



Level 6, 179 Queen Street
Melbourne, VIC 3000

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



28 February 2020

By email: FSRCconsultations@treasury.gov.au

Luke Spear
Senior Adviser
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Luke

Exposure draft – No hawking of financial products – FSRC Rec 3.4 and 4.1

Thank you for the opportunity to comment on exposure draft materials to prohibit the hawking of financial products, including insurance and superannuation, implementing Recommendations 3.4 and 4.1 of the Financial Services Royal Commission:¹

- Exposure draft—*Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020: Hawking of financial products (Draft Bill)*;
- Exposure draft— *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Regulations 2020: Hawking of financial products (Draft Regulations)*;
- Exposure Draft Explanatory Materials (**Draft EM**);
- Exposure Draft Explanatory Statement (together, the **Exposure Draft Materials**).²

This submission has been prepared by Consumer Action Law Centre with contributions and endorsement from the following organisations:

- CHOICE
- Consumer Credit Legal Service (WA) Inc
- Financial Counselling Australia
- Financial Rights Legal Centre

Information about the contributors to this submission is available at **Appendix A**.

¹ Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry (FSRC or **Financial Services Royal Commission**): <https://financialservices.royalcommission.gov.au/Pages/default.aspx>.

² Consultation materials available at: <https://treasury.gov.au/consultation/c2020-48919j>.

We strongly support the Government banning the unsolicited selling of financial products, including insurance and superannuation. Unsolicited selling is an outdated and abusive practice with a significant risk of mis-selling people products they don't want, need or understand.

This submission makes the following comments and recommendations to ensure the hawking ban is effective and aligns with the spirit and intention of Commissioner Hayne's recommendations:

- We broadly support the Exposure Draft Materials.
- **Definition of 'unsolicited contact':** We strongly support the Government's intention to make this reform technology neutral. However, to do so, it must clearly include email, SMS, in-app offers and other forms of digital contact. It must also capture unsolicited contact targeted at people experiencing vulnerability. To fix this:
 - Ideally, remove s 992A(4)(a) so that *all* contact is capable of falling within the definition of 'unsolicited contact' if the consumer did not request it or the requirements of sub-section (5) are not met; or
 - Alternatively, amend s 992A(4)(a)(iii) to read "any other form that a person in their circumstances would consider creates a reasonable expectation of a response from the other person".
- **Coverage:** We strongly support the Government applying this reform to all financial products under the Corporations Act, not just insurance and superannuation. The hawking ban should be extended to financial products under the ASIC Act, to stop the harm from unsolicited selling of credit.
- **Request for contact:**
 - These requirements should be expanded to include that a request be voluntary, unbundled and specific as to purpose to align the reform with evolving consent practices under the Consumer Data Right.
 - The Exposure Draft Materials should be amended to clarify that 'tick-box' consent practices (including as part of terms and conditions to enter a survey, competition or access a service on a take-it-or-leave-it-basis) are unsolicited contact in breach of the hawking ban.
 - Reduce the timeframe for a valid request for contact from six to two weeks, and do not provide any ability to override this timeframe, which would be gamed by firms to flout the hawking ban.
 - Ensure that any request for contact is capable of being easily withdrawn, and that firms provide information on how to withdraw a request.
- **Examples:** The examples in the Draft EM provide practical guidance to industry on this ban and should remain. Additional examples would help, including on timeshare, the unsolicited offer of accident death or sickness policies when a consumer requests life insurance, and an insurance policy with both life and general insurance components.
- **Cross-selling:** We strongly support car insurance and home insurance being treated as a different class of products. The desire of large firms to cross-sell products is not a sufficient justification for a carve-out from the hawking ban.
- **Record-keeping:** Ensure firms have a positive record keeping obligations to demonstrate compliance with the ban and make that evidence easily available to regulators and affected consumers, with civil penalties applying for breach.

- **Consumer remedies:**
 - Allow consumers to return and obtain a refund on hawked products at any time, and obtain compensation for loss and damage.
 - Ensure the regulator can seek orders for non-party consumer redress in enforcement action.
- **Commencement:** We strongly support the commencement date of 1 July 2020.
- **Name:** Change the terminology from 'hawking' to 'unsolicited selling' to improve consumer understanding and achieve consistency with unsolicited selling requirements in other sectors.

A full list of recommendations is available at **Appendix B**.

The need for this reform

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

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

The existing anti-hawking laws in the *Corporations Act 2001* (Cth) (**Corporations Act**) have failed to stop inappropriate selling. The ClearView and Freedom case studies at the Financial Services Royal Commission showed the significant harm caused by unsolicited sales of life insurance, including:

- Sales to vulnerable people: Cold-calling is a particularly harsh practice when it involves vulnerable people who may not understand the products or feel able to say no to the seller. Many people targeted by cold-calls have no need for the products being sold.
- Targeting people who could not afford it: ClearView targeted for cold-call sales of insurance people receiving disability pensions and others with lower financial means. This increases the risk of unsuitable sales and cancellations due to non-payment of premiums.
- Poorly designed, low-value products: Insurance products sold via cold-calling, particularly accidental death and accidental injury insurance, are not valuable products. This is evidenced by their very low claims rates and ratios.
- Insurers not complying with unsolicited selling laws: ClearView, which had significant cold-calling operations within its business, may have breached the existing anti-hawking provision—a law integral to its business operations—more than 300,000 times.³

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

The most telling general point to emerge from the case study was Mr Martin's frank acknowledgment that he found it difficult to see how it would be possible to sell life insurance in outbound sales calls in a way that is both financially viable and legally compliant. As he rightly said, it is difficult to see how a customer

³ FSRC, *Final Report, Volume 2: Case Studies*, p 298.

can come to a view in a phone call that lasts 20 minutes about 'a fairly complex sort of area of financial services.'⁴

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

Each of these matters is concerning. But they are not problems that arise because an insurer or a distributor deals directly with a consumer. Rather, they are problems that arise because individuals are offered complex financial products – sometimes very forcefully – when they have not turned their minds to, and do not have adequate information about, what value the product has for them. Hence, the most appropriate course is to prohibit the *unsolicited* sale of such products.⁵

ASIC also found significant harm caused by unsolicited sales of life insurance, leading to its recent ban on outbound telephone sales of life and consumer credit insurance.⁶ Concerningly, ASIC's consumer research found that outbound sales carry a higher risk of poor consumer outcomes, including that:

- 40% of respondents felt pressure to buy a product during outbound sales calls compared to 27% for inbound calls;
- consumers who bought insurance in response to outbound calls were more likely to have been told that they did not need to get a medical examination and that they did not need to answer any questions about their medical history;
- consumers were also less likely to be aware of any exclusions for their policy;
- consumers were less likely to have a specific life event in mind; they had not had the opportunity to conduct any research or thought about their need to cover specific costs, and the only information they had was that supplied by the sales person; and
- consumers were more likely to be influenced by promotions and offers.⁷

In addition to the problems exposed at the Financial Services Royal Commission and through ASIC's reports, our services continue to see people suffer severe financial harm as a result of the finance sold with products which are sold through many forms of unsolicited contact, whether by phone, face-to-face or online. These products include timeshare schemes⁸ and products sold door-to-door, such as solar panels financed with unregulated credit.⁹ Beyond financial products, we recommend that the Government implement an economy-wide ban on all forms of unsolicited selling.

No exemptions

The Financial Services Royal Commission highlighted that the current laws were not working for consumers and that, under those laws, the conduct and behaviour of some financial firms had led to significant consumer detriment. FSRC Recommendations 3.4 and 4.1, and these draft laws, are designed to ensure that the significant consumer detriment that was occurring does not continue to occur. The Financial Services Royal Commission also

⁴ FSRC, *Final Report, Volume 2: Case Studies*, p 301 (internal citations omitted).

⁵ FSRC, *Final Report, Volume 2: Case Studies*, p 282. *Competition and Consumer Act 2010* (Cth) Sch 1.

⁶ See: <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-335mr-asic-to-ban-unfair-cold-call-sales-of-direct-life-insurance-and-cci/>.

⁷ As summarised in ASIC Report 587: *The Sale of Direct Life Insurance*, 30 August 2018, p 293: <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-587-the-sale-of-direct-life-insurance/>.

⁸ Consumer Action Law Centre and Financial Rights Legal Centre, Submission to ASIC, *Consultation Paper 272 – Remaking ASIC class orders on time-sharing schemes*, 24 January 2017: <https://consumeraction.org.au/wp-content/uploads/2017/02/Consumer-Action-CP-272-Submission-Final.pdf>.

⁹ For more information, see Consumer Action Law Centre & ors, *Knock it off! Door-to-door sales and consumer harm in Victoria*, November 2017: <https://consumeraction.org.au/wp-content/uploads/2017/11/Knock-it-off-Consumer-Action-Law-Centre-November-2017.pdf>.

recommended that that the law should be simplified and that exemptions and loopholes be minimised (Recommendation 7.3).

As a result, in our view, for any exemptions to be considered an industry or product should have to establish to Treasury that significant consumer detriment will occur to consumers if the exemption is not granted. An exemption should not be granted from these laws if it might cause inconvenience to a small group of consumers.

General prohibition on hawking of financial products

Invitation to ask or apply (s992A(1))

The history of the anti-hawking provisions has been one of regulatory arbitrage and avoidance, with clever tactics used to get around the existing anti-hawking provisions in the Corporations Act. We therefore support that the hawking prohibition would apply when a person 'invites another person to ask or apply for' a financial product.

To ensure the ban works, the draft Bill should include an anti-avoidance measure. The unsolicited selling provisions of the Australian Consumer Law (**ACL**) provides a helpful template. Under section 6g(1)(c), a consumer agreement is unsolicited if, among other things:

the consumer did not invite the dealer to come to that place, or to make a telephone call, for the purposes of entering into negotiations relating to the supply of those goods or services (whether or not the consumer made such an invitation in relation to a different supply).

An anti-avoidance provision follows in section 6g(1A):

The consumer is not taken, for the purposes of subsection (1)(c), to have invited the dealer to come to that place, or to make a telephone call, merely because the consumer has:

- (a) given his or her name or contact details other than for the predominant purpose of entering into negotiations relating to the supply of the goods or services referred to in subsection (1)(c); or
- (b) contacted the dealer in connection with an unsuccessful attempt by the dealer to contact the consumer.

The final Bill should contain a similar measure to prevent firms gaming the ban.

RECOMMENDATION 1. Include an anti-avoidance measure similar to section 6g(1A) of the Australian Consumer Law.

Causal nexus

Few, if any, consumers read and understand documents PDSs, disclaimers or declarations. The age of disclosure as the primary consumer protection measure is well and truly over.¹⁰ We therefore support the examples at para 1.37 of the Draft EM that the causal nexus is unlikely to be broken by a consumer receiving general advice, a Product Disclosure Statement, or disclaimers/declarations that the offer is not by way of unsolicited contact. These actions should never break the causal nexus, so the language could be strengthened from 'unlikely' to 'very unlikely' or 'will not'.

RECOMMENDATION 2. Replace the words 'are unlikely to' with 'will not' in para 1.37 of the EM.

Meaning of 'unsolicited contact'

We broadly support the examples in the Draft EM, except where otherwise highlighted throughout this submission. These examples are important to demonstrate the intent of the reform, and provide practical guidance to industry

¹⁰ For an overview of the failures of disclosure as a consumer protection measure, see ASIC Rep 632, *Disclosure: Why it shouldn't be the default*, 14 October 2019: <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-632-disclosure-why-it-shouldn-t-be-the-default/>.

on the ban. Were the examples in the Draft EM to be removed, there is a risk that industry will take a 'business as usual' approach and fail to change sales practices in the absence of ASIC action.

Unsolicited contact can take a range of forms across financial services and consumer goods. These include circumstances where a consumer:

- receives targeted advertising after a distressing life event, such as the death of loved one, inviting the consumer to call. The consumer calls and is signed up over phone to unsuitable or low value products such as funeral insurance;
- is approached by sales representatives while on holiday (e.g. at Seaworld or in a hotel lobby) and the cooling-off period concludes while the consumer remains on holiday (e.g. timeshare, a form of managed investment scheme);
- receives targeted in-app push notices on smart phones and tablets where the financial services provider has analysed the financial data they hold to offer specific products;
- is approached when attending community events such as the Koori Knockout and offered a funeral 'expenses only' product; signs up to a competition or survey at a stall in a shopping centre, only to be sold into a complex financial product at a later date;
- is approached at their place of residence (e.g. nursing home) for the unsolicited sale of mattresses;
- receives a scratch card stating they have won a holiday, and need to attend a seminar to claim the prize, then to be pressure-sold timeshare;
- receives postal mail after home repossession proceedings inviting the person to call for 'help', drafted in a way to suggest that the person risks losing their home if they don't take action, thereby creating pressure. The consumer calls and is then signed up to unregulated debt management services.

Many of the above examples would appear to be covered by s992A(4). For the avoidance of doubt, Treasury should include versions of the above examples in the final Explanatory Memorandum to be clear that such contact is unsolicited.

In particular, we continue to hold serious concerns about the mis-selling of timeshare arrangements based on our casework, feedback from consumers, and ASIC's damning consumer research.¹¹ We strongly recommend that the EM include an example of an unsolicited meeting based on a timeshare sales model. For more information on our views on timeshare, including examples from our casework, please see our submission to ASIC *Consultation Paper 272: Remaking ASIC class orders on time-sharing schemes*.¹²

Forms of contact captured by the ban (s992A(4)(a))

We strongly support Treasury's intention to make this reform technology neutral to future-proof this reform. Treasury must be confident that the Exposure Draft Materials capture all forms of pressure contact.

Reasonable person standard

Section 992A(4)(a)(iii) states:

- (4) Contact by a person with another person, in connection with a financial product, is unsolicited contact with the other person in connection with the product if:

¹¹ ASIC, Report 642, *Timeshare: Consumers' experiences*, 6 December 2019: <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-642-timeshare-consumers-experiences/>; CHOICE, *CHOICE calls for clean-up of timeshare financial advice*, 23 February 2018: <https://www.choice.com.au/about-us/media-releases/2018/february/timeshare-schemes>.

¹² Consumer Action Law Centre and Financial Rights Legal Centre, 24 January 2017: <https://consumeraction.org.au/wp-content/uploads/2017/02/Consumer-Action-CP-272-Submission-Final.pdf>.

(a) the contact is wholly or partly in one or more of the following forms:

...

(iii) any other form that a reasonable person would consider creates an expectation of an immediate response from the other person.

We are concerned that the use of a 'reasonable person' standard in s992A(4)(a)(iii) may not adequately capture forms of contact in which people experiencing certain vulnerabilities feel pressured or confused into responding. It was clear from the case studies to the Financial Services Royal Commission that vulnerabilities were exploited to pressure sell life insurance, funeral insurance and funeral expenses only policies. Treasury should consider the potential impact of gratuitous concurrence on the drafting of this reform.¹³

One option would be to add an additional sub-section with a subjective element to capture any other form where the consumer (or 'other person' in the language of the Draft Bill) felt an expectation to respond to the contact. For example, "any other form that a person in their circumstances would consider creates a reasonable expectation of an immediate response from the other person".

Emails and SMS

The Draft EM states that 'standard email communications' would not generally be unsolicited contact. It is not clear whether SMS messages are captured. In our view, there may be types of email or SMS contact that create an expectation of response or pressure consumers. SMS contact is largely used as a conversational medium in the same way as instant messaging apps such as WhatsApp and Facebook Messenger. Unsolicited contact regularly occurs in this form – in many cases as part of an ongoing conversation over time with a financial institution's representative. In this form there can be an expectation of response in the sale of a secondary financial product, if one is seeking to maintain a good relationship with the representative of the primary product.

Unsolicited SMS correspondence was identified as a significant concern by the 2016 *Review of the Small Amount Credit Contract Laws*.¹⁴ The Review identified that payday lenders and consumer lessors commonly encourage past and current customers to apply for further products by sending SMS messages and other communications. The Review recommended and the Government accepted that providers should be prevented from making unsolicited offers to current or previous customers.¹⁵ This reform has not been enacted.

Unsolicited email and SMS contact is an ongoing concern to consumers. The *Spam Act 2003* (Cth) prohibits commercial electronic messages with an Australian link to an email or telephone number without the consumer's consent. Commercial electronic messages include email, SMS and MMS, and instant messaging with a commercial purpose. A recent report from the Australian Communications and Media Authority (ACMA) found that the 'intrusion of telemarketing calls and commercial electronic message remains a key concern for consumers.'¹⁶

Requiring consent as a condition of accessing a service is a common way in which businesses distort consumer preferences. More subtle methods of distorting consumer choice include using means like urgency ('opportunity ends soon'), social proof ('others like you have made this choice') or interference (a good example of this is 'confirm-shaming': framing a choice in a way that makes it seem dishonourable or stupid not to choose it) – all of these methods can be used in email and SMS. Reliance on consent is also likely to negatively affect more vulnerable consumers; those who lack capability may be more easily swayed by businesses.

¹³ D Eades, "A case of communicative clash: Aboriginal English and the legal system" in J Gibbons (ed), *Language and the Law*, Longman, London, 1994, pp 234–264.

¹⁴ https://treasury.gov.au/sites/default/files/2019-03/C2016-016_SACC-Final-Report.pdf.

¹⁵ Recommendations 8 and 18.

¹⁶ ACMA, *Report on industry self-regulation of commercial electronic messages, the Do Not Call Register and the Integrated Public Number Database*, May 2018, pg: <https://www.acma.gov.au/publications/2019-10/report/report-industry-self-regulation-commercial-electronic-messages-dnccr-and-ipnd>.

The forms of pressure that can arise through electronic forms such as SMS and email are different to those experienced face-to-face or during telephone calls. However, ideally, email and SMS should be within scope of the reform as a type of unsolicited contact. Whether or not it creates an expectation of response will depend on the facts and circumstances.

In-app offers and other digital contact

To future proof the hawking ban, all forms on online and digital contact must be captured. As the Consumer Policy Research Centre (CPRC) observed:

Australians are spending more of their lives online. 87% were active internet users in 2017, more than 17 million use social networking sites, and 84% of Australians are now buying products online.¹⁷

The ASIC regulatory guidance for hawking, RG 38,¹⁸ were substantively drafted in May 2005, in an era of 'boiler-room' telephone sales and before 2007 when iPhones were introduced and became ubiquitous.

We are concerned the draft materials do not capture unsolicited targeted online contact (such as Facebook advertisements) and in-app offers. These are often time-limited, interactive, and involve prompts that create a sense of urgency to respond. We are concerned that if this contact is carved out of this reform, this is where the industry will focus pressure sales tactics.

Super Consumers Australia (SCA) owes its existence to examples of 'mis-selling superannuation', that could very easily be replicated by technology. In 2018 SCA received a 'Community Benefit Payment' from ASIC from the proceeds of fines totalling \$2.5 million levied on ANZ and Commonwealth Bank for unscrupulously deceiving their own customers – in a manner that could very easily be replicated by a mobile phone app, an autonomous 'bot' program, machine learning or Artificial Intelligence.

In both cases, bank staff purported to be conducting a 'fact finding' review of their customers banking arrangements, that concluded with a recommendation to rollover their superannuation into a bank-owned superannuation fund, with little regard for the performance of their existing fund.

In another example of using technology to rollover superannuation, ASIC recently commenced court proceedings against MobiSuper, for claiming that it was offering an obligation-free 'lost super' service. The corporate regulator alleges that people were targeted through internet advertising campaigns, and prompted to roll over their other super balances into MobiSuper-promoted products, again with little regard for the performance of their existing funds.

It is not difficult to imagine people being duped by a wide range of similar digital and online inducements – including offers of low fees or even cash – unless robust consumer protections are introduced and enforced.

We should not allow the same hawking to occur on a computer or mobile phone in the form of an unsolicited digital notification, pop-up screen, or advertising prompt.

'Immediacy' of response

One way to resolve the concerns regarding the above forms of contact being excluded from the hawking ban would be to remove the word 'immediate' from contact that 'creates an expectation of an immediate response', and clarifying the wording of the EM.

Electronic contact does not necessarily require immediate contact but very often leads to an expectation in the consumer that they will need to respond. Instant messaging for example does not necessitate immediate contact

¹⁷ CPRC, *Living Online*, accessed 25 February 2020: <https://cprc.org.au/research-hub/living-online/>.

¹⁸ <https://download.asic.gov.au/media/1238114/rg38.pdf>.

– but does lead to the expectation of a response. In this way unsolicited contact via other forms would then be appropriately captured by the reform.

The FSRC Final Report does not refer to the concept of immediacy – simply that “the definition should have a breadth that achieves the purpose of the prohibition.”¹⁹ The Final Report references ASIC RG38 in developing this view. RG38 does not artificially limit the notion of unsolicited contact by reference to the expectation of an ‘immediate response’.

We believe that the breadth of definition sought by the Commissioner is therefore better served with the removal of the word “immediate.”

Remove forms of contact

However, the best way to ensure that the concept of “contact” is truly left technologically neutral, the definition should simply remove the ‘forms’ of contact in proposed section 992A(4)(a)(i),(ii) and (iii). This way the concept concentrates on the “unsolicited” nature of the term “unsolicited contact.” It is clear that Commissioner’s priority in defining the term “unsolicited contact” is centred on this “unsolicited” arm stating:

To make the proposed prohibition on unsolicited offer and sales effective, and to eliminate some arguments about what is ‘unsolicited’, it is desirable to introduce a statutory definition of that concept. The definition should have a breadth that achieves the purpose of the prohibition. To that end, the definition might usefully be based upon the definition now used by ASIC: that a meeting or telephone call is unsolicited ‘unless it takes place in response to a positive, clear and informed request from a consumer’.²⁰

By limiting the concept of contact to the categories as laid out in subsection (4)(a) is to unnecessarily and artificially constrain the concept of “contact” beyond that foreseen by the FSRC Final Report, which primarily sought to “prohibit the *unsolicited offer or sale* of insurance products.”²¹ ASIC could provide regulatory guidance on this definition. This approach would also resolve our concerns about people experiencing vulnerability.

RECOMMENDATION 3. Remove section 992A(4), so that all contact is capable of falling within the definition of ‘unsolicited contact’ if the consumer did not request it or the requirements of sub-section (5) are not met. **Alternatively**, amend section 992A(4)(a)(iii) to read: “any other form that a person in their circumstances would consider creates a reasonable expectation of a response from the other person.”

RECOMMENDATION 4. Amend the EM:

- at para 1.42 to state that email contact that creates an expectation of response can be unsolicited contact; and
- at para 1.41 to clarify that SMS and in-app offers can be unsolicited contact.

Request for contact (s992A(5))

A request should be unbundled, voluntary and specific as to purpose

We broadly support the requirements in section 992A(5) for a request for contact to be valid and not unsolicited contact in breach of the general prohibition on hawking. However, we consider that s992A(5) is missing three important requirements, namely that the request be:

¹⁹ FSRC, *Final Report, Volume 1*, p 283.

²⁰ FSRC, *Final Report, Volume 1*, p 283-4.

²¹ FSRC, *Final Report, Volume 1*, page 279.

- a) voluntary;
- b) unbundled; and
- c) specific as to purpose.

These additional requirements are consistent with Commissioner Hayne's recommendation, but would usefully align it with evolving consent practices under the Consumer Data Right. This would benefit industry and consumers alike in having similar conceptual approaches to obtaining consent to contact.

For example, a tick-box consent to a) enter a competition and b) be contacted about life insurance may be clear to some consumers, but is not unbundled. If ticking a box with a consent to be contacted about timeshare is the only way to access an online service, it may be clear and positive but not voluntary.

Consent may be positive and clear but not wholly voluntary given the existence of any imbalance of power. This includes the presence of any conditions via the bundling of consent of necessary and unnecessary uses, conflation of several purposes, and/or a potential detriment to the consumer were consent to be withdrawn or refused.

Terms and conditions, competitions, surveys

ASIC reported that some firms stated that:

they did not consider that they engaged in outbound sales, because consumers gave consent to be called (e.g. when entering a competition), or because an external third party 'pre-qualified' leads by calling to check if the consumer was happy to receive a call.²²

It is completely unrealistic to expect consumers to read and understand terms and conditions, even if they wanted to. Choice found it would take nine hours to read the Terms and Conditions of Amazon Kindle.²³ The CPRC found that:

- only 6.3% of survey participants reported that they always read Privacy Policies and Terms & Conditions documents;
- of the Australians surveyed who reported reading a Privacy Policy or Terms and Conditions for one or more services/products in the past 12 months, two-thirds (67 per cent) indicated that they still signed up for one or more products even though they did not feel comfortable.
- the most common reason (73 per cent) for accepting privacy policies with which consumers were not comfortable was that it was the only way to access the product or service.²⁴

The ACCC found in its Digital Platforms Inquiry that:

The ACCC's inquiries indicate that potentially problematic data practices, and the associated potential for consumer harm, extend beyond digital platforms to other markets. For example, many businesses seek consent to data practices using click-wrap agreements, bundled consents, and take-it-or-leave-it terms where consumers are not provided with sufficient information or choice regarding the use of their personal information.²⁵

²² ASIC, *Report 587: The Sale of Direct Life Insurance*, August 2018, para 297: <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-587-the-sale-of-direct-life-insurance/>.

²³ <https://www.choice.com.au/about-us/media-releases/2017/march/nine-hours-of-conditions-apply>

²⁴ Consumer Policy Research Centre, *Consumer data and the digital economy – Emerging issues in data collection, use and sharing*, p8-9 (internal citations omitted): https://cprc.org.au/wp-content/uploads/Full_Data_Report_A4_FIN.pdf.

²⁵ Australian Competition and Consumer Commission (ACCC), *Digital Platforms Inquiry – Final Report*, 26 July 2019, p25: <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>.

It is essential that this hawking ban prevent the kind of tick-a-box “consent” practices we have seen used to avoid the anti-hawking provisions. While we do not think that such tactics would meet the requirements of section 992A(5), the Exposure Draft Materials should put this beyond doubt.

The language in Example 1.8 in the Draft EM currently states:

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.

We agree that the consumer is unlikely to be informed, but their request would also fail to be voluntary and unbundled. The problem here is not just that people do not have time to read the terms and conditions; but they are offered on a take-it-or-leave-it basis as the only way to access the main service, competition or survey.

The inclusion of a competition terms and conditions example in the EM is helpful. However, the language in para 1.52 of the Draft EM should be strengthened by stating that ‘consent’ as part of terms and conditions for entering a competition or accessing a service *will not* satisfy the requirements of 992A(5). This will helpfully prevent firms trying to argue the case for continuing tick-a-box consent practices.

RECOMMENDATION 5. Amend the Bill to require that a request for contact under 992A(5) of the Corporations Act must also be: voluntary; unbundled; and specific as to purpose.

RECOMMENDATION 6. Amend the Exposure Draft Materials to put beyond doubt that ‘tick-box’ consent practices (including as part of terms and conditions to enter a survey, competition or access a service on a take-it-or-leave-it-basis) are unsolicited contact in breach of the hawking ban.

Timeframe for a request for contact

We consider that this timeframe should be reduced from six weeks to two weeks in 992A(5)(e).

The point of this reform is to ensure that conversations about buying complex financial products occur at a time when the consumer is in the right headspace; when they are not ‘unsuspecting’. The gap of six weeks means that, even if the consumer has previously wanted to speak about a product, such as life insurance, they may not have the information to hand were they to receive a call six weeks later. If the consumer has not re-engaged for six weeks, it is likely that they do not want or need the product.

Any business wanting to sell a product would likely respond to a request for contact within two weeks, so reducing the timeframe is unlikely to cause difficulty for firms in making sales.

We are strongly opposed to any ability for a person to consent to contact after six weeks, such as after a particular future event (e.g. at renewal time, after probate) or a specific time (e.g. end of financial year). That is, we do not support any ability for consumers to override the requirement of section 992A(5)(e). Any such ability would be open to gaming by firms by, for example, manipulating conversations to collect consent for future contact. When presented with such an option, some consumers would like to take it as a way to get the pushy salesperson off the phone. This would undermine the reforms and the harm it is designed to prevent.

While insurers may be keen to make contact for new business, in other contexts they have raised objections to actively contacting existing customers. For example, insurers have raised objections to being required, under the design and distribution obligations, to call renewing customers on an annual basis for the purpose of ensuring the customer remains within a ‘target market determination.’ Insurers cannot have it both ways. In our view, insurers should not get a loophole in the hawking ban to contact potential new customers at renewal time.

To the extent that there is any inconvenience to a small number of people who may want such contact, this is justified in order to prevent the harm exposed by the Financial Services Royal Commission. Consumers who do want to discuss a particular financial product at a particular time will follow up if they still want or need the product at the future date.

RECOMMENDATION 7. Reduce the timeframe for a request for contact in section 992A(5)(e) from 6 weeks to 2 weeks.

RECOMMENDATION 8. Do not include any ability for consumers to override the time period in section 992A(5)(e).

Ability to withdraw consent (s992A(5)(f),(6))

We support the requirement in s992A(5)(f) that a request for contact has not been previously withdrawn by the consumer. However, that requirement does not impact on the ease or a consumer's ability to withdraw consent. A consumer may not have withdrawn consent even when they wanted to because: they did not know they could; they didn't know how to; there was no way to do so; or the firm made it so difficult that if they abandoned any attempt.

In order to withdraw consent, the process must be easy for consumers, including people experiencing vulnerability. Consumers must also know how to do it, so firms and their third parties should provide information on how to withdraw that request at any time.

The Consumer Data Right requires an ability to withdraw consent; and that data recipients (ie. firms) must provide consumers with a straightforward process to do so, and provide information about that process to each consumer prior to receiving the consumer's consent. Similarly, under the EU GDPR regime, consent must be 'able to be withdrawn'.

This is not a theoretical concern. Firms routinely make it easy to agree to products and services but hard to exit. Commissioner Hayne explicitly called out:

the heavy-handed retention strategies employed by Freedom, which may result in policyholders finding it difficult to cancel policies that they no longer want or need. In my view, the community would not expect that an insurance company would make it so difficult to cancel a policy that was no longer deemed necessary or desirable.²⁶

In evidence to the Financial Services Royal Commission, Freedom's representative accepted that:

Freedom's retention processes had been too strong, and that Freedom had at times made it 'too difficult to cancel [policies]'. Information provided by Freedom to ASIC indicated that over a 12-month period, Freedom had received an average of 72 cancellation requests a day, and that policyholders had only succeeded in cancelling their policies in 28.5% of calls made to Freedom.²⁷

Without clearer guidance in the Bill and EM, firms may apply such practices to the withdrawal of a request for the purposes of the anti-hawking ban.

RECOMMENDATION 9. Consistent with the Consumer Data Right, amend the Bill to add requirements that any 'request for contact' is: capable of being easily withdrawn; only valid if the firm has provided information to the consumer on the process to withdraw the request.

²⁶ FSRC, *Final Report: Volume 2*, p 316: <https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-2-final-report.pdf>.

²⁷ FSRC, *Final Report: Volume 2*, p 312 (internal citations omitted): <https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-2-final-report.pdf>.

Reasonably within the scope of the request (s992A(5)(a)(ii))

Commissioner Hayne said that '[i]t should be made plain that a solicited meeting, call or contact to discuss one type of product may not be used for the unsolicited offering of some other type of product.'²⁸

We are concerned that s992A(5)(a)(ii) will be used by industry to flout the intention of the reform. To reduce this risk, ASIC should provide regulatory guidance, and the EM should include the following examples.

Different product to that initially requested by consumer

Consumers understanding of 'life insurance' is often very different to an insurer's understanding of the myriad policies that fall within the category of life insurance. We are aware of instances where a consumer has contacted an insurer to discuss obtaining an income protection policy, and agreed to a follow-up call. The consumer then does not obtain an income protection policy (either because the consumer cannot afford it, or because the insurer declines to provide cover), and the insurer instead contacts the consumer to offer another product, such as funeral insurance or a sickness and accident general insurance policy. Accidental death policies are in the realm of life insurance because they are sold by life insurers. But it is a junk product, that offers very little meaningful coverage by comparison to other life insurance products, as revealed by the Financial Services Royal Commission. Freedom also gave evidence of selling accidental death policies to customers attempting to cancel their life insurance,²⁹ noting that only 28.5% of calls where customers were seeking to cancel were able to cancel their policies.³⁰

Example: Offer of an alternative life insurance product

A consumer telephones an insurer after seeing an advertisement on television for income protection insurance. The consumer discusses the policy with the insurer, and agrees to a follow-up call. The insurer subsequently calls back to advise that it cannot offer the consumer income protection insurance, and instead offers a funeral insurance product. The subsequent telephone call would be unsolicited for the offer of funeral insurance.

Example: Offer of an alternative product

A consumer telephones an insurer after seeing an advertisement on television for income protection insurance. The consumer discusses the policy with the insurer, and agrees to a follow-up call. The insurer subsequently calls back to advise that it cannot offer the consumer income protection insurance, and instead offers a general insurance sickness and accident policy. The subsequent telephone call would be unsolicited for the offer of a general insurance sickness and accident policy.

Bundled life/general insurance products

The EM should also clarify whether a bundled policy with life and general insurance components can be offered if a person makes a request for 'life insurance'. One example of a bundled policy is bill protection insurance. For example, the GIO Bill Protect includes a disability benefit (a life insurance product) and a redundancy benefit (a general insurance product).³¹ In our experience, bundled products can be problematic for consumers, such as where the policy is unsuitable for the consumer.

Associated risks

Para 1.59(3) of the Draft EM states:

²⁸ FSRC, *Final Report: Vol 1*, p284.

²⁹ Exhibit #6.70, FIG.0008.0008.0013, 0044; Mr Orton accepted that this practice occurred and that it was inappropriate. See Transcript of Proceedings (Day 51, 11 September 2018) 5435.

³⁰ Transcript of Proceedings (Day 52, 12 September 2018) 5499–5506.

³¹ *GIO Bill Protect: Product Disclosure Statement and Policy Document*, prepared 1 March 2019.

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.

We strongly recommend that this be amended to 'reasonably associated risks' to ensure insurers' assessment of associated risks is reasonable.

We note Example 1.14 in the Draft EM involves the sales of home insurance with a mortgage. Whether or not this is within the scope of Eleanor's request, we consider that the Deferred Sales Model (FSRC Recommendation 4.3) should apply to this scenario. The example should be updated to reflect this.

RECOMMENDATION 10. Amend para 1.59(3) of the EM to read 'reasonably associated risks'.

Cross-selling to existing customers

We strongly support the inclusion of Examples 1.10 and 1.12 in the Draft EM, which indicates that a bank could not cross-sell car insurance with a home loan, and that car and home insurance are not in the same class of product. We strongly support this position.

There is a strong evidence base for this position, and the final Bill must resist any self-interested industry arguments for loopholes to allow unsolicited cross-selling of products. Commissioner Hayne considered the issue of cross-selling products to existing customers and stated that:

Of the submissions that opposed a prohibition on unsolicited offering or selling, at least two submitted that financial services entities should be permitted to offer financial products to existing customers or members in the course of, or because of, an unsolicited meeting. Consistently with the views that I have expressed in the chapter on superannuation, I do not consider that such an approach should be adopted. It would not prevent the detriments I have identified. I emphasise that I do not intend to place any restriction on the ability of insurers to contact current policyholders in relation to *existing* policies, including in order to notify policyholders that their insurance cover will shortly lapse. But hawking insurance products should be generally prohibited.³²

Compliance and remedies

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

Obligations to maintain records/monitoring

Often consumers subjected to unsolicited contact have no idea how the firm got their details. It is difficult for caseworkers advising consumers, sometimes months or years after the unsolicited contact, to determine if the hawking ban was flouted. In some cases, there are call recordings but they may be incomplete or unclear depending on how the "consent" to call was obtained. Call recordings are not available for unsolicited contact via shopping centre stalls, branch, in-app pop ups and other digital contact. Even where records might exist, it is not practical or appropriate to initiate legal proceedings for the purpose of discovery in order to ascertain whether such records exist.

Using Example 1.8 in the Draft EM, the consumer Christian is highly unlikely to have a copy of the competition entry form he signed at a shopping centre stall. Christian may not link the outbound call from the annuity provider to the form, so may not even think to look for a copy of the form. A preferable process is that Christian can request and obtain from the annuity provider a copy of the 'request for contact' the firm is relying on.

³² Final Report, Vol 1, page 2832 (internal citations omitted).

Consumers also need an easy way to obtain evidence of breaches to substantiate their complaints to the Australian Financial Complaints Authority (AFCA). We note the ongoing problems with firms, in AFCA disputes, failing to provide the information needed to establish consumer's claims.

It will become increasingly difficult for a regulator to monitor and enforce the ban if autonomous programs are making offers under the guise of conducting similar fact finding exercises or mining existing customer data, such as the information available under the Open Banking regime.

Firms must have a positive obligation to document and keep records of their contact with consumers to show that contact was not 'unsolicited contact', to provide this information on request by the regulator or consumer, short of discovery proceedings. Civil penalties should apply to a breach, as for record-keeping by mortgage brokers and financial advisors. This is also important for the consumer's right of return and refund to have any utility. Obligations to maintain and provide access to records will incentivise compliance with the ban and facilitate access to justice.

RECOMMENDATION 11. Ensure firms have a positive record keeping obligations to demonstrate compliance with the ban and make that evidence easily available to regulators and affected consumers, with civil penalties applying for breach.

Right of return and refund (s992AA)

The remedies under the draft Bill appear to have been taken from the existing remedies for consumers under the existing anti-hawking provisions. The cooling off timeframes are very short – in some cases, only one month and 14 days from sale (s992AA(1)(b)). The existing remedies have not served consumers well.

Some financial products can trap consumers in the product for many years – up to 99 years, in the case of timeshare.³³ Timeshare is a complex financial product that is sold in a high-pressure sales environment and lock people into expensive and poor value contracts for decades. CHOICE recently assisted a couple aged 69 who were locked into a timeshare contract until 2076. The timeshare provider refused the couple's request to exit the scheme. Similarly, with funeral insurance products, people may be concerned to cancel the product and lose coverage if they have paid significant amount in premiums.

As the Freedom case study in the Financial Services Royal Commission revealed, it can be very difficult for consumers to get out of products they never wanted. It took two phone calls and an email for Reverend Grant Stewart to cancel the accidental death policy mis-sold to his son.³⁴ We refer to the excerpts from the FSRC Final Report at page 12 above on the difficulty of cancelling Freedom insurance policies.

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

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

RECOMMENDATION 12. Remove the time limit on the right of return and refund for hawked products in s992AA.

³³ CHOICE, *Trapped in a Classic Holiday timeshare. Children to inherit parents' bad deal that won't end till 2076*, 13 September 2019: <https://www.choice.com.au/travel/accommodation/timeshare/articles/classic-holidays-timeshare-booth-case> .

³⁴ <https://www.smh.com.au/business/banking-and-finance/bloody-whinger-freedom-staff-resisted-request-to-cancel-insurance-20180912-p50387.html>.

Compensation for loss and damage

It is not immediately clear from the Exposure Draft Materials what consumer remedies apply to a breach of the hawking ban. Private consumer remedies must include compensation for consequential loss and damage, including non-financial loss. The impact on consumers can be far greater than lost money. As evidence to the Financial Services Royal Commission revealed, unsolicited contact can leave people – particularly those experiencing vulnerability – feeling disempowered, distressed, embarrassed, and unwilling to take calls from private numbers in future.³⁵

RECOMMENDATION 13. Private consumer remedies must include compensation for consequential loss and damage, including non-financial loss, for breaches of this prohibition.

Remedies for non-party consumers in enforcement action

It is unclear from the Exposure Draft Materials whether ASIC could seek, in enforcement action, redress for non-party consumers (as per s12GNB of the ASIC Act), allowing it to seek remedies for a class of people affected by breaches of the hawking ban. These remedies are an efficient mechanism for consumer redress.

RECOMMENDATION 14. Confirm that ASIC will be able to seek remedies for a class of affected consumers in enforcement action.

Penalty units

A breach of the hawking ban attracts a mere 60 penalty units, or a maximum \$12,600 fine. This is far too low. By comparison, a breach of the deferred sales model for add-on will attract a maximum penalty for 2000 penalty units for individuals, and 20,000 for a body corporate.

The penalty framework in the bill is based on the existing anti-hawking provisions in the Act. The existing penalties were too low to deter breaches. ClearView, for example, admitted to breaching these provisions 300,000 times.

We strongly recommend the penalties be brought into line with penalties under section 12GB of the ASIC Act, being 2000 units for an individual and 20,000 for a body corporate. This would also bring the penalty regime into alignment with penalties under the deferred sales model for add-on insurance – another FSRC reform intended to improve sales practices in insurance.

RECOMMENDATION 15. Increase penalties for a breach of the hawking ban to 2000 units for an individual and 20,000 for a body corporate.

Name of the Bill

We suggest changing the bill and associated materials from 'no hawking' to 'no unsolicited selling'. The word 'hawking' does not mean anything to consumers. This aligns with what is effectively being banned – offering or selling through 'unsolicited contact' as per proposed s 992A(1) of the Corporations Act. This would bring the financial services provisions into alignment with other unsolicited selling bans and restrictions:

- unsolicited consumer agreement provisions in the Australian Consumer Law,
- unsolicited communications as regulated by the ACMA;
- 'unsolicited contact' in the *National Consumer Credit Protection Regulations 2010*;³⁶ and
- unsolicited credit limit increases.

³⁵ <https://www.theguardian.com/australia-news/2018/sep/11/clearview-life-insurance-staff-trained-in-tactics-that-broke-law-banking-inquiry-told>.

³⁶ Rule 3 and Rule 23; see also ASIC, *Regulatory Guide 203: Do I need a credit licence?* 12 October 2017, at paras 130-134: <https://asic.gov.au/media/4511533/rg203-published-12-october-2017.pdf>.

Commencement

We strongly support the commencement date of 1 July 2020.

Firms that take seriously their obligation to act honestly, fairly and efficiently should be able to meet this timeframe. The ban on unsolicited selling of insurance and superannuation was recommended by Commissioner Hayne in the February 2019 Final Report. Most of the financial products subject to this reform are already subject to the anti-hawking provisions in the Corporations Act. Insurers have been subject to a ban on outbound phone sales of life insurance and consumer credit insurance since 13 January 2020.³⁷ Any firms currently engaging in unsolicited selling of financial products despite the known harm and forthcoming reforms should be make urgent changes to their business practices right now.

Any argument from industry that they don't have systems to track the last known date of contact with a consumer (for the purposes of the 6-week requirement in section 992A(5)(e)) should be treated with scepticism. Firms selling financial products have systems in place to track sales activity. Any basic Customer Relationship Management software has the ability to see the last date of a contact with a caller and set deadlines.

Further, and more concerning, every firm subject to this ban is also subject to internal dispute resolution requirements under ASIC RG165,³⁸ including that they respond to a 'expression of dissatisfaction' within 45 days, regardless of how or to whom within the firm that the consumer deals with. If a firm cannot start a time-based measure after a particular contact (whether in-store, online or via phone), then they are unlikely to be complying with these requirements. A lack of such systems must be an urgent priority for any such insurer, super fund or provider of financial products.

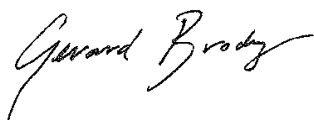
³⁷ ASIC Corporations (Hawking—Life Risk Insurance and Consumer Credit Insurance) Instrument 2019/839. For more information, see <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-335mr-asic-to-ban-unfair-cold-call-sales-of-direct-life-insurance-and-cci/>.

³⁸ ASIC, *Regulatory Guide 165: Licensing: Internal and external dispute resolution*, May 2018, <https://download.asic.gov.au/media/4772056/rg165-published-18-june-2018.pdf>.

Contact details

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

Yours Sincerely



Gerard Brody | CEO
CONSUMER ACTION LAW CENTRE



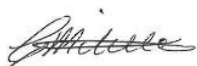
Erin Turner | Director Campaigns & Communications
CHOICE



Karen Cox | CEO
FINANCIAL RIGHTS LEGAL CENTRE



Fiona Guthrie | CEO
FINANCIAL COUNSELLING AUSTRALIA



Gemma Mitchell | Managing Solicitor
CONSUMER CREDIT LEGAL SERVICE (WA) INC

APPENDIX A – ABOUT THE CONTRIBUTORS

Consumer Action Law Centre

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

Consumer Credit Legal Service (WA) Inc

Consumer Credit Legal Service (WA) is a not-for-profit charitable organisation which provides legal advice and representation to consumers in WA in the areas of banking and finance, and consumer law. We strengthen the consumer voice in WA by advocating for, and educating people about, consumer and financial, rights and responsibilities. In the 2018/2019 financial year, we represented over 100 clients in their disputes, and participated in over 40 law reform activities.

CHOICE

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

Financial Counselling Australia

FCA is the peak body for financial counsellors in Australia. We are the voice for the financial counselling profession and provide support to financial counsellors including by sharing information and providing training and resources. We also advocate on behalf of the clients of financial counsellors for a fairer marketplace.

Financial Rights Legal Centre

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

Appendix B – List of Recommendations

RECOMMENDATION 1. Include an anti-avoidance measure similar to section 69(1A) of the Australian Consumer Law.

RECOMMENDATION 2. Replace the words 'are unlikely to' with 'will not' in para 1.37 of the EM.

RECOMMENDATION 3. Remove section 992A(4), so that all contact is capable of falling within the definition of 'unsolicited contact' if the consumer did not request it or the requirements of subsection (5) are not met. **Alternatively**, amend section 992A(4)(a)(iii) to read: "any other form that a person in their circumstances would consider creates a reasonable expectation of a response from the other person."

RECOMMENDATION 4. Amend the EM:

- at para 1.42 to state that email contact that creates an expectation of response can be unsolicited contact; and
- at para 1.41 to clarify that SMS and in-app offers can be unsolicited contact.

RECOMMENDATION 5. Amend the Bill to require that a request for contact under s992A(5) of the Corporations Act must also be: voluntary; unbundled; and specific as to purpose.

RECOMMENDATION 6. Amend the Exposure Draft Materials to put beyond doubt that 'tick-box' consent practices (including as part of terms and conditions to enter a survey, competition or access a service on a take-it-or-leave-it-basis) are unsolicited contact in breach of the hawking ban.

RECOMMENDATION 7. Reduce the timeframe for a request for contact in section 992A(5)(e) from 6 weeks to 2 weeks.

RECOMMENDATION 8. Do not include any ability for consumers to override the time period in section 992A(5)(e).

RECOMMENDATION 9. Consistent with the Consumer Data Right, amend the Bill to add requirements that any 'request for contact' is: capable of being easily withdrawn; only valid if the firm has provided information to the consumer on the process to withdraw the request.

RECOMMENDATION 10. Amend para 1.59(3) of the EM to read 'reasonably associated risks'.

RECOMMENDATION 11. Ensure firms have a positive record keeping obligations to demonstrate compliance with the ban and make that evidence easily available to regulators and affected consumers, with civil penalties applying for breach.

RECOMMENDATION 12. Remove the time limit on the right of return and refund for hawked products in s992AA.

RECOMMENDATION 13. Private consumer remedies must include compensation for consequential loss and damage, including non-financial loss, for breaches of this prohibition.

RECOMMENDATION 14. Confirm that ASIC will be able to seek remedies for a class of affected consumers in enforcement action.

RECOMMENDATION 15. Increase penalties for a breach of the hawking ban to 2000 units for an individual and 20,000 for a body corporate.