

Anti-hawking reforms for financial products – A New Cross-Positioning Strategy

FSR Guidelines, Principles and Strategies

This edition of our ‘FSR GPS’ (Guidelines, Principles and Strategies) series covers the upcoming changes to the anti-hawking regime for financial products in the Corporations Act, with the new regime coming into effect on 5 October 2021. In this article, we outline:



Part 1: Our 12 legal principles which go to the heart of the new anti-hawking regime (NAHR);



Part 2: Our legal and practical insights on each of these principles; and



Part 3: Some observations on personal advice in the context of NAHR.



Part 1 – The Principles

The 12 Principles of the New Anti-Hawking Regime (NAHR)

Principle 1	During an unsolicited contact with a retail client customer, a representative cannot offer a financial product for issue or sale, or request or invite the customer to ask or apply for a particular financial product or financial products.
Principle 2	A representative can respond and proceed to offer/invitation where a customer initiates contact with the representative and asks about a particular financial product or products.
Principle 3	A representative can respond and proceed to offer/invitation where a customer initiates contact with the representative and expresses a need/purpose by matching that need/purpose to a particular financial product or products. Here, all financial products that respond to the customer's need/purpose can be raised.
Principle 4	A representative can respond to an expanded scope of enquiry during the interaction if it is initiated by the customer, by addressing that expanded
	need/purpose or additional financial product/s raised by the customer. This expansion cannot be prompted by the representative.
Principle 5	During an interaction with a customer, a representative can provide more information to the customer about a particular financial product or products, provided the representative does not make an offer, request or invitation. This is the case whether the interaction has been initiated by the customer or initiated by the representative.
Principle 6	A representative can, when providing that information, inform the customer how they can obtain further information through other means e.g. by calling a number or visiting the website or app.
Principle 7	A representative can, when providing that information, include information about specific features of the financial product/s provided that this does not amount to an express or implied invitation to apply or ask for, or offer of, the product.
Principle 8	The NAHR does not apply to general marketing content which complies with section 1018A of the Corporations Act, or to personal advice.
Principle 9	A representative cannot legally break the nexus with an unsolicited contact by simply waiting for a period of time before engaging in another interaction; e.g. where he or she arranges a call-back.
Principle 10	A representative can break the nexus with an unsolicited contact where the customer initiates an interaction following the first unsolicited contact or following the representative sending an email/SMS to the customer (e.g. the customer calls back or otherwise gets in touch), provided that the representative has not made an invitation/offer to the customer to apply/ask for the product either in the original interaction or in the email/SMS.
Principle 11	Synthetic or artificial conduct will not be effective in obtaining customer consent. E.g. leading questions to get consent or indirect or implied invitations for customers to apply for a particular financial product or products are not permitted. Open-ended questions are permitted (e.g. “can I help you with anything else today?”).
Principle 12	Disclaimers can play a role to confirm, or even in some cases, nudge conduct to the right side of the line but you cannot use a disclaimer to transform an interaction into something that it isn't. E.g. information given about other financial products may benefit from a disclaimer that the representative is not offering, requesting or inviting applications.



Part 2 – Our Insights

Principle 1: Scope of an offer, request or invitation

Clearly, what conduct constitutes an offer, request or invitation is key here.

We see a possibility that certain conduct could fall short of a direct offer, request or invitation but could be held by a Court to be an indirect offer, request or invitation, e.g. general advice recommending a particular product coupled with some other action which acts as a stimulus to the customer to apply for or ask for the product.

An appropriate legal disclaimer, discussed below, might assist in some cases.

Principle 2: Customer-initiated contact

This scenario is a crucial exception to the NAHR or more precisely, is not an “unsolicited contact”.

Interestingly, the NAHR effectively treats this scenario as one where the customer has provided anterior consent to the contact. This is functionally not a legally accurate description of the scenario. The contact is not unsolicited because the customer initiated it. It is apparently, however, treated as if it were an anterior consent by the customer from a regulatory standpoint.

One important contesting point is that the customer’s “consent” is only deemed to have been given in respect of financial products reasonably within the scope of their contact (see next point).

Principle 3: Scope of client’s enquiry

As indicated above, the customer’s consent in a scenario where they initiate the contact has to be matched to the scope of the customer’s need or purposes, as expressed by him or her in their contact.

A representative can also ask questions to clarify the purpose of the customer’s call.

Principle 4: Expansion of scope of client’s enquiry

In our assessment, consistent with applicable legal principles (and policy), the scope of the customer’s enquiry (and hence the financial product or products which can be discussed by the representative in the contact initiated by the customer) can be expanded by the customer themselves. However, a line must be drawn where the representative seeks to prompt the customer to expand that scope. In other words, the customer’s scope or enquiry can evolve and expand during the contact but not if this expansion was stimulated by the representative (see Principle 11 below).

Principle 5: Provision of more information to the client by the representative

The Explanatory Memorandum to the NAHR acknowledges that a representative can provide more information to the customer about other financial products during the contact initiated by the customer (see paragraph 5.44). We agree, provided the provision of such other information does not itself constitute an offer, request or invitation.

We have formulated some important sub-principles to this Principle 5 which together with other compliant structuring, we call the “Cross-Positioning” Strategy.

See further commentary on this below.

Principle 6: A representative can refer a customer to other information

Here, we refer to other information aside from that provided in the contact.

This is one possible means of converting a customer’s contact into a sale by moving outside of the NAHR, e.g. by sending information electronically or referring the customer to a website where they can initiate the application for the product (i.e. this process is effectively self-directed by the customer). Again, the caution we note above about not going too far and making an invitation (or offer/request) to the customer to apply for the product applies equally here.

We distinguish between a situation where the customer asks for additional information about another product and where the representative offers this. In the latter case, this could constitute an implied offer, request or invitation. Our Cross-Positioning Strategy addresses this risk.

Principle 7: Additional information can include specific features about other financial products

This is subject to a caveat about the need to avoid personal advice unless a personal advice model is intended, noting that personal advice is itself an exception to the NAHR (see Part 3 below).

Principle 8: Section 1018A making contact is permissible

The NAHR expressly permits this as an exception to the NAHR. However, in our view the wording of the exception indicates that it is intended only to apply to a situation where marketing material is provided to a client unsolicited.

This exception seems to be intended to apply to an advertisement which is issued in conformity with section 1018A of the Corporations Act. In other words, marketing which is issued to a customer which draws attention to an offer of a financial product.

It is not clear that it can apply to a situation where:

- the customer has contacted the financial institution or their representative; and
- the financial institution/representative seeks to make an offer, request or invitation (which would otherwise be impermissible) by utilising material which complies with section 1018A.

This said, the use of section 1018A marketing material is one important ingredient in our Cross-Positioning Strategy and we explore in the strategy how such material can help facilitate sales.

Principle 9: Causal connection not broken

The causal connection between an unsolicited contact and a subsequent interaction is extremely hard to break. In our view, simply waiting a period of time would not normally break the nexus unless the period is quite lengthy so that it can be argued



that the subsequent contact is no longer attributable to/connected with the original unsolicited contact. This, in our assessment, is not straightforward.

Principle 10: Causal connection broken

Despite Principle 9, as indicated above, the causal connection can be broken where a communication is sent to the customer (such as an email or SMS) after the initial unsolicited contact and the customer initiates the application themselves. This is provided the conduct of sending the additional communication does not constitute a relevant offer, request or invitation (see commentary above).

Principle 11: Stimulating sales

As commented upon above, in our view, certain conduct by a representative which seeks to prompt, or otherwise overtly or covertly stimulate, a sales situation can cause the representative's conduct to morph into a sales situation (i.e. a relevant offer, request or invitation).

In our Cross-Positioning Strategy, we canvass this point and provide examples in some detail.

Principle 12: Role of disclaimers

As touched on earlier, a disclaimer which describes the limitations on what a representative can and cannot do under the NAHR (i.e. a sales stimulus) can play a legal part in setting up the interaction, and the particular conduct, as being on the right side of the line. We have formulated a range of suitable disclaimers as part of our Cross-Positioning Strategy. A common trait of possible disclaimers we see is the representative indicating that they are limited in his or her interaction with the client by the NAHR. The objective here is to neutralise, if possible, a possible client's perception that the representative is making a prohibited offer, request or invitation.

However, it is important to note the disclaimer should not be treated as a "safe harbour", but rather as one element of the overall customer conversation.

Our Cross-Positioning Strategy (CPS)

As mentioned above, the HSF Financial Services Team has formulated a Cross-Positioning Strategy designed to assist clients stimulate sales but within the parameters of the NAHR. If you would like more information, including a presentation, in relation to our CPS, please contact one of the team members appearing below.

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Part 3 – Some observations on personal advice

Typically, in an anti-hawking context, the relevant representative would not seek to interact with the client on a personal advice basis.

Of course, in the wake of, in particular, Gordon J's comments in *Westpac v ASIC*, the second "deeming" limb of the definition of personal advice could be enlivened where:

- the representative or the licensee has knowledge of the customer's personal circumstances; or
- due to a pre-existing and/or fiduciary relationship, the customer could reasonably expect that the representative or licensee would take his or her personal circumstances into account.

In the course of the representative's interaction with the customer, the representative may obtain knowledge of the client's personal circumstances. By providing information on other products, this of itself could be seen to be personal advice (by virtue of amounting to an implied recommendation of a product). This gives rise to the accentuated need for a disclaimer of the kind previously described.

While an exception from the scope of personal advice exists under the new DDO regime where the relevant interaction relates to ascertaining whether the customer falls within the target market for a product, this carve-out is unlikely to be of practical relevance if the representative is simply seeking to cross-position the product (i.e. stimulate a product enquiry by the customer without making an express or implied offer/request/invitation).

This is precisely because the carve-out only applies to questioning solely for the purposes of ascertaining whether the customer is in the target market.

This aspect is again covered in more depth in our Cross-Positioning Strategy.

