

**ASIC Consultation Paper 346**  
**– The hawking prohibition**  
**Update to RG38**  
Submission by Legal Aid Queensland

# ASIC Consultation Paper 346 The hawking prohibition

## Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission in response to ASIC Consultation Paper 346 – The hawking prohibition.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ’s lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ’s Civil Justice Services Unit lawyers provide advice and representation in relation to responsible lending, insurance, mortgage stress, housing repossession, banking and financial issues, financial hardship, debt, contracts, loans, telecommunications, and unsolicited consumer agreements. This includes assisting clients with legal issues relating to mis-sold products at bank branches and through unsolicited phone calls.

## Consultation Questions

B1 We propose to update our guidance to include further information on the forms of communication that are subject to the prohibition. This includes providing guidance on real-time interactions, which are in the nature of a conversation or discussion. This also includes providing guidance on advertising and information-giving practices. Note: See Section C of the draft updated RG 38 attached to this paper.

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

The communication methods used include:

- (a) telephone call;
- (b) face to face meeting;
- (c) contact in the common area of a shopping centre;
- (d) contact at a local bank branch when the consumer has attended to obtain basic banking services;
- (e) real time internet chat;

- (f) unsolicited text messages;
- (g) unsolicited emails mailouts;
- (h) contact through social media;
- (i) contact by encouraging customers to refer their family and friends;
- (j) prior to Covid-19, unsolicited invitations at wealth seminars.

LAQ does not anticipate any practical issues raised by the prohibition for these forms of communication.

We note Example 1 to RG38.32 on Page 11 of the Draft Regulatory Guide which highlights ASIC's view that an offeror is not prevented from using a letter mail out to contact customers and including a reply slip for a consumer to request that the Bank contact them. In LAQ's view, this example should clarify whether or not an email mailout is caught by the prohibition. In LAQ's submission because of the real time nature of a bulk email mailout, it would be caught by the provisions of the Hawking prohibition.

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

LAQ supports the view in RG38.33 that there will be situations where a company is required by law to make unsolicited contact with a consumer. This section would be improved by ASIC listing any further examples, beyond example 2, where it considers a company will have a legal obligation to make unsolicited contact with a consumer.

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

LAQ has no submissions to make in response to this question.

**B2** Reflecting the reforms, we propose to revise our guidance on the nature of the consent that is required from a consumer who wishes to be contacted about a financial product, including: (a) that the consent must be positive, voluntary, and clear; (b) that a reasonable person would have understood that a consumer consented to the contact; (c) that the consumer can vary or withdraw the consent and the implications of doing so; (d) what we expect from an offeror in relation to a contact, including the time period following consent within which the contact must be made; and (e) the records that an offeror may need to keep.

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

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

LAQ notes Section D of RG38 from page 14, talks about establishing consumer consent to be contacted. The guidance is framed in terms of the transactional interaction between the company and the consumer. However, what the guidance does not address is how consent is impacted by whether a customer is experiencing disability and/or vulnerability. LAQ submits that the focus should be informed (not necessarily positive) and voluntary consent.

LAQ supports the adoption of Universal Design Principles by companies designing internal models to ensure that consent is informed and voluntary. In a disability and vulnerability context, the importance of Universal Design is that it focuses society, government and institutions on designing systems, products and processes that are accessible, usable and understandable by all.

Regardless of the design principles used, the guidance needs to ensure that the company has systems in place that will protect a consumer's ability to give informed and voluntary consent

The questions being asked of the consumer need to be open ended and elicit an informed response that is not just yes or no. The questions being asked must ensure that the consumer understands what they are consenting to.

It is also important that consent may be withdrawn at any time by a consumer.

In LAQ's experience, common issues that affect a consumer's ability to give informed and voluntary consent include:

- (a) Gratuitous Concurrence - This most commonly occurs for First Nations and CALD clients and involves the consumer agreeing to every proposition when in reality they do not. This is a specific issue where the questions are not open ended and are eliciting yes/no responses.
- (b) The client is a victim survivor of family and domestic violence and is over-whelmed by issues of safety in their lives.
- (c) Elder Abuse - A client may be reliant on their abuser for care and social interaction and feel they have no choice but to agree to receiving contact in order to please their abuser.
- (d) The client lives with a disability - In LAQ's experience the default position should always be that a person living with a disability has capacity to consent to being contacted unless the company should reasonably be aware that the consumer is subject to guardianship, an administration order or to an Enduring Power of Attorney.

Companies need to be alert to a consumer's disability and vulnerabilities and aware that they will have to engage with the consumer so as to meet the consumer's circumstances in order to ensure that consent is informed and voluntarily. For example:

- (1) The use of AUSLAN interpreters where a consumer suffers from hearing loss.
- (2) The use of Easy English documents where appropriate.
- (3) The use of supported decision making where appropriate.
- (4) The appropriate use of qualified and independent interpreters for CALD consumers.

This is important that the RG38 addresses these issues.

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

LAQ has no submissions to make in response to this question.

**B3** We propose to revise our guidance to clarify that we expect an offeror to offer, issue or sell to a consumer (or invite or request a consumer to purchase or apply for) only financial products that are reasonably within scope of what the consumer has consented to, including offers of cross-sold or bundled products. Note: See Section C of the draft updated RG 38 attached to this paper.

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

LAQ agrees with most of the proposed guidance in RG38 under the heading "Determining the Scope of Consent."

However, we do not support Example 10 which posits a situation where a consumer is being offered travel insurance by a travel agent at the time of booking a holiday. Whilst it is appropriate for the travel agent to raise the need for travel insurance, travel insurance offered by travel agents is more expensive than insurance directly available directly from an insurer. Whilst LAQ accepts that a consumer would have the reasonable expectation of being made aware of the need for travel insurance by the travel agent, we submit that it would not be the consumer's expectation that they would be upsold a more expensive product than would be available directly from an insurer.

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

LAQ has no submissions to make in response to this question.

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

LAQ has no submissions to make in response to this question.

C1 We propose to include guidance in RG 38 on: (a) the consumer remedy giving a consumer the right to return a product and receive a refund when the hawking prohibition has been breached; and (b) how this remedy will operate for different financial products. Note: See Section E of the draft updated RG 38 attached to this paper.

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

The payment of refunds for financial products does not raise any practical issues.

C1Q2 To the extent applicable, how do financial product issuers currently comply with the existing rights of return? Please give details of any challenges you face in meeting those obligations, and why they are relevant to compliance with the new provisions.

In LAQ's experience, some financial product issuers attempt to make it very difficult for consumers to cancel products by not being available or making it difficult to contact them. We encourage ASIC to monitor this area more closely.

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?

LAQ has no submissions to make in response to this question.

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