



Law Council  
OF AUSTRALIA

*Legal Practice Section*

# Consultation Paper 351

## Superannuation forecasts: Update to relief and guidance

**Australian Securities & Investments Commission**

**31 January 2022**

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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 2022 Executive as at 1 January 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, 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

The Section's administration team serves the Section nationally and is based in the Law Council's offices in Canberra.

## Acknowledgement

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

## Introduction

1. The Superannuation Law Committee (**Committee**) of the Law Council's Legal Practice Section makes this submission in relation to ASIC Consultation Paper 351 *Superannuation forecasts: Update to relief and guidance (CP 351)*.
2. The Committee supports ASIC's proposal to update the relief currently provided for superannuation calculators and retirement estimates.
3. The Committee's comments are however intended only to raise legal issues for consideration by ASIC in settling the Regulatory Guide and ASIC Instrument attached to CP 351, and not matters of policy.
4. The Committee has therefore not commented on the various policy issues for which ASIC has requested comments in CP 351. Our comments are confined to technical issues.

## **Regulatory Guide reference to *Superannuation Industry (Supervision) Act 1993 (Cth) (SIS Act) section 99F***

5. Paragraph 37 of the Draft Regulatory Guide is in the following terms:

*We also note that ASIC Instrument 2022/XXX does not give relief to superannuation trustees from the requirements under s99F of the Superannuation Industry (Supervision) Act 1993. A trustee of a regulated superannuation fund must not directly or indirectly pass on to members the cost of establishing and operating a superannuation calculator if it involves the provision of personal advice to non-members or relates to a financial product that is not a beneficial interest in the fund.*

6. Paragraph 37 could be interpreted as a statement that ASIC's view is use of a superannuation calculator under the terms of the relief must be limited to the fund's members.
7. This is contrary to the practices of many funds, where superannuation calculators are publicly available on the website and can be accessed by any person regardless of whether they are a member.
8. This is also inconsistent with commentary in other paragraphs of the Draft Regulatory Guide which suggest that one of the objectives of default assumptions under the relief is for consumers to be able to make comparisons across funds by using superannuation calculators: eg, paragraph 130 regarding default assumptions for retirement age and draw down period:

*We think it is important to set a standard retirement age and drawdown period for the sake of consistency between forecasts. We also think that this can make it easier for members to compare the effect of other variables (e.g. investment*

*strategy or voluntary contributions) across different forecasts. It may also help members who switch to a different fund.*

9. Trustees must of course comply with section 99F of the SIS Act in their design of superannuation calculators. However, the statement that a trustee “*must not directly or indirectly pass on to members the cost of establishing and operating a superannuation calculator if it involves the provision of personal advice to non-members*” is not an accurate analysis of the requirements of section 99F. Section 99F relevantly requires that a trustee “*must not directly or indirectly pass the cost of providing financial product advice in relation to a member of the fund on to any other member of the fund*”, to the extent that the advice is personal advice and “*the subject member has not yet acquired a beneficial interest in the fund when the advice is given and the advice relates to whether the subject member should acquire such an interest*”. Superannuation calculators are often available to non-members but generally do not include advice relating to whether a non-member should acquire an interest in the fund. Therefore, the costs of developing a superannuation calculator are not necessarily costs that section 99F would be relevant to. Trustees designing superannuation calculators will need to consider a list of SIS Act obligations (including section 99F) that must be assessed by trustees for any expenditure on development of products or services.
10. We suggest that paragraph 37 is not helpful and should be deleted from the final version of the Regulatory Guide, or alternatively replaced with a paragraph to the following effect.

*Trustees must also consider their duties under the Superannuation Industry Supervision Act 1993 in designing, developing, and operating a superannuation calculator.*

## **Consistency with new breach reporting regime**

11. The relief ceases to apply if there is a breach of the conditions that is not immaterial, which is not reported to ASIC within 10 business days.
12. The breach reporting period of 10 business days reflects the reporting period for Australian Financial Services Licence breaches that applied under *Corporations Act 2001* (Cth) section 912D, prior to the introduction of the new breach reporting regime from 1 October 2021.
13. Trustees are in the process of updating their systems to comply with the new breach reporting requirements, including the new timeframe requiring reports to be made within 30 days after the trustee first knows, or is reckless with respect to whether, there are reasonable grounds to believe a reportable situation has arisen.
14. The Committee suggests that the superannuation forecast regime should align with the new breach reporting requirements.