



AIA Australia Limited
(ABN 79 004 837 861 AFSL 230043)
PO Box 6111
Melbourne VIC 3004
Phone : 1800 333 613
Fax : 1800 832 266
AIA.COM.AU

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

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

Dear Mr Garofano

SUBMISSION TO CONSULTATION PAPER 346 - THE HAWKING PROHIBITION: UPDATE TO RG 38

Thank you for the opportunity to provide a submission to ASIC's Consultation Paper 346 (CP 346) on the proposed updates to Regulatory Guide 38 - The hawking provisions (RG 38). AIA Australia supports the consumer protection objectives that the changes to the hawking prohibition seeks to achieve, and in particular we agree with the principle that offers to issue or sell financial products should not be made to consumers in the course of a real-time interaction unless the consumer has consented to offers being made to them.

While most life insurers have ceased traditional outbound telephone sales practices, our experience is that many consumers still wish to discuss their insurance needs in real time, and we think that the industry should continue to have the ability to accommodate these consumer preferences. We are concerned about a number of statements in the draft regulatory guide which may impact on the ability of those who issue or promote life insurance products (described collectively in this submission as "promoters") to engage with consumers who wish to discuss insurance in real time. Furthermore, there are certain elements of the new provisions which are unclear in their meaning or effect, and there is a critical need for ASIC to provide clear and definitive regulatory guidance on its position in respect of these.

In our submission we have highlighted areas where we believe RG 38 diverts from the legislative intent and also where greater clarity of guidance is required. AIA Australia welcomes ASIC's recent communication about how it will approach the transition to the reforms that take effect in October 2021. However, we would encourage ASIC to prioritise its finalisation of RG 38 as soon as possible ahead of the 5 October 2021 implementation date, noting that industry will need adequate time to update systems, processes and procedures to ensure compliance (particularly in respect of aspects of the new law which we consider to be uncertain or unclear as to their effect).

When will a person be considered to have invited a consumer to "ask or apply for" a financial product, and can a person provide information regarding a financial product in real time without also making an invitation to "ask or apply for" a financial product?

Section 992A(1) of the *Corporations Act 2001* (Cth) (Corporations Act) (as amended by the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020*) expands the scope of the previous prohibition on hawking of financial products so as to prohibit a person from inviting a consumer to **ask or apply for** a financial product. Under the previous iteration of the prohibition, its application was limited to the offering of a financial product for issue or sale, with the definition of "offering for issue" including inviting a person to **apply for** a financial product.

We believe a key threshold issue that RG 38 needs to address relates to the circumstances in which a promoter will be considered to have invited a consumer to "ask for" a financial product.

One view is that, in the absence of consent, the mere mention of a financial product to a consumer could constitute an invitation to the consumer to ask for that product. We don't believe this is the intent of the new regime, noting that this interpretation would appear inconsistent with example 5.2 in the Explanatory Memorandum (EM). This example 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 respect of such products.

In this regard, we note that 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 (our emphasis added)*
- b) no offer, invitation or request is made during, or because of, the advertisement or provision of information.”*

This drafting suggests that both a) and b) must be satisfied in order for the provision of information not to be prohibited. However, in contrast, ASIC states in CP 346 that information can be given so long as **either a) or b)** above apply (but not necessarily both a) and b)). The inconsistency between RG 38 and CP 346 needs to be clarified. Our view is that CP 346 represents the correct position – i.e. a promoter should be able to provide information in real time in the manner of a conversation or discussion, so long as no offer, invitation or request is made during or because of the provision of that information.

Alongside the requirement for RG 38 to be amended to align with the commentary in CP 346, there is also a need for ASIC to clarify, at the very least by way of example, the distinction between the provision of information regarding a financial product on the one hand, and the making of an invitation to ask or apply for a financial product on the other. The closest either RG 38 or the EM come to doing this is by way of example 5.3 in the EM, in which a bank representative provides a consumer with brochures in relation to an insurance product without breaching the hawking prohibition. However, this does not resolve the above issue given it is not clear from that example whether any level of discussion regarding insurance accompanied the provision of brochures in respect of insurance to that consumer.

In particular, it is unclear if a person would breach the hawking prohibition in the following hypothetical example: In the course of an interaction between a promoter and a consumer that was solicited by them for a purpose other than insurance, the promoter provides the consumer with **verbal information** about an insurance product for the purpose of giving context to hard copy materials or an email which the promoter has offered to send to the consumer regarding such insurance product.

To provide greater certainty, RG 38 should clarify (including through the use of examples) the circumstances in which a promoter will be considered to have invited a consumer to ask or apply for a product, and whether information regarding a financial product can be provided conversationally without this amounting to an invitation to ask or apply for a product.

RG 38.37 should also be updated to align with CP 346, so it is clear that the provision of information to consumers in respect of a financial product is not prohibited so long as, **either:**

- a) the interaction with the consumer does not take place in real time and is not in the nature of a conversation or discussion; or
- b) no offer, invitation or request is made during, or because of, the advertisement or provision of information.

Circumstances where a consumer changes their mind or evolves the nature of their consent during the course of a real time interaction

We are concerned that RG 38 does not accommodate circumstances where a consumer who has solicited a discussion with a promoter for a particular purpose seeks to change or evolve that purpose during the course of the same discussion. This could occur, for example, where a consumer rings about a certain type of insurance cover and in the course of the promoter explaining what that product covers or does not cover, the consumer identifies that the type of insurance they had inquired about does not meet their objectives. Accordingly, they describe their needs and ask whether the promoter has a product that meets those needs.

As another example, a consumer could contact a promoter about something other than a financial product (such as health insurance, or to express an interest in obtaining financial advice) and, in the course of that discussion, they conclude that they are actually interested in obtaining life insurance cover.

RG 38.70 suggests that in these circumstances the promoter’s hands would be tied and they would be unable to respond to the consumer’s request other than by telling the consumer to call back if they want to discuss an alternative product.

This is an impractical approach that does little to advance the regulatory intent, and arguably is not in the best interest of the person seeking information and financial protection. The consumer should be able to be assisted in relation to any product or need that they have raised themselves during the course of the same meeting or discussion. We don't consider this to be inconsistent with the position set out in the EM as the expansion of consent would not have been "elicited" by the promoter.

We acknowledge that s 992A(5) of the Corporations Act requires consent to have been given before the start of the relevant contact. In the context of determining whether contact has been solicited, ASIC has made its position clear that a single discussion can commence on a solicited basis and become unsolicited where the matters discussed fall outside the scope of the consumer's consent. Consistent with this position, we think that where a consumer expands the scope of their consent, or provides a new consent, during the course of a discussion, the parts of the discussion which take place in response to that expansion of consent should be viewed as a new contact for the purpose of s 992A(5). We do not think the position expressed above is inconsistent with the legislation.

An outcome where promoters are effectively required to hang up on a consumer who contacts a provider about one financial product but then seeks to initiate a conversation about another financial product is unlikely to be understood or appreciated by consumers and would place unnecessary restrictions on the ability of promoters to assist their consumers effectively. What may come across as bad consumer service could result in consumers not getting the financial protection for which they have identified a need.

To better align with regulatory intent and consumer expectations, RG 38 should clarify that the scope of consent can evolve during the course of a single meeting or discussion, in circumstances where the evolution is at the initiative of the consumer and the promoter has not procured or elicited this.

Further, where a consumer expands the scope of their consent, or provides a new consent, during the course of a discussion, the parts of the discussion which take place in response to that expansion of consent should be viewed as a new contact for the purpose of s 992A(5).

Establishing valid consent for self-initiated consumer contact that is not immediately clear

As noted above, we believe it would be helpful for ASIC to give further guidance on situations that involve real-time contact initiated by a consumer. In particular, further guidance is needed for promoters to understand how they can comply with the hawking prohibition in real-time interactions where the reason for the consumer having solicited contact – in other words, the nature of the consumer's consent – is not immediately 'clear'. In those circumstances, the promoter needs to have a discussion with the consumer to clarify their consent, which may entail raising financial product options.

ASIC provides some helpful guidance on consent, for example in 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...*" RG 38.62 also states that "*...if in doubt, confirm the scope of the contact to which the consumer gives consent.*" Example 6 in the draft RG suggests that a promoter can confirm the nature of a consumer's consent in real time after contact has begun. These encourage promoters to ask questions to clarify the consumer's financial needs, or which financial products, or classes of products, they wish to discuss to establish a clear scope for their consent.

However, RG 38.70 would appear to prevent this type of behaviour, in contradiction to 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 makes sense for outbound contact but not where the contact from the consumer is initiated by them.

While many inbound interactions occur in real time by telephone and the use of Interactive Voice Response systems may help to direct a consumer to the appropriate team, there remains a significant likelihood that the scope of the consent remains unclear. In these scenarios, we believe a promoter 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 in response to the consumer's request. We do not believe this would be 'eliciting' a consent in responding to contact initiated by the consumer.

To provide greater clarity, RG 38 should make it clear that when a consumer initiates real-time contact, the promoter would then be able to confirm the scope of consent for the contact if the scope of consent is not immediately clear. RG 38 should also 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.

Interplay between RG 275 and RG 38

ASIC has recently finalised RG 275 – The deferred sales model for add-on insurance (RG 275). We note that under s 12DO of the *ASIC Act 2001* (Cth), the deferred sales model will apply to an insurance product that, among other things, manages financial risk relating to a principal product or service in connection with which the insurance is offered or sold.

The circumstances in which an insurance product sold in connection with a principal product or service will be considered to manage financial risk in relation to the principal product or service are unclear, and RG 275 has failed to clarify this. An earlier draft of RG 275 highlighted circumstances in which a life insurance product sold in connection with a mortgage would not amount to add-on insurance because the product did not manage financial risk in relation to the mortgage; however this has been removed from the final guidance, and instead RG 275 merely notes that life insurance is unlikely to amount to add-on insurance but that this will ultimately depend on the design of the relevant product (see RG 275.35).

In the circumstances, it is not clear whether the offering of a life insurance product in the course of a home loan acquisition journey would attract the application of the deferred sales model or the hawking provision. There are severe penalties for a breach of either regime, so it is important that clarity is provided. Given the interplay between the hawking prohibition and deferred sales model for add-on insurance, we strongly urge ASIC to clarify this issue in finalising RG 38. This could be achieved through guidance to the effect that an insurance product whose operation is not specifically tied to a principal product or service, that is capable of operating independently of such principal product or service, is not an add-on insurance product and is accordingly captured by the hawking prohibition and not by the deferred sales model.

RG 38 should clarify that an insurance product whose operation is not specifically tied to a principal product or service, that is capable of operating independently of such principal product or service, is not an add-on insurance product and is accordingly captured by the hawking prohibition and not by the deferred sales model.

Clarifying ability to inform of cross-product or multi-policy discounts

Example 5.5 in the EM, which is referred to at RG 38.72, relates to a consumer who has initiated contact to discuss car insurance, with the insurer informing them of a cross-product or multi-policy discount, and asking them whether they would like to receive a quote for home insurance.

It would be helpful if ASIC could clarify its position in circumstances where, in explaining the features of an insurance product within the scope of a consumer's consent (the principal product), the insurer mentions the availability of a discount on the principal product if the consumer holds or chooses to purchase another type of insurance product outside the scope of that consent. Where the promoter does not proceed to offer the consumer a quote in respect of that other product, we do not consider that this conduct should amount to a breach of the hawking prohibition as the discount is referenced in the context of explaining features of the principal product. We would appreciate ASIC clarifying its approach to this issue.

Further, if in the above example the consumer was to ask for a quote in relation to the other insurance product (rather than being offered a quote by the promoter), we do not believe that responding to such request should amount to a breach of the hawking prohibition.

An outcome where the consumer can't be informed by the promoter of the feature of the product or service within the scope of their consent or responding to a request because the conduct is not permitted by the hawking prohibition is unlikely to be understood or appreciated by consumers and would place unnecessary restrictions on the ability of promoters to assist their consumers effectively. This could result in consumers not getting the best value out of the product or services for which they have identified a need.

ASIC should clarify that where a promoter mentions the availability of a discount on an insurance product within the scope of the consumer's consent, where such discount is tied to the consumer holding or choosing to purchase another type of insurance product that is outside the scope of the consumers consent, the following conduct would not be considered a breach of the hawking prohibition:

- the promoter mentions the availability of the discount but does not proceed to offer the consumer a quote in respect of that other product; or
- following the promoter having mentioned the availability of the discount, the consumer requests a quote in respect of the other product and the promoter responds to this request by providing the consumer with a quote in relation to the other insurance product

Should you wish to discuss any aspects of our response, please contact Tom Gordon, Head of Regulatory Affairs in the first instance, on [REDACTED] or [REDACTED].

Yours sincerely

A handwritten signature in black ink, appearing to read 'DM', with a small dot above the 'M'.

Damien Mu
CEO and Managing Director
AIA Australia and New Zealand