FSC FINANCIAL SERVICES COUNCIL

Royal Commission Recommendations 3.4, 4.1 & 4.3 Hawking of financial products and Deferred sales model for add-on insurance

FSC submission

February 2020

Contents

1. About the Financial Services Council

The FSC is a leading peak body which sets mandatory Standards and develops policy for more than 100 member companies in Australia's largest industry sector, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing almost $3 trillion on behalf of more than 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world.

2. Introduction

2.1 Overall comments

The FSC welcomes the opportunity to submit a response to the proposed legislation. We are thankful for the opportunities afforded to us and also other organisations to participate in the consultation process thus far. We look forward to meeting productively with both Treasury and ASIC during the final drafting and ongoing implementation of the legislation.

As set out within the Final Report of the Financial Services Industry Royal Commission (**Royal Commission**), it is clear that the primary policy intent of the proposed legislation that covers anti-hawking and the implementation of a deferred sales model for add-on insurance is to ensure that consumers are not cold called by a financial services provider or otherwise pressured by a financial services provider into making an immediate decision to purchase a product that they have not had time to properly consider. FSC fully supports this intent and wholly agrees with the recommendations made in the Royal Commission Final Report[1].

However, we have serious concerns that the draft legislation employs the use of concepts and offers guidance that unintentionally take it beyond the spirit of these Royal Commission recommendations and, in particular, unnecessarily restricts natural conversations with consumers. This issue, however, can easily be addressed through minor drafting changes as set out in Appendix A.

2.2 Key recommendations

Our response provides suggestions and seeks clarification on the proposed legislation in line with our understanding of the policy intent. Our key points are as follows:

- We recommend the proposed Anti-hawking legislation be amended to permit natural conversations that are initiated by consumers. Natural conversations

[1] Recommendations 3.4, 4.1 and 4.3 of the Final Report of the Royal Commission.

between consumers and financial product providers can generally lead to another class of product being discussed and general information being provided. In these circumstances it should not be deemed hawking if the consumer was asked whether they wanted to hear more about a product and they provided a positive, clear and informed request to receive more information.

- We recommend the implementation timing of the enhanced Anti-hawking regime align with the Deferred Sales Model regime, that is, one year after Royal Assent. The FSC's members share serious concerns that, without a transition period, life insurers and superannuation funds would be unable to comply with the imminent introduction of the enhanced Anti-hawking regime.
- We recommend the proposed legislation extend the six-week timeframe for the purchase of life insurance products to recognise the lengthier nature of the application process for life insurance.
- We recommend the legislation recognise that all individuals who 'hawk' superannuation or insurance products should be captured by these provisions, regardless of whether they are explicitly authorised by a product provider.
- We recommend the removal of restrictions during the pre-deferral period that are placed on pro-active consumers who specifically request for further contact to be scheduled relating to the add-on insurance product.
- If the Anti-hawking legislation clarifies that non-CCI life insurance products that provide cover for associated risks may reasonably be within the scope of the request for another product, then we recommend the proposed definition of add-on insurance clarify that the industry wide Deferred Sales Model applies only to those life insurance products classified as Consumer Credit Insurance (**CCI**).

2.3 FSC principles

Our response to Treasury has been formulated in the context of our three over-arching principles, which are as follows:

1. *Consumers should be afforded all reasonable means to choose how they best achieve a financially secure future. Importantly, they should be and feel in-control when they engage in financial services.*
2. *A strong and competitive financial services industry will result in products and services that are of good value to consumers.*
3. *Changes to existing legislative and regulatory regimes must be even-handed. Minimising consumer harm means balancing the benefits of enhancing consumer protections against the associated costs and restrictions imposed on consumers.*

3. Hawking of financial products

3.1 Natural conversations

The FSC is highly concerned that the enhanced Anti-hawking regime will restrict the choice and control afforded to consumers by eliminating or impeding natural conversations about financial products. Natural conversations help consumers understand what products are available and also help the financial services provider understand which products may be of genuine interest to the consumer.

The FSC agrees with the principle-based approach adopted in the proposed legislation, specifically the need for a consumer to first make a clear, positive and informed request (**CPIR**). We believe this approach will ensure that consumers are not exposed to situations in which they may be offered a financial product before they have been allowed to assess critically the features of the product that was being offered.

We note that the draft Anti-hawking legislation proposes changes to Section 992A of the Corporations Act 2001 so that consumers may not be offered, requested or invited to purchase or apply for a financial product if this is made in the course of, or **because of**, an **unsolicited contact** with the other person.[2] The EM for the Anti-hawking Bill builds further on the 'because of' wording by attaching the notion of the 'causal nexus'.

In our view, the use of the phrase 'because of' an 'unsolicited contact' and the notion of the 'causal nexus' do not sufficiently allow for the natural exchange of information during a consumer interaction.

For example, often consumers do not think about life insurance or income protection until they suffer an illness or injury and by this time it may be too late for the consumer to obtain comprehensive cover due to the consumer's deteriorating health. Allowing organisations to highlight life insurance products to consumers is in the public interest, particularly in circumstances where the natural flow of conversation with the customer demonstrates that the customer may have an interest in or would benefit from considering available life insurance products.

In the context of superannuation, efforts to educate and engage individuals are important to ensure members understand their own product as well as the system more broadly. Discussions about particular products, for example in a workplace context where there is a default superannuation offering, are likely to be part of a natural conversation.

Where there is no pressure selling element, these conversations should not be restricted on the basis that a product offer may be made.

We believe the drafting of the proposed legislation severely restricts the ability of an organisation to provide information on other products that are available to customers in the course of a meeting or telephone call, even if it is identified that there may be genuine interest during that conversation. Our key issues with the proposed legislation are:

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[2] The FSC notes that the wording of the proposed legislation has been designed to provide consistency with ASIC's *Regulatory Guide 38 The Hawking Prohibitions* (**RG 38**).

- The definition for the types of contact that would be considered 'unsolicited' should only apply where there is an "expectation of an immediate response". However, the requirement of an "expectation of an immediate response" currently applies to "any other form [of contact]" but not also to telephone calls or face to face meetings. Therefore, any part of any face to face meeting or telephone call would be considered unsolicited contact even where there is no "expectation of an immediate response". There are circumstances where communications such as telephone calls would not create the expectation of an immediate response, and therefore should not be considered hawking. For clarity, the drafting of Section 992A(4) should be amended to ensure that the "immediate response" test can be applied in relation to any individual communication, rather than creating a blanket ban on particular forms of communication. This allows additional flexibility without diluting the intent of the Bill.
- While the definition for unsolicited contact allows for the scenario where the consumer initiates the contact by making a CPIR, it arguably does not also consider the scenario where the consumer subsequently makes a CPIR following contact initiated by the consumer about a different matter. This will significantly impede the ability to have any natural conversations that enable important flow of information to the consumer. Without these natural conversations, we are highly concerned that knowledge of and education about financial products will be detrimentally impacted, especially for those Australians who may not be able to access the support of a financial adviser. We therefore strongly recommend this issue be addressed in the draft Bill.
- In line with enabling the natural flow of conversations, we recommend the EM make clear that ascertaining consumer interest or informing the consumer about the product (such as by providing the PDS) does not in itself constitute an offer, request or invitation that creates the expectation of an immediate response, and therefore not considered to be unsolicited contact.

We have suggested some minor wording changes to the draft legislation for how these issues could be addressed in Appendix A.

We also submit that additional guidance be provided in the EM to clarify the proposed legislation. We have provided several examples in Appendix B.

Recommendation

Clarify the draft Anti-hawking legislation to ensure natural conversations that are initiated by the consumer are permitted. Natural conversations between consumers and financial product providers can generally lead to another class of product being discussed and general information being provided. In these circumstances, it should not be deemed hawking if the consumer was asked whether they wanted to hear more about a product and they provided a positive, clear and informed request to receive more information. Without these natural conversations, we are highly concerned that knowledge of and education about financial products will be detrimentally impacted, especially for those Australians who may not be able to access the support of a financial adviser.

3.2 Timing of obligations

The FSC agrees that the enhancements to consumer protection from the proposed Anti-hawking legislation is a vital step to ensure consumers can be and feel more in-control when they engage with superannuation and insurance products. However, we caution strongly against an implementation date that does not allow industry any transition period. We seriously urge policymakers to reconsider the associated costs and potential for consumer harm with a rushed commencement date for obligations under the proposed legislation.

We note that Anti-hawking prohibitions already apply and are also subject to further prescribed guidance from ASIC under *Regulatory Guide 38 The Hawking Prohibitions* (**RG 38**). We further note that since the Royal Commission, enhancements to consumer protection against hawking have already been made, as evidenced by the recent update to RG 38 to reflect the ban on unsolicited telephone sales of direct life insurance and CCI effective from 13 January 2020.

The FSC's members share serious concerns on the achievability for industry in meeting the proposed timing of the Anti-Hawking legislation. The proposed legislation does not currently allow for any transition period, rather obligations are proposed to commence imminently on 1 July 2020. The financial services sector is undergoing significant reforms. The changes required for the Anti-Hawking legislation must be placed within this broader context.

To assist Treasury in its recommendation to Government, we have set out the specific areas that life companies and superannuation funds would be required to review and change to comply with the Anti-Hawking legislation. The FSC considers that companies require at a minimum six months from Royal Assent to fully implement the required changes, which involve:

- Scripting – all scripting will need to be reviewed from both a referral perspective for referral partners and for all product information and sales scripts. All customer facing staff and other representatives across call centres and branches will then need to be trained in respect of the changes and this entire process will take at least six months to be implemented.
- Training – all training materials will need to be reviewed, amended and training will then need to be rolled out for all customer facing staff and other representatives across call centres and branches. Given the changes will also affect non-employed authorised representatives of direct providers, this will take up to six months to complete for large direct providers.
- Systems – there will be amendments to systems which will include all customer journeys, electronic applications, websites, web chats etc to ensure appropriate record keeping for consumer requests. Again, organisations will require six months minimum but given the suite of legislative change coming through, more time is required given the tremendous strain on IT resources. Earlier implementation will mean reliance on manual workarounds. Breaches are more likely as a result.
- Monitoring – adjustments to quality assurance oversight practices will take time to draft and train QA agents for. Inevitably the scope of changes required to redesign monitoring criteria are dependent on where the legislation and EM ultimately lands.

- Compliance – refinements to the compliance program will take account of all of these changes, plus the implementation of appropriate reporting mechanisms, which would be expected to take at least six months. It is also not possible to have a fully functioning and reliable oversight mechanism in place in such a short timeframe.

The Anti-Hawking and Deferred Sales Model regimes are inherently interconnected as all life insurance products must fall under obligations of either regime. There is however a one-year transition period offered under the Deferred Sales Model legislation but none for Anti-Hawking. This means that within just one year, companies will need to implement further changes for add-on insurance products that then will fall under obligations of the Deferred Sales Model regime. As further detailed in the Deferred Sales Model section of our submission, there currently exists significant uncertainty as to the circumstances for which life insurance products would fall under which regime. Aligning the timing of obligations under the enhanced Anti-Hawking regime with the Deferred Sales Model regime provides certainty for industry and eliminates the need for companies to incur overlapping compliance costs.

Recommendation

Align the implementation timing of the enhanced Anti-Hawking regime with the Deferred Sales Model regime, that is, one year after Royal Assent. The FSC's members share serious concerns that without a transition period, life insurers and superannuation funds would be unable to comply with the imminent introduction of the enhanced Anti-Hawking regime.

It is further likely that that within just one year, life insurers will need to implement further changes for add-on insurance products that will then fall under obligations of the Deferred Sales Model regime. Ultimately, associated costs under a rushed implementation strategy would either be borne by the consumer or place an additional challenge on industry sustainability.

3.3 Specific points regarding superannuation

Defining an interest in a product

There have been some questions raised by stakeholders in relation to how a "superannuation interest" should be defined.

The application should be based on a 'financial product' in the context of the *Corporations Act 2001* for which product disclosure statements must be given. A superannuation product may include a series of investment choices, including MySuper, and members will often have the option to make investment choices within this product.

The EM currently makes this distinction quite clear at paragraph 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.

Similarly, paragraph 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.

This application aligns most closely with how members consider their superannuation accounts, and will be the least likely to cause confusion among members.

Anecdotal evidence from FSC members shows that a small but not insignificant number of members make choices from the investment menu within the same product, after being defaulted into a MySuper option.

It is possible that a member may hold an interest in more than one financial product within a superannuation fund – for example if they were to have an account in a corporate superannuation product as a result of their employment, but they maintained another account in a wrap/platform product within the same superannuation fund. In this instance, each account would be considered a separate financial product for which a separate and distinct PDS would be available.

This reflects how a member considers their own superannuation, and reflects what they would see if they logged into their MyGov account to view their superannuation accounts.

If the application of the provisions were to use the *Superannuation Industry (Supervision) Act 1993* definitions and treat MySuper and Choice investment options separately, there is a question as to how a member in an existing product could 'apply' for an interest in a MySuper or a Choice option, or indeed how a person could make an 'offer' in relation these options.

There is no distinct application form for these purposes, nor is there a separate PDS for these classes of interest. That is because in most cases they are investment options within a superannuation product, as the EM currently states, and not separate financial products. They can only be obtained by firstly acquiring an interest in the superannuation product.

Superannuation is already inherently complex for members to understand without adding an additional layer of complexity and having to provide separate disclosures and applications for different components of a product. Application to options within a product would also limit trustees' ability to engage with their members about the product they are invested in, at a time where member engagement in superannuation is already low.

Recommendation

Clarify that hawking provisions apply at a product level, based on the definition of a 'financial product' in the context of the *Corporations Act 2001*.

Retirement products

It is currently not clear how retirement products would be treated under hawking provisions.

In particular, while some retirement income products may not be captured for existing members because they may be considered to be forming part of the superannuation interest as described in the EM at 1.28, it is not clear how annuities and other innovative retirement products would be impacted. All products should be treated equally under hawking requirements, and the Bill should be drafted to reflect this.

While we do not support pressure-selling of retirement products, it is important that funds can have conversations and prompt members to consider their retirement options without inadvertently being caught by hawking provisions.

It is also important for trustees to be able to have conversations with beneficiaries entitled to receive a superannuation death benefit as a result of the death of a member of the fund. Where a beneficiary is eligible to choose to receive the benefit in the form of a retirement income stream, the trustee should be able to inform the beneficiary about retirement products in the fund.

Proposed s 992A(2)(i) provides that the general prohibition on hawking does not apply to an offer of a financial product involving a change in membership from one sub-plan in the fund to another sub-plan in the fund or an offer made to a non-member spouse. There is no specific exception for an offer made to a beneficiary. This situation is, however, very similar to the non-member spouse scenario for which an exception applies.

It will also be vital to consider how hawking may interact with the exemption under Recommendation 3.1, which allows trustees to provide personal advice, and a future Retirement Incomes Covenant which would create an obligation for trustees to discuss retirement with their members.

Recommendation

Ensure the hawking provisions provide a level playing field for all retirement products, and provide clear examples of retirement conversations that would not be considered hawking.

Employee seminars and education

Superannuation funds often conduct education sessions at workplaces where the offer to attend and present is made to an existing workplace superannuation Employer.

Fund representatives will either attend in person or provide a seminar digitally, to employees. These seminars are often on general superannuation topics, and open to interested staff regardless of whether they are a current member of the fund.

In some circumstances, where a fund has won a new workplace superannuation mandate, an education session would be run (at the invitation of the employer who nominated the fund) for all employees of the company. At the time of running the initial information sessions, none of the people being presented to would be members of the fund.

In both of these scenarios, there may be information provided about the product to attendees. While there is no expectation that non-members make an immediate decision in relation to joining the fund, some may wish to do so at the time.

Currently, it is not clear whether the fund would be considered to be making an offer when undertaking these seminars. It would be useful for the EM to provide an example clarifying that these seminars would not be considered hawking, where no specific offer is made to a non-member without them providing a positive request.

In addition to the above, many large employers across the country, including financial services groups, offer meaningful discounts to employees for products they issue. These groups (and other non-financial services businesses) also routinely use the scale of their employee-base to negotiate discounts or additional benefits for a variety of products and services, including financial products, with other providers on behalf of their employees.

Employers commonly educate their employees about all of these important employee benefits through onboarding material and conversations, as well as through roadshows and seminars focused on the range of employee benefits available. These arrangements provide meaningful benefits to employees as consumers, and an employer making an employee aware of the benefits available to them as a result of their employment, again where there is no expectation of an immediate decision being made, should not be considered to be hawking.

Recommendation

Amend the EM to provide a clear example of a situation where an employee seminar, which may involve a non-member being "offered" a product, would not be considered hawking.

Third parties

The FSC is concerned that potential ambiguity in the drafting of which parties are captured by the prohibition on hawking may result in inequitable outcomes across the industry and circumstances where hawking is permitted to continue.

The draft bill provides that:

(1) A person must not offer a financial product for issue, transfer or sale to another person, or request or invite another person to ask or apply for a financial product or to purchase a financial product, if:

(a) the other person is a retail client; and

(b) the offer, request or invitation is made in the course of, or because of, an unsolicited contact with the other person.[3]

[3] Section 992A of the Draft Bill

In relation to who is captured by this provision, the Explanatory Memorandum to the bill explains that:

> *the hawking prohibition applies regardless of whether the financial provider uses a representative or other third party during the sales process.*[4]

and that:

> *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.*[5]

However, it is not clear that all 'persons' that promote and sell superannuation products will fall within the definition of 'agents and representatives' of product issuers.

There may be instances where third party representatives, not employed by a superannuation fund, visit a workplace and hold unsolicited conversations with employees on superannuation. It is our understanding that third parties may, on occasion, proactively raise superannuation matters and recommend specific superannuation funds without any request from the employee.

Where any individual undertakes activities of this nature which meet the definition of hawking, the same risk of consumer detriment is created.

However, if the superannuation fund is not remunerating, or providing direction to, an individual, then they may not be considered an 'agent or representative' of the fund, and their promotion of a particular fund may not be considered "making an offer" for the purposes of this Bill.

As a principle, similar forms of hawking should be treated equally, regardless of the parties that are doing the hawking.

The FSC recommends that the Bill be amended to clarify that the protection applies to hawking where it is carried out by any person, irrespective of whether or not they act on behalf of, or are associated with, the product provider.

Recommendation

Make appropriate amendments to ensure that any individual who promotes a superannuation product must comply with hawking provisions, whether or not they are specifically authorised by a superannuation fund.

[4] Explanatory Memorandum at 7
[5] Explanatory Memorandum at 7

Employer sponsors

Under the Corporations Regulations[6], employer-sponsors may be considered retail superannuation clients in some circumstances.

Under a strict reading of the Bill, any unsolicited approaches made to employer-sponsors (for example, for the purpose of exploring a sponsored superannuation offering) may be captured under the definition of hawking as the employer (a retail client) has not asked for the contact about that superannuation product.

Importantly, there is no expectation of an immediate response during these calls, and typically discussions with employers span several months and several offers may be made during that time as the employer refines what it is looking for. However due to 992A(1)(b) which considers a request "made in the course of, or because of, an unsolicited contact" to be hawking (see also paragraph 1.33 of the EM) it is not clear that a proposal the employer requests from a superannuation fund would not be captured.

The FSC understands that it was not the Government's intention to capture employers in these provisions, and we consider that the wording change proposed in **Appendix A** would be helpful in clarifying the intent.

It also may be helpful to provide a relevant example in the EM to reflect this position.

Recommendation

Clarify that employers are not captured by anti-hawking provisions.

3.4 Specific points regarding life insurance

Request for related financial products that provide cover for associated risks

We note that Paragraph 1.59 EM and the following examples provide some guidance around financial product/s a reasonable person would consider offering to the consumer to have been reasonably within the scope of the request. We further note that examples 1.13 and 1.14 provide guidance for where general insurance products may be offered to provide cover for associated risks of another product. We recommend that the EM include a similar example for how a life insurance product could be offered in a similar scenario. We have suggested one example covering this scenario in **Appendix B**.

We note that this recommendation must be considered in conjunction with our recommendation in Section 4.2, which submits that only life insurance products classified as CCI are captured in the Deferred Sales Model regime.

Recommendation

Amend the EM to provide a clear example of a situation where a life insurance product may be offered to provide cover for associated risks of another product.

[6] In particular Regulation 7.1.28AA

Time to respond to a customer's request

Life insurance purchases involve more detailed application requirements and take more time than applying for many other financial products. Unlike superannuation, investment and most general insurance products, bespoke information (medical and underwriting) may be requested as part of the underwriting process. For many consumers, life insurance is not a financial product that is typically purchased again each year from a different provider and so consumers tend to shop around to ensure they have considered products from different providers. Many consumers choose to apply for life insurance through multiple providers at once to assess the range of terms they would be offered before entering into a contract. Consequently, it is not uncommon for the consumer interaction relating to a single life insurance request to extend for longer than six weeks before the final terms are offered for issue or sale.

We note that the proposed legislation is unclear whether 'the contact' refers to the initial contact or the entire period of contact. If this was the entire period of contact, the FSC envisages many instances whereby a life insurer would initiate contact with the consumer solely for the purpose of 'checking-in' to renew the consumer request in order to 'reset' the six-week request period. Such compliance actions would understandably frustrate consumers.

We note that consumers can always choose to withdraw their request, at which point further contact initiated by the financial product provider requiring an expectation of an immediate response would be unsolicited. This would equally apply under any length of time proposed for the request period, so there is little potential consumer harm by having a more appropriate timeframe for life insurance products.

Recommendation

Extend the proposed six-week timeframe for the purchase of life insurance products. Due to the nature of the underwriting requirements, a significant proportion of life insurance contracts would reasonably be expected to take longer than six weeks before a binding offer of issue or sale is made to the consumer.

As potential solutions to the highlighted issue, we suggest Treasury consider the merits of either:

- Clarifying that the six-week contact period from the date of the initial request relates only to the initial response of the life insurance product provider; or
- Extending the contact period from the date of the initial request from six weeks to three months where the request relates to a life insurance product.

3.5 Additional technical amendments

Several additional inconsistencies have been identified in the legislation, which should be addressed to simplify compliance and ensure clarity of obligations:

- Section 992AA(1)(a) refers to the Corporations Act provisions for cooling-off periods in section 1019B, which entitle the client to “have the money they paid to acquire the product repaid.” However, section 992AA(2)(a) and (b) creates a different obligation, to terminate “without penalty to the client.” It is not clear why two separate formulations are required in relation to refunding amounts, and it would be helpful to have a single consistent requirement.
- Section 992AA(1) refers to “the issuer” contravening section 992A. However, it is possible that a person other than the issuer has contravened the requirements – for example a third-party hawking superannuation products in a workplace as identified above. It will be important to be clear about obligations of a product issuer where another individual has contravened hawking provisions.
- Section 992AA currently provides for exempt classes of financial products from anti-hawking provisions through regulation. For consistency, an equivalent provision should be inserted in section 992A.

4. Deferred Sales Model for add-on insurance

The FSC comments and suggestions in the proceeding sub-sections have been provided in the context of our understanding of how the sale of add-on insurance will operate under the Deferred Sales Model. To assist Treasury in their consideration of our response, we have provided a diagram in **Appendix C** to summarise our understanding.

4.1 Requests made during the pre-deferral period for further contact

The proposed legislation contemplates the scenario where the consumer informs the principal or third-party provider that they no longer wish to receive offers, requests, or invitations to purchase or apply for an add-on insurance. We agree with Treasury's approach to prohibit any offers, requests or invitations relating to this add-on insurance product following the consumer's request as the consumer needs to be and feel in-control.

However, the legislation is noticeably silent in circumstances where the consumer plays a pro-active role by opting-in to further contact. We refer to *Scenario 2* within **Appendix C**. In this scenario, the consumer self-initiates a request clearly expressing their preference for the nature and timing of the further contact by saying, for example:

> *"Please give me a call in three days on Friday morning and I'll let you know whether I want to buy the add-on or not".*

However, the request recipient is prohibited from meeting the consumer's request under the proposed legislation. Instead, the recipient must inform the consumer that they are unable to provide an offer that is not in-writing unless the consumer makes a separate request once the deferral period starts. The consumer is clearly not in-control.

Recommendation

Remove restrictions placed on pro-active consumers requests during the pre-deferral period relating to the add-on insurance product. We submit that consumers should not be restricted in their interaction arising from the insurer's inability to schedule further contact that directly relates to the consumer's request.

4.2 Prohibition of sales until after the deferral period

Under the Deferred Sales Model proposed by Treasury, sales of add-on insurance are prohibited until after the deferral period. The end of the deferral period occurs four days following the later of:

- the time the consumer enters into the commitment to acquire the principal product or service; and
- the time the consumer is given the information prescribed by ASIC.

The FSC and its members appreciate the intent of the Deferred Sales Model is to insert a pause into the sales process to give consumers additional time to navigate the complexities

of add-on products and facilitate improved decision making.[7] We believe the proposed legislation will help to address the issues highlighted by the Royal Commission case study on add-on insurance[8], which related to the sale of consumer credit insurance (**CCI**) as an add-on insurance product in car yards.

However, we have strong concerns that the industry wide application of the Deferred Sales Model to add-on insurance will mean systemic consumer restriction for classes of add-on insurance products where there is no evidence base to support issues of pressure-selling and poor customer value. We note that these issues will already be covered by the design and distribution obligations (**DDO**), which will commence prior to the proposed Deferred Sales Model regime[9].

In particular, the FSC is concerned that the proposed Deferred Sales Model arguably captures life insurance products that are purchased in connection with a mortgage for a home purchase. This is because under the draft definition the purchase of a life insurance product would manage the associated financial risk of the mortgage owner being unable to meet debt obligations should they become deceased or disabled.

The first issue with this definition is that it may have the effect of extending the application of the industry wide Deferred Sales Model beyond the class of products investigated in the Royal Commission case studies identified to have serious issues. This over-reach arguably occurs for life insurance products that are not CCI; that is, these policies offer sum assureds that are not tied to the mortgage itself but are still connected with the commitment to acquire the principal product.

In this scenario:

- Consumers are unable to purchase any life insurance products that are sold in connection with the principal or related party product provider for at least four days.
- This may only be circumvented if the consumer makes a further decision to engage separately with a different product provider in the stand-alone market. The life insurance product offered from this provider may well be on less generous terms or pricing than what the consumer could obtain in one transaction from the principal or related party product provider. Further, this interaction would be governed by the Anti-Hawking regime.

The result of this uneven playing field for identical life insurance products is a restriction of consumer control and the risk of both under-insurance and harm to consumers in this market segment.

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[7] ASIC, Consultation Paper 294, 24 August 2017 and referenced in the RC Final Report
[8] RC Final Report, Volume 2, Insurance Case Study 8
[9] DDO will require issuers to design products that are likely to be consistent with the likely objectives, financial situation and the needs of the consumers for whom they are intended (the **target market**). Distributors must take 'reasonable' steps to distribute financial products that will, or are reasonably like to, result in its retail product distribution conduct being consistent with the target market. It is expected to commence on 5 April 2021.

Recommendation

If the Anti-Hawking legislation captures life insurance products that are not CCI, then the definition of add-on insurance should make clear that the industry wide Deferred Sales Model only applies to life insurance products classified as CCI (i.e. where the life insurance product offers a sum assured that is directly linked to the loan amount).

The FSC's members also have strong concerns on applying the Deferred Sales Model for CCI purchased in connection to mortgages. These concerns also stem from the level of restrictions imposed on the consumer when purchasing CCI for their mortgage, which poses a significant risk of underinsurance and consumer harm.

However, we acknowledge that the industry wide Deferred Sales Model developed by Treasury is intended to capture all CCI products. We note however that the legislation contemplates that ASIC may, by legislative instrument, exempt a class of add-on insurance products from the Deferred Sales Model if ASIC considers there is a need for coverage by the add-on insurance products immediately after the consumer acquires, or makes a commitment on acquiring the principal products or services to which the products relate.[10] The EM clarifies further that this exemption power differs from the other exemption powers as it seeks to mitigate the risk of underinsurance for certain classes of products where there is an immediate risk of loss or damage.[11] To this end, the FSC intends to engage closely with ASIC on the possibility of an exemption from the Deferred Sales Model regime for CCI products that are purchased in connection with mortgages.

4.3 Length of post-deferral period under the Deferred Sales Model

Similar to the issues noted with the request period proposed in the Anti-Hawking legislation, we recommend the proposed six-week timeframe for the purchase of life insurance products under the Deferred Sales Model be extended to recognise the lengthier nature of the application process for life insurance.

[10] Schedule [4.3], item 3, subsections 12DY(3), (6), (7)
[11] Deferred Sales Model Bill Explanatory Materials, Paragraph 1.85

Appendix A: Suggested amendments to allow natural conversations

1) Prohibition on hawking of financial products

With respect to amending proposed section 992A, we suggest the following:

(1) A person must not offer a financial product for issue, transfer or sale to another person, or request or invite another person to ~~ask or~~ apply for a financial product or to purchase a financial product, if:

(a) the other person is a retail client; and

(b) the offer, request or invitation is made:

(i) in the course of, or because of, an unsolicited contact with the other person; or

*(ii) where there is contact requested or initiated by the other person about a matter, in the course of an unsolicited contact with the other person about a financial product. [**Please note: this sub-section (ii) needs more work to avoid unintended consequences – we look forward to discussing this with Treasury]***

(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:

(a) the contact is wholly or partly in one or more of the following forms in circumstances that a reasonable person would consider creates an expectation of an immediate response from the other person:

(i) a telephone call;

(ii) a face-to-face meeting;

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

(b) either:

(i) the other person did not request the contact; or

(ii) if the other person made such a request—the requirements of subsection (5) are not met.

2) Allowing the causal nexus to break

We note that the principles of a consumer making a CPIR are not mentioned at all in Paragraph 1.36 of the EM as a criterion under which the causal nexus between the unsolicited contact and the offer may be broken. We recommend these principles be included so that it more closely aligns with the proposed section 992A, as follows:

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;*
- *the customer makes, a clear, positive and informed request; or*

- *a significant period of time has elapsed since the initial unsolicited contact (or any other unsolicited contact with the offeror).*

3) Guidance for natural conversations

We consider that the following paragraph (or a paragraph to similar effect) should be included in the EM to provide clear guidance for how financial product providers may meaningfully (and lawfully) engage with consumers. This is important as issuers require absolute certainty as to how lawful conversations with customers may occur, particularly given the provision (section 992A) is a criminal offence:

> For contact initiated by the consumer about a financial product, if a person asks the consumer whether the consumer might be interested in finding out more about a different financial product or informing the consumer about the availability, existence, nature and/or purpose of that product (such as giving the consumer a PDS) does not of itself constitute an *offer*, *request* or *invitation* to apply for the product. For the avoidance of doubt, this would not breach section 992A.

4) Guidance for third party providers

We recommend that paragraphs 1.54-1.56 within the Deferred Sales Model EM relating to third party providers also be included in the Anti-hawking EM. These paragraphs acknowledge the additional physical elements that exist for third party providers, above those for principal providers.

Appendix B: Additional examples for the EM

We have noted a number of examples that appear to restrict natural conversations be amended to provide guidance on how financial product providers can meaningfully engage with consumers. Our suggestions are below:

- *Request relating to a new financial product in course of contact initiated by the consumer about a different matter*

  We note that Examples 1.2 and 1.10 in the EM contemplate this scenario but could be amended to provide more clarity. Example 1.10 seems to suggest that any offers of the additional insurance product at the meeting would likely be considered hawking. We are concerned Example 1.10 creates uncertainty as to the proper distinction between simply asking a customer if they wish to find out more information about a product, and an interaction that creates an expectation of an immediate response. In contrast, Example 1.2 mentions how this may be permitted under the Anti-hawking legislation. However, it makes no comment on how a CPIR relating to a new financial product may arise through the natural course of conversation. We submit that Treasury consider instead the following example:

  Cheryl is a retail customer who calls her health insurer and makes a clear, positive and informed request to add her newborn baby to her health insurance policy. Hamish explains to Cheryl that their company has an arrangement with MyLifeInsurer who issues life insurance and can provide cover in the event of death or illness and asks Cheryl as her personal circumstances have changed, whether she is interested in finding out more about life insurance. Following this, Cheryl makes a clear, positive and informed request for life insurance. The contact is not unsolicited with regards to either health insurance or life insurance as Cheryl made a clear, positive and informed request for both products thereby breaking any causal nexus.

  Paragraph 1.49 of the EM notes that, where a customer makes a request that is unclear, it is expected the 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. However, the guidance and examples provided stop short of informing what constitutes a clear request following a two-way conversation between the product provider and consumer. We suggest Treasury consider the following example:

  Ken had a face to face meeting with the customer, Peter, at the Preston branch. Peter wanted 'better options' for his investment. Upon further discussion, Ken found that Peter wanted a better return for his term deposit. Ken, told him the rate was as high as the Bank could offer but informed there are managed funds that return a little higher, aren't bank products and carry some more risk. The customer was interested in finding out more and Ken provided him with a PDS and application form before he left the Bank. Ken also provided the number of the Bank's Wealth Concierge Team that can help with any further queries if he wanted more information.

  We expect this type of example would meet the test of positive, ***clear*** and informed, but it would be helpful to clarify that this scenario would not be considered hawking. The test of whether a request is ***clear*** should be judged on the depth of a holistic

conversation, or subsequent conversation, rather than the initial request alone. Factors such as, the depth of the conversation with the customer, whether the customer is given time to consider the offer, whether the conversation leads to the customer be informed etc, should be taken into account in determining whether or not the customer request meets the ***clear*** obligation.

- *Request for related financial products that provide cover for associated risks*

  We note that Paragraph 1.59 EM provides guidance that the scope of a request would also include what a reasonable person may consider related financial product products that provide cover for associated risks. As Examples 1.13 and 1.14 provide guidance for general insurers, we suggest Treasury include a similar example for life insurance products as follows:

  Eleanor visited a bank and made a clear, positive and informed request to arrange a mortgage. During the process, the bank offered non-CCI life insurance (the product provides a sum assured that is not directly linked to the outstanding balance of the mortgage). The life insurance would protect Eleanor's ability to repay the bank in the event of her death. A reasonable person would consider life insurance as covering risks associated with the mortgage, so the offer of the life insurance is reasonably within the scope of Eleanor's request.

- *Request for a financial product arising from 'call to action' advertising*

  The proposed subsection 992A(4)(a)(iii) as drafted creates a broad definition of what may fall within scope, despite the exclusion under subsection (7) for advertising. We are particularly concerned that email-based marketing and calls to action within them could unintentionally be caught. Where the *Spam Act 2003* has been adhered to, advertising via email should not be deemed to fall within the scope of subsection 992A(4)(a)(iii). We suggest Treasury consider the following as examples that are not considered to be hawking:

  Example A

  A customer receives an email with an advertisement for a life insurance product. This advertisement includes information about a discount available for a limited time and a button that the customer can click to find out more. Depending on when the email is received and/or read this could require the customer to act in a fairly short time-period to take up the discount. The customer clicks through and finds themselves on a web page that includes information and an option to apply for cover.

  Example B

  A customer has previously contacted a life insurer and asked for a quote. The quote is about to expire so the insurer sends an email to the customer to remind them that the price could change if they don't act by the quote expiry date. Within the email there is a link that the customer can click on to activate their quote and proceed to have the policy put into force.

  Although emails like these can provide specific times to respond, the urgency is created by the facts of the circumstances, and deciding to respond is still the consumer's decision. As the legislation is drafted, we are concerned that these

examples could unintentionally fall within scope. We urge Treasury to consider including these examples to clarify that communications with time-based criteria, where they are factual and let the customer choose whether or not to respond, should not be taken as hawking.

It would also be helpful to clarify through the EM that the following situations would not be considered hawking:

1. **SMSF term deposit maturity:**

   A SMSF invests in a term deposit. Three weeks prior to the maturity of the term deposit, a representative of the bank that offers the term deposit contacts the SMSF trustee (and member) to ask what they would like to do with the term deposit – this could include paying out to cash, or rolling the term deposit over for the same or a different term.

   During the conversation the customer asks questions about managing their SMSF, including about how to invest the cash proceeds from the term deposit. The representative asks the customer if they would like to be referred to a superannuation specialist, or financial advisor, who can answer their questions. The customer agrees and is provided a referral.

2. **Home loan assessment:**

   An employee of a financial services provider is speaking to a customer as part of a home loan application, or to assess borrowing capacity. In the course of understanding the financial assets of the potential borrower, the employee asks for details regarding the customer's superannuation (including details of the insurance inside superannuation).

   During the conversation the employee asks the customer whether there is anything else they can help the customer with. The customer responds that they would like some help consolidating their superannuation. The employee refers the customer to a superannuation specialist, or financial advisor, who can answer their questions, after receiving the customers consent to do so.

3. **Advertising/Marketing:**

   A customer of a financial services provider has opted-in to receiving information on the group's products and services. The customer is not currently a member of the provider's superannuation product. The customer is sent an email with information on a superannuation product that is offered by the provider. Some customers receive the same content via a notification on the provider's online portal or via written communication, such as welcome letters.

4. **Assessing customer needs**

   Bob meets with a representative from his financial services provider on a regular basis – at least once every six months. Each meeting generally has an open agenda. During

a meeting Bob mentions that he would like to discuss his wealth and retirement planning needs. The representative then engages with Bob about his superannuation, including mentioning products that the provider offers. Where required, the representative provides Bob with a referral to contact a superannuation fund employee, or financial advisor, who can assist him further.

Note: As per our comments on natural conversations outlined in this submission we also believe that it should not be considered hawking if in this example it was the representative that asked Bob if he needed any help with his wealth and retirement needs and Bob agreed (via a clear, positive and informed response) to find out more.

5. Closure of a product

A product issuer is closing a legacy product and an investor in that product needs to make a decision about what happens to their money – they may either transfer to the new product offered by the product issuer as a close replacement, choose a completely new product, or do nothing and receive cash. There may be adverse tax outcomes or other implications for consumers who don't make a decision, so it is in the best interests of the member to make a proactive decision that is right for their circumstances.

The product issuer has sent an information pack to the investor telling them about the closure of the legacy product, the investor's choices and the timing to make a decision, but the customer has not responded.

The product issuer makes an outbound call to the investor to remind them to make a decision. The call would state that it is important that investors consider which outcome best meets their circumstances, get advice if needed and make a decision. It would remind the investor of the 3 decision choices - the product that is a close replacement for the closing product, another product chosen by the investor or receive cash. This reminder may involve a sense of urgency for the investor to make a choice before the deadline.

6. Customer falling outside of target market (for DDO)

A customer is discussing the purchase of a particular financial product from an issuer or distributor. During the conversation, it becomes clear that the customer is outside the Target Market Determination for the product. The issuer/distributor offers the customer alternative products whose target markets the customer would likely be in. See Example 14 in ASIC draft regulatory guide on Product Design and Distribution Obligations.

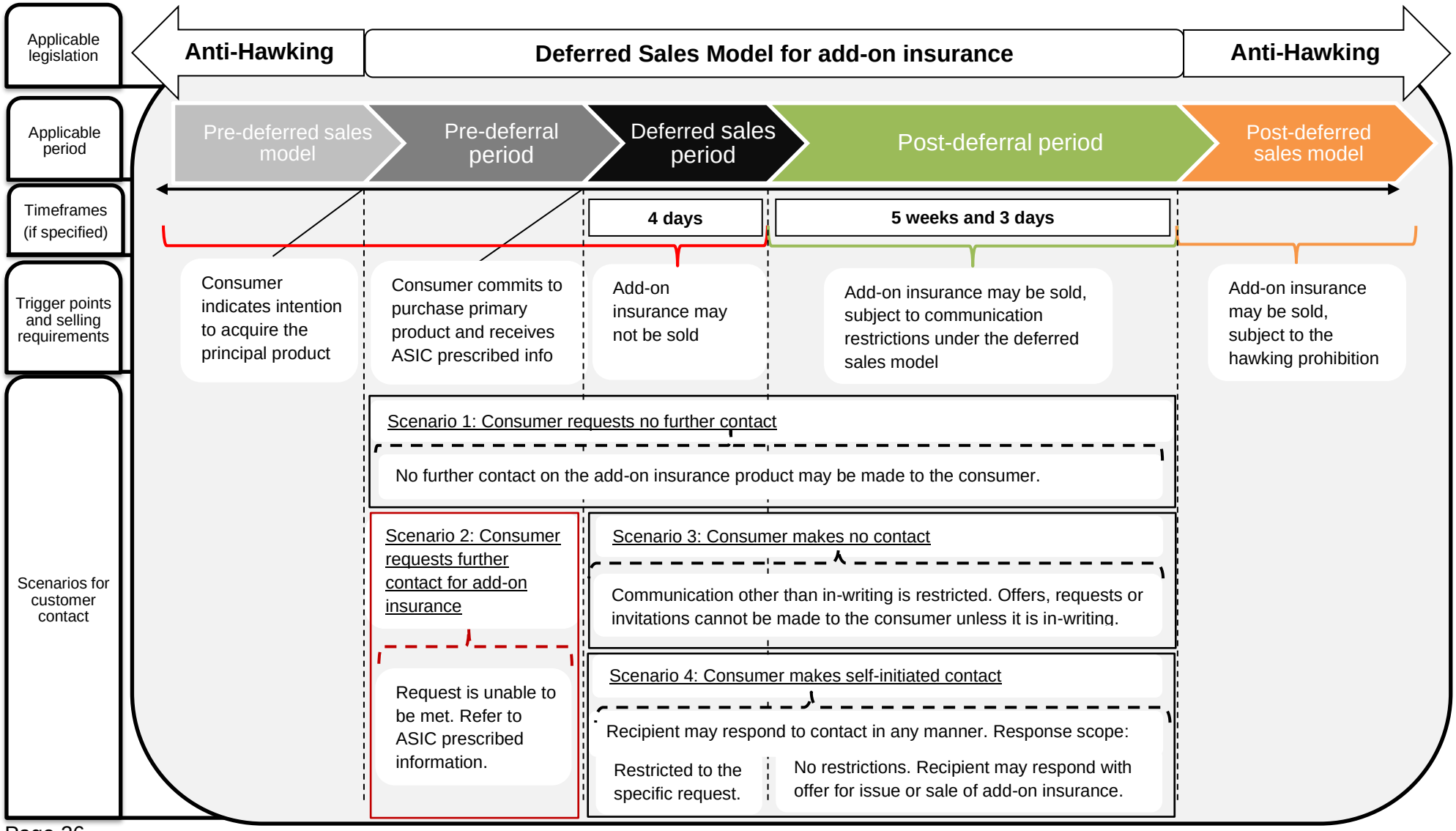
7. Reasonably within the scope

Example 1.19 of the EM indicates that it would not be reasonable to offer a superannuation product to a person requiring access to capital and earnings on their investment. While this would generally be true, there may be some circumstances in which a superannuation product may be suitable. For example, if Jon was age 65-74 and gainfully employed, he could make regular contributions and draw on the funds at

any time. Depending on the level of access to capital required, a transition to retirement strategy may also be appropriate for someone who had reached preservation age. We recommend the example is amended to indicate that Jon is under age 55 and requires access to all of his capital and earnings.

Appendix C: Outline of the Deferred Sales Model for add-on insurance

To give context to our comments and suggestions, the following diagram outlines our understanding of how the sale of add-on insurance will operate under the proposed legislation.



Appendix D: Further background

On 1 February 2019, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Royal Commission (**Royal Commission**) released its Final Report wherein the Commissioner recommended:

> *"Hawking of superannuation products should be prohibited. That is, the unsolicited offer or sale of superannuation should be prohibited except to those who are not retail clients and except for offers made under an eligible employee share scheme. The law should be amended 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."*[12]
>
> (**Recommendation 3.4**)
>
> *"Consistently with Recommendation 3.4, which prohibits the hawking of superannuation products, hawking of insurance products should be prohibited."*[13]
>
> (**Recommendation 4.1**)
>
> *"A Treasury-led working group should develop an industry-wide deferred sales model for the sale of any add-on insurance products (except policies of comprehensive motor insurance). The model should be implemented as soon as is reasonably practicable."*[14]
>
> (**Recommendation 4.3**)

In its response to the Final Report, the Government agreed with these Recommendations.[15]

On 9 September 2019, Treasury released its Proposal Paper on the implementation of Recommendation 4.3. The FSC provided a submission to this Proposal Paper.

On 31 January 2020, Treasury, in response to recommendations made in the Financial Services Industry Royal Commission (**Royal Commission**), released:

(a) An Exposure Draft (**ED**) of the *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures)) Bill 2020: Hawking of financial products (***Anti-Hawking Bill***);*
(b) an ED of the *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures)) Bill 2020: Deferred sales model for add-on insurance* (**Deferred Sales Model Bill**);

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[12] Recommendation 3.4 of the RC's Final Report.
[13] Recommendation 4.1 of the RC's Final Report.
[14] Recommendation 4.3 of the RC's Final Report.
[15] See: https://treasury.gov.au/publication/p2019-fsrc-response

(c) an ED of the *Corporations (Fees) Amendment (Hayne Royal Commission Response – Protecting Consumers (2020 Measures)) Bill 2020 (***Corporation Amendment Bill**)
(d) an Explanatory Memorandum for each Bill (**EM**);
(e) an ED of the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers)) Regulations 2020: Hawking of financial products*; (**Anti-Hawking Regulation**);
(f) an ED of the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers)) Regulations 2020: Deferred sales model for add-on insurance* (**Deferred Sales Model Regulation**); and
(g) an Exposure Draft Explanatory Statement (**ES**) for each Regulation.

For convenience within this submission, the items above has been collectively referred to as the **proposed legislation**. Due to the inter-connectedness of the proposed pieces of legislation, we have submitted a consolidated response to Treasury. However, we have also made clear where our comments relate to specific legislation.