

23 August 2021

Mr Stephen Garofano
Strategic Policy Adviser, Strategic Policy
Australian Securities and Investments Commission
Level 5, 100 Market Street
SYDNEY NSW 2000

By email: stephen.garofano@asic.gov.au

Dear Mr Garofano

Consultation Paper 346 and draft Regulatory Guide 38: The hawking prohibition

The Law Council of Australia appreciates the opportunity to respond to the Australian Securities and Investments Commission's Consultation Paper 346 and draft Regulatory Guide 38: The hawking prohibition released by ASIC on 21 July 2021.

Please find enclosed the Law Council's submission addressing the matters raised in Consultation Paper 346.

The Law Council would be pleased to provide further comment or assistance in relation to this matter. In the first instance, please contact Dr Natasha Molt, Director of Policy on [REDACTED] or at [REDACTED].

Yours sincerely



Michael Tidball
Chief Executive Officer



Law Council
OF AUSTRALIA

Consultation Paper

Consultation Paper 346 and draft Regulatory Guide 38: The hawking prohibition.

Australian Securities and Investments Commission

23 August 2021

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
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- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is particularly grateful for the expertise of the Superannuation Law Committee (**Superannuation Committee**) of its Legal Practice Section in leading the development of this submission with input from the Financial Services Committee of the Business Law Section.

Introduction

1. The Law Council makes this submission in relation to the Consultation Paper 346 and draft Regulatory Guide 38: The hawking prohibition released by ASIC on 21 July 2021.
2. The Law Council's comments are intended to raise legal issues for consideration by ASIC in settling its updated Regulatory Guide 38, and not matters of policy.
3. Given the expertise of the members of the Superannuation Committee, the primary focus of this submission is on the application of the hawking regime to trustees of superannuation funds which hold a registrable superannuation entity licence (**RSE licence**) granted by the Australian Prudential Regulation Authority (**APRA**).

The prohibition applies to offers made to retail clients

4. Section 992A(1) applies where a person:
 - ... offer[s] a financial product for issue or sale to another person (the consumer), or request[s] or invite[s] the consumer to ask or apply for a financial product or to purchase a financial product.
5. The draft Regulatory Guide notes at paragraph 17 that:
 - 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 ...
6. We agree an offeror is not prohibited by the section from approaching an employer because an employer is not issued with a superannuation product when they apply to become a participating employer of a superannuation fund or when they contribute to a fund for their employees. Given this, we query whether the draft Regulatory Guide could be more definitive by saying that when a person provides financial product advice to an employer about a superannuation product the employer is a retail client under section 761G(6)(b) of the Act.

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

7. Paragraph 18 of the draft Regulatory Guide says:
 - 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.
8. Subsection (2) provides an exemption from the hawking prohibition to any person who provides personal advice where the best interests duty applies. Those people are not limited to financial advisers, as that term is ordinarily understood. An important example of where the exception might apply to a person who may provide personal advice and who is not a 'financial adviser' is a superannuation trustee. Superannuation trustees and their representatives may provide intra-fund advice to a

member of the fund. Intra-fund advice is personal advice and the best interests duty in section 961B of the Corporations Act applies. To avoid any doubt about the circumstances in which the exception applies, we suggest that the reference to 'financial adviser' here be changed so that it is clear the exception applies more broadly.

Forms of contact subject to the prohibition

9. Paragraph 33 and example 2 of the draft Regulatory Guide address circumstances where a superannuation fund trustee contacts a deceased member's dependant to pay a death benefit. It says that the trustee will not breach the hawking prohibition if it contacts the dependant (or any other person) 'for the purpose of communicating information in order to fulfil the trustee's legal obligations'.
10. While we agree that this conduct would not of itself breach section 992A(1) we do not think there is an exception in the legislation where the unsolicited contact is 'in order to fulfil legal obligations'. So we are concerned that the wording of the draft Regulatory Guide may misrepresent that there is an exception when in fact there is not.
11. Nevertheless, we do not think the conduct described in the paragraph or the example would breach section 992A because the unsolicited contact would not be to issue or invite the dependant or other beneficiary to apply for a financial product.
12. In the ordinary course, a trustee would contact a deceased member's dependants, legal personal representative and next of kin for the purposes of notifying them about how the trustee proposes to pay the benefit, asking for information to assist the trustee to make a decision, undertaking claims staking and asking for payment instructions. None of these things would constitute an offer or an invitation to apply for a financial product.
13. If a trustee did in fact invite a beneficiary of a death benefit to apply for an interest in the fund (a superannuation product), we query why that conduct wouldn't fall within the scope of the prohibition in the ordinary course. Even if there was an exception in section 992A for the purposes of fulfilling a legal obligation, a trustee will not have a legal obligation to invite a beneficiary of a death benefit to apply for a superannuation product.

Real time contact in the nature of a conversation or discussion

14. We note that although the draft Regulatory Guide refers to 'instant messages' in paragraph 34, it does not refer to text or SMS messages sent by mobile phone. In our experience, this can be a common way superannuation fund trustees communicate with members including in accordance with the electronic delivery of notice relief provided by ASIC in ASIC Instruments 2015/647 and 2015/649.
15. We think the industry may find it useful for ASIC to provide some guidance – for example, to confirm that sending text/SMS messages are distinct from 'instant messages' and would not be considered a 'real-time interaction' in the nature of a conversation.

Consent must be clear and reasonably understood

16. Example 6 in the draft Regulatory Guide is about vague or ambiguous language and describes a consumer who uses a chat function to contact a superannuation fund about a 'basic superannuation account'. During the conversation, the fund's representative (Jacinta) 'raises the availability of a socially responsible investing superannuation product' and asks for consent about contacting the consumer (Seth) the next day to 'run [him] through an application' for the superannuation product.
17. While this example is about consent (Seth is non-committal in his response to Jacinta's invitation), it raises a question about why Seth's consent is required in the circumstances. Is the responsible investing superannuation product a different financial product from the financial product Seth contacted Sibylline Super about? This would be the case if the basic superannuation account is an interest in a separate superannuation fund from the fund from which the responsible investing superannuation product is issued. However, given the example refers to 'Sibylline Super', the implication is that this is not so much an interest in another superannuation fund but rather an investment option in the Sibylline superannuation fund. We think the example should be clear about the status of the responsible investing product – in what way is it a superannuation product? If it is in fact an investment option offered in the Sibylline Super superannuation fund we query whether the example might be misleading.
18. As the draft Regulatory Guide later notes at paragraph 77, it would be rare for a consumer to contact a superannuation fund and ask about its choice product or its MySuper product. In this example Seth has inquired about a 'basic superannuation account'. This is not itself a financial product, and contrary to what is suggested in paragraph 77 we do not think there is a sound basis for assuming the consumer is asking about the MySuper product offered by the fund only. The financial product is the interest in the superannuation fund which is issued to the member. That financial product will be issued in the choice class if Seth makes an investment choice or the MySuper class if he does not. In either case, the superannuation product might provide Seth with a 'basic superannuation account'.
19. In our view, any conversation between a superannuation fund and a consumer about acquiring even a 'basic superannuation account' should include an explanation that the fund offers investment choice (a choice product) and a default investment option (a MySuper product) and, consistent with this, it is difficult to conceive of how Jacinta, as a representative of Sibylline Super, could provide adequate information to Seth about a basic superannuation account without explaining that Seth may make an investment choice or may choose (or be defaulted to) the default investment option.
20. Accordingly, we suggest that this example be reconsidered and clarified.

General meaning of reasonably within scope

21. As noted in the draft Regulatory Guide, in order to give consent within the meaning of section 992A(5)(a) or (b), the consumer's 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.

22. In paragraph 65 the draft Regulatory Guide says a consumer will be taken to have consented to the relevant contact when a reasonable person would consider the financial product to be within the scope of the consumer's consent and then goes on to provide examples which, in paragraph (iii) include:

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

23. In paragraph 66, the draft Regulatory Guide goes on to say that this would be the case if:

... the financial product is functionally related to the initial product or service.

24. Example 10 is of a consumer (Kasia) who attends a travel agency to discuss a holiday. It says the travel agent may offer Kasia travel insurance in that meeting because the:

... 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.

25. We are not confident that a court would interpret the requirements in this way. While Kasia has initiated the contact with the travel agent, she has done so for the purpose of asking about a holiday. She has not been asked to consent in any ordinary sense to any discussion. To the contrary, Kasia asked for specific information and presumably the travel agent has consented to give that information. Given this, it is not clear how Kasia has consented to the travel agent offering travel insurance during the conversation irrespective of how closely related the product is to the flights Kasia has asked about.

26. Similarly, we would welcome examples of when particular kinds of financial products might be treated as "functionally related" to other financial products, having regard to current industry practices. Examples which spring to mind include:

- a. inviting a person opening an account with a platform operator to discuss superannuation or managed fund products on the platform investment menu which platform account holders can direct the platform operator or platform custodian to acquire on their behalf; and
- b. inviting a person applying for a margin loan to discuss the purchase of securities or managed fund products using the loaned funds.

Required consent for products with multiple features (draft paragraph RG 38.74)

27. In paragraph 74 of the draft Regulatory Guide there is a discussion about products which have 'multiple features'. The example is an investment facility that provides exposure to both shares and debentures. The draft guide says:

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.

28. It is not entirely clear what is meant by consent relating to the 'material attributes' of the product and nor is it clear why consent is required to discuss both shares and debentures if the investment facility is in fact a financial product. An example might be a superannuation platform product. If a consumer contacted a fund about a platform product, section 992A(1) should not be construed as prohibiting the fund's representative discussing all of the features and the full range of investment options whether or not the consumer mentioned any specific investment option. Similarly if a consumer makes an inquiry about opening an account with a platform operator to gain access to managed fund investments on the platform's investment menu, this should not preclude a discussion about products on the menu. This is because the investment in the underlying superannuation fund or managed fund (as applicable) is intrinsically linked to the purpose for which the interest in the relevant platform product was acquired.
29. The Superannuation Committee notes that ASIC appears to express a view in paragraph 74 and Example 13 that if a consumer contacted a superannuation fund and asked about, for example, 'investing' in the fund, the fund's representative could not discuss the insurance options available to the consumer. The Superannuation Committee considers that insurance is a significant feature of a superannuation product which should be able to be raised whenever a fund is asked about its products. The Financial Services Committee acknowledges that the view ASIC expresses in paragraph 74 appears to be consistent with the policy intention and considers that the law would require any discussion about insurance to be separately initiated.

Required consent for different classes of superannuation interests

30. Section 992A(8) says that section 992A(1) applies to financial products that are beneficial interests in a regulated superannuation fund as if each class of beneficial interest in the fund were a separate financial product.
31. Paragraphs 77 and 78 of the draft Regulatory Guide say this means a fund cannot make an unsolicited offer of a class of interest in the fund to a member holding a different class of interest in the fund. We agree. However, again we have reservations about the statement that:

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.

32. We very much doubt a consumer's consent could ever be so narrow that it would prevent a representative of a superannuation fund discussing both a MySuper product and a choice product in response to a question or inquiry about a superannuation product in the growth phase. In our experience the difference between a MySuper product and a choice product (in the growth phase) is often limited to differences in the investment options members' balances are invested in.