



FINANCIAL
SERVICES
COUNCIL

CP 346 The hawking prohibition

Submission to ASIC

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1. About the Financial Services Council

The FSC is a leading peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advice licensees and licensed trustee companies. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing \$3 trillion on behalf of more than 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world.

2. Executive Summary

The FSC welcomes the opportunity to provide a submission to ASIC's consultation on their proposed updates to Regulatory Guide 38 *The hawking prohibitions (RG 38)*. Our submission responds to the items raised in ASIC's consultation paper as they relate to life insurance and superannuation.

As set out within the Final Report of the Financial Services Industry Royal Commission (**Royal Commission**) the primary policy intent of the new hawking prohibition is to ensure that consumers are not pressured by a financial services provider into making an immediate decision to purchase a product that they have not had time to properly consider. The FSC supports this intent and agrees with the recommendations made in the Royal Commission Final Report¹. We have considered the proposals set out by ASIC with this overarching policy intent in mind.

The FSC believes that clear regulatory guidance from ASIC is critical, not only to ensure that offerors can update their systems, processes, and procedures to comply with the new legislative requirements but also so that they can implement the new regime in the way that optimises the experiences and outcomes of consumers.

We have also highlighted areas where we believe providing offerors greater flexibility in the ways they can contact existing customers would result in better outcomes for both those customers and offerors.

We would welcome the opportunity to discuss any aspects of this submission should ASIC have any questions or would like further clarification.

¹ Recommendations 3.4 and 4.1 of the Final Report of the Royal Commission.

3. FSC Recommendations

1. Clarify that an offeror can provide information in real time in the manner of a conversation or discussion where no offer, invitation or request is made during or because of the provision of that information.
2. Provide additional guidance on the types of activities that would constitute merely providing information to a consumer versus those that invite or request a consumer to ask or apply for a product. If a consumer, after considering this information, initiates further contact with the offeror to discuss or apply for the financial product, then a subsequent offer would not breach the hawking prohibition.
3. Make clear that when a consumer initiates real-time contact with an offeror, the offeror would then be able to confirm the scope of consent for the contact if the scope of consent is not sufficiently clear. Further, clarify that consent established in this way can be relied on for the purposes of making an offer of, or request or invitation to apply for, a financial product.
4. Make clear that a consumer's consent can evolve during the course of contact that occurs in real time. Further, clarify that consent that evolves in this way and which is still valid (positive, voluntary and clear) can be relied on for the purposes of making an offer of, or request or invitation to apply for, a financial product.
5. Broaden the proposed Regulatory Guidance to capture scenarios where a consumer's intention to vary or withdraw their consent is not immediately clear to the offeror or cannot, for practical reasons, be actioned immediately. In these cases, organisations should be expected to take reasonable steps to process these requests as soon as practicable.
6. Provide guidance on the types of underwriting information (such as medical exams) that offerors may require to determine the final terms of offer of the financial product.
7. Broaden the existing guidance to cover situations, including in the context of the DDO regime, where an offeror contacts an existing customer about the offer to upgrade or replace a product already held.
8. Consider broadening the commentary in RG 38.33 to reflect the fact that offerors other than superannuation trustees may also be required by law to contact consumers in real-time and where this might result in an offer of, or request or invitation to apply for, a financial product.

4. Detailed feedback

4.1. Forms of contact subject to the prohibition

Advertising or giving information

We note that draft RG 38.39 states that “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.” We agree with this statement and believe additional guidance would help offerors understand what would constitute merely giving information in contrast to an “invitation or request to ask or apply for” a financial product.

There is a distinction between the provision of information about a product, and an offer of, or invitation or request to apply for a product. The mere mention of a financial product would not in itself constitute an invitation or request to the consumer to ask or apply for the product and is not the intent of the new regime. Such an interpretation would appear inconsistent with example 5.2 in the Explanatory Memorandum (**EM**), which concerns a situation where attendees at a workplace information session are told about the benefits and features of different superannuation products, but without an offer, request or invitation being made to them.

In this regard, we note that draft RG 38.37 provides that the provision of information to consumers in respect of a financial product is not prohibited 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; **and**
- b) no offer, invitation or request is made during, or because of, the advertisement or provision of information.” (bold for emphasis)

In summarising this guidance, ASIC states in CP 346 that information can be given so long as *either* a) **or** b) above applies. Our view is that CP 346 represents the correct position – that is, that a person should be able to provide information in real time in the manner of a conversation or discussion where no offer, invitation or request is made during or because of the provision of that information. Provision of information is not synonymous with an offer or invitation. There is a distinction between these two aspects and we recommend that ASIC confirm this position in its final RG.

Recommendation

1. Clarify that an offeror can provide information in real time in the manner of a conversation or discussion where no offer, invitation or request is made during or because of the provision of that information.

Example 6 in the draft RG explores the scenario where a consumer initiates contact in real time with the offeror but there is no indication of clear and positive consent for the offeror to initiate further real time contact with the consumer. Example 6 then suggests that if the offeror were to provide further information through a medium that is not in real time, then it would not breach the hawking prohibition.

We note that this scenario, where the offeror provides further information to the consumer in a hard copy or a digital format, is commonplace. For the avoidance of doubt, it would be helpful to clarify in Example 6 that if the consumer then takes active steps to then apply for or obtain the financial product having had an opportunity to consider this information, then it would not be 'because of' the initial contact. This clarification would be consistent with the principles outlined in example 5.3 of the Explanatory Memorandum.

We also recommend that ASIC should provide further guidance, at the very least by way of example, on the distinction between the provision of information on the one hand and the making of an invitation to ask or apply for a product on the other. For the avoidance of doubt, ASIC should make clear that an offeror merely giving information could do so in any of the following ways without breaching the hawking prohibition:

- provide the ability in a communication for a consumer to request further contact to discuss or apply for the financial product;
- provide instructions in a communication for a consumer to ask for or receive further information such as the product disclosure statement, obtain a quote, or apply for the financial product;
- provide a link in the communication to a website that has information on the product, the ability to get a quote, and to apply for the financial product; and
- tailor the information provided to a consumer based on the information gathered from the consumer through prior interactions.

We note all these activities are common industry practice and go towards the principle of enabling consumers to make self-directed decisions.

Recommendation

2. Provide additional guidance on the types of activities that would constitute merely providing information to a consumer versus those that invite or request a consumer to ask or apply for a product. If a consumer, after considering this information, initiates further contact with the offeror to discuss or apply for the financial product, then a subsequent offer would not breach the hawking prohibition.

4.2. Nature of the consent required for contact

Real time contact initiated by a consumer

We believe more definitive guidance addressing circumstances where real time contact is initiated by the consumer would help offerors ensure compliance with the new changes to the hawking prohibition. More prominent guidance on situations that involve real time contact initiated by the consumer would greatly benefit industry in their implementation.

Since ASIC Report 587 on the sale of direct life insurance, life insurers have moved away from models that rely on outbound sales practices towards inbound type models. Inbound telephone sales remain active sales channels for the majority of life insurers, which follows general consumer preferences to speak to someone prior to making a decision to purchase. Guidance in these circumstances would especially help offerors understand how they can comply with the hawking prohibition in real time interactions where the consumer has initiated contact but their purpose in doing so sufficiently 'clear'.

We note ASIC provides some helpful guidance in this regard, namely in draft RG 38.61 which states that “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...” Draft RG 38.62 also states that “...if in doubt, [offerors should] confirm the scope of the contact to which the consumer gives consent.” In these cases, we agree that an offeror should be permitted to ask questions to clarify which financial products, or classes of products, the consumer wishes to discuss to establish a clear scope for the consumer’s consent. It would be helpful to provide an example that makes it clear that “confirming or clarifying the scope of the contact” is good practice and that a subsequent offer, invitation or request won’t be considered to have been made on an unsolicited basis because the offeror had sought to clarify the consumer’s consent.

The FSC is concerned that draft RG 38.70 would appear to prevent this type of interaction and appears to contradict ASIC’s earlier guidance. It states that “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.” This statement does not work in scenarios where the scope of the consent is not sufficiently clear following an inbound contact from a customer. We would appreciate examples demonstrating that there needs to be some flexibility to allow offerors to clarify the scope of the contact. We propose the following amendment:

“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 **but can clarify the scope of the contact where a consumer initiates contact with the offeror.**”

Situations where the consumer initiates real time contact with the offeror about financial products are commonplace. In these scenarios, we believe an offeror should be entitled to confirm and/or clarify the scope of consent and be able to rely on this consent if they were to make an offer, request or invitation. In our view, actions such as the offeror asking questions or taking steps to clarify the consumer’s reason for the call, would not be ‘eliciting’ a consent from a consumer.

Many inbound interactions occur in real-time by telephone. Interactive Voice Response (IVR) systems are generally used by offerors to help categorise the scope of the contact that a consumer is consenting to before an interaction in real time commences. While this may help with clarifying the nature of the contact, such systems are not infallible and would not help offerors once the call starts if the scope of the consent remains unclear. IVR systems are limited in that the customer can choose one, and only one, option. If they are calling in relation to several products it is not possible to take account of this in an IVR.

Recommendation

3. Make clear that when a consumer initiates real-time contact with an offeror, the offeror would then be able to confirm the scope of consent for the contact if the scope of consent is not sufficiently clear. Further, clarify that consent established in this way can be relied on for the purposes of making an offer of, or request or invitation to apply for, a financial product.

Consent that evolves during contact in real time

The FSC is concerned that draft RG 38.70 suggests that an offeror would not be able to support a transition of a conversation with a consumer to a matter that is outside the scope of the consent established at the start of that conversation despite this transition being consumer controlled.

We submit that the notion of a static consent fails to recognise that a consumer who initiates a contact might change their mind (or have an erroneous understanding clarified) about which product would best suit their circumstances after they have received information about that product and an alternative during the course of the contact. Such a consumer would expect their consent to transition to the alternative product.

This could occur, for example, where during the course of receiving an explanation about a product, Product A, that is within scope of the consumer's consent for the contact, the consumer realises that Product A does not meet their needs and seeks to continue the discussion regarding a different product, Product B, which they consider better meets their needs. It would be a poor outcome if, in this situation, the offeror was to be prohibited from offering Product B to the consumer during this contact.

This principle of evolving consent should hold true for contact that is a single interaction or over multiple interactions. We note that the draft RG is silent about multiple interactions as the examples in the draft RG deal only with single interactions. The sale of financial products via telephone often involves several interactions, both in real time and otherwise.

For example, a consumer might call an offeror about an insurance product, Product C, and the offeror provides the consumer a quote through the course of the interaction. At the end of this call, the consumer decides not to proceed but asks the offeror to send them more information for them to consider, perhaps about another product, Product D. The consumer and the offeror might agree on another time for the offeror to call the consumer to pick up that conversation again once the consumer has had sufficient time to consider the information. In this situation, the consumer is in fact providing a new second consent in the first call to be contacted again in a second call by the offeror. Instead, the draft RG seems to suggest that the second call is happening because of the first consent. This becomes especially problematic for sequences where there are multiple interactions where the scope of the consent continually evolves.

ASIC should make clear that any consumer-controlled changes to the scope of their consent during real time contact should be permitted under the new anti-hawking regime. In our view, for real-time contact between a consumer and an offeror to enable good consumer outcomes under the new anti-hawking regime, a consumer's consent that underpins the contact must be permitted to evolve. Of course, for a consumer's consent to remain valid if it does evolve during a real time interaction, it must continue to satisfy the criteria of being positive, voluntary and clear.

Our position on evolving consent is consistent with s992A(6) of the Act and acknowledged by ASIC in draft RG 38.87, which states that "...a consumer may vary or withdraw consent at any time leading up to or during a meeting, telephone call or other interaction..."

Recommendation

4. Make clear that a consumer's consent can evolve during the course of contact that occurs in real time. Further, clarify that consent that evolves in this way and which is still valid (positive, voluntary and clear) can be relied on for the purposes of making an offer of, or request or invitation to apply for, a financial product.

Variations or withdrawal of consumer consent has immediate effect

ASIC should provide practical guidance for how offerors can seek to comply with a variation or withdrawal of consent for contact given that paragraph 5.85 of the Explanatory Memorandum states that the withdrawal or variation has 'immediate effect'.

We note the relevant sections in draft RG 38.88 and Example 17 which concerns the situation where the offeror would be expected to take reasonable steps to ascertain the identity of the person seeking the withdrawal or variation before it can know the extent to which it can rely on the consumer's consent. This example itself already presents a situation where an immediate opt out of the call is not possible.

We note that offerors typically employ the use of technologies, systems and controls that prevent unilateral decisions being made by an offeror's agents and/or employees which would contravene the hawking requirements (as well as other legislation). However, there are limitations to the connectivity of such systems. When consumers engage with an offeror through mechanisms that are not integrated, such as social media as presented by Example 17, there is necessarily a processing time to firstly recognise and then process the request.

We recommend that Example 17 be broadened to capture scenarios where a consumer's intention to vary or withdraw their consent is not immediately clear to the offeror. This may happen if the variation or withdrawal of consent arrives at a different part of the organisation or to a different employee. In these cases, the request cannot be actioned immediately, only as soon as practical.

Recommendation

5. Broaden the proposed Regulatory Guidance to capture scenarios where a consumer's intention to vary or withdraw their consent is not immediately clear to the offeror or cannot, for practical reasons, be actioned immediately. In these cases, organisations should be expected to take reasonable steps to process these requests as soon as practicable.

Medical examination

We note that where there is a requirement for a consumer to undergo a medical examination before the financial product can be sold or issued then the consumer can consent to a longer period not exceeding 12 weeks. As per Paragraph 5.89 of the Explanatory Memorandum, this time limit is to balance giving consumers 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 at the front of their mind.

Life insurance purchases can take more time than applying for many other financial products. Unlike superannuation, investment and most general insurance products, bespoke information (medical and underwriting) may be requested and considered as part of the underwriting process.

We note that ASIC does not currently propose to comment on the circumstances where underwriting information might be requested that could take time to gather and consider. It would therefore be helpful for ASIC to provide guidance around the broader range of information that life insurance applications might require for underwriting purposes before a final offer is made. Information that might be required could include GP health reports, blood test results, genetic test results and/or financial records.

Recommendation

6. Provide guidance on the types of underwriting information (such as medical exams) that offerors may require to determine the final terms of offer of the financial product.

4.3. Contacting existing customers

We recommend that ASIC should broaden its guidance about offerors that wish to contact existing customers about potential offers in relation to a contract still in force.

We note the relevant sections in draft RG 38.78 that “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...”. ASIC then provides an example (Example 15) in relation to the renewal of a general insurance contract. In Example 15, while the offeror has made an offer in relation to a contract that is still in force, the contract that is renewed would constitute the entry into a new financial product and may be on terms and conditions that are different to the existing contract.

After the release of draft RG 38 on 5 August 2021, we note Treasury made new regulations in relation to the new anti-hawking prohibition entitled *Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 (Cth)*. One of the provisions in this regulation confirms that the hawking prohibition does not apply to offers for the issue or sale of a financial product that is substantially similar to a financial product that the consumer already holds (or held with the offeror at any time during the period of 30 day before the day on which the offer is made) with the offeror. We recommend that ASIC translate this legislative position into its final RG. In particular, the final RG should make clear that similar scenarios do apply to life insurance.

One common example where this might occur is where a life insurer wishes to contact an existing customer about the availability of a more modern product that is an up-to-date equivalent of their existing product. This newer product might be the result of the life insurer updating their product offerings following recent legislative and regulatory changes, such as the unfair contract terms regime, the design and distribution obligations (DDO) or APRA’s individual disability income insurance sustainability measures. We note that the Government is currently consulting on reforms to remove barriers to product modernisation. In this context, it is important that the hawking prohibition does not introduce a new barrier to modernisation.

Another situation that might arise after the commencement of the DDO regime is where a customer is discussing the purchase of a particular financial product from an issuer or distributor. During the conversation, it becomes clear that the customer is outside the Target Market Determination for the product. The issuer/distributor may wish to offer the customer alternative products whose target markets the customer would likely be in but appears to be prevented from doing so without breaching the hawking prohibition. This would appear to be inconsistent with Example 15 in the ASIC Regulatory Guide on Product Design and Distribution Obligations (**RG 274**). In that example, ASIC discusses situations where an existing customer may not be in the target market for an insurance product, and ASIC recommends the insurer could take steps including “offering alternative products with target markets that the consumer would likely be in.” ASIC also suggests that where an existing customer is assessed to be likely to be outside the target market, “an insurer need not decline to renew the policy, but would need to take reasonable steps to direct the consumer to a policy that is likely to be appropriate.” These recommended approaches should be explicitly considered in the context of the Regulatory Guidance on The Hawking Prohibition.

Recommendation

7. Broaden the existing guidance to cover situations, including in the context of the DDO regime, where an offeror contacts an existing customer about the offer to upgrade or replace a product already held.

4.4. The right to return a product and receive a refund

Ref	Question in CP 346	FSC Feedback
C1Q1	Does the payment of refunds for financial products raise any practical issues?	Yes. For superannuation trustees, it will not be possible for a superannuation trustee to pay a refund directly to a superannuation fund member where the monies are restricted non-preserved or preserved superannuation benefits. This raises practical issues should such a superannuation fund member not hold an alternate superannuation fund into which the monies can be paid.
C1Q3	Is there any additional or alternative guidance that you think would help offerors to meet their obligations to allow consumers to return products and to provide refunds?	Yes. Providing more complete guidance for superannuation trustees where the monies are restricted non-preserved or preserved superannuation benefits, it is not possible for a refund to be paid directly to a superannuation fund member and the member does not hold an alternate superannuation fund into which the monies can be paid.

4.5. Other comments

Unsolicited contact

We note ASIC's guidance in relation to unsolicited contact required of offerors of superannuation products by law. We suggest that this guidance could be broadened out more generally for other types of offerors.

Recommendation

8. Consider broadening the commentary in RG 38.33 to reflect the fact that offerors other than superannuation trustees may also be required by law to contact consumers in real-time and where this might result in an offer of, or request or invitation to apply for, a financial product.

Alignment with other regulatory changes

Several questions have arisen relating to the operation of the hawking prohibition in the context of other incoming regulatory changes. In particular, several superannuation reforms are on foot which will potentially change the way superannuation trustees interact with members and potential members.

For example, new stapling requirements under the Your Future, Your Super reforms will significantly change the default superannuation landscape. It would be expected that employers may wish to provide information about corporate superannuation arrangements to new employees to give them the opportunity to make a choice to join the employer's default fund – for example, where discounted fees or insurance cover are made available to employees.

It would be helpful for the RG to make it clear the activities which would be acceptable in this context for all participants in the superannuation context. For example, can employers or employee representatives discuss a fund in pre-employment conversations or provide information as part of a new starter kit to incoming employees? It would be helpful to clarify whether providing information in these contexts is considered hawking, including if the process is automated or unsolicited by the new employee.

While not yet legislated, FSC members are also considering the potential interaction between hawking requirements and obligations under the retirement income strategy required by the Retirement Income Covenant. Where a trustee offers a retirement income product, there may be some blurring of the boundary between provision of information and an invitation to apply for the product. Consideration should be given to ensuring there is no inconsistency between these obligations.

Wording

We note draft RG 38.11 refers to "922AA", which may have been intended to refer to '992AA'. We note draft RG 38.48 refers to "Consent" being unsolicited, which may have been intended to refer to "contact" being unsolicited.