FINANCIAL SECTOR REFORM (HAYNE ROYAL COMMISSION RESPONSE – PROTECTING CONSUMERS (2020 MEASURES)) BILL 2020: HAWKING OF FINANCIAL PRODUCTS

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

Abbreviation	***Definition***
MIS	Managed Investment Scheme

Chapter 1
Hawking of financial products

Outline of chapter

1.1 Schedule ? to the Bill amends the *Corporations Act 2001* to ban the hawking of financial products. In particular, the amendments strengthen the existing prohibitions on offers of financial products, securities and interests in MISs during the course of, or because of, unsolicited contact with a consumer.

1.2 This Chapter provides an overview of the amendments in Schedule ? of the Bill to implement recommendations 3.4 and 4.1 of the Financial Services Royal Commission to prohibit the hawking of insurance and superannuation products.

Context of amendments

1.3 The *Corporations Act 2001* currently contains three separate prohibitions for the hawking of financial products, securities, and interests in MISs. The Final Report of the Financial Services Royal Commission found that the existing prohibitions did not effectively protect consumers from harm and amendments were required to the existing provisions in the *Corporations Act 2001*.

1.4 It is intended that the new prohibition on the hawking of financial products will mean that consumers have greater control over their decisions to purchase financial products by determining how they want to be contacted by product providers and the kinds of financial products they are offered.

Operation of current law

The general prohibition on hawking

1.5 The primary anti-hawking provisions exist in Division 8, Part 7.8 of Chapter 7 of the *Corporations Act 2001*. Under subsection 992A(1) of the *Corporations Act 2001,* ‘a person must not offer financial products for issue or sale in the course of, or because of, an unsolicited meeting with another person’.

1.6 A ‘financial product’ is defined in sections 763A to 765A of the *Corporations Act 2001* and includes insurance and superannuation products, shares, interests in MISs (whether or not they are registered), currency trading, and other products.

Exceptions to the general prohibition

1.7 The *Corporations Act 2001* provides a number of exceptions to the general prohibition on hawking.

1.8 Broadly, the main exceptions include:

- offers of financial products to a person who is not a retail client (see subsection 992A(3A) of the Corporations Act 2001); or
- offers of financial products under an eligible employee scheme (see subsection 992A(3B of the *Corporations Act 2001*).

1.9 Subsection 992A(3) prohibits a person from making an offer to issue or sell financial products in the course of, or because of an unsolicited telephone call or unsolicited contact with another person *unless* it is made during certain prescribed hours and the other person is not listed on the do not call register.

1.10 The general prohibition on hawking also does not apply to offers of interests in a MIS or securities, which are covered by specific hawking prohibitions.

Specific hawking prohibitions

1.11 In addition to the general hawking prohibition, there are two specific prohibitions that apply to the hawking of interests in MISs and securities in sections 992AA and 736 respectively.

Prohibition on the hawking of interests in a MIS

1.12 Subsection 992AA(1) of the *Corporations Act 2001* offering interests in a MIS for issue or sale in the course of, or because of, an unsolicited meeting or telephone call. Subsection 992AA(1) of the *Corporations Act 2001* prohibits offering interests in a MIS for issue or sale in the course of, or because of, an unsolicited meeting or telephone call.

1.13 However, the prohibition does not apply to:

- offers not made to a retail client (see paragraph 992AA(2)(a) of the *Corporations Act 2001*);
- offers of interests in a listed MIS made by telephone by a financial services licensee (see paragraph 992AA(2)(b) *Corporations Act 2001*);
- offers by a financial services licensee to existing clients who acquired or disposed of interests in a MIS

in the previous 12 months (see paragraph 992AA(2)(c) of the *Corporations Act 2001*); or

- offers under an eligible employee share scheme (see paragraph 992AA(2)(d) of the *Corporations Act 2001*).

Prohibition on the hawking of securities

1.14 Subsection 736(1) of the *Corporations Act 2001* specifically prohibits offering to sell or issue securities in the course of, or because of, an unsolicited phone call or meeting.

1.15 However, the prohibition does not apply to:

- offers not requiring disclosure documents because the offeree is a professional or sophisticated investor; or
- offers of listed securities made by telephone by a licensed securities dealer; or
- offers of securities by a licensed securities dealer to a client who has bought or sold securities through that dealer in the last 12 months; or
- the offer is made under an eligible employee share scheme.

Summary of Recommendations 3.4 and 4.1 of the Financial Services Royal Commission

1.16 The Financial Services Royal Commission found that the existing anti-hawking provisions do not effectively protect consumers from harm. Case studies in the Financial Services Royal Commission showed widespread unsolicited sales of insurance and superannuation products and demonstrated that hawking methods often contributed to consumers purchasing products that did not meet their needs.

1.17 Recommendations 3.4 and 4.1 of the Financial Services Royal Commission were that the hawking of insurance and superannuation products should be prohibited except to those who are not retail clients and for offers made under an eligible employee share scheme.

1.18 Commissioner Hayne also recommended amending the law to make clear that contact with a person during which one kind of product is offered is unsolicited unless the person attended the meeting, made or received the telephone call, or initiated the contact for the express purpose of inquiring about, discussing or entering into negotiations in relation to the offer of that kind of product.

1.19 In response to the Financial Services Royal Commission, the Government agreed to:

- prohibit the hawking of insurance and superannuation products, noting for example, that the Financial Services Royal Commission did not propose restricting the ability of insurers to contact policyholders in relation to existing policies; and
- clarify the definition of hawking for a financial product to include selling of a financial product during a meeting, call or other contact initiated to discuss an unrelated financial product.

Summary of new law

1.20 The Bill amends the *Corporations Act 2001* to give consumers the power to guide their conversations with product issuers in relation to financial products. It achieves this by including a new general prohibition of offers to sell or issue financial products which are made in the course of, or because of, unsolicited contact. The general prohibition will apply to all kinds of financial products, including securities and interests in MISs, except in certain circumstances.

1.21 Unsolicited contact is any contact which is not in response to a consumer request and which is made by telephone, in face-to-face meetings or by any other form which creates an expectation of an immediate response. Contact is not unsolicited contact if it is response to a positive, clear and informed consumer request and it relates to a financial product which the consumer has specifically requested or which a reasonable person would consider to be reasonably within the scope of the request.

1.22 The Bill also gives consumers the power to specify how they can be contacted and withdraw or vary a request at any time, meaning that consumer has full control over the form of the contact and can stop the contact from continuing if they are no longer interested in the relevant financial product or no longer wish to be contacted for any other reason.

Comparison of key features of new law and current law

New law	***Current law***
The new law will prohibit offers to sell or issue of financial products made in the course of, or because of, unsolicited contact. Unsolicited contact is contact which the consumer did not request which is made by telephone call, face-to-face meetings, or any other form which creates an expectation of immediate response.	The current law prohibits offers to sell or issue financial products in the course of, or because of, unsolicited phone calls or meetings.
There will be one general prohibition for the hawking of all financial products.	The hawking regime includes three separate hawking prohibitions. One general prohibition, one for MIS interests and another for securities.
The hawking prohibition only applies to offers to sell, issue or transfer financial products to retail clients.	The general and MIS hawking prohibitions only apply to offers made to retail clients. The securities hawking prohibition does not apply to sophisticated investors.

Detailed explanation of new law

New harmonised prohibition on hawking of financial products resulting from unsolicited contact

1.23 Section 992A of the *Corporations Act 2001* currently prevents a person from offering certain financial products for issue or sale in the course of, or because of, an unsolicited meeting or telephone call with another person.

1.24 To ensure that the prohibition on the hawking of financial products provides effective protection for consumers, section 992A of the *Corporations Act 2001* will be amended to strengthen the existing hawking prohibition.

1.25 Under the new prohibition on hawking, a person is prohibited from offering a financial product for issue, transfer or sale to another person; or requesting or inviting another person to ask, apply or purchase a financial product if the offer, request or invitation is made in the course of, or because of, unsolicited contact with the other person. ***[Schedule ?, item 2, subsection 992A(1) of the Corporations Act 2001]***

1.26 Unlike the existing regime which has three separate provisions for the offer of interests in a MIS, securities and other financial products, the new prohibition on hawking will apply to all financial products. ***[Schedule ?, item 2, subsection 992A(1) of the Corporations Act 2001]***

1.27 The hawking prohibition applies regardless of whether the financial provider uses a representative or other third party during the sales process.

1.28 The new prohibition will only apply to offers which are made to retail clients. It does not apply to wholesale clients, or nonfinancial products. As a result, in the superannuation context, the hawking prohibition does not apply to investment and insurance options for members that form part of a superannuation interest. Such options are not financial products which can be offered to members separate to the superannuation interest itself. ***[Schedule ?, item 2, paragraph 992A(1)(a) of the Corporations Act 2001]***

1.29 More broadly, the new prohibition means that offers to sell or issue financial products to businesses or sophisticated investors will not be prohibited. Businesses and sophisticated investors are capable of assessing the value of a financial product offered in the course of, or because of, unsolicited contact and are less susceptible to pressure selling tactics.

The hawking prohibition applies to the offer of a financial product and invitations to apply for or request a financial product

1.30 An offer includes an invitation to apply for a financial product and an invitation to request a financial product. This means that an offeror cannot avoid the hawking prohibition by approaching a consumer and asking the consumer to request a financial product or by asking a consumer to fill in an application to be sold, transferred or issued a financial product. ***[Schedule ?, item 2, subsection 992A(1) of the Corporations Act 2001]***

1.31 The hawking prohibition will apply to agents and representatives of product issuers, meaning that product issuers cannot circumvent the hawking prohibition by engaging a third party to make offers on their behalf.

The hawking prohibition applies to offers, requests or invitations made 'because of' unsolicited contact

1.32 Under the new prohibition, an offer, request or invitation is only prohibited if it is made in the course of, or because of, unsolicited contact. ***[Schedule ?, item 2, paragraph 992A(1)(b) of the Corporations Act 2001]***

1.33 Consistent with the existing hawking prohibition, the words 'because of' mean that an offer will only be prohibited where there is a causal nexus between the unsolicited contact and the offer, request or invitation. The inclusion of the words 'because of' seeks to address the situation in which a financial provider makes unsolicited contact with a consumer, but the actual offer, request, or invitation is made during subsequent contact that is solicited by the consumer.

1.34 An offer is made 'because of' a meeting, telephone call or other contact if the offer is caused by, or is a result of, the unsolicited contact. An offer will not be 'because of' a meeting, telephone call or other contact where the connection between the offer and the meeting, telephone call or other discussion is insignificant or trivial.

1.35 Determining whether an offer is causally connected with an unsolicited meeting, telephone call or other contact ('initial unsolicited contact') will depend on all the facts and circumstances, including:

- the nature of the initial unsolicited contact;
- how much time has elapsed between the unsolicited contact and the offer; and
- whether there are any intervening events that should be regarded as breaking the causal nexus between the unsolicited contact and the offer.

1.36 However, the causal nexus between the unsolicited contact and the offer may be broken if:

- the consumer obtains personal advice (and the appropriate Statement of Advice) on the product following the initial unsolicited contact; or
- a significant period of time has elapsed since the initial unsolicited contact (or any other unsolicited contact with the offeror).

1.37 Generally, the following are unlikely to break the causal nexus between the unsolicited contact and the offer:

- the consumer obtaining general advice;
- the consumer receiving a prospectus or Product Disclosure Statement (PDS); or
- a disclaimer by the offeror or a declaration by a consumer to the effect that the offer is not because of the initial unsolicited contact.

The type of contact that is ’unsolicited contact’

‘Unsolicited contact’ requires an ‘expectation of an immediate response’

1.38 Under the new law, contact is ‘unsolicited contact’ if it is not requested by a consumer and the contact is, wholly or partly, made by telephone, in a face-to-face meeting or any other form of contact which a reasonable person would consider creates the expectation of an immediate response. For example, a financial product provider calling a consumer who has not made any request for contact and seeking to sell the consumer a financial product during the telephone call (‘cold-calling’) is unsolicited contact. ***[Schedule ?, item 2, subsection 992A(4) of the Corporations Act 2001]***

1.39 Applying the hawking prohibition to contact in any form which creates an expectation of an immediate response will ensure that the new law is technology neutral.

1.40 Contact which creates an expectation of an immediate response will capture any conversations or discussions which happen in real-time where a consumer may feel obligated to respond to an offer.

1.41 The types of contact that would be captured include:

- online video chat;
- web chat services; and
- conversations in instant messaging apps.

1.42 Generally, it is expected that the following forms of contact would not create an expectation of an immediate response from a consumer and therefore would not be ‘unsolicited contact’:

- standard email communication; and
- ordinary corporate transactions such as sending investors offer documents.

Consumer requested contact for a financial product will not be ‘unsolicited contact’ if certain conditions are satisfied

1.43 If a consumer makes a request for contact relating to a financial product, any contact in connection with that financial product will not be unsolicited, if the following conditions are satisfied:

- the consumer made a positive request;
- the consumer’s request was clear;
- the consumer understood what they requested to be contacted about;

- the contact is only made in the from requested by the consumer;
- the contact occurs within 6 weeks of the consumer's request;
- the consumer does not withdraw the request prior to the contact being made;
- the contact is in accordance with any variations a consumer made to their request; and
- the financial product offered is reasonably within the scope of the consumer's request

[Schedule ?, item 2, subsections 992A(4) and (5) of the Corporations Act 2001]

1.44 The above conditions must be satisfied in relation to each financial product offered. For example, if a consumer made a request that met the above conditions ('a clear positive and informed request') for one product, the offer of a separate product outside the scope of the consumer's request during the contact that was not requested would be considered unsolicited contact.

Example 1.1

Frank is a retail customer who calls an insurer and makes a clear, positive and informed request for pet insurance. During the conversation, the salesperson asks Frank about life insurance and offers him a TPD product. Frank did not mention life insurance during the call and so did not make a clear, positive and informed request for it. The contact is not unsolicited with regard to the sale of pet insurance. However, the contact would be considered unsolicited with regard to the sale of TPD.

Example 1.2

Cheryl is a retail customer who calls an insurer and makes a clear, positive and informed request for pet insurance. During the conversation, Cheryl also makes a clear, positive and informed request for life insurance policies. The contact is not unsolicited with regard to either pet insurance or life insurance as Cheryl made a clear, positive and informed request for both products.

1.45 The Bill removes the exceptions for telephone hawking in the existing law which enable a person to offer a financial product in the course of, or because of unsolicited contact provided that the person provides the consumer with a PDS, an explanation of the importance of the PDS and the client is not on the do not call register and has been given the opportunity to be placed on that register during the contact. The case studies in the final report found that these exceptions failed to protect consumers by enabling offers to be made to unsuspecting consumers who were not able to assess the value of the product being offered.

A consumer's request for contact must be a positive act

1.46 A consumer must take an active step to initiate a request for contact, such as calling a product issuer and asking to discuss a financial product or submitting a form online indicating that the financial provider should contact the consumer. ***[Schedule ?, item 2, paragraph 992A(5)(b) of the Corporations Act 2001]***

1.47 A positive request should involve a conscious decision by the consumer to seek a financial product. A positive request would not simply be an ambiguous or vague statement, a compliant answer to a leading question, or failing to ask that future contact not take place when given an opportunity to do so.

Example 1.3

Ben is a retail customer interested in buying life insurance. He types his phone number into an insurance website which clearly offers to call him to discuss life insurance. The request would be considered positive.

Example 1.4

Nikhilesh is a retail customer interested in buying life insurance. In applying for a life insurance product online, he does not untick a box saying he agrees to be contacted with regard to insurance products. Nikhilesh has not made a positive act to request contact with regard to any other insurance products.

A consumer's request to be contacted must be clear and the consumer must understand that they are requesting to be contacted about a financial product

1.48 A request by the consumer must be sufficiently clear to identify what is being requested. The request should clearly indicate which financial product the consumer wishes to discuss. In cases where a consumer makes a broader request, the request must clearly identify the purpose for which the consumer needs a financial product before a financial product provider is able to offer a product within the scope of the request. ***[Schedule ?, item 2, subparagraph 992A(5)(c) of the Corporations Act 2001]***

1.49 In cases where a consumer makes a request that is unclear, it is expected that a financial product provider will seek out more information to get a clear indication of the type of financial product the consumer is interested in discussing or the type of financial risk the consumer is interested in managing through a financial product.

Example 1.5

Simon is a retail customer who walks into a bank and says 'tell me more about your products'. Until Simon provides further information on the products he is interested in, his request is not clear enough for an offer of a specific financial product to be made.

1.50 A consumer must also understand what they are requesting. That is, the consumer should be sufficiently informed to understand they have made a request to be contacted by a financial provider, and this request may result in the offer of a financial product within the scope of the request. ***[Schedule ?, item 2, subparagraph 992A(5)(c) of the Corporations Act 2001]***

1.51 Whether the consumer understands what is being requested will depend on the circumstances in each case. Where the consumer initiates the contact and so has had sufficient time and information to decide to request to be contacted, including the method of contact with the financial provider, it is expected the consumer would understand what was being requested.

1.52 In cases where a consumer is incentivised to hastily consent to be contacted about a financial product, for example as part of the terms and conditions of entering a competition, it is unlikely the consumer will be sufficiently informed about what they are requesting. The consumer is therefore unlikely to understand that they are requesting to be contacted about a financial product.

Example 1.6

Mike is a retail customer who called an insurer to ask a question about home insurance. During the conversation, Mike finds out more about home insurance and is offered home contents insurance. The contact is not unsolicited because Mike understood he was contacting an insurer by initiating the contact and understood this contact may result in the offer of a financial product related to home insurance.

Example 1.7

Pete is a retail customer who fills in an online form requesting a superannuation trustee contact him to discuss transferring his superannuation. The contact is not unsolicited because Pete understood he would be contacted by the superannuation trustee and this contact may result in the offer of a superannuation product.

Example 1.8

Christian is a retail customer who filled in a competition form in a shopping centre to win $100. As part of the form, it was disclosed that his contact details would be forwarded to a business partner who would contact him with regard to an annuity. As Christian agreed to make the request for contact with little time or information to consider annuities, he is unlikely to understand that he was requesting to be contacted and his request may result in the offer of a financial product.

Example 1.9

Gary is a retail customer who has a meeting with a bank to discuss his home loan. During the meeting, Gary also asks ‘do you have any car insurance products’. Gary’s request for car insurance is likely to be understood because Gary chose to initiate the contact with regard to the car insurance, and so is likely to have had sufficient time and information to decide to make the request.

Example 1.10

Pam is a retail customer who has a meeting with a bank to discuss her home loan. During the meeting, the salesperson asks her about car insurance and tells her about the special deal the bank is currently offering. If Pam makes a request for car insurance during the meeting, it is likely she did not understand the request because she did not initiate the contact with regard to car insurance and is unlikely to have had sufficient time and information to decide to make the request.

While requesting to be contacted, a consumer can specify the ways in which they are to be contacted

1.53 A consumer may specify the form of contact that they are requesting. If a consumer has specified the form of contact then the consumer cannot be contacted in any other way. ***[Schedule ?, item 2, subparagraph 992A(5)(d) of the Corporations Act 2001]***

A consumer’s request is only valid for six weeks

1.54 The request made by the consumer is valid for six weeks from the day the consumer makes the request. This means that a financial product provider is prohibited from offering a financial product for issue, transfer or sale; or requesting or inviting the consumer to ask, apply or purchase a financial product once this six week period ends. Where this occurs, the contact will be ‘unsolicited’. ***[Schedule ?, item 2, paragraph 992A(5)(e) of the Corporations Act 2001]***

A consumer can withdrawal or vary of their request at any time

1.55 A request may be withdrawn or varied by a consumer at any time after the initial request for contact is made. A withdrawal or variation may take any form. A withdrawal has immediate effect and a person cannot make any offers after they have been notified by the consumer that the request has been withdrawn. ***[Schedule ?, item 2, subsection 992A(6) of the Corporations Act 2001]***

1.56 Where a request has been withdrawn by the consumer and the financial product provider subsequently offers a financial product for issue, transfer or sale; or requests or invites the consumer to ask, apply or purchase a financial product, the contact will be ‘unsolicited’. ***[Schedule ?, item 2, paragraph 992A(5)(f) of the Corporations Act 2001]***

The financial product offered is specifically requested by a consumer or reasonably within the scope of the consumer's request

1.57 Where a consumer has requested a specific financial product, the subsequent offer of that specific financial product will not be 'unsolicited contact' provided the other requirements are also met. ***[Schedule ?, item 2, subparagraph 992A(5)(a)(i) of the Corporations Act 2001]***

1.58 Where a consumer makes a request, but that request does not refer to a specific financial product, an offer of a financial product for issue, transfer or sale will be 'unsolicited contact' unless the financial product offered was reasonably within the scope of the consumer's request. ***[Schedule ?, item 2, subparagraph 992A(5)(a)(ii) of the Corporations Act 2001]***

1.59 Whether or not a product is reasonably within the scope of the consumer's request will depend on the facts and circumstances of each request, including the words and actions of the consumer and the offeror. It is intended that the consumer will set the scope of the request and that an offer will not be reasonably within the scope if the offeror has guided or manipulated the conversation so that the consumer makes a request for a specific product or kind of product. For guidance, it is expected that:

1. If a consumer requested a product with a particular **purpose or function** (for example, managing a particular financial risk), a reasonable person would likely consider products that had a similar purpose or function to be within the scope of that request.
2. If a consumer requests a broad **class** of products (for example, life insurance), then a reasonable person would consider products within that class (for example, total personal disability, trauma, income protection and term life) to be within the scope of that request.
3. If a consumer requests a product (for example, a home loan) then a reasonable person would consider related financial products that provide cover for **associated risks** (for example, home insurance) to be within the scope of the request.

Example 1.11

Jess contacted an insurer and made a clear, positive and informed request for car insurance, but did not specify the exact product required. The insurer has many insurance products including, but not limited to, comprehensive motor vehicle insurance, third party property damage, and third party property damage with fire and theft insurance. As a reasonable person would consider each of these products within the class of car insurance, the offer of any of these products is reasonably within the scope of Jess's request for car insurance.

Example 1.12

Isla called an insurer and made a clear, positive and informed request for car insurance. During the phone call, Isla was offered home insurance without Isla raising or requesting this during the discussion. A reasonable person would not consider car insurance and home insurance within the same class of product or related to the same risk, so the offer of home insurance is not reasonably within the scope of Isla's request.

Example 1.13

Rosetta made a clear, positive and informed request for a new Fiat 500 Abarth from a car dealer. The dealer offers to sell comprehensive motor vehicle insurance. A reasonable person would consider comprehensive motor vehicle insurance as covering risks directly associated with the car, so the offer of comprehensive car insurance is reasonably within the scope of Rosetta's request.

Example 1.14

Eleanor visited a bank and made a clear, positive and informed request to arrange a mortgage. During the process the bank offered home insurance. The home insurance would protect Eleanor's ability to repay the bank in the event of loss or damage to her property. A reasonable person would consider home insurance as covering risks directly associated with the mortgage, so the offer of the home insurance is reasonably within the scope of Eleanor's request.

Example 1.15

Yi Chi contacted an insurer and made a clear, positive and informed request for insurance to manage the risk of his inability to work in the future. A reasonable person would consider a range of products that can provide assistance and manage this risk to assist his family, such as income protection and life insurance products, to be reasonably within the scope of Yi Chi's request.

Example 1.16

Thomas contacted an insurer and made a clear, positive and informed request to purchase insurance for an investment property he owned. The insurer provided a quote for home building insurance and a quote for landlord insurance. A reasonable person would consider both products manage the risks associated with his investment property, and so both are reasonably within the scope of Thomas's request.

Example 1.17

Kayla recently inherited a sum of money and requested to meet with her bank and made a clear, positive and informed request for an investment account. Under a general advice model, in addition to offering Kayla an investment account, the bank offered Kayla income protection insurance. A reasonable person would not consider income protection to be in the same class, or have the same purpose or function as an investment account, so the offer of income protection insurance would not be reasonably within the scope of Kayla's request.

Example 1.18

Nathan was considering switching banks and arranged to meet an adviser to talk about an everyday savings account and the interest rates on term deposits. However, during the discussion about the bank's basic banking products, the adviser unexpectedly offered Nathan a superannuation product. The offer of that financial product (i.e. the superannuation interest) during the meeting is prohibited as Nathan did not make a positive, clear and informed request for that product and a reasonable person would not expect to be offered a superannuation product during contact that was requested to talk about basic banking products.

Example 1.19

Jon contacted a large bank about options for making low-risk, long-term investments with his savings, and indicated that he would want to be able to draw on those returns and his original principal as needed. The bank offered a range of investment products, and also offered a superannuation product at the same time. A reasonable person would not expect to be offered a superannuation product during contact that was requested about investments providing access to returns and capital (typically access to superannuation is restricted until retirement).

Example 1.20

Emily was considering changing superannuation funds and called a large bank to ask about their superannuation offerings. As part of the conversation, Emily was offered a direct life insurance policy. A reasonable person would not expect to be offered a direct life insurance policy during contact that was requested to talk about superannuation products.

Prohibition on hawking does not apply under certain circumstances

1.60 The hawking prohibition will not apply where another regime already gives appropriate consumer protection in relation to the offer of that financial product or where the consumer is expected to have enough knowledge to adequately assess the financial product offered. Specifically, the hawking prohibition will not apply to:

- advice given to a client by a financial advisor who is required to act in the client's best interests under Division 2 of Part 7.7A of the *Corporations Act* in relation to that advice; ***[Schedule ?, item 2, paragraph 992A(2)(a) of the Corporations Act 2001]***;

- offers which are made under eligible employee share schemes ***[Schedule ?, item 2, paragraph 992A(2)(f) of the Corporations Act 2001]***;
- offers of medical indemnity insurance made to a medical or health professional ***[Schedule ?, item 2, paragraph 992A(2)(g) of the Corporations Act 2001]***;
- crowd-sourced funding offers made in accordance with Part 6D.3A of the Act ***[Schedule ?, item 2, paragraph 992A(2)(e) of the Corporations Act 2001];***
- offers of interests in a litigation funding scheme and interests in a scheme that is declared not to be a MIS by the *Corporations Regulations 2001* ***[Schedule ?, item 2, paragraph 992A(2)(h) of the Corporations Act 2001];***
- offers made by or on behalf of superannuation trustees relating to a member's a move to the retirement phase, sub-plan changes and payment splits.[1] This ensures superannuation trustees can continue to contact members about their retirement options and changes to their superannuation interest. ***[Schedule ?, item 2, paragraph 992A(2)(i) of the Corporations Act 2001]***

1.61 The new hawking prohibition will not apply to financial providers who are contacting an existing customer about an existing financial product that has not lapsed, been cancelled, or otherwise expired, including a renewal of that existing financial product.

Maintaining existing exemptions relating to the hawking of securities and interests in MISs

1.62 To minimise uncertainty for industry stakeholders and preserve the operation of the existing law, offers of listed securities and listed interests in MISs which are made by financial services licensees over the phone will not be impacted by the hawking prohibition. ***[Schedule ?, item 2, paragraph 992A(2)(b) of the Corporations Act 2001]***

1.63 Financial services licensees will continue to be able to make offers of securities to clients who have acquired or disposed of securities with them in the previous 12 months. Financial services licensees will also continue to be able to make offers of interests in MISs to clients who have acquired or disposed of interests in MISs with them in the previous 12 months. It is expected that these consumers will be more capable of assessing the benefits and risks associated with the financial product than

[1] These circumstances are taken to constitute the issue of a financial product as a result of regulations made under paragraph 761E(7)(a): see regulations 7.1.04E, 7.9.02 and 7.9.86 of the *Corporations Regulations 2001*.

a consumer who has not recently considered these products. ***[Schedule ?, item 2, paragraphs 992A(2)(c) and 992A(2)(d) of the Corporations Act 2001]***

Exemption for Add-on insurance products

1.64 To minimise uncertainty for industry, the new hawking prohibition will not apply to offers to sell or issue add-on insurance products if the offer is subject to the rules for selling add-on insurance products under subdivision DA of Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* (Recommendation 4.3 of the FSRC implementing a deferred sales model for add-on insurance products). ***[Schedule ?, items 2 and 7, paragraph 992A(2)(j) and section 9 of the Corporations Act 2001]***

1.65 However, the hawking prohibition will apply to offers, requests or invitations relating to an add-on insurance product if it is covered by proposed sections 12DU to 12DY of the *Australian Securities and Investments Commission Act 2001*. ***[Schedule ?, item 2, paragraphs 992A(3)(a) and 992A(3)(b) of the Corporations Act 2001]***

1.66 Offers of add-on insurance products which are made after the end of the period of 6 weeks beginning on the first day of the deferral period, or which are made after a consumer has requested not to be contacted about an add-on insurance product, will be subject to the hawking prohibition. ***[Schedule ?, item 2, subparagraph 992A(3)(b)(i) and paragraph 992A(3)(c) of the Corporations Act 2001]***

1.67 Where there is no add-on insurance pre-deferral period within the meaning of proposed section 12DP of the *Australian Securities and Investments Commission Act 2001*, the hawking rules will apply to offers of add-on insurance products made within 6 weeks of the beginning of the add-on insurance pre-deferral period (within the meaning of proposed section 12DP). ***[Schedule ?, item 2, subparagraph 992A(3)(b)(ii) of the Corporations Act 2001]***

1.68 Add-on insurance product has the same meaning as in section 12DO of the *Australian Securities and Investments Commission Act 2001*. ***[Schedule ?, item 2, section 9 of the Corporations Act 2001***

Advertising is not hawking

1.69 The new hawking prohibition does not prevent product issuers from advertising financial products. Most advertisements would not constitute an offer and as a result would not be captured by the new law. In circumstances where the advertisement does amount to an offer or invitation, then it is unlikely to be hawking because advertisements do not usually create an expectation of immediate response from the consumer.

1.70 Additionally, if a consumer actively contacts the issuer of financial product after seeing an advertisement for that financial product then the positive action by the consumer to contact the product issuer would break the causal nexus. This would mean that the offer would not be 'because of' the advertisement, but would be 'because of' the consumer making a request. The hawking prohibition would not apply.

Right of return

1.71 In the event that a product issuer breaches the new hawking prohibition the consumer who was sold or issued the product will have the right to return a financial product and obtain a refund for any amounts paid. Where the financial product has a cooling-off period under section 1019B of the *Corporations Act 2001* then the right of return will expire one month after the end of the cooling-off period. For all other products the right of return will expire one month and 14 days after the financial product was issued. ***[Schedule ?, item 2, section 992AA of the Corporations Act 2001]***

1.72 The right of return is a consumer remedy and applies in addition to the applicable civil penalties for breaching the new hawking prohibition. This means that a person who breaches section 992A may be liable to pay civil penalties as well as being required to refund the amount paid by a consumer for the financial product. ***[Schedule ?, item 2, subsection 992AA(4) of the Corporations Act 2001]***

Penalty framework

1.73 A person who breaches the new hawking prohibition will be guilty of an offence and will be liable for 6 months imprisonment or 60 penalty units. This reflects the penalties which apply to a breach of the general hawking prohibition in the existing law. ***[Schedule ?, item 2, subsection 992A(8) of the Corporations Act 2001]***

1.74 This is consistent with the current penalty framework that applies to the hawking of financial products.

Consequential amendments

1.75 This Bill makes a number of consequential amendments to remove the specific prohibitions against the hawking of securities and interests in MISs and to ensure that the existing right of return is maintained in the new law.

Application and transitional provisions

1.76 The new law will commence on 1 July 2020.

1.77 ASIC has provided exemptions from the anti-hawking prohibition in existing sections 736, 992A and 992AA of the *Corporations Act 2001* in a number of specific circumstances. ASIC will retain the power to provide such exemptions on a class or individual basis, which includes the power to continue existing exemptions in effect.