



FINANCIAL PLANNING
ASSOCIATION of AUSTRALIA

23 October 2019

ASIC
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Dear Sir / Madam

Draft Legislative Instrument and revised RG38: The hawking prohibitions

The Financial Planning Association of Australia¹ (FPA) welcomes the opportunity to provide feedback in response to ASIC's draft Legislative Instrument and revised Regulatory Guide to enact anti-hawking provisions in relation to life insurance and consumer credit insurance products.

The FPA supports and welcomes the clear exemption of the offer of a life insurance product if made with the provision of personal financial advice and acknowledge ASIC's efforts in addressing many of the concerns raised in our previous submission.

The FPA makes the following recommendations to clarify the application and exemptions in relation to the hawking provisions.

Legislative instrument

The draft Legislative Instrument applies Part 7.8 of the Corporations Act to life risk insurance products and consumer credit insurance products if *"...an offer to issue or sell a financial product in the course of, or because of, an unsolicited telephone call to another person unless the other person has been provided with personal advice in relation to the financial product"*.

The FPA is concerned that consumers may be left unprotected as the draft provisions do not connect the provider of the personal advice to the making of the offer to sell or issue the product.

For example, Relevant Provider A of ABC Advice, provides personal advice to Client Paul on life risk matters. Representative B (who is not a relevant provider) of XYZ Product makes an unsolicited telephone call to Client Paul. During the unsolicited telephone call Representative B makes an offer to sell a life insurance product to Client Paul. Under the draft Legislative Instrument, the hawking provisions would not apply as Client Paul has been *"provided with personal advice in relation to the financial product"*, even though that advice was provided by a different person – Relevant Provider A.

The FPA recommends it be made clear in the Legislative Instrument that:

- the personal advice provided in relation to the financial product must have been provided by 'the person who has made the offer'

¹ The Financial Planning Association (FPA) has more than 14,000 members and affiliates of whom 11,000 are practising financial planners and 5,720 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
- We have an independent Conduct Review Commission, chaired by Dale Boucher, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 26 member countries and the more than 175,570 CFP practitioners that make up the FPSB globally.
- We built a curriculum with 18 Australian Universities for degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
- We are recognised as a professional body by the Tax Practitioners Board.



- the provider of the personal advice must be a relevant provider
- the definitions in the Legislative Instrument include 'personal advice' and 'relevant provider' as defined in the Corporations Act – The FPA notes that the definition of relevant provider is tied to the definition of relevant financial product, which excludes consumer credit insurance. The Legislative Instrument and Regulatory Guide should include an amended version of this definition specifically in relation to the hawking provisions for life insurance products and consumer credit insurance products.

The FPA suggests consideration should also be given as to the timing of the offer in relation to the provision of the personal advice. As discussed below, personal advice should not be required to be provided during the unsolicited telephone call, however there should be a reasonable time limitation as to making such an offer following the provision of the personal advice. This is to protect consumers who may make an informed decision not to implement the recommendations in the SOA provided by that particular relevant provider.

Regulatory Guide RG38

[RG38.7](#)

Note 2 in RG38.7 states:

We have also issued ASIC Corporations (Hawking—Life Risk Insurance and Consumer Credit Insurance) Instrument 2019/839, which prohibits the offer to issue or sell life risk insurance products or consumer credit insurance without personal advice in the course of an unsolicited telephone call. See paragraphs RG 38.44 - RG 38.47 for further guidance.

The drafting of this note could be misinterpreted and assumed that the personal advice is required to be provided during the unsolicited telephone call. This is inconsistent with the provisions in the draft Legislative Instrument, which do not specify the timing of the provision of the personal advice.

The FPA suggest it would not be in a client's best interest to provide personal advice during an unsolicited telephone call. Quality personal advice on life risk insurance is complex and usually requires the client to gather pertinent information about their circumstances and needs in preparation for and prior to a discussion with a relevant provider.

The FPA recommends Note 2 of RG38.7 be amended to resolve these issues.

[RG38.29](#)

RG38.29 states:

As a matter of good practice, we suggest that offerors:

- a) encourage consumers to specify which financial products or classes of financial products they wish to discuss;*
- b) provide consumers with enough information to allow them to carefully consider whether to request the meeting or telephone call; and*
- c) if in doubt, confirm the scope of the meeting or telephone call requested by the consumer.*

The FPA supports the suggested good practice in relation to the need for a consumer request for a meeting or telephone call to be positive, clear and informed.



However, it should be acknowledged in the Regulatory Guide that relevant providers may later scope the personal advice to the needs of the client as required under the best interest duty in s961B of the Corporations Act. When providing personal advice a relevant provider must identify the subject matter of the advice based on the objectives, financial situation and needs of the client. The consideration of the client's personal circumstances may result in the scope of the advice being different to the "scope of the meeting or telephone call requested by the consumer" during an unsolicited telephone call.

The personal advice best interest duty requirements should also be acknowledged in the section: *The scope of the consumer's request* - particularly RG38.39.

cancelling a request

The FPA recommends a request should also be treated as unreliable if the consumer fails to attend the scheduled meeting or telephone call. Under these circumstances the meeting or telephone request should be considered cancelled and the offeror can no longer rely upon the request.

Meetings and telephone calls with existing clients

Financial planners operate under different business models including establishing an ongoing fee arrangement with a commitment to providing agreed services to their client, or a fee-for-service model for example. Under a fee-for-service model, the planner may provide ongoing financial advice services and annual reviews based on the client's needs, but there is no ongoing fee agreement. The client is considered an existing client under both models.

A financial planner keeps track of their client's needs in relation to life events, such as the age or life stage of their client, and the potential impact of changes in the regulatory environment. This may result in an unsolicited telephone call to the existing client. This professional service and unsolicited contact with a client is in line with the intent of the financial planner's best interest duty in the Corporations Act, the requirements under the Tax Agent Services Act Code of Conduct, and the new standards of the FASEA Code of Ethics.

The FPA is concerned that interactions between a financial planner and their client that comply with the financial advice requirements may inadvertently be captured under the hawking provisions if an explicit exemption is not included.

The FPA recommends RG38.41-43 should explicitly exempt an unsolicited telephone call to an existing client from their financial planner.

Key terms

The key terms should include the definition of 'relevant provider' as defined in s910A of the Corporations Act, in line with the FPA's recommendation above in relation to the Legislative Instrument.

We would welcome the opportunity to discuss with ASIC the issues raised in our submission. If you have any questions, please contact me on ben.marshan@fpa.com.au or 02 9220 4500.

Yours sincerely

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