

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Corporations Act 2001

Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021

Section 1364 of the Corporations Act (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Schedule 1 to the *Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021* (the Regulations), in conjunction with Schedule 5 to the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020*, implements recommendations 3.4 and 4.1 of the Financial Services Royal Commission in relation to the hawking of financial products.

Schedule 5 to the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* provides that a person cannot offer to sell or issue a financial product to a consumer unless if the offer is made in the course of, or because of, unsolicited contact with the consumer. Schedule 1 to the Regulations amend the *Corporations Regulations 2001* to insert exceptions to this prohibition in circumstances where a consumer is expected to have enough knowledge to adequately assess the suitability of the product or where another part of the law already provides a consumer with adequate protection from being hawked a financial product. The Regulations also repeal a number of existing exceptions to the hawking prohibition which curtail or reduce the effectiveness of the prohibition and increase the risk of consumer harm.

The *Corporations Act 2001* does not specify any conditions that need to be met before the power to make the Regulations is exercised.

The Regulations were released for public consultation for 4 weeks, from 31 January 2020 to 28 February 2020 alongside the draft changes to the *Corporations Act 2001* and the explanatory materials. Twenty-seven submissions addressing the proposed changes to the hawking regime were received. Direct consultation with ASIC and APRA was undertaken at the same time. None of the submissions raised issues in relation to the regulations. Details of the Regulations are set out in [Attachment A](#)

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on 5 October 2021.

Regulation Impact Statement

The Financial Services Royal Commission Final Report has been certified as being informed by a process and analysis equivalent to a Regulation Impact Statement for the purposes of the Government decision to implement this reform.

The Financial Services Royal Commission Final Report can be found at this link:
<https://financialservices.royalcommission.gov.au/Pages/reports.html>

A statement of Compatibility with Human Rights is at Attachment B.

Details of the *Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021*

Section 1 – Name of the Regulations

This section provides that the name of the Regulations is the *Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021* (the Regulations).

Section 2 – Commencement

The Regulations commence on the 5 October 2021.

Section 3 – Authority

The Regulations are made under the *Corporations Act 2001* (the Act).

Section 4 – Schedules

This section provides that each instrument that is specified in the Schedules to this instrument will be amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this instrument has effect according to its terms.

Schedule 1 – Amendments

Item 1 – exceptions to prohibitions on hawking of financial products

Item 1 repeals regulations 7.8.21A to 7.8.22A which contain exceptions to the existing hawking prohibition and substitutes them with a new regulation 7.8.21A. The new regulation 7.8.21A provides for a number of exceptions to the new hawking prohibition in section 992A of the Act.

Paragraph 7.8.21A(h) and (i) provides that an offer, request or invitation will not breach the hawking provisions if it is made in the course of contact that was initiated by the consumer for any purpose and the offer, request or invitation relates to:

- a basic banking product; or
- a term deposit with a maximum term of 5 years if the consumer can withdraw funds during that 5 years by providing the product issuer with 31 days or less notice.

Contact is consumer initiated if the consumer takes positive steps to contact the offeror and the contact is not made in response to previous contact initiated the offeror (e.g. returning a missed phone call). Under section 961F of the Act basic deposit products, facilities for making non-cash payments and facilities for providing travellers cheques are basic banking products. Eligible term deposits are treated the same as basic deposit products for the purposes of hawking, this is consistent with ASIC Class Order CO14/1262 which extends the basic deposit product definition to capture these term deposits for the purposes of parts 7.6, 7.7 and 7.9 of the Act.

Due to the simple and relatively low-risk nature of these products it is expected that consumers will be able to assess their suitability quickly and easily and there is a low risk of consumer harm associated with these products.

The other exceptions in regulation 7.8.21A apply in relation to offers or invitations in relation to a financial product in circumstances where the consumer is expected to have enough knowledge to adequately assess the features and benefits of the financial product or where another regime already provides adequate consumer protection. Specifically, regulation 7.8.21A provides that the hawking prohibition does not apply to:

- Offers relating to listed securities or listed interests in managed investment schemes made by financial services licensees over the phone;
- Offers for the issue or sale of securities made by a financial services licensee through whom the client has bought or sold securities in the last 12 months;
- Offers for the issue or sale of interests in managed investment schemes made by a financial services licensee through whom the client has acquired or disposed of an interest in a managed investment scheme in the previous 12 months;
- Crowd Source Funding offers;
- Offers, invitations or requests relating to employee share schemes;
- Offers of medical indemnity insurance which are made to healthcare or medical professionals;
- Offers, requests or invitations in relation to interests in insolvency litigation funding schemes and litigation funding arrangements;
- Offers for the issue or sale of a financial product that is substantially similar to a financial product that the consumer already holds with the offeror (such as offers to renew an insurance policy).

Items 2 to 4 – consequential amendments

Items 2 to 5 amend subregulations 7.8.23(1) and 7.8.23(3) and regulations 7.8.24 and 7.8.25 to replace references to the existing hawking provisions with references to the new provisions. This ensures that the law continues to operate correctly.

Item 5 – repeal of regulation 7.8.26

Item 5 repeals the existing regulation 7.8.26 which exempts offers to sell or issue interests in insolvency litigation funding schemes and litigation funding arrangements from the existing hawking rules. This exemption is now included in paragraph 7.8.21A(g).

Item 6 – application provision

Item 6 inserts Part 10.39 which sets out the application rules for the new hawking regulations. Subregulation 10.39.01(1) provides that the existing regulations 7.8.23 and 7.8.25 continue in force after the commencement of the Regulations as if they had

been made for the purposes of subparagraph 992A(2)(c). This ensures that the right of return for superannuation products continues to operate effectively.

Subregulation 10.39.01(2) provides that the exceptions to the right of return provisions in regulation 7.8.24 as in force immediately prior to commencement of the regulations continues will apply after commencement as if it had been made for the purposes of paragraph 992AA(3)(a) of the Act. This ensures that the right of return provisions in the new law operate consistently with the old law.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021* (the Regulations), in conjunction with Schedule 5 to the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* implement Recommendations 4.1 and 3.4 of the Financial Services Royal Commission to strengthen the existing prohibitions against the hawking of financial products.

The Regulations amend the *Corporations Regulations 2001* to insert exceptions to the hawking prohibition for offers to sell or issue or invitations to apply for financial products in circumstances where a consumer is expected to have enough knowledge to adequately assess the suitability of the product or where another part of the law already provides a consumer with adequate protection from being hawked a financial product. Specifically, the regulations provide that the hawking rules in section 992A of the Act do not apply to:

- Offers for the sale or issue of listed securities or interests in managed investment schemes which are made by a financial services licensee by telephone;
- Offers for the issue or sale of securities made by a financial services licensee through whom the client has bought or sold securities in the last 12 months;
- Offers for the issue or sale of interests in managed investment schemes made by a financial services licensee through whom the client has acquired or disposed of an interest in a managed investment scheme in the previous 12 months;
- Crowd Source Funding offers;
- Offers, invitations or requests relating to employee share schemes;
- Offers of medical indemnity insurance which are made to healthcare or medical professionals;
- Offers, requests or invitations in relation to interests in insolvency litigation funding schemes and litigation funding arrangements;

- Offers, requests or invitations in relation to basic banking products which are made during contact with a consumer in relation to another financial product which is not unsolicited.
- Offers for the issue or sale of a financial product that is substantially similar to a financial product that the consumer already holds (such as offers to renew an insurance policy).

The regulations also amend the *Corporations Regulations 2001* to remove a number of existing exceptions to the hawking prohibition which curtail or reduce the effectiveness of the prohibition and ensure that the *Corporations Regulations 2001* continue to operate effectively.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.