statistics are a good indicator of overall performance, they are strongly correlated to option-level returns suggesting member outcomes are unlikely to be improved through intra-fund option/product switching https://www.industrysuper.com/assets/FileDownloadCTA/5a7898ae10/The-usefulness-of-comparisons-based-on-fund-level-returns-Final.pdf

## Establishing consumer consent to be contacted and the consequences for breaching the hawking prohibition

***Feedback questions B2 and C1***

All AFS licensees are subject to overriding conduct obligations in s912A of the *Corporations Act* such as the obligations to act efficiently, honestly and fairly, to manage conflicts of interests and comply with financial services laws. It is likely that there will be some conduct which does not breach the hawking prohibition but nevertheless breaches other conduct obligations. We note that recent decisions against Mobisuper and Westpac shed new light on the scope of the obligation to act efficiently, honestly and fairly and also show how this obligation can apply to a product issuer. Highlighting these obligations in the context of the hawking prohibition would send a clear message to industry to consider its conduct in light of all relevant regulatory obligations. In the case of super funds, this will also include the obligation to act in the best financial interests of members.

This could be supported by examples such as the one below which is based on real-life experience. In the example it isn't clear whether the conduct breaches the hawking prohibition because the provision of personal advice may break the nexus or sufficiently interrupt the continuum of communication to avoid being captured. However, it demonstrates an approach to pressure selling that is unlikely to be in the member's best financial interests. It would further complicate the example if Super Review was paid on a per referral basis by the super fund.

**POSSIBLE EXAMPLE 4**

Brian receives a call from Sally at Super Review offering him a free review of his Super. Super Review is a third-party organisation which gathers information about a person's super with the aim of rolling them into a different super fund or product, for a fee. Brian says his super is with ABC Super. Sally arranges a three-way call with ABC Super, herself and Brian. During this call Brian gives Sally authority to obtain further information about his super account from ABC Super.

Immediately after the three-way call, Sally arranges for Brian to speak to a financial adviser who prepares a statement of advice with a recommendation for Brian to switch his super to another fund. Brian is then referred back to Super Review who pressures him to act on the financial advice and switch super funds. Super Review receives a fee from Brian for arranging the rollover. Super Review also shares a proportion of the fee with the financial adviser (who may also receive a fee from Brian).

Another emerging area that may not fall foul of the hawking prohibition but may breach other laws are related party relationships. Related party relationships may stimulate cross selling methods through opaque ownership structures rather than the more traditional vertical integration model. For example, the parent entity (or a majority or part owner) of a superannuation fund which also has an ownership stake in a payroll software entity that provides digital onboarding and HR services could leverage that relationship to push new employees of businesses using the software toward a particular superannuation fund or product in which the parent/owner has a financial interest.

While these issues and marketing methods are out of scope of this consultation, they are good examples of the technological and market direction which member acquisition is heading because of changes in the super sector. They may raise other conduct issues that ASIC should be pro-active in monitoring.

ISA strongly encourages ASIC to point to the overriding conduct obligations on all AFS licensees highlighting that even if conduct doesn't breach the hawking prohibition, it may still breach other licensee obligations.

## Retirement income products

It is outside the scope of this consultation, but it is important to note retirement income products were not among those provided an exemption.

This may be explained by the explanatory memorandum which said:

> As retirement phase products are particular types of choice product, the prohibition applies to any offers, requests or invitations that are made to a member about converting their accumulation interest into a pension, annuity, or other retirement phase interest. However, as discussed above, trustees are not prohibited from contacting their members to provide them with information. For example, the hawking rules permit a trustee to contact a member who is approaching retirement with information about different retirement income products offered by the fund provided that the trustee does not make an offer, request or invitation to the member.

The nature of retirement income products, and how and when members are targeted to receive information about them, makes it is difficult to establish a clear line between the provision of targeted information and when that becomes an offer. There should be a clear exclusion that readily enables trustees to offer and promote retirement income products that they believe are in the best financial interests of members.

This issue will need to be dealt with through the process of developing the Retirement Income Covenant, currently on foot, but we note here the importance for clarity on this issue because the growing obligation on trustees to engage with their members about retirement income options strongly interacts with the hawking prohibitions.

In ISA's submission (**Attachment 1**) to Treasury on the Retirement Income Covenant, we recommend that the government amend the exemption from the anti-hawking prohibition to ensure that it is broad enough to allow funds to offer retirement income products to members without breaching the prohibition.

For the sake of clarity, Example 17 in ASIC's hawking regulatory guidance could be clarified to make it clear that as an existing member, Big Super can still contact Zhang.