



Law Council  
OF AUSTRALIA

*Legal Practice Section*

2 March 2020

Manager  
Financial Services Reform Taskforce  
Treasury  
Langton Crescent  
Parkes ACT 2600

By email: [FSRCconsultations@treasury.gov.au](mailto:FSRCconsultations@treasury.gov.au)

Dear Sir/Madam

**FINANCIAL SERVICES ROYAL COMMISSION RECOMMENDATION 4.1 - NO  
HAWKING OF FINANCIAL PRODUCTS**

1. The Superannuation Committee and Australian Consumer Law Committee<sup>1</sup> of the Law Council of Australia's Legal Practice Section welcome the opportunity to make a submission to Treasury in relation to the Exposure draft Bill and Regulations *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020: Hawking of financial products [FSRC rec 3.4]*.

Consumer Law Committee views

2. The Australian Consumer Law Committee strongly supports the Australian Government banning unsolicited selling of financial products.
3. The Australian Consumer Law Committee supports the intent of the Exposure Draft (ED) to make the reform technologically neutral but does not consider that the ED has been successful in doing so. Paragraph 992A(4)(a) limits the concept of “unsolicited contact” to telephone calls, face to face meetings and “other forms that a reasonable person would consider creates an expectation of an immediate response”. This formulation, however, ensures that many forms of common interactive electronic contact is carved out of consideration. This is done largely with the use of the word “immediate” – which discounts many electronic forms of communication that by its very nature allows the user to choose when to respond to contact. It is our view that no constraints should be placed on the concept of contact and that it should be as broad as possible to capture current and future forms of “unsolicited contact”. It is the unsolicited nature of the contact that should be clearly defined in the ED.
4. The Australian Consumer Law Committee supports the inclusion of a “positive, clear and informed request from a consumer” as per Commissioner Hayne’s recommendation. However, it also recommends that this be updated to align with the

---

<sup>1</sup> The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

concept of consent introduced under the Australian Consumer & Competition Commission (**ACCC**) Consumer Data Right Rules which includes the concepts of voluntariness and specificity as to purpose. Neither concept is in the Australian Consumer Law Committee's view currently captured under the concepts of a positive request or the request being clear.

5. The Australian Consumer Law Committee recommends that, where the Exposure Memorandum (**EM**) provides examples of an offer being reasonably within the scope of the consumer's request, there should be a life insurance example. Specifically there should be an example that makes clear that where a consumer is seeking a "term life" or "life insurance" but then is offered a lesser product like "accidental death" then this is prohibited as it is outside of the class of products and not within the scope of the consumer's request.
6. The Australian Consumer Law Committee recommends the ED be amended to ensure that financial service providers be obligated keep records of the sales process, that is create and store a paper or electronic trail. This is critical evidence required when acting on behalf of a client to test any assertion that a contact was solicited or unsolicited.
7. The time limits for returns are very short at one month and 14 days. The Australian Consumer Law Committee considers that these need to be extended given the long-term nature of these products.
8. The Australian Consumer Law Committee would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact the Chair, Ben Slade on [BSlade@mauriceblackburn.com.au](mailto:BSlade@mauriceblackburn.com.au)

#### Superannuation Committee views

9. The proposed legislation would extend the scope of prohibition of offers to sell or issue financial products (including superannuation products) made in the course of "unsolicited contact".
10. It is noted from the draft EM that the new measures are **not** intended to:
  - restrict a provider's (including a superannuation trustee's) ability to contact members in relation to existing membership options, features and benefits in their fund. This is consistent with the Royal Commission's recommendation that the new measures should not interfere with the trustee's discharge of duties to members in accordance with its statutory covenants;
  - apply to investment and insurance options (i.e. communication on choices available) for members that form part of a superannuation interest (that they already hold) on the basis that such options cannot be offered to members separate to their existing superannuation interest (**Exception 1**);
  - apply to "offers" made by or on behalf of a trustee relating to:
    - member benefits being moved from the superannuation accumulation phase to the retirement phase;

- sub-plan changes; and
- (presumably Family Law payment splits);

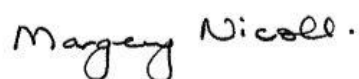
which are otherwise taken to constitute the issue of (another) financial product due to the Corporations Regulations (**Exception 2**).

11. To achieve the above:

- for Exception 1: It provides that offers in connection with changes to features of an existing member's interest are **not** captured (by the proposed new prohibition) in proposed subsection 992A(1) of the *Corporations Act 2001* (Cth) which is appropriate. However, in view of a breach of section 992A being a strict liability offence and the inclusion of a list of defined exceptions in draft section 992A, it would be preferable to include an "avoidance of doubt" provision to spell out that offers by or on behalf of a trustee in respect of a variation of a member's existing interest in a superannuation fund (and not just changes to features) are exempted.
- For Exception 2: An express exception to the prohibition of subsection 992A(1) is included as proposed paragraph 992A(2)(i) to cover off on deemed "issues" of products by superannuation trustees to an existing member. In the Superannuation Committee's view, for the avoidance of doubt, the express exceptions should be expanded to include offers and issues in connection with:
  - income streams for death benefit beneficiaries;
  - successor fund transfers;
  - default fund member admission; and
  - switching between retirement phase products or between accumulation phase and retirement phase products.

12. Should the Department wish to discuss this submission, please contact in the first instance the Superannuation Committee Chair, Dr Lisa Butler Beatty on [BeattyLi@cba.com.au](mailto:BeattyLi@cba.com.au).

Yours sincerely



**Margery Nicoll**  
**Acting Chief Executive Officer**