



Law Council  
OF AUSTRALIA

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*Legal Practice Section*

# Retirement Income Covenant - September 2021

**The Treasury**

**13 October 2021**

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

## About the Section

The Legal Practice Section of the Law Council of Australia was established in March 1980, initially as the 'Legal Practice Management Section', with a focus principally on legal practice management issues. In September 1986 the Section's name was changed to the 'General Practice Section', and its focus broadened to include areas of specialist practices including Superannuation, Property Law, and Consumer Law.

On 7 December 2002 the Section's name was again changed, to 'Legal Practice Section', to reflect the Section's focus on a broad range of areas of specialist legal practices, as well as practice management.

The Section's objectives are to:

- Contribute to the development of the legal profession;
- Maintain high standards in the legal profession;
- Offer assistance in the development of legal and management expertise in its members through training, conferences, publications, meetings, and other activities.
- Provide policy advice to the Law Council, and prepare submissions on behalf of the Law Council, in the areas relating to its specialist committees.

Members of the Section Executive are:

- Ms Maureen Peatman, Chair
- Mr Geoff Provis, Deputy Chair
- Dr Leonie Kelleher OAM, Treasurer
- Ms Tanya Berlis
- Mr Mark Cerche
- Ms Peggy Cheong
- Mr Philip Jackson SC
- Ms Christine Smyth

## Acknowledgement

The Legal Practice Section is particularly grateful for the expertise of its Superannuation Law Committee in leading the development of this submission.

## Introduction

1. The Superannuation Committee of the Legal Practice Section (**the Committee**) makes this submission in relation to the proposed introduction of a retirement income covenant for Australian Prudential Regulation Authority (**APRA**) regulated superannuation trustees (**RI Covenant**) as set out in the Exposure Draft Legislation released on 27 September 2021 (**Exposure Draft Law**).
2. The RI Covenant is proposed to be added to the existing suite of statutory covenants applying to APRA regulated superannuation trustees under the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS**).
3. The Exposure Draft Law for the RI Covenant is set out in proposed new sections 52(8A) and 52AA of SIS and is summarised at page 4 in the Draft Explanatory Materials (**EM**) as follows:

*Implement a new covenant that requires trustees of an RSE to prepare a retirement income strategy to assist beneficiaries achieve and balance three objectives:*

1. *maximizing their expected retirement income;*
2. *managing expected risks to the sustainability and stability of their expected retirement income; and*
3. *having flexible access to expected funds during retirement.*

*This includes obligations to:*

- *take reasonable steps to gather the information necessary to inform the formulation and review of the strategy;*
- *record the strategy in writing;*
- *record a range of matters as part of the strategy; and*
- *make a summary of the strategy publicly available on the website of the RSE.*

4. The Committee's submission is intended for consideration by Treasury in finalising the legislative framework in which the RI Covenant will operate. The new laws as drafted should provide a simple and clear pathway for regulated super fund trustees to develop, determine, record, publish and implement a fund retirement income strategy (**RI Strategy**) for their beneficiaries, in accordance with the Government's stated policy objectives and consistent with the complex, regulatory and legal environment in which trustees must already operate.

## Regulatory overlap – design and distribution obligations

5. From 5 October 2021, superannuation trustees were subject to new requirements under the design and distribution legislation (Part 7.8A of the Corporations Act) (**Design and Distribution Laws**). Those requirements include in respect of the design and distribution of retirement products to ensure appropriate identification and consideration of member cohorts in determining suitable target markets and appropriate delivery of products to those target markets.

6. The Committee notes that MySuper products, which have their own specific statutory feature requirements enshrined under SIS, are carved out of the Design and Distribution Laws.
7. Similarly, the Committee suggests that any retirement products offered by a trustee in compliance with a properly formulated RI Strategy (in accordance with the new RI Covenant) should also be carved out of the Design and Distribution Laws.
8. To do otherwise risks confusion and unhelpful overlap between the respective laws – particularly as regards target market (and sub market) determinations under the Design and Distribution Laws and member cohort analysis and the application of a retirement income strategy determination in respect of different member cohorts under the proposed RI Covenant laws.

## Implementation of RI Covenant – Reasonable actions not taken to be personal advice

9. The EM at paragraph 1.51 asserts:

*Trustees must operate within the existing financial advice framework. Trustees can fulfill the requirements of the covenant and create effective retirement income strategies without providing personal advice.*

10. The Committee, respectfully considers that while a RI Strategy in accordance with the new laws can be developed, determined recorded and published by a trustee without providing personal advice, diligent **implementation** of the RI Strategy in compliance with the trustee's suite of statutory covenants poses a real and unavoidable risk of the trustee's actions being taken to give personal financial advice to members under the Corporations Act.
11. For that reason, the Committee suggest a clear provision be inserted in the new Laws so that any action *reasonably taken* by a trustee in compliance with the RI Covenant and implementation of its RI Strategy for its members will not be regarded as personal advice under the Corporations Law.
12. As noted in our previous submission on the Treasury's RI Covenant Position Paper, all that is required for a finding that advice given by a trustee is personal advice is – pursuant to the objective test under s 766B(3)(b) of the *Corporations Act 2001* (Cth) (**Corporations Act**) – that a 'reasonable person' might expect the provider to have considered their objectives, financial situation or needs. Therefore, in the context of the trustee being required to disclose to members key retirement income objectives which align with characteristics of different cohorts of members, that very disclosure may provide sufficient context for a court to view that in fund communications with members a reasonable person would expect their 'objectives, financial situation and needs' to have been considered. The consequence for trustees will then be that in seeking to give only information and general advice to members at large about their

fund's retirement income products, they may instead be taken to be giving personal advice with all of the associated cost and compliance burdens.

13. The Committee notes the EM states at paragraph 1.52 that:

*The retirement income strategy is to express the general actions the trustee will take to assist their members to balance key retirement income objectives. It also does not need to consider the specific circumstances of individual members*

*Collecting information on beneficiaries in and of itself, would not result in the provision of personal financial advice (which relates to making statements of opinion or recommendations about financial products).*

14. However, the relevant test under the definition of personal advice is **not** whether a trustee has considered the specific circumstances of individual members– the test is whether a reasonable member might expect the trustee to have considered one or more of the member's objectives, financial situation, and needs.

15. The EM indicates an expectation that trustees will consider combinations of a number of factors in designing products (eg age, account balance, partner status, home ownership and level of mortgage, life expectancy) gathered from collation of personal data about their membership.

16. It cannot be assumed members will be aware that the trustee's determination of products that may be suitable for cohorts with specific characteristics is made pursuant to a statutory covenant and is not intended as a recommendation to members in those cohorts. There is a considerable risk that a member could reasonably interpret factual information about a product that is designed for a cohort which applies to the member as a recommendation that the product is suitable for the member (having regard to the member's personal financial characteristics which are the characteristics of the cohort). This is particularly the case where the member has a "one on one" conversation with the trustee's call centre (whether the contact is initiated by the trustee or the member).

17. The Committee suggests that, critical to promoting the change in behaviour sought of both trustees and members is a legislative regime which in the Committee's view:

- provides clear and express (ie mandated) permission for the trustee to engage with their existing membership and utilise both fund level and member specific data collected and provided for the purpose of designing and promoting suitable retirement income options (including new innovative products) and for trustees to educate and guide members in their assessment and decisions on those options suitability as they transition from the accumulation to the retirement phase of superannuation investment;
- allows trustees to do so within a protected framework where their actions to fulfil the requirements of the Covenant, deliver suitable retirement product options and support their members (taking into account individual personal data) will not trigger or overlap with requirements that would otherwise apply in the provision of personal financial advice under the Corporations Act.

18. This could be achieved by an amendment to the definition of personal advice in s 766B of the Corporations Act, to the effect that:
- a. any action taken by a trustee to comply with the RI Covenant and implement a RI Strategy would not be personal advice; or, in the alternative:
  - b. any information provided to superannuation fund members regarding a trustee's RI Strategy does not constitute making a recommendation.
19. The definition of personal advice already excludes specified circumstances where the provider is giving information. For example, the purpose of the exclusions for telling a person the cost of a product is to carve out quotes for insurance products and is required because insurance staff obtain information about the client's personal circumstances in order to provide a quote, and there is therefore a risk that providing information about the cost of insurance could be interpreted as a recommendation.

## Review of relief for provision of generic calculators and retirement income projections for purposes of RI Covenant and RI Strategy implementation

20. Consideration should also be given to reviewing the current generic calculator and retirement projection statement ASIC relief in connection with trustees complying with the RI Covenant and implementing a RI Strategy. A retirement income calculator developed in connection with a trustee's implementation of the RI Covenant would not be generic, as the calculator would need to be specific to the trustee's own fund and product suite in order to be of any use to members, so would not meet the current terms of the relief for generic calculators.
21. To ensure trustees have reasonable tools at their disposal to effectively implement a RI Strategy – including any application of a member's personal data in those tools for that purpose – trustees should be enabled (by express provision tied to the discharge of the new RI Covenant) to provide calculators and forecasts that are designed for the trustee's RI Strategy without triggering personal advice regulatory requirements.
22. Relief is currently provided under:
- a. ASIC Legislative instrument 2016/207 – Generic superannuation calculators;
  - b. ASIC Class Order 11/1227 Relief for Providers of Superannuation forecasts – see also ASIC RG 229 Superannuation Forecasts.
23. Consideration could also be given to including the terms of the relief in legislation, following review and revision.

## Protection for action taken in compliance with RI Covenant

24. Section 55(5) of SIS is an important protection for trustees in respect of exercise of the Investment Covenant under section 52 of SIS:

*(5) It is a defence to an action for loss or damage suffered by a person as a result of the making of an [investment](#) by or on behalf of a [trustee](#) of a [superannuation entity](#) if the defendant establishes that the defendant has complied with all of the covenants referred to in sections 52 to 53 and prescribed under section 54A that apply to the defendant in relation to each act, or failure to act, that resulted in the loss or damage.*

25. The purpose of this protection is to support investment decision making which is not unduly risk averse or inhibited by risk of speculative or opportunistic class action behaviour, and is limited by the requirement that the Trustee must demonstrate compliance with all statutory covenants before the defence can be engaged

26. The Committee suggests that a similar protection should apply in respect of the RI Covenant, covering retirement income product development and innovation and including retirement income product performance, also for the purpose of supporting trustee decision making regarding retirement income products.

The Committee would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact the Committee Chair, Dr Lisa Butler-Beatty on [lisabbeatty@kpmg.com.au](mailto:lisabbeatty@kpmg.com.au).