



ASIC
Australian Securities &
Investments Commission

REGULATORY GUIDE 38

The hawking prohibition

July 2021

About this guide

This guide is for people who offer financial products for issue or sale. It sets out our guidance on the hawking provisions in s992A and 992AA of the Corporations Act.

In particular, this guide explains how to comply with the hawking prohibition contained in s992A, a prohibition that aims to protect consumers from unsolicited offers of financial products.

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 will exercise specific powers under legislation (primarily the Corporations Act)
- 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.

Document history

This draft guide was issued in July 2021 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 38, issued December 2019
- Superseded guide *The hawking prohibitions: An ASIC guide*, issued July 2002 and reissued May 2005, and rebadged as a regulatory guide 5 July 2007

Disclaimer

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

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Key points

Under the hawking prohibition, a person must not, in the course of, or because of, an unsolicited contact with a retail client:

- offer financial products for issue or sale; or
- request or invite the client to apply for financial products.

The aim of the prohibition is to protect consumers from unsolicited offers of financial products that may not meet their needs.

This guide explains:

- the scope of the hawking prohibition;
- how an offeror can comply with the prohibition; and
- the consequences of a breach of the prohibition.

Purpose of this guide

- RG 38.1 This guide is for people who offer financial products for issue or sale, and concerns situations involving unsolicited contact with consumers.
- RG 38.2 It sets out our guidance on the hawking provisions in s992A and 992AA of the *Corporations Act 2001* (Corporations Act). In particular, this guide explains:
- the scope of the hawking prohibition in s992A (see Section B);
 - what it means to make an offer because of or during an unsolicited contact (see Section C);
 - the nature of the consent a consumer must give in order for a contact not to be unsolicited (see Section D); and
 - the consequences of a breach of the prohibition, including a consumer's right to return a product and receive a refund (see Section E).
- Note: In this guide, references to sections (s), divisions (Div) and parts (Pt) are to the Corporations Act, unless otherwise specified.
- RG 38.3 This document contains general guidance only. The application of the hawking prohibition will depend on the particular facts and circumstances of each case.
- RG 38.4 In this guide we have highlighted the core statutory provisions of the hawking regime (see, for example, at RG 38.6). Where we have done so, we

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have indicated the relevant subsections or paragraphs of s992A and 992AA to which we are referring.

Note: These core statutory provisions are highlighted at RG 38.6, RG 38.18, RG 38.22, RG 38.31, RG 38.44–RG 38.45, RG 38.51, RG 38.56, RG 38.63, RG 38.75, RG 38.81, RG 38.84, RG 38.87, RG 38.96, RG 38.97, RG 38.98, RG 38.101–RG 38.102, and RG 38.103–RG 38.104.

Off-market unsolicited offers

- RG 38.5 This guide does not apply to unsolicited offers to purchase financial products off-market under Div 5A of Pt 7.9. A person who makes an offer to purchase financial products from another person should consider how Div 5A applies to that offer.

The hawking prohibition

- RG 38.6 Under s992A(1), a person (the ‘offeror’) must not offer financial products for issue or sale to a retail client if the offer is made in the course of, or because of, an unsolicited contact.

- RG 38.7 An offeror includes an issuer or seller of financial products, as well as their agent or representative: see paragraph 5.31 of the [Explanatory Memorandum to the Financial Sector Reform \(Hayne Royal Commission Response\) Bill 2020](#) (Explanatory Memorandum). This prohibition also extends to inviting or requesting an application from a retail client for issue or sale.

- RG 38.8 ‘Unsolicited contact’ is contact by telephone, face-to-face contact, or any other real-time interaction in the nature of a discussion or conversation to which the consumer did not consent: see s992A(4).

Note 1: In this guide, a person who offers, issues or sells a product (invites or requests a consumer to purchase or apply for a product) is referred as an ‘offeror’ and an existing, potential or prospective retail client or customer is referred to as a ‘consumer’, unless otherwise indicated.

Note 2: For more information on whether particular conduct amounts to the provision of financial product advice, see [Regulatory Guide 36 Licensing: Financial product advice and dealing](#) (RG 36).

- RG 38.9 The hawking prohibition aims to protect consumers from unsolicited offers of financial products, which often contribute to those consumers purchasing products that do not meet their needs: see paragraph 5.16 of the Explanatory Memorandum. The prohibition is also intended to provide consumers with a degree of control over their decisions to purchase financial products—it allows them to determine how they want to be contacted and the kinds of products they are offered: see paragraph 5.4 of the Explanatory Memorandum.

- RG 38.10 A failure to comply with the hawking prohibition is an offence of strict liability: see s992A(9).

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Commencement of the revised provisions

- RG 38.11 The provisions of s992A and 922AA commence on 5 October 2021: see s2(1) of the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020*.
- RG 38.12 These provisions replace prohibitions previously contained in s736, 992A and 992AA.

General consumer protection provisions

- RG 38.13 This guide should be considered in the context of the general consumer protection provisions of the Corporations Act and the *Australian Securities and Investments Commission Act 2001* (ASIC Act).
- RG 38.14 Regardless of whether an offeror is subject to the hawking prohibition for a particular transaction, the offeror needs to ensure that they otherwise comply with:
- (a) the product design and distribution obligations (see Pt 7.8A of the Corporations Act), which commence on 5 October 2021; and
 - (b) the prohibitions on:
 - (i) unconscionable conduct (see s12CA–12CC of the ASIC Act and s991A of the Corporations Act);
 - (ii) misleading or deceptive conduct (see s12DA–12DB of the ASIC Act; s1041E–1041H of the Corporations Act); and
 - (iii) harassment or coercion in connection with supply or payment for financial services (see s12DJ of the ASIC Act).

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B Scope of the hawking prohibition

Key points

The hawking prohibition applies to unsolicited contact when:

- a consumer is offered a financial product during or because of unsolicited contact; or
- a consumer is invited to apply for a financial product, or an application for a financial product is requested from the consumer, during or because of unsolicited contact.

The hawking prohibition does not apply when the offer, request or invitation is made in the course of giving personal financial advice.

Offerors of certain types of products are exempt from the requirements under the hawking prohibition.

What the prohibition applies to

RG 38.15 In general terms, the hawking prohibition in s992A(1) applies to offers of financial products, and concerns ‘unsolicited contact’ that is, partly or wholly, in the form of:

- (a) a telephone call;
- (b) a face-to-face meeting; and
- (c) other real-time interaction that is in the nature of a discussion or conversation and creates an expectation of an immediate response.

Note: The term ‘unsolicited contact’ is defined in s992A(4) and (5). See also Sections C and D. In particular, for cases where customers initiate contact, see RG 38.61.

The prohibition applies to offers made to retail clients

RG 38.16 The hawking prohibition applies only to offers that are made to a retail client: see s992A(1)(a).

Note: ‘Retail client’ has the meaning given in s761G of the Corporations Act and Div 2 of Pt 7.1 of the Corporations Regulations 2001.

RG 38.17 For superannuation products, an offeror will not breach the hawking prohibition where they contact an employer to discuss the employer’s choice of default fund for employees who do not nominate a fund to receive payments. Although employers are generally considered to be retail clients within the meaning of the Corporations Act, employers do not typically acquire an interest in the fund. An employer selecting a superannuation fund

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as a default fund does not constitute the issue or sale of a financial product to that employer.

Note: Trustees are, however, subject to the prohibition under s68A of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) regarding employer inducements, as well as the obligation to give an employer a Product Disclosure Statement (PDS) at or before the time they become an employer sponsor: see s1012I of the Corporations Act.

The prohibition does not apply to offers made in the course of giving personal financial advice

RG 38.18 Under s992A(2), the hawking prohibition does not apply to an offer, request or invitation made in the course of giving personal advice by a financial adviser who is required to act in their client's best interests.

Note: For further guidance on the best interests duty and related obligations for financial advisers, see [Regulatory Guide 175 Licensing: Financial product advisers—Conduct and disclosure](#) (RG 175).

Interaction with the deferred sales model regime for add-on insurance products

RG 38.19 An offer, request or invitation relating to an 'add-on insurance' product is not subject to the hawking prohibition during any 'add-on insurance deferral period': see s992A(2)(b) and 992A(3). Except when provided for by regulation, add-on insurance products will be subject to the hawking prohibition prior to, and after, any add-on insurance deferral period.

Note 1: Section 12DO of the ASIC Act defines an 'add-on insurance product' and s12DP defines 'add-on insurance deferral period'.

Note 2: It is a separate offence to offer an add-on insurance product during any applicable add-on insurance deferral period (see s12DR of the ASIC Act). For further information on the regulation of add-on insurance products, see draft Regulatory Guide 000 *Deferred sales model for add-on insurance*. (We are currently consulting on this new regulatory guide—see Attachment 1 to [Consultation Paper 339 Implementing the Royal Commission recommendations: The deferred sales model for add-on insurance](#) (CP 339)).

Note 3: Where an add-on insurance product is exempt from the deferral sales model regime (such as by s12DX or 12DY of the ASIC Act), the hawking regime will apply to it: see paragraph 3.120 of the [Explanatory Memorandum](#).

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Products and entities exempt from the hawking prohibition

- RG 38.20 Regulations may be made for the purpose of exempting products or classes of products from the hawking prohibition: see s992A(2)(c) and 992AA(3).
- RG 38.21 In addition, certain types of financial products and certain entities are currently exempt from the requirements under the hawking prohibition: see Table 1 in the appendix. The legislative instruments listed in this table give broader relief from a range of regulatory requirements (e.g. disclosure obligations) as well as the hawking prohibition, to products the function or features of which are such that it is not appropriate for the whole (or part) of the financial product regulatory regime to apply. We have given relief where there is low risk of consumer harm.

Note: ASIC is considering what, if any, changes are appropriate with regard to these instruments.

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C Making offers because of or during unsolicited contact

Key points

An offer, invitation or request is prohibited by s992A if it takes place in the course of, or because of, an unsolicited contact.

For the purposes of the hawking regime, unsolicited contact is contact that takes place in real time to which the consumer did not consent.

The hawking prohibition does not generally apply to advertising or the mere provision of information.

Meaning of ‘because of’ in the hawking prohibition

- RG 38.22 Under s992A(1)(b), for a breach of the hawking prohibition to occur, the offer of financial products to the consumer must be made ‘because of’ or ‘in the course of’, an unsolicited contact.
- RG 38.23 An offer, request or invitation made during an unsolicited contact with a consumer will constitute one made ‘in the course of’ that contact: see paragraph 5.52 of the [Explanatory Memorandum](#).
- RG 38.24 Paragraph 5.53 of the Explanatory Memorandum states that the words ‘because of’ limit the breadth of offers that are prohibited to those where there is a ‘causal nexus’ between the unsolicited contact and the offer, request, or invitation. In addition, the paragraph says that:
- ...[T]he inclusion of the words ‘because of’ seeks to address the situation in which a person makes unsolicited contact with a consumer, but the actual offer, request, or invitation is made during subsequent contact that is solicited by the consumer.
- RG 38.25 The prohibition may still apply to offers, requests or invitations that take place through a medium other than one that is a real-time interaction. For example, emailing a consumer an offer during or directly after an unsolicited outbound sales call with them would be ‘because of’ that call.
- RG 38.26 Ultimately, whether the offer is caused by, or is a result of, the unsolicited contact, will depend on the facts and circumstances of each case: see paragraph 5.54 of the Explanatory Memorandum.
- RG 38.27 For example, the causal nexus will be broken if between an unsolicited contact and a subsequent offer, request, or invitation the consumer has obtained personal advice (and the appropriate Statement of Advice) on the product (see paragraph 5.56 of the Explanatory Memorandum).

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- RG 38.28 The causal nexus may also be broken if between an unsolicited contact and subsequent offer, request or invitation, the consumer has taken active steps to consent to further contact regarding the offer, request or invitation, and has had a reasonable opportunity to consider any information that they have been provided about a financial product and to assess its suitability prior to receiving the offer: see paragraph 5.55 of the Explanatory Memorandum.
- RG 38.29 If during the course of an initial unsolicited contact, an offeror pressures or manipulates a consumer into providing consent to future contact in relation to a financial product, then any such future contact would continue to be unsolicited: see paragraph 5.57 of the Explanatory Memorandum.
- RG 38.30 Generally, we consider that the following circumstances are unlikely to, of themselves, break the causal nexus:
- (a) the consumer obtaining general advice;
 - (b) the consumer receiving a prospectus or PDS; or
 - (c) the offeror providing a disclaimer to the consumer or obtaining a declaration from the consumer to the effect that the offer is not because of the initial unsolicited contact.

Forms of contact subject to the prohibition

- RG 38.31 Under s992A(4)(a), unsolicited contact in connection with a financial product is defined as being, wholly or partly, in the form of:
- (a) a telephone call;
 - (b) a face-to-face meeting; or
 - (c) any other real-time interaction in the nature of a discussion or conversation.
- RG 38.32 An offeror is not prevented by the hawking prohibition from using communications that are not in real time to encourage consumers to request future contact: see Example 1. However, the offeror would need to ensure that any later offer, request, or invitation complies with the hawking prohibition.

Example 1: Letter mail-out

Bank ABC sends unsolicited letters through a bulk mail-out to potential consumers. This letter contains a reply slip for a consumer to request that Bank ABC call them at a future time and date convenient to the consumer to discuss certain types of products.

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This letter would not breach the hawking prohibition as it does not constitute a real-time interaction. Further, if a consumer returns the reply slip and Bank ABC contacts them within six weeks of its return, the telephone call is not unsolicited, even though the consumer did not consent to receiving the original letter. By contrast, if the consumer had not returned the reply slip, but Bank ABC nonetheless called the consumer and offered them products for sale, this call would be unsolicited, and the offers would be considered hawking.

- RG 38.33 A superannuation trustee will not breach the hawking prohibition if they contact a consumer for the purpose of communicating information in order to fulfil the trustee's legal obligations: see Example 2.

Example 2: Unsolicited contact required by law

Joe recently passed away. His superannuation fund Seraphic Super has a record of Joe's binding death benefit nomination in which he nominated his husband, Jerry, as his beneficiary. Seraphic Super makes the relevant inquiries, which include contacting Jerry over the phone, and determines that Jerry is the person entitled to receive the benefit. Seraphic Super provides Jerry with a range of options for the payment of the benefit in accordance with Seraphic Super's governing rules and the relevant requirements of the *Superannuation Industry (Supervision) Regulations 1994*.

The hawking prohibition does not apply in this circumstance because Seraphic Super is required under the law to pay the benefit to the person entitled to receive it as soon as practicable after the member has died. Seraphic Super must contact the beneficiary to fulfil this legal obligation.

Real-time contact in the nature of a conversation or discussion

- RG 38.34 The hawking prohibition is technology neutral. This means that, in addition to telephone calls and face-to-face meetings, 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: see s992A(4)(a)(iii).
- RG 38.35 The hawking prohibition cannot be circumvented by engaging a third party to make offers on a person's behalf (as their representative or agent): see paragraph 5.31 of the [Explanatory Memorandum](#). We consider that this includes where third parties are contracted to develop artificial intelligence sales tools, such as chat bots. In such cases, the person commissioning the chat bot's use, or under whose licence it operates will be responsible for any offer, request or invitation made by the chat bot.
- RG 38.36 Real-time interactions are ones where the offeror and consumer respond to each other continuously in real time, or where an expectation exists that both parties will provide an immediate response to each other: see paragraph 5.59 of the Explanatory Memorandum. This includes both verbal and written communications.

Advertising or giving information

- RG 38.37 An offeror is not prevented from advertising financial products or providing information to consumers so long as:
- (a) the interaction with the consumer does not take place in real time and is not in the nature of a conversation or discussion (see RG 38.34–RG 38.36); and
 - (b) no offer, invitation or request is made during, or because of, the advertisement or provision of information (see RG 38.22–RG 38.30).
- RG 38.38 For the avoidance of doubt, where advertising or giving information involves practices that are not in the nature of a conversation, discussion, or real-time interaction, such as brochures, television or radio advertising, it is not within the scope of the prohibition.
- RG 38.39 Whether an offeror’s communication goes beyond the giving of mere information and amounts to an offer of a financial product, or an invitation or request to apply for a product, and is therefore subject to the hawking prohibition, will depend on the facts and circumstances of each case.
- RG 38.40 Certain practices, such as providing a consumer with a quote (e.g. in the case of an insurance product), constitute an offer of that insurance product, and may, if provided because of, or during, an unsolicited real time communication, constitute a breach of the hawking prohibition: see the example provided at RG 38.72.
- RG 38.41 Offers, requests or invitations made using non-real time channels (such as by email) following an unsolicited contact may still constitute a breach of the hawking prohibition. Offers, requests or invitations cannot be made ‘because of’ an unsolicited contact that is in real time: see also RG 38.22—RG 38.30.
- RG 38.42 The hawking prohibition does not apply to the advertising of an offer, or the publication of a statement about an offer that is otherwise subject to and complies with or is subject to an exemption in s734 or s1018A: see s992A(7).

Note: See also [Regulatory Guide 254](#) *Offering securities under a disclosure document* (RG 254).

- RG 38.43 When advertising or providing information, offerors still need to ensure that they comply with any other relevant laws, including the misleading or deceptive conduct and consumer protection provisions discussed at RG 38.13–RG 38.14. Offerors should also note ASIC’s guidance in relation to advertising financial products and services.

Note: See [Regulatory Guide 234](#) *Advertising financial products and services (including credit): Good practice guidance* (RG 234) for information on obligations relating to advertising or promotional material.

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D Establishing consumer consent to be contacted

Key points

In order to make an offer, request, or invitation in relation to a financial product, an offeror must receive consent from a consumer to contact them. The consent must be:

- positive, voluntary, and clear;
- such that a reasonable person would have understood that the consumer consented to the contact; and
- given before the start of such contact.

This consent can be withdrawn at any time prior to or during the course of the contact.

In turn, the contact must:

- relate to financial products specifically consented to, or that are reasonably within the scope of the consent; and
- be by a method of communication set out in the consumer's consent, where this is specified.

The giving of consent generally

- RG 38.44 Under s992A(4)(b), contact with a consumer by an offeror is 'unsolicited contact' if the consumer did not consent to the contact.
- RG 38.45 Under s992A(5)(c) and (h), the consent must be given prior to the contact. The consent must not have been withdrawn before the contact occurs.
- RG 38.46 This means that an offeror cannot rely on a consent obtained at the start of, or during, an unsolicited contact, such as an outbound sales call: see paragraph 5.73 of the [Explanatory Memorandum](#).
- RG 38.47 If a consumer's consent indicates the form of contact that the consumer wants, an offeror may only contact them in that form: see s992A(5)(f).
- RG 38.48 Consent will be unsolicited unless it takes place after a consumer has given consent that is positive, voluntary, and clear. That consent must also be such that a reasonable person would have understood that the consumer was consenting to the contact: see s992A(5)(d)-(e), and paragraph 5.22 of the Explanatory Memorandum.

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- RG 38.49 A consumer may consent to a meeting, telephone call or other real-time interaction for one or more purposes, and the consent could take a number of forms. It may relate to a single instance or be ongoing—for example a request to receive telephone calls for a particular purpose over a period of time, not exceeding six weeks. In any case, the consent obtained should be positive, voluntary, and clear.
- RG 38.50 In RG 38.51–RG 38.62, we give some general guidance on the concept of positive, voluntary and clear consent. For guidance on:
- (a) determining how consent should be established in relation to particular offerings and situations, see RG 38.64–RG 38.83; and
 - (b) tracking consumer consent, see RG 38.84–RG 38.94.

Consent must be positive and voluntary

- RG 38.51 Under s992A(5)(d), offerors may only rely on a consumer’s consent to be contacted if it is positive and voluntary.

Positive consent

- RG 38.52 Generally, positive consent may involve either:
- (a) consent sought through a standalone communication or interaction that demonstrates the consumer’s decision; or
 - (b) where consent is sought in a broader discussion or larger document (e.g. forms relating to a separate product or service)—consent is clearly brought to the attention of the consumer in a way that allows for an express decision by the consumer: see paragraph 5.73 of the [Explanatory Memorandum](#).
- RG 38.53 Positive consent involves an active step by the consumer, such as initiating contact with the offeror through a telephone call or online form: see paragraph 5.75 of the [Explanatory Memorandum](#). This involves a conscious decision by the consumer, and cannot be given through silence or a failure to act. It cannot be provided in response to a leading question: see paragraph 5.76 of the Explanatory Memorandum. This includes situations where a leading question is used to attempt to obtain an extension or renewal of consent.
- RG 38.54 An offeror cannot contact a consumer merely because they failed to state that they are not to be contacted after being given an opportunity to do so: see paragraph 5.76 of the Explanatory Memorandum. For example, the fact that a consumer did not opt out of receiving future telephone calls when given an opportunity to do so on an application form will not, on its own, mean that subsequent telephone calls from the offeror are solicited. A consumer’s failure to opt out does not constitute a positive act of providing

consent for the contact: see paragraph 5.76 of the Explanatory Memorandum.

Example 3: Opt-out notices

Good Deal Derivatives recently bought a client book from a dormant OTC derivatives dealer, Dazzling Derivatives, in order to obtain new clients for their business. As a dormant dealer, Dazzling Derivatives has not made contact or sought consent from any clients in the last year.

Good Deal Derivatives sends a letter to all individuals whose contact details it has acquired asking them to respond to the letter if they wish to opt-out of future financial product offers. Good Deal Derivatives then calls all individuals in the client book a week later inviting them to start trading OTC derivatives using their platform. None of the individuals had responded to the letter prior to receiving the telephone call.

By telephoning these individuals with an invitation, Good Deal Derivatives has breached the hawking prohibition. The consumers did not clearly and positively consent to this real-time contact. Failure to respond or an absence of objection does not constitute consent to be contacted by the offeror. Previous consents that may have been granted by individuals in relation to offers from Dazzling Derivatives' would have expired six weeks after they were given. In any event, they would not extend to offers from Good Deal Derivatives.

Voluntary consent

RG 38.55 The consumer must have voluntarily made the decision to be contacted. A consent is not valid if the consumer was forced, pressured, or manipulated into consenting to be contacted by an offeror, or induced to contact the offeror, so the consumer could, for example, receive another service or take up another opportunity: see paragraphs 5.57, 5.75, and 5.77 of the Explanatory Memorandum, as well as Example 4 and Example 5.

Example 4: Timeshare presentation

A promoter has a stall at a shopping centre with a banner about free movie tickets. The promoter approaches a consumer about participating in a survey on holiday destinations and hearing information about holidays, and offers free movie tickets in return. The survey will take place at a nearby venue. The consumer goes to the venue and is told that the survey will take place at the end of a presentation and the free movie tickets will be handed out then. The consumer discovers that the presentation is about a time-sharing scheme and is offered an opportunity to purchase an interest in the scheme during the presentation.

The presentation is unsolicited because it does not take place in response to a consent that was voluntarily given by the consumer as to the nature of the contact—that is, it was not made clear that the consent was for contact in relation to an offer to purchase an interest in a time-sharing scheme. In

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any case, the offer is 'because of' the promoter's initial, unsolicited contact with the consumer. Had the promoter properly informed the consumer that the presentation was for the purposes of offering interests in, or inviting or requesting applications for interests in, a time-sharing scheme, then consent given by consumers would have been voluntary.

Example 5: Price comparison website

Peter is wanting to switch comprehensive car insurers. He searches the internet for more information and finds an insurance price comparison website 'Best Price Compare'. The homepage shows the logos of ten different insurance providers and describes the insurance that they offer. Peter presses a button that reads 'Compare your quotes'. Once he presses this button a dialogue box appears, 'By providing your details to Best Price Compare you are consenting to be offered comprehensive car insurance by our Best Price Compare members, including by telephone. Do you wish to proceed?'

Peter wants to receive the quotes from the Best Price Compare so answers 'yes' and proceeds to fill out his details on the webform. He then compares the quotes that now appear on the page. Peter subsequently receives a telephone call from three of the member insurance providers offering to complete the purchase process.

These calls were solicited because Best Price Compare has made it clear to consumers that by answering 'yes' and filling out the form they will be contacted by Best Price Compare's member insurance providers, including by phone. Peter has taken positive action by acknowledging that he consents to being contacted by the member insurance providers, and subsequently voluntarily filled out his details on the webform.

Consent must be clear and reasonably understood

- RG 38.56 Under s992A(5)(e), a consumer's consent must be clear, and such that a reasonable person would have understood that the consumer consented to the contact: see also paragraphs 5.79 and 5.81 of the [Explanatory Memorandum](#).
- RG 38.57 This means that a consumer's consent must demonstrate they understand they are consenting to being contacted for the purpose of being offered, or invited to purchase or apply for, a financial product. For consent to be clear, it must not be vague or ambiguous: see paragraph 5.79 of the Explanatory Memorandum.
- RG 38.58 The nature of the contact being consented to by the consumer should be clear from the language used to communicate it. Any valid consent must make clear what financial need, or which financial products or classes of products, the consumer wishes to discuss: see paragraph 5.80 of the Explanatory Memorandum and RG 38.64–RG 38.83. This means that an offeror cannot

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rely on a broad consent solicited from a consumer that does not specify products or a particular consumer need.

Example 6: Vague or ambiguous language for consent

Seth is looking for a new superannuation fund. He uses the instant chat box function on Sibylline Super's website to enquire about a basic super account with minimal fees. Jacinta from Sibylline Super responds. During the instant chat exchange, Jacinta raises the availability of a socially responsible investing superannuation product. The following conversation then takes place:

Seth: What's socially responsible investing?

Jacinta: It's a kind of superannuation product that invests in companies that engage in ethical business practices.

Seth: Okay.

Jacinta: I could call you tomorrow and run you through an application if you like?

Seth: Ummm ... okay?

Seth's language does not indicate clear and positive consent to the contact by Jacinta in relation to socially responsible investing. If Jacinta calls Seth and offers him such a superannuation product, this contact would be unsolicited and would breach the hawking prohibition. If Jacinta was uncertain whether Seth properly understood that any subsequent telephone calls were for the purpose of signing up to a socially responsible investing product, she could have provided further information, and then sought to confirm his understanding.

In addition, if Jacinta had offered to send Seth a package in the mail with information about the different superannuation products offered by Sibylline Super, this would not breach the hawking prohibition. This is because providing information alone does not constitute an offer or invitation, and the subsequent contact is not a real-time interaction in the nature of a conversation or discussion.

Example 7: Website lead generator

Vanessa has heard on the news about a surge in retail securities trading and decides to search the internet for more information. A link for Quick Traders appears stating, 'Learn about trading securities today!'. Vanessa submits her contact details in a webform on the Quick Traders website. She is surprised when she later receives a call from a representative from Dealin' Derivatives, who had used Quick Traders to generate leads. The Dealin' Derivatives representative gives Vanessa general information about securities trading, but in the course of this conversation invites Vanessa instead to begin trading over-the-counter (OTC) derivatives using the Dealin' Derivatives platform.

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The representative's invitation is unsolicited as it does not take place in response to a consent voluntarily given in relation to the invitation to trade financial products, or for that matter to be contacted about derivatives.

- RG 38.59 The effect of s992A(5)(e) is that an offeror must be satisfied on a reasonable basis that the consumer was sufficiently informed so as to understand that:
- (a) they have provided consent to being contacted by the offeror; and
 - (b) the contact may result in an offer of a financial product or a request or invitation to apply for a financial product (see paragraph 5.82 of the Explanatory Memorandum).
- RG 38.60 Whether there is a reasonable basis for considering a consumer to have understood what they are consenting to will depend on the circumstances in each case.
- RG 38.61 It is generally reasonable to assume that the consumer understands what they are consenting to if the consumer initiates contact in relation to acquiring a product. In contrast, it is unlikely that a consumer would understand what they are consenting to if they are incentivised to consent hastily to contact about a financial product (e.g. as part of the terms and conditions of entering a competition): see paragraph 5.83 of the Explanatory Memorandum.

Example 8: Competition form

A company runs a campaign where a consumer can fill in a form to enter a draw to win a new car. Small print contained in the lengthy terms and conditions attached to the form state that by submitting their entry the consumer consents to being called about the sale or offer of financial products.

Any telephone calls for the offer or sale of financial products that take place as a result of the information provided on the form would be considered unsolicited. The company did not specifically or separately draw being contacted about financial products to the consumer's attention. As a result, no reasonable person would likely have understood that the consumer had consented to contact in relation to the offer of financial products.

- RG 38.62 As a matter of good practice, we suggest that offerors:
- (a) encourage consumers to specify which financial products or classes of financial products they wish to discuss;
 - (b) provide consumers with enough information in a sufficiently prominent way so as to allow them to carefully consider whether to consent to the contact, and the form of that contact; and
 - (c) if in doubt, confirm the scope of the contact to which the consumer gives consent.

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Determining the scope of consent

- RG 38.63 Under s992A(5)(a) and (b), the consent must be to contact for the purpose of offering, or requesting or inviting a consumer to apply for, either:
- (a) the particular financial product that is the subject of the offer, request, or invitation; or
 - (b) a financial product reasonably within the scope of the consumer's consent.
- RG 38.64 It is possible that a consumer's consent may be broad enough so as to reasonably apply to more than one product: see paragraph 5.67 of the [Explanatory Memorandum](#).

General meaning of 'reasonably within scope'

- RG 38.65 While each situation will depend upon its facts, certain products will be considered to be reasonably within the scope of the consumer's consent if:
- (a) the consumer has consented to the contact for products of a particular type or with particular features, and the product is of that type or has those features;
 - (b) the consumer asks for a product that has a particular purpose or function and the financial product that is offered has that purpose or function; or
 - (c) a reasonable person would consider the financial product to be within the scope of the consumer's consent—for example when the product:
 - (i) covers the risks that the consumer consented to being contacted about;
 - (ii) has the same purpose or function as the product that the consumer consented to being contacted about (see Example 9); or
 - (iii) is 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.

Note: See s992A(5)(a)(ii) and s992A(5)(b)(ii), as well as paragraphs 5.65 and 5.66 of the Explanatory Memorandum.

Example 9: Products not for the same function or purpose

Kathleen meets with a sales representative of Gold Standard Bank to inquire about setting up a fixed-term deposit account. During the meeting, the sales representative tells the consumer that if she wants long-term financial security, she should consider applying for Gold Standard Bank's income protection insurance.

The offer of the income protection insurance breaches the hawking prohibition because it was not reasonably within the scope of the consumer's consent, which was in relation to a term deposit. This is

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because a reasonable person would not consider income protection insurance to be a financial product with the same purpose or function as the fixed-term deposit account. The deposit account has the purpose and function of generating return on capital investment, which income protection insurance does not.

The sales representative may instead offer Kathleen a pamphlet with information regarding income protection insurance during the meeting.

- RG 38.66 A financial product is ‘so closely related to a product or service that a consumer would reasonably expect to be offered it’, if the financial product is functionally related to the initial product or service. In the case of an insurance product, it will be functionally related to another product or service, if it primarily manages financial risk:
- (a) directly relating to that other product or service, or assets secured by that product; or
 - (b) directly relating to the purposes for which the other product or service is commonly supplied, or the purposes for which assets secured by that product are commonly supplied.

Example 10: Reasonable expectation of being offered a product

Kasia visits a travel agent to arrange an overseas holiday. During the meeting with the travel agent, the agent offers to issue travel insurance to Kasia. Generally, the meeting would be solicited for the offer of travel insurance, as a discussion of travel insurance would be within the scope of Kasia’s consent in meeting with a travel agent. In particular, it is so closely related to the offering of flights that Kasia would have expected to be offered that form of insurance.

Consent in the context of bundling or cross-selling

- RG 38.67 Offerors sometimes sell or issue multiple products together in practices known as cross-selling and bundling. This can involve the offer of discount on the usual price of a product or products.
- RG 38.68 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 paragraph 5.67 of the Explanatory Memorandum, and Example 11.

Example 11: Offer of a cross-sold or bundled product reasonably within scope

Liam walks into the local branch of his bank and asks Ahmed, a customer services representative, about the bank’s home loan offerings. They discuss the options, and at the conclusion of the meeting, Ahmed provides Liam with information about, and offers him the opportunity to open, a

transactions account that could be linked to the home loan as an 'off-set account'.

The offer of the transactions account would not be unsolicited as Liam's consent to be contacted about home loans is sufficiently broad as to reasonably cover a product, such as an off-set transactions account, that is functionally related to home loan products in that it affects the accumulation of interest on those products.

- RG 38.69 A second product will be within the scope of a consumer's consent if, for example, it covers the same risk, has the same purpose or function, or is so closely related to the product that the consumer consented to being contacted about that the consumer would reasonably expect to be offered the second product: see RG 38.65–RG 38.66. Understanding the breadth of a consumer's consent in each case will depend on its circumstances, and, in particular, the words used by the consumer: see Example 12.

Example 12: Offering products reasonably within the scope of the consent

Emmily telephones Venture Insurance Co and speaks with a sales representative about acquiring insurance. During the discussion Emmily states that she is looking to be protected in the event of a housefire at her place of residence. To better understand Emmily's needs, the sales representative confirms that Emmily owns her home. As a result, in addition to offering her contents insurance, the sales representative also offers her home building insurance.

While Emmily did not request either insurance by name, Emmily's initiation of contact constitutes consent to offer her multiple insurances covering the same financial risk—loss she may suffer as the result of a fire: see further RG 38.61. As the sales representative established that Emmily owned her place of residence, the offer of home building insurance does not breach the prohibition.

- RG 38.70 An offeror may only rely on a consent given by a consumer before the contact occurs—they cannot elicit consent from a consumer for the contact after it has already begun: see RG 38.44. This means that if a consumer contacts a product offeror or consents to being contacted about a product, the offeror cannot in the course of that contact offer another product outside the scope of consent even if the consumer gives further consent during the contact: see paragraphs 5.72 and 5.74 of the [Explanatory Memorandum](#).
- RG 38.71 The fact that two products *could be* or *often are* offered together at the point of sale does not in and of itself mean that those products are reasonably within the scope of a consumer's consent.

RG 38.72 The Explanatory Memorandum also provides (after paragraph 5.67) a further example on how to assess the scope of a consumer's consent, and establish whether it is appropriate to offer multiple products:

Example 5.5: Products outside the scope of consent

Kayla calls Big Insurance Co and asks the sales representative, Tom, to give her a quote for third party property damage insurance for her car. Tom tells Kayla that Big Insurance Co is currently offering a discount to clients who take out car and home insurance policies as part of a package and asked Kayla if she would like a quote for home insurance as well. The offer of the insurance package is outside the scope of Kayla's request because she did not consent to contact involving offers about any product other than third party property damage insurance. Tom has therefore contravened the hawking prohibition.

RG 38.73 Some products offered together for issue or sale may only be obtained together as a bundle, for example, small business insurance packages (where sold to a retail consumer). Whether or not the products are independently obtainable, the relevant test remains that the consumer's consent is sufficiently broad as to reasonably apply to each of the products offered: paragraph 5.67 of the Explanatory Memorandum.

Note: What constitutes a distinct financial product will be for product issuers to determine based on the law relevant to their product. More information on bundling in the context of product issuers' design and distribution obligations can be found in [Regulatory Guide 274 Product design and distribution obligations](#) (RG 274).

Required consent for products with multiple features

RG 38.74 Some products offered for issue or sale may have multiple features—for example, an investment facility that provides exposure to both shares and debentures. In such cases, consumer consent is required that relates to material attributes of the product (such as those set out in RG 38.65), so long as the consent does not exclude the product on the basis of its other material features.

Example 13: Products with multiple features

Niamh meets with Velko, a sales representative at Live Long & Prosper Investments and inquires about investment options involving shares. Velko offers Niamh a range of options, including an investment facility that provides exposure to both shares and debentures.

On the basis of Niamh's consent, Velko's offer would be reasonably within the scope of the consent and therefore not unsolicited. However, had Niamh asked about investment options that involved *only* shares, then the offer of the facility with exposure to both shares and debentures would not have been reasonably within the scope of the consent, being excluded on the basis of the consent provided. An offer in such a context would have been unsolicited, and a breach of the hawking prohibition.

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Required consent for different classes of superannuation interests

- RG 38.75 Under s992A(8), each class of beneficial interest in a regulated superannuation fund is considered to be a separate financial product.
- RG 38.76 This means that when a consumer is offered, or invited or requested to apply for, a new beneficial interest in a fund in which they already hold a different existing beneficial interest, we will consider the contact to have been unsolicited unless consent was given in relation to the offer or invitation for that new beneficial interest: see Example 14.
- RG 38.77 If a consumer has consented to be contacted about the issue or sale of superannuation generally, a superannuation trustee can discuss both MySuper and choice products: see s992A(8) and paragraph 5.69 of the Explanatory Memorandum. However, if the consumer's consent only reasonably applies to one class of beneficial interest, the trustee cannot make an offer, request, or invitation to apply in relation to a different class: see paragraphs 5.68 and 5.69 of the Explanatory Memorandum. 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.

Example 14: Hawking of superannuation products

Aparna currently holds a defined benefit interest in GG Super. Lily, who works at GG Super, contacts Aparna by phone and offers her a choice product. Lily has breached the hawking prohibition because a defined benefit interest is a different beneficial interest to a choice product and the offer was made during an unsolicited contact.

Required consent for contacting existing clients

- RG 38.78 The hawking prohibition does not prevent contact with an existing client about a product already held by or on behalf of that client if the discussion does not involve an offer or invitation to apply for a new financial product: see paragraph 5.34 of the [Explanatory Memorandum](#) and Example 15.

Example 15: Insurance Contract renewal

Sam's motor vehicle insurance is about to expire, and their insurer, Best Insurance, contacts them about upcoming expiry of their insurance. On that call, Sam indicates that they are considering swapping insurers. Best Insurance offers Sam another year of coverage at a discounted rate.

As Sam is an existing customer and the offer made was in relation to a contract still in force, Best Insurance will not have breached the hawking prohibition in making the offer on the telephone call.

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- RG 38.79 A consumer request may relate to a single contact or be ongoing: see RG 38.48. To be effective, the request by a client must be positive, voluntary, and clear: see RG 38.51 and RG 38.56.

Note: Offerors should also ensure that contact with existing clients complies with the consumer protection provisions set out at RG 38.13–RG 38.14.

Required consent for the financing of another financial product

- RG 38.80 In some instances, a credit product may be offered in order to finance the consumer to purchase some other financial product. The hawking prohibition contained in s992A does not apply to credit products (except when they are also financial products). However, offerors should comply with any obligations set out in the *National Consumer Credit Protection Act 2009*.

Forms of contact

- RG 38.81 Under s992A(5)(f), if the consent indicated the form of contact that the consumer wants, the contact must be in that form.
- RG 38.82 Contact through means other than those specified will not be covered by the consumer's consent and therefore such contact will be unsolicited. As part of ensuring that consumer consent is positive and clear, we expect an offeror to ask or clarify the form or forms of communication that the consumer wishes to receive.
- RG 38.83 If a consumer wishes to be contacted through a medium not used by the offeror, the offeror may inform the consumer that they do not communicate through that medium, and advise them of other media used by the offeror. This advice must not be coercive or use inducement: see RG 38.55. If the consumer does not consent to those other media, then future contact will be unsolicited: see Example 16.

Example 16: Consumer specifying forms of contact not used by offeror

Zara starts an online chat with a customer service representative at an insurance company about the company's potential product offerings. During the chat, Zara asks to be contacted about home and contents insurance products through a particular messaging application.

If the insurance company uses that application, then future contacts through this medium over the next six weeks about home and contents insurance products would not be unsolicited.

However, if the insurance company does not use the particular application as a means of official communication, it could instead advise Zara that its only outbound form of real-time communication is through a telephone call. If Zara agrees to receive the telephone call, then the subsequent telephone call would not be unsolicited.

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Tracking consumer consent

- RG 38.84 Under s992A(5)(g), an offeror may only rely on the consent provided by a consumer for the six-week period after the consent is given. If there is a need for a medical examination before a product is issued or sold, the consumer may agree to a longer period of consent not exceeding 12 weeks.
- RG 38.85 These set time periods balance the need to allow adequate time to discuss a financial product and reach an agreement for its sale or issue, against the need to protect consumers from being contacted about products when they are no longer front of mind: see paragraph 5.89 of the [Explanatory Memorandum](#).
- RG 38.86 A consumer cannot provide consent to extend the six-week period (or 12-week period, where a medical examination is involved), but is able to provide a new consent to be contacted. In this case, the new consent must meet all of the criteria of the original consent in order to be valid: see paragraph 5.90 of the Explanatory Memorandum.

Variation or withdrawal of consumer consent

- RG 38.87 Under s992A(6), a consumer may vary or withdraw consent at any time leading up to or during a meeting, telephone call or other interaction. The variation or withdrawal may take any form, regardless of the form of consent: see also paragraph 5.84 of the Explanatory Memorandum.
- RG 38.88 Any communication to the offeror or its representative that expresses a clear intention to vary or withdraw consent should be sufficient. Offerors must comply with the variation or withdrawal of consent when the identity of the person seeking the withdrawal or variation is reasonably ascertainable: see Example 17.

Example 17: Communicating withdrawal of consent

Zhang contacts his superannuation fund, Big Super, by phone to ask about retirement income products. He gives consent to Aisha who works at Big Super to contact him.

Zhang later withdraws this consent by email using an email address that is linked to his member account with Big Super. In the email he states that he does not want to be contacted. Aisha is able to identify that Zhang is withdrawing the consent, despite the withdrawal being made in a different form to the form in which the consent was originally given. Big Super can therefore accept Zhang's withdrawal of consent.

If Zhang used a social media application (where his username was 'Z Dizzle') to post on Big Super's social media page that he did not want to be contacted, while it may not have been readily apparent to Big Super's social media team that it was Zhang, we expect that Big Super would take

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reasonable steps to ascertain the poster's identity, such as replying to the post asking the customer to provide their name. If Zhang does not respond or the identity of the poster cannot otherwise reasonably be ascertained, it may not be possible for Big Super to determine that they are no longer able to rely on Zhang's consent.

RG 38.89 Once withdrawn or materially varied, the offeror can no longer rely on the original consent to contact the consumer: see Example 18.

Example 18: Varying consent

Prue fills out an online form on Harmony Insurance's website requesting a phone call to discuss life insurance. The following day, a Harmony Insurance sales representative calls Prue to discuss their range of products. The sales representative offers to provide a quote, but Prue declines, telling the sales representative that she is no longer interested in receiving calls, but is happy to receive offers by email. A few days later, another sales representative makes a follow-up phone call to Prue to see if she has changed her mind and offers to sell her life insurance.

Harmony should not contact Prue via telephone after she has withdrawn her consent to be contacted by this means. Harmony should ensure the withdrawal is recorded by the sales representative. Harmony may contact Prue via email as she has indicated on the phone call.

RG 38.90 A variation does not restart the six-week consent period unless it amounts to a new consent.

RG 38.91 An offeror should not rely on consent if it becomes evident during the contact that the ongoing consent relied on is no longer positive, voluntary, and clear. For example, the offeror should cease contact and no longer rely on the consent if it becomes evident that a consumer:

- (a) has no recollection of providing consent to a meeting;
- (b) alleges that they did not provide consent; or
- (c) expected the contact to be about a different type of product or a different topic.

Note: The contact should cease on the basis that the consent has been, in effect, withdrawn: see paragraphs 5.85 and 5.86 of the Explanatory Memorandum.

RG 38.92 When a consumer has sought to vary their consent, an offeror may wish to confirm that the consumer's consent, as varied, remains positive, voluntary, and clear prior to relying on it.

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Keeping records of consumer consent

RG 38.93 We expect that in practice to comply with the hawking prohibitions an offeror will need to keep records, including information regarding when, in what form, and to what extent an offeror has received consent from a consumer to contact them about the issue or sale of products. Given that consumers can withdraw or vary their consent at any time, the maintenance of these records will be necessary for offerors to demonstrate compliance with the hawking prohibition. We expect offerors to check their records where there is doubt as to whether a consent is in place: see paragraph 5.86 of the [Explanatory Memorandum](#).

RG 38.94 Examples of records offerors may need to keep in order to comply, or to demonstrate compliance with, the hawking provisions are:

- (a) the date on which the consent was obtained;
- (b) the methods of contact allowed by the consent;
- (c) the product or range of products within the scope of the consent;
- (d) the circumstances in which the consent was obtained—for example, by what means the consent was obtained and any information provided to the consumer before they gave their consent;
- (e) any variations to the consent made by the consumer, and the circumstances and date of the variations;
- (f) any withdrawals of consent, and the date of the withdrawals;
- (g) any communication made with the consumer before the consent; and
- (h) any products issued or sold to the consumer during or in the course of any communication pursuant to their consent.

Note: For AFS licensees, these records would form part of the risk management systems and compliance arrangements required by s912A. For more information on AFS licence obligations, see [Regulatory Guide 104 AFS licensing: Meeting the general obligations](#) (RG 104).

E Consequences of breaching the hawking prohibition

Key points

A breach of the hawking prohibition is a strict liability offence. The maximum applicable penalty for a breach is:

- in the case of an individual, 60 penalty units or six months imprisonment (or both); or
- in the case of a body corporate, 600 penalty units.

If an offeror breaches the prohibition, a consumer has the right to return the product that was acquired and receive a refund.

The way in which a product may be returned and refunded will depend on the type of financial product. However, in each case, the aim will be to compensate the consumer for amounts they paid in the acquisition and maintenance of the product.

Conduct that breaches the hawking prohibition

- RG 38.95 An offeror breaches the hawking prohibition if:
- (a) the offeror makes an offer of, or request or invitation to apply for a financial product;
 - (b) the offer is made in the course of, or because of, contact with a consumer;
 - (c) the contact is a telephone call, meeting, or any other real-time interaction in the nature of a conversation or discussion; and
 - (d) the contact is made in the absence of a valid consumer consent.

Note: For general guidance on our approach to the meaning of ‘because of’, see RG 38.22–RG 38.30. For the meaning of ‘unsolicited’, see RG 38.44–RG 38.92.

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General consequences of a breach

- RG 38.96 Under s992A(1) and (9), a breach of the hawking prohibition is a criminal offence, and one of strict liability. The maximum penalties are:
- (a) for an individual:
 - (i) a fine of 60 penalty units;
 - (ii) six months imprisonment; or
 - (iii) both; and
 - (b) for a body corporate, 600 penalty units.
- Note: See www.asic.gov.au/penalties for more information about penalties, including the value of a penalty unit.
- RG 38.97 When a breach occurs, the affected consumer may also have a right to:
- (a) return the product (see s992AA); or
 - (b) undertake civil proceedings against the offeror (see s1324).

Return of a product

- RG 38.98 Under s992AA, if the hawking prohibition has been breached, a consumer has a right to return any financial product issued or sold to them and to receive a refund.
- RG 38.99 We consider it good practice for offerors to include information about the right of return in their communication with consumers.
- RG 38.100 It may be difficult for a consumer to identify that they have been sold or issued a product in breach of the hawking prohibition. Where a consumer makes contact to return a product, the offeror should consult their records to ascertain whether or not any offer, request or invitation was made subject to a valid consent.

When the product may be returned

- RG 38.101 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.
- RG 38.102 However, where a statutory cooling-off period applies to a product under s1019B, then 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.

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Effect of returning a product

- RG 38.103 Under s992AA(2), if a financial product is returned because it was sold or issued in breach of the hawking prohibition, any legal relationship between the consumer and the issuer for that financial product will be terminated with effect from the time of return without penalty to the consumer. This does not affect any legal relationship the consumer may have with the same offeror for other products.
- RG 38.104 Under s992AA(5), where a consumer exercises their right of return, and an offeror accepts the return and issues a refund, a penalty may still apply for the breach of the hawking prohibition.

Customer contact to return products

- RG 38.105 Contact by a consumer to return a product may also give rise to obligations under internal dispute resolution systems that AFS licensees are required to have under s912A. This is because that contact will likely constitute a ‘complaint’ because the consumer expresses dissatisfaction with the financial product and expects a response from the financial product issuer: see [Regulatory Guide 271 Internal dispute resolution](#) (RG 271) at RG 271.27–271.29.

Note: These paragraphs of RG 271 will be enforceable by ASIC from 5 October 2021: see [ASIC Corporations, Credit and Superannuation \(Internal Dispute Resolution\) Instrument 2020/98](#).

- RG 38.106 If a consumer seeks to return a product after the expiration of the statutory period under s992AA, the product issuer may still have obligations under their internal dispute resolution processes in respect of the handling of that contact with the consumer: see s912A and RG 271.

Refunds to consumers

Statutory refund

- RG 38.107 Where a consumer returns a product under s992AA, the issuer must provide the consumer with a refund of any amounts paid for the financial product: see paragraph 5.96 of the [Explanatory Memorandum](#). Different considerations might affect how this is done, depending on the product.
- RG 38.108 We expect, consistent with offerors’ approaches more broadly to remediation, that refunds made under s992AA are made in a timely manner.

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Products with an investment component

- RG 38.109 For products involving invested funds, such as superannuation accounts or interests in managed investment schemes, the amount that is refunded will be the amount of initial and subsequent contributions or investments made into the account (excluding any withdrawals or distributions). Offerors of such products will be responsible for any shortfall that accrues during the refund period because of a reduction in the value of the interest.
- RG 38.110 To exercise the right of return for a superannuation account, the consumer must nominate a superannuation fund into which the refund money is to be repaid if the money includes restricted non-preserved benefits or preserved benefits. This means that the consumer must hold another superannuation product into which the refund can be paid. This other superannuation product may be held within the previous fund the consumer was a member of, another fund that the consumer joins or the same fund.

Banking products

- RG 38.111 For banking products, the refund should include any amounts deposited, and any fees charged by the offeror for that account for its establishment or maintenance.

Insurance products

- RG 38.112 For insurance products, the consumer's right to a refund entitles them to a refund of all premiums paid.

Market-based products

- RG 38.113 In the case of markets-based products, including but not limited to securities or derivatives, the consumer's right of refund entitles them to have repaid the amount initially paid for the product. Offerors of such products will be responsible for any shortfall that accrues between the date of acquisition and date of refund.

Other remediation obligations

- RG 38.114 The obligation to provide consumer refunds under s992AA must be considered in the context of offerors' broader legal and equitable obligations to remediate. For example, all AFS licensees have an obligation to ensure that their financial services are provided efficiently, honestly, and fairly: see s912A(1)(a). Complying with this obligation includes AFS licensees taking responsibility for the consequences of their actions if things go wrong when financial products are sold or issued and clients suffer loss or detriment. This may mean that AFS licensees have to remediate clients who have suffered loss or detriment as a result of a breach of the hawking prohibition beyond merely refunding any amounts paid.

RG 38.115 In addition, where an offeror identifies that a breach of the hawking prohibition has occurred with respect to one consumer, we expect the offeror to consider whether there may be further breaches relating to the same or similar conduct or compliance failure.

Note: See ASIC [Regulatory Guide 256](#) *Client review and remediation conducted by advice licensees* (RG 256). ASIC is separately consulting on updates to RG 256—see [Consultation Paper 335](#) *Consumer remediation: Update to RG 256* (CP 335)

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Appendix: Products exempt from the hawking provision as a result of ASIC legislative instrument or class order

Table 1 below sets out all products currently exempt by legislative instruments and class orders currently in force under the existing hawking regime. ASIC is reviewing each of these instruments to determine what changes may be appropriate.

Table 1: Financial products exempt from the hawking prohibition

Financial product or entity	Legislative instrument
Investor directed portfolio service (IDPS)	Class Order [CO 13/763] <i>Investor directed portfolio service</i>
IDPS-like schemes	Class Order [CO 13/762] <i>Investor directed portfolio services provided through a registered managed investment scheme</i>
Conditional cost schemes	ASIC Corporations (Conditional Costs Schemes) Instrument 2020/38
Employee incentive schemes	<p>Class Order [CO 14/1001] <i>Employee incentive schemes: Unlisted bodies</i></p> <p>Class Order [CO 14/1000] <i>Employee incentive schemes: Listed bodies</i></p> <p>Note: See also Regulatory Guide 49 <i>Employee incentive schemes</i> (RG 49).</p>
Employee redundancy schemes	ASIC Corporations (Employee Redundancy Funds Relief) Instrument 2015/1150
Low value non-cash payment facilities, gift facilities, prepaid mobile facilities	ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211
Private horse breeding schemes	ASIC Corporations (Horse Schemes) Instrument 2016/790
School enrolment deposit schemes and school enrolment debentures	ASIC Corporations (School Enrolment Deposits) Instrument 2016/812
Charitable investment fundraisers	ASIC Corporations (Charitable Investment Fundraising) Instrument 2016/813
Serviced apartment and like schemes	ASIC Corporations (Serviced Apartment and Like Schemes) Instrument 2016/869
Property rental schemes	ASIC Corporations (Property Rental Schemes) Instrument 2016/870

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Financial product or entity	Legislative instrument
<p>Managed discretionary account (MDA) providers and external MDA custodians</p> <p>Securities that if acquired would become client portfolio assets in relation to MDA services provided by a person that was and remains an MDA provider</p> <p>Market participants who provide MDA services to family members only</p>	<p>ASIC Corporations (Managed Discretionary Account Services) Instrument 2016/968</p>
<p>Managed investment schemes: Interests not for money</p>	<p>ASIC Corporations (Managed Investment Schemes: Interests Not For Money) Instrument 2016/1107</p>
<p>Factoring arrangements</p>	<p>ASIC Corporations (Factoring Arrangements) Instrument 2017/794</p>
<p>Mortgage investment schemes with no more than 20 investors</p>	<p>ASIC Corporations (Mortgage Investment Schemes) Instrument 2017/857</p>
<p>Nominee and custody services</p>	<p>ASIC Corporations (Nominee and Custody Services) Instrument 2016/1156</p>
<p>Securities and managed investment schemes hawking relief</p>	<p>ASIC Corporations (Securities and Managed Investment Scheme Hawking Relief) Instrument 2017/184</p>

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Key terms

Term	Meaning in this document
AFS licensee	A person who holds an Australian financial services licence under s913B of the Corporations Act
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
consumer	An existing, potential, or prospective retail client
Corporations Act	<i>Corporations Act 2001</i>
Corporations Regulations	Corporations Regulations 2001
Explanatory Memorandum	Explanatory Memorandum to the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020
financial product	<p>A facility through which, or through the acquisition of which, a person does one or more of the following:</p> <ul style="list-style-type: none"> • makes a financial investment (see s763B); • manages financial risk (see s763C); or • makes non-cash payments (see s763D) <p>Note: This is a definition contained in s763A of the Corporations Act (see also s763B–765A).</p>
Financial Services Royal Commission	Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry
life insurance	A life risk insurance product as described in s764A(1)(e) of the Corporations Act
managed investment scheme	Has the meaning given in s9 of the Corporations Act
offer	An offer of a financial product for sale or issue.
offeror	A person who offers, issues, or sells a financial product or who invites or requests applications in relation to a financial product
PDS	<p>A Product Disclosure Statement—a document that must be given to a retail client for the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act</p> <p>Note: See s761A for the exact definition.</p>

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Term	Meaning in this document
personal advice	<p>Financial product advice given or directed to a person (including by electronic means) in circumstances where:</p> <ul style="list-style-type: none"> the person giving the advice has considered one or more of the person's objectives, financial situation and needs; or a reasonable person might expect the person giving the advice to have considered one or more of these matters <p>Note: This is a definition contained in s766B(3) of the Corporations Act.</p>
Pt 7.9 (for example)	A part of the Corporations Act (in this example numbered 7.9), unless otherwise specified
reg 7.8.22A (for example)	A regulation of the Corporations Regulations (in this example numbered 7.8.22A), unless otherwise specified
representative	<p>Means:</p> <ul style="list-style-type: none"> an authorised representative of the licensee; an employee or director of the licensee; an employee or director of a related body corporate of the licensee; or any other person acting on behalf of the licensee <p>Note: This is a definition contained in s910A of the Corporations Act.</p>
retail client	A client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of the Corporations Regulations
RG 36 (for example)	An ASIC regulatory guide (in this example numbered 36)
right of return	A consumer remedy that is available under s992AA of the Corporations Act that enables a consumer to return a product and receive a refund if the hawking prohibition is breached
RIS	Regulation Impact Statement
s992A (for example)	A section of the Corporations Act (in this example numbered 992A), unless otherwise specified
SIS Act	Superannuation Industry (Supervision) Act 1993
superannuation trustee	A body corporate or group of individual trustees licenced by APRA under s29D of the SIS Act to operate a registrable superannuation entity (e.g. superannuation fund)
unsolicited contact	Contact between a consumer and an offeror that takes the form described by s992A(4)

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Related information

Headnotes

financial products, harassment or coercion, hawking, insurance, managed investment schemes, misleading or deceptive conduct, Product Disclosure Statement, right of return, securities, superannuation, unsolicited contact

Regulatory guides

[RG 36](#) *Licensing: Financial product advice and dealing*

[RG 49](#) *Employee incentive schemes*

[RG 104](#) *AFS licensing: Meeting the general obligations*

[RG 175](#) *Licensing: Financial product advisers—Conduct and disclosure*

[RG 234](#) *Advertising financial products and services (including credit): Good practice guidance*

[RG 254](#) *Offering securities under a disclosure document*

[RG 256](#) *Client review and remediation conducted by advice licensees*

[RG 271](#) *Internal dispute resolution*

[RG 274](#) *Product design and distribution obligations*

[RG 000](#) *Deferred sales model for add-on insurance*

Note: We are currently consulting on this new regulatory guide—see Attachment 1 to [Consultation Paper 339](#) *Implementing the Royal Commission recommendations: The deferred sales model for add-on insurance* (CP 339).

Legislative instruments

[ASIC Corporations \(Charitable Investment Fundraising\) Instrument 2016/813](#)

[ASIC Corporations \(Conditional Costs Schemes\) Instrument 2020/38](#)

[ASIC Corporations, Credit and Superannuation \(Internal Dispute Resolution\) Instrument 2020/98](#)

[ASIC Corporations \(Employee Redundancy Funds Relief\) Instrument 2015/1150](#)

[ASIC Corporations \(Factoring Arrangements\) Instrument 2017/794](#)

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[ASIC Corporations \(Horse Schemes\) Instrument 2016/790](#)

[ASIC Corporations \(Managed Discretionary Account Services\) Instrument 2016/968](#)

[ASIC Corporations \(Managed Investment Schemes: Interests Not For Money\) Instrument 2016/1107](#)

[ASIC Corporations \(Mortgage Investment Schemes\) Instrument 2017/857](#)

[ASIC Corporations \(Nominee and Custody Services\) Instrument 2016/1156](#)

[ASIC Corporations \(Non-cash Payment Facilities\) Instrument 2016/211](#)

[ASIC Corporations \(Property Rental Schemes\) Instrument 2016/870](#)

[ASIC Corporations \(School Enrolment Deposits\) Instrument 2016/812](#)

[ASIC Corporations \(Securities and Managed Investment Scheme Hawking Relief\) Instrument 2017/184](#)

[ASIC Corporations \(Serviced Apartment and Like Schemes\) Instrument 2016/869](#)

[ASIC Corporations \(Share and Interest Purchase Plans\) Instrument 2019/547](#)

[Class Order \[CO 13/763\] Investor directed portfolio services](#)

[Class Order \[CO 13/762\] Investor directed portfolio services provided through a registered managed investment scheme](#)

[Class Order \[CO 14/1000\] Employee incentive schemes: Listed bodies](#)

[Class Order \[CO 14/1001\] Employee incentive schemes: Unlisted bodies](#)

Legislation

ASIC Act, s12CA–12CC, 12DA–12DB, 12DJ

Corporations Act, Pts 6D.3A, 7.8A and 7.9, s734, 912A, 991A, 992A, 992AA, 1019B, 1012I, 1018A, 1041E–1041H, 1324

Corporations Regulations 2001, Pt 7.1, regs 7.8.21A, 7.8.26

Financial Sector Reform (Hayne Royal Commission Response) Act 2020

National Consumer Credit Protection Act 2009

SIS Act, s68A

Superannuation Industry (Supervision) Regulations 1994

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