

SUBMISSION

Submission to ASIC —
Consultation Paper 346
The hawking prohibition:
Update to RG 38

18 August 2021

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Stephen Garofano
Strategic Policy Adviser, Strategy Group
Australian Securities and Investments Commission

Via email: hawking.submissions@asic.gov.au

18 August 2021

Dear Mr Garofano

Consultation Paper 346 The hawking prohibition: Update to RG 38

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to Consultation Paper 346 The hawking prohibition: Update to RG 38.

About ASFA

ASFA is a non-profit, non-political national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its \$3 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing almost 90 per cent of the 16.5 million Australians with superannuation.

If you have any queries or comments in relation to the content of our submission, please contact Maggie Kaczmarska, Senior Policy Advisor, on [REDACTED] or by email [REDACTED].

Yours sincerely



Julian Cabarrus
Director - Policy Operations, Member Engagement & External Relations

Specific comments

Forms of contact subject to the prohibition

Most RSE licensees communicate with their members through a variety of mediums including websites, direct mail, email, SMS, WhatsApp, chat bots and live chat functions. Progressions in communicative technology have increased the range of communication channels available to RSE licensees and this is expected to continue in the future. For this reason, ASFA encourages ASIC to continue its commitment to ‘technology neutrality’ in relation to guidance relating to forms of contact subject to the hawking prohibition.

It can be difficult, however, to manage the obligations under RG 38 for certain forms of communicative technology. The application of the hawking prohibition to the use of chat bots, for example, can be difficult to manage given the nature of consumer interaction that typically occurs through this medium. Consumers generally use chat bots to ask questions on a variety of topics. Chat bots are programmed to provide pre-prepared answers, including directing consumers to other areas of the RSE licensee’s website where the relevant information is located. For the purposes of RG 38, a consumer interaction with a chat bot could be considered a ‘real-time’ interaction similar in nature to a discussion or conversation.

ASFA recommends ASIC provide examples where a chat bot would and would not be compliant with the hawking prohibition. It would also be useful to understand how ASIC views the application of RG 38 to situations where a consumer interaction began with a chat bot but progressed to a discussion with a live chat agent. This transfer usually occurs because of certain answers a consumer has provided to a chat bot or where a chat bot has *not* been able to satisfactorily answer the questions posed and has asked the consumer whether they wish to speak to a live chat agent.

There may also be circumstances where a RSE licensee needs to contact members to remind them to make a decision as a result of, for example, changes to their corporate superannuation product or legislative changes requiring changes to insurance offered through superannuation. Where a RSE licensee contacts these members and discusses their options with them, or reminds them that a decision needs to be made, it could be considered an ‘offer’ because an application for a new product may be the outcome of that contact. There is a question as to whether this would be considered hawking.

It would also be beneficial to understand ASIC’s views on whether the inclusion of an application form when providing a Product Disclosure Statement (PDS) to a consumer would breach the hawking prohibitions.

Return of a product

While under section 992AA a consumer has a right to return any financial product and receive a refund if the hawking prohibition had been breached, ASFA notes that there are very limited circumstances when RSE licensees can legally provide a ‘refund’ of a superannuation product.

Superannuation preservation rules prevent members accessing their superannuation benefits unless a member satisfies a condition of release (e.g. reaching preservation age). Additionally, cooling-off periods do not apply to most superannuation products (Corporations Regulations 2001, Reg 7.9.64). As such, even where a consumer has the right to return a product under section 992AA, the balance will likely be required to be transferred to another superannuation product.

Where the right to return a product under section 992AA is triggered, ASFA recommends ASIC provide clarification in relation to how the refund mechanism would work in practice. For example, the balance

could be transferred to a consumer's active superannuation account or the same arrangements as existing cooling-off periods could be applied.

Required consent for different classes of superannuation interests

RG 38.77 states that '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'. It is not necessarily the case that a 'low cost' product offered by an RSE licensee is a MySuper product. Additionally, seeking a 'low cost' product option does not necessarily reflect a preference for a MySuper product.

It would be beneficial to have additional examples that demonstrate how an RSE licensee is to manage contact with a consumer when a consumer describes in vague terms the product that they may be seeking. Most consumers do not differentiate between MySuper or Choice superannuation products or know that superannuation products can be categorised in this manner. As such, it could be difficult for an RSE licensee to identify whether the consumer is consenting to receiving information about MySuper or Choice superannuation products.

Proposed additional examples for revised RG 38

Overall, ASFA commends ASIC on the inclusion of numerous examples in the revised RG 38. These examples provide important practical guidance for RSE licensees when putting RG 38 compliance measures in place. ASFA recommends the addition of the following examples that would also be particularly useful for RSE licensees:

- The provision of insurance within a superannuation product
- When a consumer changes investment options, including when a consumer decides to change from a MySuper product to a Choice product and vice versa

It would also be beneficial to have an example that explores what happens when a superannuation member is approaching or reaches retirement. RSE licensees often contact such members to better understand their needs and for the member to understand what options are available to them. It would be helpful to understand what conduct by the RSE licensee would and would not breach the hawking prohibition in this circumstance. There is also the question whether an RSE licensee who does *not* actively encourage a member to transition from an accumulation product to a retirement product is acting in the best financial interests of the member given, for example, the adverse tax consequences that arise from a member remaining in an accumulation product after they have met a condition of release.

For these reasons, ASFA recommends that ASIC actively consider excluding retirement products from the hawking prohibition. The inclusion of retirement products within the hawking prohibition creates confusion and inconsistency between various duties and obligations an RSE licensee has. For example, where section 992AA is triggered in a situation when a member has transitioned their accumulation product to a retirement product, it may be required that the retirement product be converted back into an accumulation product. This may not be in the best financial interests of the member.

Understanding how the hawking prohibition applies to scenarios where a member is approaching or reaches retirement is also particularly important given the proposed Retirement Income Covenant encourages, if not obliges, trustees to direct members to products when assisting members with retirement income solutions. This can create inconsistency between obligations an RSE licensee has under the proposed Retirement Income Covenant and those under the hawking prohibition.

The below scenario provides an example of a current member engagement strategy deployed by an RSE licensee to support members understanding of their retirement options and it would be beneficial if ASIC included this or a similar example in RG 38:

Example scenario – commencing a pension

John has just turned 60 and is contacted by his superannuation fund. During the call the superannuation fund representative:

- Checks if John knew he could commence a regular income stream through either a transition to retirement, or depending on his circumstances, a pension account.
- Explains what a condition of release is, and how it applies to John's situation.
- Provides general advice and education on:
 - a transition to retirement account/strategy
 - an account-based pension and how it is used.
- Offers a referral to obtain personal financial advice from the advice team.
- Provides John with a pension product PDS, or alternatively directs him to where the PDS is located on the superannuation fund's website, so John can gain further understanding of the pension product.
- The superannuation fund does not open a new account for John. The intent of the call is to assist John to understand the options and support available to him as he transitions to the retirement phase.

Tracking consumer consent – social media

Example 17 states that social media channels can be used to withdraw consent and that Big Super should take reasonable steps to ascertain the poster's identity. Taking steps to verify the identity of individuals on social media is incredibly difficult due to, for example, privacy settings or social media accounts being subject to suspicious activity.

Additionally, there are a myriad of social media channels that RSE licensees do not monitor, utilise or have an active presence in. This raises several issues, such as defining the scope of what is classified as a social media channel for the purposes of RG 38 and whether RSE licensees need to undertake additional monitoring of all channels to ensure that they have complied with the hawking prohibition. For example, does ASIC consider that RSE licensees are required to view all TikTok videos in order to meet their obligations? Given consent expires after six weeks, the complexities in tracking social media channels for this purpose does not seem commensurate with the risk it is trying to mitigate.

ASFA recommends that, if consent can be withdrawn via the medium of social media channels, ASIC clearly identifies strict guidelines in terms of the scope and extent of monitoring required by RSE licensees. This could include, for example, the requirement that:

- the consumer **directly** contact the RSE licensee via a social media channel with a new post, private message or equivalent
- the consumer is easily identifiable by name
- the withdrawn consent is provided in writing
- RSE licensees should only be required to monitor a social media channel that it has an active presence in.

ASFA also recommends example 17 be amended to clearly identify that, as Zhang continues to be an existing member of Big Super, Big Super can still contact Zhang.

While it is a legislative requirement under subparagraph 992A(5)(g) that an offeror may only rely on the consent provided by a consumer for a six-week period, ASFA notes that implementing system changes to ensure consent is removed after six weeks will be a costly exercise for RSE licensees.

Advertising or giving information

ASFA notes that there is a contradiction between CP 346 and the proposed RG 38. CP 346 states that an offeror is not prevented from advertising / providing information to consumers so long as the interaction is not in real time **or** no offer, invitation or request was made.

By comparison the proposed RG 38 states that an offeror is not prevented from advertising / providing information to consumers so long as the interaction is not in real time **and** no offer, invitation or request was made.

ASFA recommends the '**or**' test be the preferred approach.