Law Council
OF AUSTRALIA

Business Law Section

29 July 2026

Wholesale Markets, Market Conduct
Australian Securities and Investments Commission
GPO Box 9827
MELBOURNE VIC 3001

By email: markets.consultation@asic.gov.au

Dear Sir/Madam,

Consultation Paper 389 and draft Regulatory Guide 000: Pre-hedging

1. The Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committee**) welcomes the opportunity to respond to Consultation Paper 389 *Proposed regulatory guide on pre-hedging* (**CP 389**) and the accompanying draft Regulatory Guide 000 *Pre-hedging* (**Draft Regulatory Guide**), released by the Australian Securities and Investments Commission (**ASIC**) on 15 June 2026.

2. This submission focuses on three matters: the application of the insider trading prohibition in section 1043A of the *Corporations Act 2001* to pre-hedging; the definition of pre-hedging and the scope of its application, having regard to the final report published by the International Organisation of Securities Commissions (**IOSCO**) in November 2025; and the better practices proposed in Proposal B2. A summary of the Committee's responses to ASIC's specific consultation questions is provided towards the end of this submission.

3. The Committee broadly supports ASIC's initiative in developing the Draft Regulatory Guide. It is an important initiative on ASIC's part to replace the 1 February 2024 letter to CEOs on pre-hedging and reinforce ASIC's conduct expectations with respect to pre-hedging activity. in this respect, the Committee notes that the proposed guidance appropriately seeks to mirror the recommendations and findings in IOSCO's final report. However, as noted below, imposing requirements beyond those recommendations—by way of the "better practice" guidelines, which seek to import observations of the Federal Court in the ANZ and Westpac cases—creates several operational issues, especially for financial institutions with operating across multiple jurisdictions and, in certain instances may lead to poorer client outcomes. If, notwithstanding the foregoing, ASIC remains of the view that the better practice guidelines should be retained in the final regulatory guide, the Committee makes the following comments for ASIC's consideration.

4. The Committee's submissions should not be read as detracting from the Committee's support for the overall initiative. The Committee generally supports ASIC's principles-based approach in the Draft Regulatory Guide and welcomes the

opportunity to engage further before the regulatory guidance is finalised, and would encourage ASIC to do so.

Interaction with the insider trading prohibition

5. The Draft Regulatory Guide notes that, if information about an anticipated client transaction meets the definition of "inside information" in section 1042A(1) of the Corporations Act, trading in a financial product while in possession of that information risks contravening section 1043A. The Draft Regulatory Guide goes on to say that a market participant that fails to establish a risk management purpose associated with an anticipated client transaction may increase the risk its pre-hedging activities "may be considered as insider trading or market manipulation" (RG 000.41(a)).

6. The Committee notes that this part of the proposed guidance could be read as suggesting that an intention to benefit the client, or a demonstrated benefit to the client, could constitute a defence to insider trading, or that the risk of an offence under section 1043A being established is reduced where such an intention exists.

7. However, as ASIC is aware, section 1043A does not contain any element directed to the purpose for which a person trades. This means that, if no statutory exception applies, a market participant that establishes and documents a thorough risk management process will still contravene section 1043A if it trades while in possession of inside information. Conversely, the presence or absence of a risk management purpose does not, of itself, determine whether trading falls within the statutory prohibition.

8. If ASIC's position is that a demonstrated risk management purpose is nonetheless relevant to ASIC's exercise of its enforcement discretion in relation to potential insider trading arising from pre-hedging, the Committee submits that this distinction needs to be set out with significantly greater clarity, effectively as a no-action position, in the final guide. In this regard:

   (a) the Committee acknowledges ASIC's statement that the guide is not intended to create a safe harbour;

   (b) the Committee's submission is not that ASIC should create such a safe harbour, however the final guide should clearly identify the basis for ASIC's enforcement policy in these contexts to enable market participants to assess the level of risk as it relates to the prohibitions in Part 7.10 of the Corporations Act, particularly following the Westpac case; and

   (c) it would assist the market significantly, for instance, if ASIC's policy positions were underpinned by a no-action letter or a similar (public) statement of position.

Definition of pre-hedging and alignment with the IOSCO final report

9. The Committee notes the definition of pre-hedging in the Draft Regulatory Guide follows IOSCO's final report published in November 2025, and incorporates a requirement that trades be executed with the intention of benefiting the client. The Committee supports this, but submits that the final guide should clarify that market impact is not *of itself* indicative of market abuse or misconduct. That is, the guidance

should be directed at conduct that clearly indicates an intention to cause (or reckless disregard for) market impact, misuse of confidential information, or failures in conflicts management and controls.

10. The Committee also notes the distinction between pre-hedging, inventory management and hedging. This is consistent with feedback provided to IOSCO that the definition of pre-hedging should not extend to general inventory risk management undertaken otherwise than in response to a specific anticipated client transaction. However, the Committee notes that it can in practice be challenging to categorise trades as falling into a particular type (pre-hedge, inventory management or hedge) and the final guidance should recognise this difficulty. This observation is particularly relevant to Better Practice 3.

11. In this context the Committee also submits that ASIC should consider *excluding* exchange-traded equity and futures products from the scope of the Draft Regulatory Guide, on the basis that these markets are already heavily regulated in Australia, with existing market integrity rules providing an appropriate framework. This would allow the guidance to remain focused on over-the-counter derivatives, fixed income, currency and commodity markets and other off-exchange wholesale markets where pre-trade transparency is lower.

Proposed better practices (Proposal B2)

12. The Committee notes the three proposed better practices respond directly to specific matters identified in the orders made in *Australian Securities and Investments Commission v Westpac Banking Corporation (Penalty Hearing)* [2024] FCA 52, namely:

    (a) the absence of any formal review of Westpac's pre-hedging trading after execution of the transaction (paragraph 2(d) of the Orders);

    (b) inadequate training, practices or procedures as to disclosure and, where appropriate, obtaining consent from counterparties in relation to pre-hedging (paragraph 2(c) of the Orders); and

    (c) the absence of any policy specifically addressing pre-hedging of transactions (paragraph 2(b) of the Orders).

13. The third "better practice" also appears to pull together certain observations in the IOSCO final report (on distinguishing pre-hedging from inventory management and hedging).

14. The Committee submits, as a threshold matter, that the regulatory guide should *not* extend beyond the recommendations in IOSCO's Final Report. IOSCO's recommendations were developed following extensive multi-jurisdictional stakeholder engagement, including surveys of IOSCO members and industry associations, and are intended to provide a common global framework for pre-hedging conduct that promotes competitive neutrality and a level playing field across jurisdictions.

15. The Committee is concerned that the three better practices proposed in Proposal B2 of CP 389 would impose obligations beyond IOSCO's recommendations.

(a) While the Committee understands ASIC's wish to have regard to the matters identified in the Westpac and ANZ decisions in ASIC's market supervision and enforcement role, doing so by including additional requirements (even if positioned as "better practice") in formal regulatory guidance will cause the Australian regulatory standard to depart from that established at the IOSCO level.

(b) For market participants operating across multiple jurisdictions, where pre-hedging in connection with Australian client transactions is often conducted, supervised, or subject to policies and controls that are designed, and applied, on a global or regional basis (including from offices outside Australia such as London, New York, Singapore or Hong Kong), this is especially burdensome. Those global offices typically design their policies, procedures and controls by reference to the IOSCO recommendations and internationally recognised codes which are broadly consistent with the IOSCO framework.

(c) This is of particular importance for highly interconnected markets that operate across multiple jurisdictions, such as foreign exchange markets, where Australian requirements that go beyond IOSCO's recommendations risk creating friction in global execution and undermining the competitive neutrality that the Committee understands ASIC's guidance is intended to promote.

16. The Committee considers it unlikely that any specific additional Australian market integrity or investor protection objective is achieved by the "better practice" proposals in B2 that is not already achieved by implementing the IOSCO recommendations. The Committee submits on this basis that ASIC should limit the guidance in the final regulatory guide to matters addressed in IOSCO's final report, including Recommendations A1 to A4 (concerning risk management purpose, client benefit, fair and honest dealing, and minimising market impact and maintaining market integrity) and Recommendations B1 to B6 (concerning policies and procedures, disclosure, consent, compliance and supervisory arrangements, management of confidential information and conflicts, and record-keeping).

17. If ASIC nevertheless considers that inclusion of the three better practices proposed in Proposal B2 is warranted, the Committee submits that any such practices should be framed only as non-mandatory illustrative examples, and not as an implicit minimum standard (which will be the practical effect of including such guidelines in a final regulatory guide). The final guide should also clarify that market participants may adopt a flexible, proportionate approach to their application, *having regard to the nature, size and risk profile of the relevant transaction* (that is, more extensive controls may be appropriate for large or complex transactions, while a less extensive approach would be appropriate for routine and lower-risk transactions). The same observation applies to other specific references in the draft regulatory guide, such as the suggestion that a market participant might implement a physically and electronically segregated "dark room" for pre-hedging staff; such examples should be noted as illustrative only and not as setting a baseline for compliance purposes.

18. **Better Practice 1** appears to propose that market participants conduct an internal post-trade review of *every* large or complex pre-hedged transaction. IOSCO's Recommendation B4 requires that dealers have appropriate compliance and supervisory arrangements covering pre-hedging, comprising supervisory systems and reviews together with trade and communications monitoring and surveillance, but does not specifically require a standalone post-trade review of each large or complex transaction. The Committee submits that requiring such reviews is far more prescriptive than necessary to achieve the underlying supervisory objective, and is disproportionate given that most participants already operate broader, risk-based post-trade review programs covering their trading activity generally, including by reviewing appropriate samples of trades.

19. **Better Practice 2** proposes that market participants seek explicit, informed, trade-by-trade client consent for pre-hedging where this poses greater execution or pricing risk. IOSCO's Recommendation B3 requires only that dealers seek prior consent from the client at the outset of the relationship, together with a clear process for the client to modify or revoke that consent at any time on reasonable notice; it does not require consent to be sought on a trade-by-trade basis. The Committee submits that a trade-by-trade consent requirement is difficult to operate in practice, particularly in fast-moving or electronically executed markets, and risks introducing delay and wider or uncertain pricing to the client's detriment, without a corresponding benefit beyond that achieved by consent obtained at the outset of the relationship supported by robust disclosure.

20. **Better Practice 3** proposes that market participants implement internal controls to identify pre-hedging and distinguish it from other trading activity, including inventory management. IOSCO's recommendations do not require this. Instead, existing firmwide compliance, surveillance and conflicts-management arrangements are treated as sufficient to cover pre-hedging within a dealer's broader trading activity. The Committee submits that such requirements—to identify and segregate pre-hedging transactions from inventory management at a trade level—create practical, operational and systems complexity that is disproportionate to the regulatory objective. Dealers do not typically attribute a single purpose to an individual trade at the time of execution, and a given trade may serve multiple purposes simultaneously.

21. To the extent the final regulatory guide nevertheless seeks to impose additional requirements, including under the better practices, they should be directed at "large, complex" transactions only, defined by reference to established, asset-specific industry standards (rather than a new standalone definition). ASIC should avoid prescriptively defining this concept as it will vary significantly across markets, asset classes and participants. Market participants should be permitted to adopt a proportionate risk-based approach informed by relevant market characteristics and their own trading activity.

Timing and further consultation

22. The Committee notes the comment period for CP 389 closed on 27 July 2026, with the final regulatory guide expected in the fourth quarter of 2026. Given the significance and complexity of the issues raised in this submission, in particular those concerning the interaction between pre-hedging and insider trading, the Committee submits that ASIC should engage directly with industry participants, including through

further roundtables or bilateral discussions, before finalising the Draft Regulatory Guide.

Summary of responses to consultation questions

23. For ease of reference, the Committee's responses to ASIC's specific consultation questions in CP 389 are summarised below.

Table 1: Responses to CP 389 consultation questions

Reference	Consultation Question	Committee Response
B1Q1	Is our guidance sufficiently clear to promote a common understanding of pre-hedging?	The guidance is substantially clear in relation to the conduct principles for pre-hedging, but is not yet sufficiently clear on the interaction between those principles and the insider trading prohibition. It also risks giving the impression that a consequential market impact is indicative of misconduct which may not be the case.
B1Q2	How can our guidance better support a level playing field?	By clarifying ASIC's position on the insider trading issues, and not imposing requirements beyond those recommended by IOSCO—see our comments above.
B1Q3	Are there circumstances where the guidance may create uncertainty or unintended consequences?	Yes, on insider trading in particular and the degree to which the better practices (if they are included in the final regulatory guide) are expected to be followed.
B1Q4	Are there any changes we should make to the proposed guidance? If so, please provide details with reasons.	Yes, (1) to further explain the position in relation to insider trading, including a revision of paragraph RG 000.41(a) including possibly a no-action position and (2) to leave the "better practice" points out of the final regulatory guide.
B2Q1	What are the costs, benefits and utility of including these better practices in the proposed regulatory guide?	The practices may be a useful reference for market participants designing their own arrangements, provided ASIC (if ASIC were minded to include them in the final regulatory guide, which we do not support) makes clear that they are not mandatory and do not create a new minimum standard.

Reference	Consultation Question	Committee Response
B2Q2	Are there situations in which their inclusion might lead to confusion or unforeseen circumstances?	Yes. Please see comments in the body of the submissions above. Explicit trade-by-trade consent is not operationally practical and there may be more effective ways to achieve this (if needed) under an electronic or competitive request-for-quote trading.
B2Q3	Will their inclusion support a level playing field?	As we note in the submissions, including the "better practices" may cause Australia to impose requirements over and above what is recommended in the IOSCO final report, and cause operational and systems complexity for market participants that operate across multiple jurisdictions and may in certain instances lead to diminished client outcomes.
B2Q4	What (if any) amendments to the better practices would you suggest if they are included in the proposed regulatory guide?	For the reasons noted above, the Committee does not generally support the inclusion of the better practice points in the final regulatory guide.
B2Q5	What other better practices (if any) should be included in the proposed regulatory guide?	None identified at this time; the Committee would welcome the opportunity to comment further once ASIC's position on the matters raised in this submission is clarified.

Further contact

24. The Committee would be pleased to discuss any aspect of this submission.

25. Please contact Philippa Stone, Chair of the Committee [redacted] or Andrew Kim of Ashurst Perkins Coie [redacted] if you would like to discuss this submission with representatives of the Committee.

Yours sincerely



Adrian Varrasso
Chair, Business Law Section