



18 August 2021

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

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

Anti-hawking: Update to RG 38

The Australian Banking Association (ABA) welcomes the opportunity to comment on the Australian Securities and Investments Commission (ASIC) consultation on proposed updates to Regulatory Guide 38 (RG38) regarding the prohibition on hawking of financial products.

Our position

The ABA supports the general rule that financial products should not be 'hawked' to retail clients and we welcome the enacted legislation that has been designed to protect consumers from practices that can result in 'pressure selling' of financial products.

We also welcome recently enacted regulations that exempt from this regime key product offerings considered to be relatively low risk and are well understood by consumers. These include basic banking products, certain term deposits and renewals of products already held by consumers.

In the ABA's view, the guidance detailed throughout RG38 provides clarity over the forms of communication subject to the prohibition, the nature and scope of a consumer's consent. However, the guide does not adequately consider the types of interactions between customers and frontline staff. These interactions vary greatly and, in many cases, involve a frontline staff member needing to gain an understanding of a customer's needs to educate them on the scope of products.

The guidance could better account for these varied needs and types of interactions to ensure financial service providers are given the clarity to serve customer needs effectively while meeting their obligations under the law.

Consistent with these views, the ABA makes some key recommendations below:

Key recommendations

Further clarity required on 'non-real time' communications

An offer, request or invitation through a non-real time communication such as an email or letter, following an unsolicited interaction could be captured under the anti-hawking regime if it is 'because of' unsolicited real-time contact (RG 38.41). However, there are circumstances where this creates uncertainty for industry, as non-real time communications do not differ from other forms of targeted marketing triggered by data attributes or a customer conversation. In this context, the ABA is seeking more clarity on circumstances where non-real time communications are caught by anti-hawking law.



Further clarity is needed on when the causal nexus between contact and the offer is broken

ASIC could provide further examples and details of what is required from a financial institution to allow a customer 'a reasonable opportunity to consider any information'. Clarity over what constitutes such a reasonable opportunity and the circumstances in which the nexus is broken would be valuable. Examples could highlight the relative weight placed on time and other factors that take place between the provision of information and the customer seeking an offer.

Relationship-managed customers should not be captured

Relationship managed customers expect to receive offers as part of an agreement with their manager to meet set financial goals. Such relationships do not fit well in the anti-hawking regime given the expectation and structure of the relationship. Obtaining specific consent every 6 weeks is also not well suited to such relationships, given they are generally long term in nature. Offers to such customers should not be considered as hawking under this regime, and the guidance should provide clarity on this point.

The scope of consent in relation to customers making broad inquiries should be clarified

The guidance should clarify the scope of consent of an individual seeking an understanding of a range of products and an interest in receiving offers generally. Such customers are often new to the country and seek education and products that they may not necessarily know about but will need. The ABA considers the guidance should reflect that where there is clear and voluntary consent from the consumer to understand different product options upon being offered, the offerings are no longer limited to products that are closely related to the original request. In these instances, it should be permitted to discuss different insurance policies that may benefit the customer.

Other issues

Draft RG 38 provides no guidance on the operation of the basic banking product exemption which is creating uncertainty. The ABA welcomes further clarity in relation to the operation of the basic banking exemption in this guidance, insofar as it interacts with financial products subject to the prohibition in circumstances such as bundling of offers.

Additional examples, queries and responses to specific questions raised by ASIC in its consultation paper are provided in the table in the following pages.

Thank you for the opportunity to provide feedback. If you have any queries, please contact me at Fiona.landis@ausbanking.org.au

Yours sincerely,

Fiona Landis
Executive Policy Director
Australian Banking Association

About the ABA

The Australian Banking Association (ABA) advocates for a strong, competitive and innovative banking industry that delivers excellent and equitable outcomes for customers.

We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership.



Question for consultation	ABA response	Proposed action
FORMS OF COMMUNICATION SUBJECT TO THE PROHIBITION		
<p>B1Q1 - What forms of communication do you currently use, or foresee using, with consumers, and do you anticipate any practical issues raised by the prohibition in respect of those forms?</p>	<p>ABA members use or anticipate using a range of communication methods with consumers, including face-to-face, video conferencing, phone, email, website chatbots, live chats during application processes, phone text messaging, social media (Facebook, Twitter, Instagram), Advertising materials.</p> <p>Practical issue: under RG 38.41, Offers, requests or invitations made using non-real time channels (such as by email) following an unsolicited contact may still constitute a breach of the hawking prohibition. Offers, requests or invitations cannot be made ‘because of’ an unsolicited contact that is in real time: see also RG 38.22—RG 38.30.</p> <p>The ABA seeks to clarify the scope of what information can be provided to a customer where there is no expectation of a real-time response.</p> <p>The ABA considers that an offer, request or invitation through a non-real time communication such as an email/letter, following an unsolicited interaction should not be captured under the hawking regime.</p> <p>Sending non-real time communication does not differ from other forms of targeted marketing irrespective of the genesis. These non-real time communications could be triggered by data attributes or a conversation.</p>	<p>The ABA recommends the guidance provide specific examples on the interaction between real and non-real time communications to better guide where the causal nexus is broken between contact and consent.</p> <p><u>Example for clarification</u></p> <p><i>A customer comes into a bank branch to get a bank cheque to buy a car. The staff asks if the customer has organised car insurance and the customer says no, but they probably should.</i></p> <p><i>Staff provides the customer with a brochure and asks if they can send the customer an email with further benefits and features, which the customer accepts. The email also contains a telephone number to call and hyperlink to apply online.</i></p> <p><i>The customer clicks the “apply now” link and follows the prompts to receive a quote.</i></p> <p>In this example, the ABA considers the nexus is broken as the customer needs to call the insurer or click on a link to access a quote and recommends this could be made clearer in RG 38.41.</p>
<p>B1Q2 Is there any additional or alternative guidance you think would be useful in helping you design and monitor</p>	<p>The ABA notes the guidance should address scenarios where customers do not always know what they need and could benefit from a banker's expertise and knowledge of the product.</p>	<p>The ABA recommends the guidance include scenarios where customers do not always know what they need and could benefit from a banker's expertise and knowledge of products.</p> <p><u>Example for consideration</u></p>



<p>communication methods with consumers?</p>	<p>In many situations, the banker and the customer have a conversation to uncover the scope of the customer's need. Such conversations may require probing questions and natural interactions that do not easily fit within a strict 'consent' framework.</p>	<p><i>A new customer walks into a branch or calls their Bank. He/she would like information on motor vehicle insurance products. The bank officer presents information on a range of motor vehicle insurance products, explains what they do and asks whether the customer would like a quote. The customer consents to be provided quotes and asks to go ahead on the quoted product.</i></p> <p><i>The officer then asks the customer if there is anything else they need help with or other types of insurance and provides oral information or an advertising brochure of all the types of insurance available with the bank.</i></p> <p><i>The customer understands the bank offers home insurance and asks for a quote. The officer provides a quote which is again agreed to by the customer.</i></p> <p>The ABA considers the customer has varied their consent during the conversation and has taken steps to seek out a second quote for home insurance.</p>
<p>B1Q3 Do you currently use unsolicited real-time contact to advertise or provide consumers with information about your products? If so, what types of information do you provide, and how do you communicate it?</p>	<p>ABA members currently use a range of methods to contact customers, including unsolicited contacts.</p> <p>Examples include:</p> <ul style="list-style-type: none"> • Face to face conversations • Telephone conversations <p>Types of information provided:</p> <ul style="list-style-type: none"> • Factual product information • Potential savings and special offers • Product features and benefits 	



NATURE OF THE CONSENT REQUIRED FOR CONTACT

B2Q1 Do you anticipate any practical issues in seeking consumer consent? Please give details.

There are a range of practical difficulties ABA members are likely to face in seeking consent, particularly where the customer has limited financial literacy, is vulnerable or has difficulties in communicating consent clearly due to language barriers etc.

Other difficulties are associated with practical issues relating to the consent requirements arise due to the 6-week limitation period and the varying application of consent before contact. Examples here include relationship-managed clients, and situations such as property transaction matters.

The ABA is also concerned that there are practical issues in relation to monitoring and updating the status of a customer's consent if made via social media.

Example 17 in the draft guide presents an example of where it is posited that it may be reasonable that a customer's revocation of consent on social media may be caught by the bank and actioned. However, banks are unlikely to be able to capture consent using social media and would be an unreasonable expectation that they could. The ABA suggests this example be reconsidered.

The ABA recommends further guidance to explain situations where the 6-week limitation period on consent creates practical issues.

Examples for clarification

1. It may not be practical to obtain additional consent after 6 weeks expires in relation to home and contents insurance between approval and settlement of the home loan. Before settlement of a home loan, the home finance manager may call the customer to go through the pre-settlement checklist, including that the customer has obtained insurance, a standard term of a mortgage.

The original mortgage conversation and consent may be over 6 weeks prior to the pre-settlement call. It could be confusing to the customer if the home finance manager raises insurance with the customer as a settlement requirement but is not willing to provide a quote.

The ABA considers in this example, the contacts between the bank and the customer would not be 'unsolicited' and will not be considered hawking. The ABA recommends the guidance provide clarity on this issue.

2. A customer can qualify to be Relationship Managed (personal/business) based on their current holdings and having complex financial needs with an organisation. The Relationship Manager (RM) then on-boards this customer and part of the service offering is to partner with a dedicated RM to strengthen their financial position and identify opportunities for financial growth.

RM's will regularly review a customer's financial situation, actively keeping them on track to reach their goals. Customers who are relationship managed expect a higher level of proactive service and attention from their RM. These customers tend to be professionals and are business owners who are time poor but not necessarily classified as significant investors and the contact is generally made via telephone to identify customers' needs and fulfil products when required, as this in most cases is convenient for the customer. Seeking consent every 6 weeks to discuss individual products poses practical difficulties in the



		<p><i>case of such clients, given the types of offering and the nature of the relationship where consumers expect contact.</i></p> <p>The ABA considers the exemption provided in 7.8.21A (b) that allows offers for the issue or sale of securities made to a client by a financial services licensee through whom the client has bought or sold securities in the last 12 months would apply and such conduct would not be therefore considered to be hawking. The ABA recommends the guidance to provide clarity on this point.</p>
<p>B2Q2 Is there any additional or alternative guidance you think would be useful to help you design internal policies and processes to ensure compliance with the new prohibition? Please give details.</p>	<p>The ABA supports further guidance highlighting situations where the nature of consent is difficult to clarify, and also where a customer expands or varies the scope of their consent in a single conversation.</p> <p>Alternative guidance could also distinguish between a cold-call to a prospective customer and an outbound service call to an existing customer during which the customer initiates a conversation in relation to a financial product.</p> <p>Finally, the ABA considers clarity is required through examples of what they would consider a reasonable opportunity for the customer to consider any information in these situations. More guidance on reasonable time to consider the information would also be valuable.</p>	<p>The ABA recommends alternative guidance should incorporate situations where there is a need to educate customers on different products available even if not explicitly raised by the customer.</p> <p>Alternative guidance could also clarify outbound cold calls with service calls to existing customers that seek out quotes actively and voluntarily.</p> <p><u>Examples for consideration</u></p> <p><i>1. Customer is a new migrant who has approached the bank to ask about setting up a bank account in Australia. Through the course of the conversation, it is discovered the customer has children, is self-employed, is renting, and has a large amount of money they are using to buy cars etc. The conversation has identified different needs however the customer has no financial literacy and has asked for help in sorting it out.</i></p> <p><i>They came to the Bank on recommendation of a friend who is very happy with the service provided.</i></p> <p>The ABA seeks clarity over the nature of this consent and what is permitted under hawking law. The guidance could further clarify such instances.</p> <p><i>2. A customer attends a bank branch and informs the teller that they would like a foreign currency card. Once that is fulfilled, the customer then informs the teller that they also need to arrange travel insurance. The customer has initiated conversation in relation to the insurance</i></p>



		<p><i>without pressure from the sales representative but chose to raise their needs sequentially.</i></p> <p>The ABA considers this is a variation or expansion in consent and would not be considered hawking if a quote is provided or a sale is made.</p> <p><i>3. A dealer calls the customer about the settlement of an existing FX deal. During the conversation the dealer informs the customer that the USD has jumped 2 cents overnight. The customer then asks for a quote on the USD forward exchange contract.</i></p> <p>The ABA considers this not to be hawking as an offer was not made, only a fact stated. The customer takes the next voluntary step of seeking a quote.</p> <p><i>4. A customer comes into a bank branch and seeks information on a range of products. The bank is not sure what they are after and provides information and offers a discussion. The customer takes the information and immediately asks to buy one of the products.</i></p> <p>The ABA considers this to be a case where the customer has taken clear steps and will not be hawking, even though they have taken steps immediately to choose a product.</p>
<p>B2Q3 Do you anticipate any practical issues associated with your implementation of our guidance on the creation and maintenance of records, including practices that may help offerors meet their obligations?</p>	<p>The ABA considers there are some practical system issues that need to be worked through, particularly in recording the consent, its scope and relaying that to different areas within financial service providers.</p>	<p>ABA members will need to devise solutions for content capture, particularly when working across different platforms and external partners, distributors and agents.</p> <p>At 38.94(g), the guide requires recording of communication made with the customer before consent. The ABA recommends ASIC set out practical expectations on to the extent of this consent capture.</p> <p><u>Example for consideration</u></p> <p><i>A banker may provide information to a customer in branch, or at a public event. The customer then takes steps to purchase the product online. The bank is unlikely to have records to confirm that the customer has taken a 'reasonable opportunity to consider the product' before the customer took steps to purchase the product online</i></p>



ESTABLISHING THE SCOPE OF THE CONSUMER’S CONSENT

B3Q1 Do you agree with our proposed guidance on offering products that are within reasonable scope of a consumer’s consent? If not, why not

The ABA broadly agrees with ASIC’s proposed approach.

However, the guidance could include more examples of what is within the consumers request to provide further clarity on the scope of permissible conduct.

The guidance should also address the scenario where a financial product is reasonably within the scope of another product, but that other product is not a ‘financial product’ and therefore ‘consent’, as prescribed in the anti-hawking laws, is not strictly applicable. For example, many business credit products require a transaction account for functional or security reasons. Further guidance that:

(a) request for the other product is considered consent for the purposes of hawking laws; or

(b) guidance that confirms that a basic banking product which is necessary (e.g. for functionality, or as security) for, but ancillary to, the operation of a non-financial product or a product not otherwise in scope for hawking (e.g. credit), is considered part of the issue of the credit product and not a separate issue for the purposes of hawking,

The ABA recommends additional guidance should be provided about what is reasonably within scope of the customer’s request and how this concept is adapted where the customer’s requested product is not a financial product.

As counterpoint to Example 9 in draft RG 38, it would be illustrative to include an example of a situation where the product would have the same function or purposes (38.65(c)(ii)) in the context of risk management products like derivatives.

Examples for consideration

1. The customer may ask for information about FX forward. When the FM specialist calls the customer, the customer then asks about FX Options.

The ABA considers the FX Options are reasonably within scope because they manage a similar risk or are functionally related as they both have a currency hedging capability.

2. Introducing insurance when a customer makes an enquiry for the specific purpose of purchasing an asset, for example increasing their daily transaction limit or acquiring a bank cheque to purchase a car or a house (the loan for the house is with another financial institution).

The ABA considers this is within reasonable scope of a consumer’s consent.

3. Insurance may be sold at the same time as a travel product, like a currency wallet. This scenario is like example 10. Travel insurance is likely to cover loss of the currency card among other risks related to the customer’s travel arrangements.

The ABA considers this is within reasonable scope of a consumer’s consent.

4. A customer calls a bank to cancel a product. The bank offers an alternative product that is better priced and the customer accepts the offer.



		<p>The ABA seeks clarity over whether this is this considered to be hawking</p> <p><i>5. A customer who owns a rental property holds landlord insurance policy. The customer decides to occupy the rental property and contacts the bank asking to cancel their landlord insurance policy.</i></p> <p>The ABA seeks clarity as to whether the banker is allowed to obtain consent during the call to discuss alternative products, such as home and contents insurance?</p> <p><i>6. A customer seeks an unsecured loan to purchase a motor vehicle. The officer making out the loan offers to provide a quote for comprehensive car insurance to protect the customers asset which is agreed.</i></p> <p><i>The officer explains that as an alternative the customer could also consider third party fire, theft and property damage quotes as a combination which is cheaper than comprehensive insurance. The customer opts for third party fire, theft and damage combination because the loan is for an older vehicle that they do not want necessarily to protect from damage.</i></p> <p><i>7. Insurances can be cancelled at any time by a customer as they may believe they are better off not to have insurance especially when times are tough; this can lead to under- insurance and a customer being placed in a very difficult position if something was to happen to that asset. The Banking Code requires banks to remind customers of the obligation to have insurance coverage on a mortgaged property annually.</i></p> <p>To ensure they are helping to protect our customers in case of a loss event, the ABA considers bank staff should be able to quote and originate insurance when under-insurance is identified.</p> <p><i>8. A customer requests to talk to the bank about a mortgage (or top up/fix/split/maintenance) and the bank raises home insurance as part of that conversation.</i></p> <p>In this situation, the ABA considers home insurance is reasonably within the scope of that request regardless of the purpose of the loan</p>
--	--	--



		<ol style="list-style-type: none"> 1. That could extend to all properties the customer owns even if they are not subject to the mortgage. For example, a customer would be confused if the bank could quote and fulfil on one property and not the other. 2. That could extend to all mortgage holders (e.g., the bank can continue to offer Home Insurance to existing HL customers) <p>The ability to offer Home Insurance in these scenarios helps ensure that consumers are not underinsured or don't have insurance at all where they believe insurance is not necessary, affordable or accessible. In taking or obtaining mortgage funding from the Bank in the first instance, consumers understand the link between their Home Loan and insurance for their Home and Contents. The ABA considers it is reasonably within the scope of the customer's request for the Bank to offer Home Insurance in a customer led conversation with their Bank about their Home Loan and believe the regulatory guide should reflect this.</p> <p><i>9. In response to a bank-initiated contact, the customer has determined they would like to take out a business loan. As part of the discussion, the bank explains that operationally a transaction account is required for the payment of interest, principal and fees. The customer confirms that they want to proceed with the business loan and therefore the bank account. In this example, the customer's subsequent clear request to take out the business loan should be sufficient to cover the functionally related transaction account.</i></p> <p>In each case, the opening of the bank account results primarily from the customer's decision to take out the lending and accordingly is not "because of" the unsolicited contact.</p>
<p>B3Q2 What products do you commonly cross-sell or bundle together for sale or issue? Does the prohibition raise practical issues for these practices?</p>	<p>A range of bundles products are offered by financial institutions. Some of these involve financial products, while others offer other types of products that are either credit facilities or payment-type services.</p> <p>Some banks bundle, combine or package several non-financial products with financial products including:</p>	<p>The ABA recommends further clarity be provided in the guidance in relation to the following examples:</p> <p><u>Examples for consideration</u></p> <ol style="list-style-type: none"> 1. <i>Customers paying an annual fee for a package may benefit from a call to remind them of the features of the package to which they are entitled.</i> 2. <i>When a customer calls the bank to ask about better interest rates, this may lead to a conversation about a package with preferential interest</i>



	<ul style="list-style-type: none"> • Home loans with a deposit account/offset facility and home and motor insurance discounts (but no obligation to acquire the insurance product in the package) • Merchant payment facilities (not financial products) with a deposit account, noting the deposit account is used as a settlement account for transactions made using the merchant facility and is functionally required to manage the bank's credit risk • Overdraft or line of credit facilities (not financial products) which require a deposit account to enable the customer to use that facility • Business loans (not financial products) with foreign exchange products, as the bank requires the borrower to manage the risk relating to the use of the loan proceeds by having a foreign exchange product. <p>Although the ABA understands basic banking products are not directly impacted by the anti-hawking regime and are exempted via the regulations, we would like to understand how they may be considered as part of bundling/packaging of products.</p>	<p><i>rates. The customer would expect the sales representative to be prepared to have a comprehensive discussion about the features that it provides, and this may result in the customer asking for a quote for insurance during the conversation so that they can consider the overall benefit to them of the package.</i></p> <p><i>3. A customer contacts the bank requesting a bank guarantee. A bank may require the issuance of a bank guarantee to be secured by a term deposit. Would the term deposit fall within the scope of the customer's consent to discuss the bank guarantee?</i></p>
<p>B3Q3 Is there any additional or alternative guidance you think would be useful to help you design or update your processes and procedures for your staff to identify the products that are within the scope of a consumer's consent?</p>	<p>ABA members provide a range of packaged products that are not necessarily part of the consumers consent but are nonetheless included as part of the bundle. In such circumstances, should the availability of those included products, benefits and offers be excluded from the discussion purely because they are not part of the consumers consent?</p>	<p>Additional guidance could highlight circumstances where associated products that are not directly related are part of an offer as a promotion or on an ongoing basis.</p> <p><u>Example for consideration</u></p> <p><i>If a customer initiates a general enquiry about a home loan are banks able to introduce the home loan package even though it has a motor insurance discount? Would it make a difference if the bank did not discuss the motor insurance discount or invite/offer motor insurance? Based on the draft RG.38 the deposit account/offset facility and home</i></p>



		<p><i>insurance should be reasonably within scope of the home loan request by the customer.</i></p>
<p>THE RIGHT TO RETURN A PRODUCT AND RECEIVE A REFUND</p>		
<p>C1Q1 Does the payment of refunds for financial products raise any practical issues?</p>	<p>The ABA seeks clarity on expected timeframes and what is deemed reasonable to provide a refund to a customer. Institutions may need to complete an investigation prior to determining the right amount of the refund.</p> <p>It would also be helpful if at Reg 38.112 ASIC confirm that when a refund is not required when a claim is made (or has been made and paid) against a policy prior to it being returned.</p> <p>There is also a possibility that a customer could claim under an insurance policy and seek a refund of the premium under the hawking right of return. It is not clear whether the right of refund is supposed to be set-off against a claim made by the customer under the policy.</p>	
<p>C1Q2 To the extent applicable, how do financial product issuers currently comply with the existing rights of return? Please give details of any challenges you face in meeting those obligations, and why they are relevant to compliance with the new provisions.</p>	<p>The ABA notes that financial product issuers have existing obligations under the Corps Regs which they comply with. No specific issues have been identified.</p> <p>The ABA notes that a right to return should not create an environment where customers think they can use “non consent” to reclaim premiums paid over an extended period. This is currently occurring in the CCI space and the cost of actioning these requests is significant and mainly found in favour of the banks.</p> <p>There is a possibility that a customer could claim under an insurance policy and seek a refund of the premium under the hawking right of return. It is not clear whether the right of refund is supposed to be set-off against a claim made by the customer under the policy.</p>	
<p>C1Q3 Is there any additional or alternative guidance that you think would help offerors to meet their obligations to allow consumers to return products and to provide refunds?</p>	<p>Nothing specific at this time.</p>	



Any other issues

Scope of consent

Banks submit that where they make contact with a customer about product “A” in a hawking compliant manner and the customer makes an unprompted request for product “B” this should not be hawking if we sell product “B”. Banks submit that the relevant part of Example 5.6 of the Explanatory Memorandum does not reflect the objective of the legislation.

Renewals

With respect to Example 15 of draft RG 38, if the customer has already provided renewal instructions upon establishment of the product (e.g. a term deposit) will the proposed renewal exemption allow the bank to make an unsolicited call to the customer to confirm those instructions? If the customer then changes their instructions (unprompted by the bank) which involve opening a new financial product (e.g. a savings account) can the bank open that new product for them during that same interaction?

Supporting consumer outcomes

ASIC should consider allowing a customer to vary their consent during contact, where the variation is initiated by the customer. To address the risk of harm or detriment to the customer, banks should be required to establish that the variation was initiated by the customer and was not manipulated or coerced by the bank. This would address the risk of consumer detriment and also provide a consumer with agency and flexibility to make informed decisions and purchases.

An example of this could be in domestic violence situation when the bank calls the customer to sell credit or for a service call and the customer asks at the end of the call if he/she can urgently open a separate bank account from his/her partner. The bank will need to be able to action this request without risk of breaching the Anti-hawking regime to assist the customer quickly. Breaking the causal nexus is not appropriate in urgent circumstances.

Another example is when a customer living in a remote area is contacted by the bank, and during this conversation, requests that other members of their family or community (secondary customer) be provided with services, such as no-fee bank accounts for secondary customers who need to access their Centrelink payments. Not all of the secondary customers have credit on their phone to call, and due to remoteness, they cannot access the internet to apply for accounts.

In these situations, can the bank go on to contact a secondary customer based on someone else’s consent and ask the secondary customer in the call if they did in fact consent to the contact?

Without this flexible view of consent in the context of hawking of basic banking products, many customers who are illiterate or who cannot afford a phone may miss out on accessing bank accounts.

Breaking the nexus

At 38.28 ASIC could provide detail of what is required from a financial institution to allow a customer ‘a reasonable opportunity to consider any information’. For example, the sales representative allows the customer a reasonable opportunity to consider information by leaving it in the customer’s discretion, when to take active steps to obtain an offer from the sales representative. If a customer received information and decided to go online to obtain a quote, the nexus would be broken.



It would also be helpful if RG 38.28 reflects is the 'a reasonable opportunity' is contextual, depending on the customer's experience, like information already provided to them and the nature of the product. A reasonable opportunity may be shorter for a currency product that is time sensitive for a customer who has received all required disclosure information and previously traded a number of different types of foreign exchange products.

Conversations

When providing information, it would be useful to see guidance about an appropriate way to refuse a customer request for a quote of car insurance when it is raised by a sales representative off the back of a clear customer need (e.g. the customer mentions to the banker that they are about to buy their first car and would like to increase their daily limit to make the payment and the banker checks in to see whether the customer has their insurance sorted).

Personal Advice

ASIC guidance at RG38.18 and RG38.27 should more accurately reflect the legal requirement of the personal advice exemption (s992A(2)(a)). The personal advice exemption applies to advice during the course of a conversation by a person who is subject to the best interest duty when giving the advice. Section 992A(2)(a) does not specifically require that the person giving advice is a financial adviser, nor that they provide the customer with a statement of advice. For basic banking products and general insurance products, personal financial advice does not require a statement of advice (Regs 7.7.10AE, 7.7.10, ASIC RG 175.176) and while the adviser must be appropriately trained and must comply with the best interest duty, the adviser may not qualify to use the term "financial adviser" (s 923C).

RG38.18 could be changed to:

"Under s992A(2), the hawking prohibition does not apply to an offer, request or invitation made in the course of giving personal advice by a person who is required to act in their client's best interests"

RG 38.27 could be changed to:

"For example, the causal nexus will be broken if between an unsolicited contact and a subsequent offer, request, or invitation the consumer has obtained personal advice"