

9 February 2024

Retirement, Advice and Investment Division
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Dear Treasurer

Submission on the Retirement Phase of Superannuation: Discussion Paper - December 2023

We appreciate the opportunity to make a submission in relation to the *Retirement Phase of Superannuation Discussion Paper* released in December 2023 (**Discussion Paper**).

MinterEllison is a leading Australian law firm. We advise major financial institutions, including banks, insurance companies and superannuation funds, as well as specialist fund managers, platform operators, financial advice firms, stockbrokers, and other financial intermediaries in Australia and overseas.

The views expressed in our submission are ours alone and do not necessarily reflect the views of our clients.

The Discussion paper is broad-ranging and seeks input on a number of policy issues. We have not attempted to address all of the Questions in the Discussion Paper – rather, we have focussed on topics that are technical or legal in nature or where we have something to contribute based on our experience gained in the course of our legal practice.

Our responses to selected consultation questions raised in the Discussion Paper are set out below.

1. Supporting members to navigate retirement income

Consultation Question 6: Where can government and industry reduce complexity in the retirement income system, and provide simpler consumer experiences?

A significant issue that can contribute to complexity and confusion is that of product disclosure. Product disclosure statements (**PDSs**) for superannuation products in the accumulation stage must follow a prescribed format and are subject to a maximum page length of 8 A4 pages (although supplementary product information may be set out in other documents and incorporated by reference). For accumulation funds, these constraints have made comparing products simpler and forced trustees to create summary information suitable for an 8 page PDS.

For retirement income products, there is no corresponding prescription. There is no page limit nor any standard approach to presenting information in a PDS for a retirement income product.

This issue was the subject of Treasury's '*Retirement Income Disclosure Consultation Paper Stage Two of the Retirement Income Framework*' released in December 2018, which noted that:

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"when people approach retirement they are confronted with complex legal and financial information. In almost all cases, consumers are provided with lengthy Product Disclosure Statements which focus on discharging the product issuer's legal responsibilities. Complex disclosure and a lack of simple, clear information can lead to people relying on behavioural biases to make decisions and choosing a default retirement product, which may not suit their circumstances."

That Discussion Paper proposed the introduction of a 'retirement income fact sheet' that would 'highlight the following factors:

- the amount of periodic income the product would be expected to provide;
- the likelihood that income may fall short of that expectation in a given period;
- the degree of protection the product provides against the risk of running out of money; and
- the level of access to the underlying capital or for lump sum withdrawals.

The fact sheet would be designed to be used as one source of information. They would not replace or remove the need for funds to provide PDSs and would be required for all retirement products.'

While the ideas put forward in that Discussion Paper may have required further refinement, to our knowledge, these potential reforms were not pursued.

We would support law reform designed to make product disclosure more effective and facilitate product comparison by consumers.

Consultation Question 7: How might funds utilise guidance, nudges, defaults and other actions to assist members into better solutions for their retirement income? What are the barriers to funds being more active in these ways?

We consider the following issues to be the principal legal barriers to funds being more active in utilising guidance, nudges, defaults and other actions to assist members into better solutions for their retirement income:

Anti-hawking laws: a pension product offered through a fund is deemed to be a separate financial product to the accumulation product. The anti-hawking provisions restrict a superannuation trustee from engaging in real time interactions with its own members to discuss the fund's pension product offering. We consider that the anti-hawking provisions should treat all interests in the same superannuation fund as a single product and allow trustees to engage directly with their members. We consider that the duties imposed on superannuation trustees under the superannuation legislation and the heightened scrutiny of those institutions as significant APRA-regulated bodies provide adequate protection to members such that the anti-hawking provisions are not needed in this context.

Personal advice: as a superannuation trustee has a fair amount of personal financial information in respect of each member, any financial product advice provided to members runs the risk of being personal advice, particularly in light of *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* [2021] HCA 3. The threshold for whether a recommendation or opinion about or in respect of a financial product amounts to financial product advice is a low one. It is a considerable barrier to trustees giving 'nudges' or other assistance to members into 'better solutions' for their retirement that any such nudges or assistance would likely be considered as the trustee providing personal advice to that member (which would mean the various duties attaching to the provision of personal advice would need to be satisfied and a statement of advice provided, for instance).

Financial and superannuation calculators overregulation: we consider that ASIC's current approach to the regulation of financial and superannuation calculators is overly prescriptive and acts as a considerable barrier to superannuation trustees providing what could be invaluable tools to members. We do not think financial or superannuation calculators should be regulated on the assumption that the provider of the calculator would be providing financial product advice or personal advice to the user. ASIC takes this approach and has a relief instrument with overly prescriptive conditions which must be

complied with, or the provider is at risk of being considered by ASIC to be providing personal advice to users. For instance, a superannuation calculator does not comply with ASIC's instrument if it takes into account any information about the user that the user has not themselves inputted into the calculator. In our view, financial and superannuation calculators should be expressly exempted from the provisions of the Corporations Act regulating personal advice, and providers should not be required to comply with a prescriptive ASIC instrument in order to be exempted.

Defaulting not permitted: the law does not allow a member of a fund's accumulation product to be defaulted into the fund's pension/retirement product. The law only allows a person to be 'defaulted' into a fund's MySuper product where stapling does not otherwise apply and the person has not nominated their own fund, and their employer has nominated the fund in the standard choice form provided to the person. We think providers should be allowed to offer default arrangements where these are clearly disclosed. The concept of accumulation products and retirement income products being separate financial products is a relatively new one, and the need to effectively redeem the accumulation product and re-enrol the member in a pension product can be cumbersome and cost inefficient.

Consultation Question 9: The retirement income covenant does not apply to SMSFs

We consider that SMSF trustees are generally far more engaged and better able to provide retirement income to members because of their deeper understanding of the SMSF members' overall retirement income strategies. We do not consider it necessary for SMSF trustees to be subject to a retirement income covenant.

2. Supporting funds to deliver better retirement income strategies: Potential policy responses

Consultation Question 4: What approaches could make product disclosure useful for members?

Please refer to our comments on Consultation Question 6 in the previous section.

3. Making lifetime income products more accessible: Potential policy responses

Consultation Question 7: Would an industry-standardised product(s) assist funds to develop and offer lifetime income products to their members?

- **What features should a standardised product include?**
- **Should there be a path to more easily transition members to a standardised product?**
- **Should superannuation funds be required to offer a standardised retirement product, similar to MySuper for accumulation?**
- **How should a product vary for individual circumstances of the member?**

We do not think imposing a requirement on funds to offer standardised lifetime income products would assist funds to develop and offer such products to members. Rather, the prescription in the law (including the requirements under the SIS regulations to meet applicable definitions of 'annuity' and 'pension') with respect to lifetime income products is in our view a barrier to innovation and the development of these products.

An alternative approach may be to require funds to offer each member a minimum of two retirement income 'types' and perhaps to identify one of those types as a suggested default, based on information known to the trustee about the member. One type would need to be weighted more towards the provision of income guaranteed or expected to last for the member's lifetime and the other could prioritise other benefits such as access to capital. The notion of a choice may force trustees to better identify the benefits and disadvantages of each choice (perhaps by reference to 'cameos') and this approach could

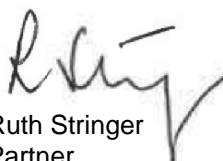
promote greater understanding by members of the trade-offs between different income stream types. The choices could be products offered within the fund or by an external provider.

Yours faithfully
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