

### CONTEXT

On 23 September 2021, ASIC released its final guidance on the hawking provisions, Regulatory Guide 38 ('RG 38'). This sets out the regulator's expectations on complying with the hawking prohibition contained in s992A of the Corporations Act 2001 – a prohibition that aims to protect consumers from unsolicited offers of financial products.

In releasing the final RG 38, ASIC Deputy Chair, Karen Chester noted, 'these changes put in place fairness protections, so consumers are not sold products they don't want or need'.

With the release of the final RG 38 coming less than 2 weeks out from go-live, the regulator has stated that it will take a reasonable approach in the initial stages, provided industry participants are using their best efforts to comply.

This document sets out some of the key proposals put forward in Consultation Paper 346 ('CP 346'), the feedback received from industry participants and the updates made to the final RG 38.

### METHOD OF CONTACT

#### PROPOSAL

In CP 346, ASIC updated guidance to include more information on forms of communication that are subject to the hawking rules. This included guidance on real-time interactions in the nature of a conversation or discussion.

### OFFER, REQUEST, INVITE

#### PROPOSAL

In CP 346, ASIC updated guidance to reflect the inclusion of 'request' and 'invite' as it pertained to the general prohibition on hawking. This mirrored the expansion in scope captured under the revised legislative provisions.

### OBTAINING CONSENT

#### PROPOSAL

In CP 346, ASIC updated guidance on the nature of consent that is required from a consumer who wishes to be contacted about a financial product (e.g., positive, voluntary, clear, understood, and can vary, withdraw or expire).

#### FEEDBACK

Respondents were supportive of the 'technology-neutral' approach but requested further guidance demonstrating application. This included for both modern and traditional forms of communication.

#### FEEDBACK

Respondents sought clarification on the distinction between 'offer', 'request', and 'invitation'. Some also asked for guidance on the difference between inviting and providing information / advertising.

#### FEEDBACK

Respondents sought guidance on scenarios where solicited contact is underway for a financial product and the consumer asks about a different product. Some questioned consent in a partially-filled, unsubmitted online form.

#### UPDATES

- Additional examples on in-app pop-ups, welcome calls and promotional stalls.
- Clarified that some text messages may be "real-time" or not, depending on situation.
- Confirmation that a customer must only be contacted in the form specified.

#### UPDATES

- Additional section relating to 'offer, request and invitation'.
- Additional example on information-giving, vs 'offer', 'request', or 'invitation'.
- Clarified that discussing existence, function and purpose of product does not amount to an offer.

#### UPDATES

- Consent in consumer-initiated contact is taken to have occurred 'before' contact.
- Confirmation that clarifying the scope of consent would likely not be a breach.
- Clarified that a consumer may raise additional product(s) of their own accord.
- Filling but not submitting a form, or receiving a pamphlet and questioning it, is not consent.

#### QUICK REF

- Example 8
- Example 10
- RG 38.36 to 38
- RG 38.108 to 110

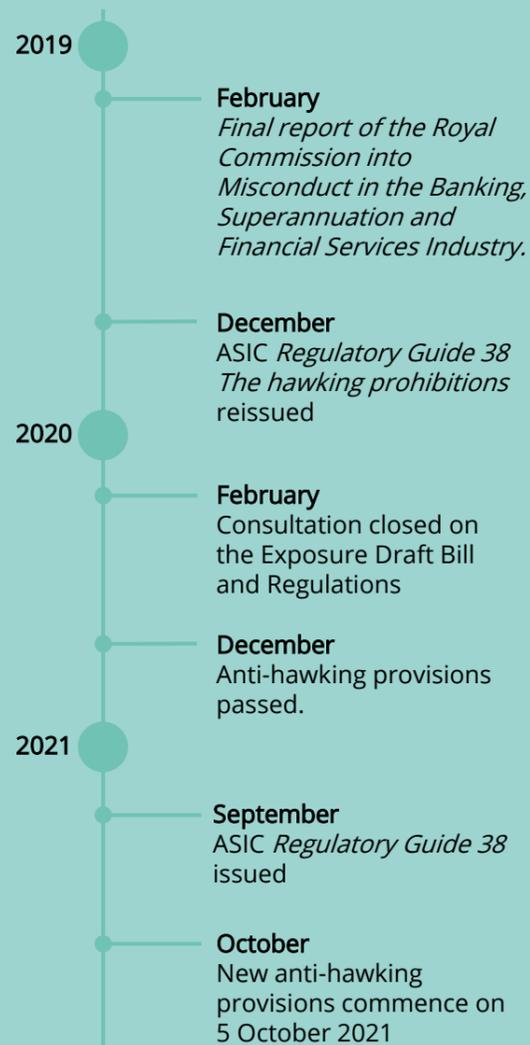
#### QUICK REF

- Example 7
- Example 9
- RG 38.39 to 47

#### QUICK REF

- Example 19 to 21
- RG 38.79 to 80
- RG 38.81 to 83
- RG 38.74

### TIMELINE



### WITHDRAWING CONSENT

#### PROPOSAL

In CP 346, ASIC updated guidance on the nature of consent that is required from a consumer who wishes to be contacted about a financial product. This included the ability to withdraw consent previously provided.

#### FEEDBACK

Respondents suggested that guidance should be provided on withdrawing consent via social media, giving consumers information on withdrawing consent, and withdrawing offers on multiple platforms.

#### UPDATES

- No prescribed requirements on how businesses monitor or track consent.
- Best practice note added to state that a system or process should be in place for consumers to withdraw consent.

#### QUICK REF

- RG 38.117

### SCOPE OF CONSENT

#### PROPOSAL

In CP 346, ASIC updated guidance on offers, requests or invitations for financial products only being made to consumers where this was reasonably within the scope of consent, which may apply to more than one product.

#### FEEDBACK

Respondents sought further guidance on determining the scope of consent, including common scenarios. Respondents also asked to clarify the interaction between hawking provisions and the deferred sales model.

#### UPDATES

- Inclusion of factors to determine whether a product is 'reasonably within scope', as well as 'so closely related' to the product.
- Additional example on above factors for home building insurance with home loan.
- Where a product is exempt from deferred sales model, the hawking rules will apply.

#### QUICK REF

- Example 23
- RG 38.22
- RG 38.87 to 89

### CONSENT AND BUNDLING

#### PROPOSAL

In CP 346, ASIC updated guidance on offers, requests or invitations for financial products, addressing practical issues relating to products that are commonly cross-sold or bundled together for sale or issue.

#### FEEDBACK

Respondents raised concerns about the commercial effect of the guidance, such as offering multi-policy discounts. Respondents also questioned whether consent for one product within a bundle reasonably includes all other products within that bundle.

#### UPDATES

- Explaining a discount (e.g. multi-policy discount) cannot be relied on for consent.
- Clarification that bundling or cross-selling does not alter the need to obtain consent that applies across each bundled product.
- Confirmed that bundling products in a single TMD under DDO does not change consent requirements per product.

#### QUICK REF

- Example 25
- RG 38.45
- RG 38.74
- RG 38.92
- RG 38.97
- RG 38.99 to 100

### CLOSING

Despite being released shortly prior to go-live, the final RG does provide some helpful points of clarification for the industry to consider.

With the complexity of the hawking provisions presenting many challenges in implementation, we are eager to see how organisations are able effectively embed the requirements long-term.

### CONTACT



**Rosalyn Teskey**  
Partner  
[rteskey@deloitte.com.au](mailto:rteskey@deloitte.com.au)  
+61 431 408 558



**Georgia Amery**  
Senior Manager  
[gamery@deloitte.com.au](mailto:gamery@deloitte.com.au)  
+61 434 899 450



**Raveena Fonseka**  
Senior Analyst  
[rfonseka@deloitte.com.au](mailto:rfonseka@deloitte.com.au)  
+61 3 9671 6985

### TRACKING CONSENT

#### PROPOSAL

In CP 346, ASIC updated guidance on the records that may need to be maintained to demonstrate compliance with the hawking provisions.

#### FEEDBACK

Respondents raised concerns over the practical challenges of tracking consent and the cost involved in doing so, particularly in instances involving third parties, or where the interaction is ad hoc (e.g., in-branch).

#### UPDATES

- Confirmation that keeping records will support demonstrating compliance, even where this is not initiated by the offeror.
- Acknowledged that it is at the discretion of the industry to decide how to keep records.

#### QUICK REF

- RG 38.122 to 123

### RIGHT OF RETURN

#### PROPOSAL

In CP 346, ASIC updated guidance on the consumer remedy, which gives a consumer the right to return a product and be refunded where a breach has occurred. This included guidance on how the remedy will operate for different financial products.

#### FEEDBACK

Respondents requested clarity on practical aspects such as whether the right of return applies where a claim has been paid, how the refund is paid where a consumer does not indicate a fund to pay the refund, and how the consumer will be aware of the right.

#### UPDATES

- No further guidance on calculation.
- Reiterated that offerors have related obligations to uphold
- Best practice to alert consumers of their right and investigate potential breaches when a consumer returns a product.
- Additional options on refunds for super included (deposit funds, retirement funds).

#### QUICK REF

- RG 38.146
- RG 38.142
- RG 38.130 to 131

### OTHER ISSUES RAISED

#### EXEMPTIONS

RG 38 reflects exemptions previously set out in *Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021*. This includes for basic banking products, lapsed products and renewals and stockbrokers.

#### MEMBER CONTACT

RG 38 clarifies that offerors may discuss products with consumers and provide options – including retirement options. However, unsolicited offers, requests or invitations may not be made, unless there is a statutory obligation requiring this.

#### PRODUCTS CAPTURED

RG 38 clarifies that credit products (except where they are also financial products) are not subject to the hawking provisions. The accompanying report 701 noted that ASIC believes it is clear that “buy now, pay later” products are therefore not captured.

#### QUICK REF

- Example 1, 3 to 5
- RG 38.23 to 33
- RG 38.43 to 45
- RG 38.102 to 106
- REP 701 ‘C’

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