Law Council
OF AUSTRALIA

Legal Practice Section

15 June 2018

The Treasury
Manager, CIPR's
Retirement Income Policy Division
Langton Cresent
PARKES ACT 2600

By email: superannuation@treasury.gov.au

Dear Sir/Madam

RETIREMENT INCOME COVENANT POSITION PAPER

1. This submission has been prepared by the Law Council of Australia's Superannuation Committee **(the Committee)**,[1] which is a committee of the Legal Practice Section of the Law Council of Australia.

2. The Committee is grateful for the opportunity to provide comments to the Treasury regarding the *Retirement Income Covenant Position Paper* (**the Position Paper**).

3. This submission does not seek to raise issues concerning matters of practice or policy. Rather, the Committee raises some specific queries relating to its objective of ensuring that the law relating to superannuation in Australia is sound, equitable and demonstrably clear.

Executive Summary

4. The Committee appreciates the intention behind the proposed introduction of a retirement income covenant that would require superannuation trustees to develop a retirement income strategy for their fund members.

5. The Committee notes that there will need to be a number of additional clarifications to the legislative and regulatory framework in order for the covenant to have its intended effect of expanding the range of retirement income products and allowing members to better balance competing risks in retirement.

6. The Committee has some concerns with:

    - the implication in the Position Paper that trustees owe a best interests duty to individual members, as opposed to the members collectively; and

    - the intermingling of a trustee's obligations as an issuer of a superannuation product with any obligations a trustee may owe if it provides advice as an Australian Financial Services (**AFS**) licensee.

[1] The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

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7. The Committee suggests that the legislation introduced to implement the Government's proposal should clearly delineate the obligations applicable to the trustee as the issuer of a retirement income product and the obligations applicable to the trustee if it provides advice in relation to a retirement income product (including exemptions, where appropriate).

Background

8. By way of background the Committee notes the different frameworks that apply to trustees and advisers.

9. Trustees must act prudently and in the interests of members as a whole. They must also act fairly as between different groups of members and avoid conflicts of interest. Under section 52(2)(d) of the *Superannuation Industry (Supervision) Act 1993* (Cth), they must give priority to their duty to the beneficiaries and to the interests of the beneficiaries, if there is a conflict with their personal interests. Trustee duties are therefore collective in nature.

10. Advisers have a number of legislated obligations under Part 7.7A of the *Corporations Act 2001* (Cth) when providing personal advice to clients, including to act in the best interests of the client, to give suitable advice to the client and to give priority to the client's interests. Adviser duties are therefore individual in nature.

11. When a trustee provides personal advice to individual members, it will become subject to the statutory adviser obligations towards the individual member as a client, but only in respect of the provision of advice.

12. Trustees may also provide general advice to members (that does not take into account their individual circumstances), but general advice does not trigger the individual best interests obligation.

Covenant Principles

<u>Retirement Income Strategy</u>

13. The Committee generally agrees with the factors relevant to the design of a retirement income strategy. However, the Committee notes that the extent to which retirement income can be maximised with the objective of delivering 'high income' in retirement will always depend on the account balance of an individual member. Similarly, to the extent that the factors reference member needs and preferences, the information available to a trustee about these matters will inevitably vary across the membership.

14. A trustee's role is traditionally to administer a trust for members collectively, rather than to 'design' products. The way the factors are expressed could therefore imply that trustees have a duty to design retirement products that are suitable for individual members. This would represent a significant change to a trustee's role.

    Recommendation: The Committee therefore suggests that the factors should be expressed in a less absolute way such that trustees would only need to consider them in a relative way and to the extent that they are relevant to the fund's membership collectively.

Engagement

15. To the extent that trustees are required to provide guidance to help members understand and make choices about retirement income products, we note that such guidance would fall within the broad concept of 'general advice' under the *Corporations Act 2001* (Cth). However, not all trustees have an AFS License (**AFSL**). In addition, as a matter of principle, if the Government is requiring this guidance to be given, the Committee submits that a trustee (even with an AFSL) should not have additional legal obligations to comply with licence conditions and give warnings when providing the guidance.

    Recommendation: A legislated exemption from the definition of general advice may therefore be required to enable this guidance to be provided within the parameters proposed.

Supporting Principles

Offering a Flagship CIPR

16. While the Committee agrees with the general concept that up to three flagship Comprehensive Income Products for Retirement (**CIPRs**) might be offered for different cohorts of members, there is a risk (also referred to above) that the mere offer of different CIPRs could imply that they are inherently suitable for a particular cohort. Some form of explicit legislated protection should be provided for trustees to avoid this inference, provided that the trustee has taken relevant factors into account to the extent that they are applicable to a particular cohort.

17. The Position Paper makes the point that offering different flagship CIPRs would not constitute advice, but as mentioned above, the implied application of a 'suitability' obligation should also be refuted.

Offering an alternative Retirement Income Product through advice

18. In this section of the Position Paper, the obligations of a trustee in 'offering' a product and the obligations of a trustee in 'recommending' a product become intermingled.

19. In paragraph 3, the Paper states:

    > *If the trustee offers the member a product that is not a flagship CIPR, the trustee should ensure that the alternative retirement income product is in the best interests of the member compared with the flagship CIPR …*

20. The Committee respectfully submits that this statement does not reflect the law. The mere offering of a product does not (and should not) constitute financial advice such as to trigger the individual best interests duty owed by an adviser. If, however, the trustee does provide personal advice and in that capacity does recommend an alternative CIPR, then the individual best interests duty would apply to the trustee as an adviser, but not as a trustee.

Future Considerations

Safe Harbour

21. As flagged above, the Committee agrees that there will need to be a statutory defence for trustees in relation to the offering of retirement income products. The Committee suggests that the defence could be similar to the defence offered under section 55 of the *Superannuation Industry (Supervision) Act 1993* (Cth) to the effect that a trustee will not be liable for loss merely because a retirement product is not suitable for a particular member and the member's dependants if it has offered a retirement product consistently with a compliant retirement income strategy.

Additional Issues

The Committee raises the following additional issues for consideration:

22. *Exceptions for certain other kinds of funds:* There may need to be exceptions allowed for in relation to certain types of funds. Although not common, it is possible for a fund to provide insurance-only benefits, in which case there are no traditional retirement benefits as such. Therefore, complying with a CIPR covenant would not be feasible. Likewise, there are some corporate funds where membership is strictly limited to employees of the corporate group and benefits are not provided beyond ceasing service (i.e., they rollover their benefits to another fund if they want post-employment superannuation benefits); so again, a CIPR covenant would not feasible for those funds.

23. *Implications for fund mergers:* Consideration may need to be given to whether CIPRs might complicate matters in terms of fund mergers. That is, a fund's CIPRs offering might need to be compared with another fund's offering in terms of the equivalency requirements necessary for successor fund transfers. Each trustee may have developed quite different CIPR offerings, but this should not cause barriers to arise for a successor fund transfer.

24. *Self-managed superannuation funds:* The Committee notes that 'Development of a retirement income strategy would be the only principle that would apply to self-managed superannuation funds' (Position Paper, page 4). However, it seems very unlikely that self-managed superannuation funds (**SMSFs**) would have an in-house CIPR, and if the members wanted to access a third-party or alternative CIPRs they are likely to choose to do so irrespective of whether there is a 'strategy' in place in order to comply with the covenant. So, the utility of extending the legal requirement to have a strategy to SMSFs seems limited.

Contacts

25. The Committee would welcome the opportunity to discuss its submission further and to provide additional information in respect of the comments made above. In the first instance, please contact:

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Yours sincerely

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