



Level 6, 179 Queen Street
Melbourne, VIC 3000

info@consumeraction.org.au
consumeraction.org.au
T 03 9670 5088
F 03 9629 6898



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

Stephen Garofano
Strategic Policy Adviser
Strategy Group
Australian Securities and Investments Commission (ASIC)

Dear Stephen

ASIC Consultation Paper 346 – The Hawking Prohibition: Update to RG 38

Thank you for the opportunity to comment on *Consultation Paper 364: The Hawking Prohibition* and a draft update to Regulatory Guide 38 (July 2021) (RG38).¹

This submission has been prepared by Consumer Action Law Centre with contributions and endorsement from the Financial Rights Legal Centre, Financial Counselling Australia and Super Consumers Australia. Information about the contributors to this submission is available at **Appendix A**.

We strongly support banning the unsolicited selling of financial products, including insurance and superannuation. Unsolicited selling is an outdated and abusive practice with a significant risk of mis-selling people products they don't want, need or understand. We do not see unsolicited sales delivering benefits to consumers. Generally, the products sold are expensive and poor value, and cheaper products are often available through direct sales channels.

RG38 is generally well drafted and gives clear guidance and useful examples, save for our comments in this submission.

Our main concern is that RG38 effectively gives add-on travel insurance an entirely unwarranted exemption from the hawking ban. This would be an appalling outcome, contrary to the letter and spirit of the reforms recommended by the Financial Services Royal Commission. Unless RG38 is amended, it will give the green light to travel insurers and their retailing partners to continue business as usual with all of the attendant harm that entails.

It would also signal a return to the dark days of financial firms successfully lobbying for undeserved and harmful exemptions from the law—a problem Commissioner Hayne explicitly called out in the Final Report (Recommendation 7.3). The previous anti-hawking regime failed to stop the pressure sales of inappropriate products. This reform must stamp out unsolicited selling practices altogether—not allow it to continue simply because travel agents want huge commissions from the pressure sale of add-on insurances.

¹ Consultation documents available at: <https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-346-the-hawking-prohibition-update-to-rg-38/>.

This submission aims to ensure the hawking ban is effective and aligns with the spirit and intention of Commissioner Hayne’s reforms to sales practices in the financial system, and with best practice consent principles. A full list of recommendations is below.

List of Recommendations

- RECOMMENDATION 1. RG38 should incorporate all the principles under Rule 4.9 of the Consumer Data Right to determine an affirmative act of consent, being that consent must be: voluntary, express, informed, specific as to purpose, time limited, and easily withdrawn.
- RECOMMENDATION 2. RG38 should prohibit bundled consent.
- RECOMMENDATION 3. RG38 should provide that consumers should be asked to choose the way they would like any follow up contact to occur, for example, by phone, email.
- RECOMMENDATION 4. Amend Example 5 to allow a consumer to select their contact method so that the consent to any telephone call is truly clear, voluntary, and specific as to purpose, for example by including a consent box asking Peter how he would like to be contacted with a time limit in place, and information on how to withdraw this consent.
- RECOMMENDATION 5. Include more examples in RG38 that include the transcripts of conversations, which are helpful to demonstrate compliance (or non-compliance) by companies with the requirement for informed consent.
- RECOMMENDATION 6. RG38 should provide that where firms pass on contact details to third parties, the firms then have an obligation to advise those third parties if consent is subsequently withdrawn. The process for withdrawing consent should be simple and accessible for consumers to use.
- RECOMMENDATION 7. Remove para RG38.66 and Example 10 – ASIC should not expressly permit the sale of add-on travel insurance by travel agents, as this contradicts the letter and spirit of the Hayne reforms.
- RECOMMENDATION 8. Include a section in RG38 on keeping and making available all call recordings and transcripts of real-time contact in the nature of a conversation (e.g. chat-bots and in-app messaging) to demonstrate compliance (or non-compliance) with the hawking prohibition.
- RECOMMENDATION 9. RG38 should provide that there be a right of return and refund if there is a breach of the hawking provisions, regardless of the timeframes in s992AA of the Corporations Act.
- RECOMMENDATION 10. RG38 should state that once a consumer alleges the hawking prohibition has been breached, consumer remedies should apply unless the firm can clearly demonstrate positive compliance.
- RECOMMENDATION 11. RG38 should state that interest applies to refunds and compensation.

The need for a robust implementation of this reform

We strongly support the banning the unsolicited selling of financial products, including insurance and superannuation. Unsolicited selling is an outdated and abusive practice with a significant risk of mis-selling people products they don't want, need or understand. We do not see unsolicited sales delivering benefits to consumers. Generally, the products sold are expensive and poor value. Frequently, they are sold to people who cannot afford them.

The asymmetry of power and information between the product provider and the acquirer is very large. Even if the hawkler is not fraudulent or unscrupulous, the acquirer may be vulnerable, unsuspecting, or lacking knowledge. The potential acquirer is not ready to critically evaluate the product or service, and often does not know what questions to ask.

The existing anti-hawking laws in the *Corporations Act 2001* (Cth) (**Corporations Act**) have utterly failed to stop inappropriate selling. The history of the anti-hawking provisions has been one of regulatory arbitrage and avoidance, with clever tactics used to get around the existing anti-hawking provisions in the Corporations Act.

The ClearView and Freedom case studies at the Financial Services Royal Commission showed the significant harm caused by unsolicited sales of life insurance, including:

- Sales to vulnerable people: Cold-calling is a particularly harsh practice when it involves vulnerable people who may not understand the products or feel able to say no to the seller. Many people targeted by cold-calls have no need for the products being sold.
- Targeting people who could not afford it: ClearView targeted people receiving disability pensions and others with lower financial means for cold-call sales of insurance. This increases the risk of unsuitable sales and cancellations due to non-payment of premiums.
- Poorly designed, low-value products: Insurance products sold via cold-calling, particularly accidental death and accidental injury insurance, are not valuable products. This is evidenced by their very low claims rates and ratios.
- Insurers not complying with unsolicited selling laws: ClearView, which had significant cold-calling operations within its business, may have breached the existing anti-hawking provision—a law integral to its business operations—more than 300,000 times.²

As the Final Report observes about the witness that appeared on behalf of ClearView:

The most telling general point to emerge from the case study was Mr Martin's frank acknowledgment that he found it difficult to see how it would be possible to sell life insurance in outbound sales calls in a way that is both financially viable and legally compliant. As he rightly said, it is difficult to see how a customer can come to a view in a phone call that lasts 20 minutes about 'a fairly complex sort of area of financial services.'³

After summarising the problems found in the sale of life insurance, Commissioner Hayne said:

Each of these matters is concerning. But they are not problems that arise because an insurer or a distributor deals directly with a consumer. Rather, they are problems that arise because individuals are offered complex financial products—sometimes very forcefully—when they have not turned their minds

² FSRC, *Final Report, Volume 2: Case Studies*, p 298.

³ FSRC, *Final Report, Volume 2: Case Studies*, p 301 (internal citations omitted).

to, and do not have adequate information about, what value the product has for them. Hence, the most appropriate course is to prohibit the *unsolicited* sale of such products.⁴

ASIC's excellent work also found significant harm caused by unsolicited sales of life insurance, leading to its ban on outbound telephone sales of life and consumer credit insurance.⁵ Concerningly, ASIC's consumer research found that outbound sales carry a higher risk of poor consumer outcomes, including that:

- 40% of respondents felt pressure to buy a product during outbound sales calls compared to 27% for inbound calls;
- consumers who bought insurance in response to outbound calls were more likely to have been told that they did not need to get a medical examination and that they did not need to answer any questions about their medical history;
- consumers were also less likely to be aware of any exclusions for their policy;
- consumers were less likely to have a specific life event in mind; they had not had the opportunity to conduct any research or thought about their need to cover specific costs, and the only information they had was that supplied by the sales person; and
- consumers were more likely to be influenced by promotions and offers.⁶

In addition to the problems exposed at the Financial Services Royal Commission and through ASIC's reports, our services continue to see people suffer severe financial harm as a result of the finance sold with products which are sold through many forms of unsolicited contact, whether by phone, face-to-face or online. Unsolicited contact can take a range of forms across financial services and consumer goods. These include circumstances where a consumer:

- receives targeted advertising after a distressing life event, such as the death of loved one, inviting the consumer to call. The consumer calls and is signed up over the phone to unsuitable or low value products such as funeral insurance;
- is approached by sales representatives while on holiday (e.g. at Seaworld or in a hotel lobby) and the cooling-off period concludes while the consumer remains on holiday (e.g. timeshare, a form of managed investment scheme);
- receives targeted in-app push notices on smart phones and tablets where the financial services provider has analysed the financial data they hold to offer specific products;
- is approached when attending community events such as the Koori Knockout and offered a funeral insurance product; signs up to a competition or survey at a stall in a shopping centre, only to be sold into a complex financial product at a later date;
- is approached at their place of residence (e.g. nursing home) for the unsolicited sale of mattresses;
- receives a scratch card stating they have won a holiday, and need to attend a seminar to claim the prize, then to be pressure-sold timeshare;
- is sold solar panels financed with unregulated credit including through Buy Now Pay Later;

⁴ FSRC, *Final Report, Volume 2: Case Studies*, p 282. *Competition and Consumer Act 2010* (Cth) Sch 1.

⁵ See: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-335mr-asic-to-ban-unfair-cold-call-sales-of-direct-life-insurance-and-cci/>.

⁶ As summarised in ASIC Report 587: *The Sale of Direct Life Insurance*, 30 August 2018, p 293: <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-587-the-sale-of-direct-life-insurance/>.

- receives postal mail after home repossession proceedings inviting the person to call for 'help', drafted in a way to suggest that the person risks losing their home if they don't take action, thereby creating pressure. The consumer calls and is then signed up to unregulated debt management services.

Beyond financial products, we recommend that the Government implement an economy-wide ban on all forms of unsolicited selling, including on credit products.

Nature of the consent required for contact

This update to RG38 is a key opportunity align consent practices of financial product offerors with the broader reforms under the consumer data right (CDR) and Universal Design Principles, and to strive for best practice consent practices.

With the CDR being extended to insurance,⁷ it makes sense to seek alignment and strive for best practice consent processes now. The CDR has developed clear principles to determine an affirmative act of consent. Under Rule 4.9, consent should be:

- voluntary;
- express;
- informed;
- specific as to purpose;
- time limited; and
- easily withdrawn.

These principles have been further endorsed by the ACCC,⁸ and should act as a guide in the development of the concept of consent under these guidelines.

We encourage ASIC to reconsider its guidance on consent to better align with Universal Design Principles 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 must get us to an outcome where all financial firms have systems in place that will ensure a consumer's ability to give informed and voluntary consent.

RECOMMENDATION 1. RG38 should incorporate all the principles under Rule 4.9 of the Consumer Data Right to determine an affirmative act of consent, being that consent must be: voluntary, express, informed, specific as to purpose, time limited, and easily withdrawn.

Contact in the form used by the consumer

Best practice would be to give the consumer all available options for contact that the firm uses, and then allow the consumer to select their preferred method. Bundled consents such as 'we may call or email you' are not voluntary.

We have noticed a sales practice by at least one insurer (Youi) where, after a person seeks a quote through an online form, they receive a call from the insurer within minutes if not seconds. We consider this to create a pressure sales environment. Consumers may find this invasive or creepy. Unlike other consumer services that are advertised at a stated price, to ascertain the price of an insurance policy, consumers are typically forced to consent

⁷ <https://www.accc.gov.au/focus-areas/consumer-data-right-cdr-o/cdr-accreditation-guidelines>.

⁸ The ACCC Digital Platform Inquiry 2020 Report has also recommended that consent requirements be strengthened from this base level. Recommendation 16(c) proposes that: Valid consent should require a clear affirmative act that is freely given, specific; unambiguous and informed. This includes de-bundling consents and any settings for data practices relying on consent to be pre-selected to 'off'.

to contact from the insurer or intermediary. While the consumer may want to know the price – i.e. the quote – they may not want a sales call from an insurer. Indeed, if they wanted to discuss the policy or quote in a telephone call, they likely would have called the insurer in the first place.

In our view, calling someone moments after they fill in an online request for a quote is unlikely to be consent 'such that a reasonable person would have understood that the consumer consented to the contact'. This should be clarified through an example in RG38.

RECOMMENDATION 2. RG38 should prohibit bundled consent.

RECOMMENDATION 3. RG38 should provide that consumers should be asked to choose the way they would like any follow up contact to occur, for example, by phone, email.

Voluntary consent

We support the inclusion of Example 4 on timeshare. Timeshare schemes continue to cause significant consumer harm.

However, we have concerns about Example 5 in relation to price comparison websites.

To give context to our concerns, there are serious problems with the transparency of comparison websites, particularly in insurance. There will be little meaningful comparison of insurance policies unless and until Australia modernises and mandates an effective 'standard cover' regime and standardises key definitions. Until then, people are undertaking price comparison on different products that may appear the same. This is true even with supposedly well-understood policies like home building and car insurance. Concerningly, the commission and referral arrangements are often opaque. Further, some comparison sites give the false impression of comparing the market by comparing different brands, when in fact each brand is underwritten by the same insurer.

In Example 5, Peter's consent is positive and but not clear, voluntary or specific as to purpose. Peter must consent to contact "including by telephone" in order to use the website. This is an example of bundled consent – that is Peter has no ability to choose between specific forms of contact – he must accept all or nothing. The consent is also not time limited – Peter has the potential to be on a sales database for potentially years to come. This example ASIC has provided consequently demonstrates how sales tactics and poor consents can in fact lead people into high pressure situations that they would otherwise not wish to enter. Thus, though it is drafted to be an example of good practice, Example 5 contains elements of poor practice. ASIC should re-draft this example to demonstrate better practice with a consent box asking Peter how he would like to be contacted with a time limit in place, and information on how to withdraw this consent.

RECOMMENDATION 4. Amend Example 5 to allow a consumer to select their contact method so that the consent to any telephone call is truly clear, voluntary, and specific as to purpose, for example by including a consent box asking Peter how he would like to be contacted with a time limit in place, and information on how to withdraw this consent.

Vague or ambiguous language

The inclusion of a sample conversation in Example 6 relating to vague or ambiguous language for consent is helpful guidance. We recommend that the final RG38 include more conversation-style examples.

RECOMMENDATION 5. Include more examples in RG38 that include the transcripts of conversations, which are helpful to demonstrate compliance (or non-compliance) by companies with the requirement for informed consent.

Withdrawing consent

In our experience, it can be difficult for a consumer to effectively withdraw their consent because:

- they did not know they could;
- they didn't know how to;
- there was no way to do so; or
- the firm made it so difficult that they abandoned any attempt.

The process for withdrawing consent should be simple and straightforward for consumers, including people experiencing vulnerability. Consumers must also know how to do it, so firms and their third parties should provide information on how to withdraw that consent at any time.

As mentioned above, the Consumer Data Right requires an ability to withdraw consent; and that data recipients (i.e.. firms) must provide consumers with a straightforward process to do so, and provide information about that process to each consumer prior to receiving the consumer's consent.

ASIC should give clear guidance in RG38 on how firms, including price comparison sites, must enable an easy withdrawal of consent where a consumer's contact details are shared with numerous third parties.

In Example 5, Peter should be able to tell Best Price Compare that he no longer wants to be contacted by any car insurers, and Best Price Compare should follow up with all firms that it shared his details with to ensure no further contact.

RECOMMENDATION 6. RG38 should provide that where firms pass on contact details to third parties, the firms then have an obligation to advise those third parties if consent is subsequently withdrawn. The process for withdrawing consent should be simple and accessible for consumers to use.

Consent must be clear and reasonably understood – Competition forms (Example 8)

We support the inclusion of Example 8 on competition forms. The key problem is that people do not have time to read the terms and conditions, and even if they did, services are offered on a take-it-or-leave-it basis as the only way to access the main service, competition or survey.⁹ This practice must be stamped out.

RG38.61 currently states:

... it is unlikely that a consumer would understand what they are consenting to if they are incentivised to consent hastily to contact about a financial product (e.g. as part of the terms and conditions of entering a competition).

We recommend strengthening this language as this situation is a clear breach of the hawking prohibition. RG38 should state that "consent" obtained through the terms and conditions of entering a competition or survey will (or is highly likely to) breach the hawking prohibition. There should be no wriggle room for financial firms, which are on notice that this practice must stop.

Establishing the scope of the consumer's consent – Add-on travel insurance (Example 10)

We are very concerned about ASIC's framing of the requirements that the offer, request or invitation to purchase or apply for the financial product must be 'reasonably within the scope of the consumer's consent.' In particular, paragraph RG38.66 and Example 10 on 'reasonable expectation of being offered a product' clearly breach the

⁹ For more information on the problems with "consents" obtained through surveys, competitions and terms and conditions, please see pages 10-11 of our submission on the exposure draft legislation for the hawking reforms.

intention of this reform by permitting the sale of add-on travel insurance by travel agents selling flights and holiday packages.

Contrary to the letter and spirit of the reform

We do not agree with ASIC's formulation at para RG38.66 that:

A financial product is 'so closely related to a product or service that a consumer would reasonably expect to be offered it', if the financial product is functionally related to the initial product or service. In the case of an insurance product, it will be functionally related to another product or service, if it primarily manages financial risk:

(a) directly relating to that other product or service, or assets secured by that product; or

(b) directly relating to the purposes for which the other product or service is commonly supplied, or the purposes for which assets secured by that product are commonly supplied.

This articulation would appear to exempt all insurances added-on at the point of sale to the purchase of a non-insurance product, as they would fall within limb (a). This articulation is wrong and problematic for multiple reasons.

Firstly, RG38.66 goes beyond the wording of the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020*. In defining what is not 'unsolicited contact' in s992A(5)(a)(ii) and (b)(ii), the Act merely refers to the financial product being offered (or that the consumer is being invited to apply for) needing to be 'reasonably within the scope of the consumer's consent.'

Further, Parliament explicitly dealt with the interaction of the add-on insurance and hawking reforms, requiring one but not both reforms to apply to insurance. The Explanatory Memorandum states at para 3.120:

Amendments to the Corporations Act ensure that the deferred sales model replaces the anti-hawking obligations with respect to add-on insurance products. Therefore, providers of insurance will generally be subject to either the deferred sales model or the anti-hawking obligations, but not both at the same time. In circumstances where there are no requirements under the deferred sales model, or an exemption from the deferred sales model applies, the anti-hawking obligations will generally apply.¹⁰

If the Parliament intended for add-on travel insurance to be exempt from both reforms, Parliament could have easily said so in the Act or EM. Indeed, the reforms are considered and enacted in the very same amending legislation.

If Example 10 were to remain in the final RG38, this would have flow on implications for all other add-on products provided exemptions under the deferred sales model – this would be a poor outcome for consumers. Disappointingly, the Government has decided to exempt a large number of add-on products, including: home building insurance; home and contents insurance; compulsory third party (CTP) insurance for motor vehicles; third party property damage, fire and theft insurance for motor vehicles; comprehensive insurance for boats, motorcycles, motorhomes, caravans, and trucks; insurance sold within superannuation (including group life insurance); postage and delivery of consumer goods insurance; and landlord insurance.¹¹

Secondly, RG38.66 is clearly contrary to the spirit and intention of the reforms recommended by Commissioner Hayne. The Final Report recognised that commission-fuelled pressure-selling opportunities were being widely used by insurers and retail partners for all types of add-on insurance.¹² Known behavioural biases inherent in the add-on sales process have been long exploited by the insurance industry and their retailing partners, which have prioritised making a quick buck over selling suitable insurance products that people want and need. The sale of

¹⁰ Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 Explanatory Memorandum:

https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6630.

¹¹ The Hon Josh Frydenberg MP, Media Release, *Outcome of consultation on deferred sales model for add on insurance products*, 8 July 2021: <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/outcome-consultation-deferred-sales-model-add>.

¹² Page 290.

these products continues to cause significant consumer harm, particularly in situations where excessive commissions are being paid to retailers for pushing particular insurance products – regardless of what the consumer wants and needs.

The Financial Services Royal Commission also recommended that the law should be simplified and that exemptions and loopholes be minimised (Recommendation 7.3). Despite this clear directive from Commissioner Hayne, these reforms are already facing a serious threat from exemptions and loopholes. Consumer advocates have strongly opposed any exemptions for add-on travel insurance products from the Hayne reforms without strong evidentiary justification. Implementing an industry-wide deferred sales model (**DSM**) for add-on insurance, and a robust ban on hawking of all insurance products, were key recommendations Commissioner Hayne made for the insurance industry. These are reforms about sales practices and tactics, not about the underlying form of insurance. Both of these reforms were drafted with a wide net – the aim was to stamp out these harmful sales practices. If the sales practice is in use, the reform should apply, regardless of the lobbying efforts of self-interested industry stakeholders.

Thirdly, para RG38.66 also contradicts the more accurate description of the interaction of the hawking prohibition and the DSM at para RG 38.19. Unless RG38.66 is removed, this will cause confusion and an inconsistent treatment of add-on insurance within the hawking prohibition.

For the above reasons, Example 10 is also contrary to the letter and spirit of the FSRC and should be removed from RG38. Example 10 is a clear example of add-on insurance – an insurance product (travel insurance) added on to the sale of non-insurance product (Kasia’s overseas holiday). Insurance—a financial risk product—is a fundamentally different product to an overseas holiday.

Para RG38.66 and Example 10 should be removed from RG38.

Consumer harm caused by add-on travel insurance

Our concerns are not just a matter of principle and proper implementation of the FSRC reforms—they also flow from the consumer harm in the add-on travel insurance market.

Documented problems with add-on travel insurance products in the recent past have included both poorer quality products being sold via add-on arrangements, and exorbitant commissions being paid, resulting in consumers paying much higher premiums than they would for an equivalent standalone product. CHOICE’s 2017 investigation found that travel insurance bought through travel agents generally offers worse coverage than those products purchased directly, and could not recommend any add-on products.¹³

Travel insurance for the sake of travel insurance is not worth having – it is only worthwhile if the policy purchased covers the risks that are relevant for the consumer and provide value. Deciding this in a commission-fuelled pressure sales process is not likely to lead to appropriate cover.

The variation in coverage across the travel insurance market also means there is not always a high level of consumer understanding of what their product covers them for, which increases the risk of underinsurance. Research by the Department of Foreign Affairs and Trade and the Insurance Council of Australia shows that the greater risk of underinsurance is from getting the wrong insurance.¹⁴ This report found that:

- 87% of travellers were not clear that insurance policies do not cover all destinations as standard;
- 84% were not clear that travel insurance won't cover them in countries where the government recommends against travel;

¹³ CHOICE, *Double (the cost) agents*, January 2018.

¹⁴ Quantum Market Research, *Survey of Australians’ Travel Insurance Behaviour*, Prepared for the Insurance Council of Australia and the Department of Foreign Affairs and Trade, 2017.

- 70% were not clear that travel insurance won't cover claims as a result of alcohol; and
- 87% were not clear whether they're covered for riding a motorcycle overseas.¹⁵

Neither the DSM nor the hawking reform stop people from obtaining travel insurance. People can take out insurance online, over the phone, the same day if they buy a flight or holiday.

We have not seen any consumer research suggesting that consumers expect to be sold insurance when purchasing a flight or holiday package.

Applying the DSM to travel insurance could help improve consumer outcomes, and get travellers into more appropriate and cheaper insurance cover.

It follows that we are very disappointed the Government has decided to undermine its own reform but giving a class exemption from the DSM to all add-on travel insurance.¹⁶ This has occurred without meaningful consultation. We are also concerned that travel insurers (and others) were granted exemptions without providing the requested evidence of good value—making a farce of the Government's own consultation process. This decision also flies in the face of FSRC Recommendation 7.3 that exemptions and loopholes should be minimised.

The Federal Government poking holes in its own reforms is no reason for ASIC to follow suit. ASIC should not compound this consumer harm by now signalling in RG38 that travel insurance effectively has an exemption from the hawking prohibition.

RECOMMENDATION 7. Remove para RG38.66 and Example 10 – ASIC should not expressly permit the sale of add-on travel insurance by travel agents, as this contradicts the letter and spirit of the Hayne reforms.

Keeping records of consumer consent

Experience from our casework, the Financial Services Royal Commission and ASIC's own excellent work on the direct sale of life insurance shows the power of recordings from sales and sign-up telephone calls. These often provide the evidence of the harm of hawking. Call recordings can reveal that a consumer is concerned, unclear, reluctant, or confused—and therefore, not meaningfully consenting to the call or pressure sale.

In our casework, obtaining the call recordings from firms—even during an AFCA complaint—can be incredibly difficult. We face arbitrary barriers put up by firms including references to 'privacy obligations,' long delays, or only making them available at the offices of the financial firm.

Sometimes we receive part of the call recordings but not the critical call where the misconduct is likely to have occurred. Firms should record not just the consent, but the earlier conversation that informs the consumer's understanding (or otherwise) of what they are consenting to.

While RG38 covers the records firms may need to keep, it does not deal with the importance of call recordings. We encourage ASIC to specify that if firms record sales and other interactions with consumers (e.g. for training purposes), these call recordings should be kept and made available to demonstrate positive compliance with the hawking prohibition. Reminding financial firms of their obligations to provide this evidence and ASIC's other compulsion powers in RG38 would likely help ASIC in its supervision work, and in our casework, saving our limited resources.

Similarly, firms investing in chat-bots, apps and other technology to enable real-time online communication other than by telephone or a face-to-face meeting should always provide an option for consumers to receive a copy of

¹⁵ Ibid, p 15.

¹⁶ The Hon Josh Frydenberg MP, Media Release, *Outcome of consultation on deferred sales model for add on insurance products*, 8 July 2021: <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/outcome-consultation-deferred-sales-model-add>.

the transcript of the online conversation to the consumer, both at the time or upon request. This would be very helpful in the event of an eventual dispute, and in demonstrating compliance.

RECOMMENDATION 8. Include a section in RG38 on keeping and making available all call recordings and transcripts of real-time contact in the nature of a conversation (e.g. chat-bots and in-app messaging) to demonstrate compliance (or non-compliance) with the hawking prohibition.

Right of return and refunds

The success of this reform will depend on ASIC's ability to confirm compliance with the hawking ban. There is little point in having laws unless there is a meaningful deterrent associated with breach. The community expects that where breaches of consumer and privacy laws occur, this is treated seriously and with sufficient consequence.

The existing remedies have not served consumers well—nor will the current remedies. The cooling off timeframes are very short—in some cases, only one month and 14 days from sale (s992AA(1)(b) of the *Corporations Act*).

Some financial products can trap consumers in the product for many years—up to 99 years, in the case of timeshare.¹⁷ Timeshare is a complex financial product that is sold in a high-pressure sales environment and locks people into expensive and poor value contracts for decades. CHOICE recently assisted a couple aged 69 who were locked into a timeshare contract until 2076. The timeshare provider refused the couple's request to exit the scheme. Similarly, with funeral insurance products, people may be concerned to cancel the product and lose coverage if they have paid significant amount in premiums.

As the Freedom Insurance case study in the Financial Services Royal Commission revealed, it can be very difficult for consumers to get out of products they never wanted. It took two phone calls and an email for Reverend Grant Stewart to cancel the accidental death policy mis-sold to his son.¹⁸

It would be a perverse outcome if a person was criminally liable for breaching the hawking prohibition, but the consumer was required to remain in the product because they did not exercise the cooling off rights.

We recommend that ASIC RG38 should provide for a right of return and refund at any point if there is a breach of the hawking prohibition. This would provide an appropriate incentive to firms to comply, and ensure people are not stuck in products they were pressured into in breach of this law.

RECOMMENDATION 9. RG38 should provide that there be a right of return and refund if there is a breach of the hawking provisions, regardless of the timeframes in s992AA of the *Corporations Act*.

While ASIC has clearly attempted to do its best with the legislation as drafted, we suggest that ASIC go further in para RG38.100 by stating that unless firms have clear evidence of compliance with the hawking prohibition, firms should err on the side of permitting a return or refund. That is, the onus should be on the firm to demonstrate compliance, not on the consumer to demonstrate non-compliance.

RECOMMENDATION 10. RG38 should state that once a consumer alleges the hawking prohibition has been breached, consumer remedies should apply unless the firm can clearly demonstrate positive compliance.

Finally, best practice would see consumers be entitled to interest on amounts to be refunded.

RECOMMENDATION 11. RG38 should state that interest applies to refunds and compensation.

¹⁷ CHOICE, *Trapped in a Classic Holiday timeshare. Children to inherit parents' bad deal that won't end till 2076*, 13 September 2019: <https://www.choice.com.au/travel/accommodation/timeshare/articles/classic-holidays-timeshare-booth-case>.

¹⁸ <https://www.smh.com.au/business/banking-and-finance/bloody-whinger-freedom-staff-resisted-request-to-cancel-insurance-20180912-p50387.html>.

Contact details

Please contact Senior Policy Officer Cat Newton at Consumer Action Law Centre on 03 9670 5088 or at cat@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely



Gerard Brody | CEO
CONSUMER ACTION LAW CENTRE



Fiona Guthrie | CEO
FINANCIAL COUNSELLING AUSTRALIA



Karen Cox | CEO
FINANCIAL RIGHTS LEGAL CENTRE

On behalf of

Xavier O'Halloran | Director
SUPER CONSUMERS AUSTRALIA

APPENDIX A – ABOUT THE CONTRIBUTORS

Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work, campaigns, outreach, community engagement and more. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Financial Rights Legal Centre

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters.

Financial Counselling Australia

Financial Counselling Australia is the peak body for financial counsellors. Financial counsellors work in community organisations and provide advice, support and advocacy for people experiencing financial hardship. FCA is the national voice for the financial counseling profession.

Super Consumers Australia

Super Consumers Australia (Super Consumers), formerly known as the Superannuation Consumers' Centre, is an independent, not-for-profit consumer organisation formed in 2013. Super Consumers was first funded in 2018. We work to advance and protect the interests of low and middle income people in the Australian superannuation system.

During its start up phase Super Consumers has partnered with CHOICE to deliver support services. Set up by consumers for consumers, CHOICE is the leading consumer advocate that provides Australians with information and advice, free from commercial bias.