

## Submission to ASIC in response to Consultation Paper 203

1. The Australian Securities and Investments Commission (**ASIC**) has issued licensing relief designed to enable superannuation fund trustees to provide retirement benefit projections to their members without the need to hold an Australian Financial Services license (**AFSL**) authorising them to provide personal financial product advice. The relief comes in the form of Class Order 11/1227.<sup>1</sup>
2. ASIC Regulatory Guide 229: *Superannuation Forecasts* explains ASIC's policy and the operation of the class order.
3. In order to have the benefit of the relief, a retirement estimate must:
  - (a) Provide an estimate of the member's account balance at age 65 and annual retirement income using a prescribed formula;
  - (b) be given to a member younger than 65;
  - (c) include certain mandatory 'consumer warnings';
  - (d) be calculated taking into account all of the required variables and using certain default assumptions (including an assumption the member retires at 65 and will have a further 25 year life-span;
  - (e) not include any other benefit, such as the age pension;
  - (f) be given at the same time as the member's periodic statement and be included in, or accompany, the statement.
4. However, take-up of the relief has apparently been very limited. This may be a consequence of the narrowly prescribed variables, In response, ASIC is considering modifying the instrument by allowing for the inclusion of the age pension and changing the assumed retirement age to the age the member becomes entitled to the age pension (among other changes)<sup>2</sup>.
5. In our view, the proposals canvassed in the Consultation Paper are unlikely to substantially alter the appeal of the relief. We think that it would be more helpful if ASIC could clarify and refine its views on whether, and in what circumstances, a retirement estimate constitutes financial product advice. An estimate which does not constitute financial product advice can be provided without having to comply with the restrictions set out in the Class Order.

### Are Retirement Benefit Estimates Personal Financial Product Advice?

6. ASIC states that, without relief, providers of retirement estimates might need to hold an AFSL with a personal advice authorisation and comply with the personal advice requirements of the licensing regime<sup>3</sup>. This statement strongly suggests that ASIC considers that a retirement benefit estimate constitutes personal financial product advice, presumably on the basis that the estimate was formulated using the member's individual account information and therefore involves taking into account

---

<sup>1</sup> [http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/co11-1227.pdf/\\$file/co11-1227.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/co11-1227.pdf/$file/co11-1227.pdf)

<sup>2</sup> Refer to ASIC Consultation Paper 203 - *Age pension estimates in superannuation forecasts: Update to RG 229*. Submissions in response to this paper are due by 19 April and ASIC will issue an update to RG 229 and CO 11/1227 shortly thereafter.

<sup>3</sup> ASIC Regulatory Guide 229: *Superannuation Forecasts*, at paragraph

the member's individual financial circumstances, as contemplated by the personal advice definition.

7. ASIC does not, however, go on to explain why it holds this view, or the perceived link between a retirement benefit estimate and a relevant decision about a financial product. It is therefore unclear why, or in what circumstances, ASIC considers that a superannuation forecast "may involve personal advice".
8. Interestingly, however, RG 229 goes on to state (at paragraphs 22 and 23) that retirement estimates may contain only factual information and a trustee providing such forecasts does not need to rely on the relief in [CO 11/1227] (i.e. from the requirements associated with providing financial product advice). ASIC comments further that these 'factual' forecasts may be given to members, provided that a clear statement is included that the estimate is only factual information.
9. In this regard, since ASIC seems to accept that a forecast will not necessarily involve personal financial product advice, and so it appears that much will depend upon the nature of the information contained in any forecast and the way in which it is presented.
10. Accordingly, if a superannuation trustee wishes to provide a retirement benefit estimate to members but does not wish to rely on the class order, it must determine whether the estimate constitutes the provision of financial product advice, however, ASIC has provided very little guidance on how to make this determination.

#### **Factual information only?**

11. Communications that consist only of 'objectively ascertainable information, the truth or accuracy of which cannot reasonably be questioned' will generally not involve an expression of opinion (i.e. a qualitative evaluation) and therefore will not constitute financial product advice.<sup>4</sup>
12. The projection of a member's balance into the future (with an assumed rate of return applied) is simply another articulation or a manipulation of the information already presented in the member's benefit statement. In other words, as the assumptions have all been stated, the estimate provided is capable of being independently and objectively ascertained. It does not involve a qualitative evaluation of any of the features of the superannuation fund and no statement of opinion in relation to the fund is made in an estimate.

#### **Influencing a person in making a relevant decision?**

13. Another aspect of the financial product advice definition is that the statement of opinion is intended to influence someone in making a decision in relation to a financial product. It is therefore necessary to identify any relevant decisions about a financial product to which an estimate might be directed. Conceptually, a projected retirement benefit estimate may be relevant to decisions about whether to maintain or alter the level of contributions being made and whether to change investment strategy or to rollover to another fund.
14. ASIC has expressed the view is that, in the superannuation context, relevant decisions include "the level of contributions to be paid to a superannuation fund

---

<sup>4</sup> ASIC Regulatory Guide 36.21

(including altering the level of contributions)" and "selecting a particular investment or insurance option within a superannuation fund."<sup>5</sup>

15. Trustees would need to consider whether one of these decisions or options is referred to in the estimate. A consideration of these options may be prompted by the member's assessment of the adequacy or otherwise of the projected retirement benefit. For example, depending on the member's individual circumstances, an extremely low estimate may lead a member to conclude that the expected retirement benefit is likely to be inadequate, and this may prompt the member to increase contributions. On the other hand, an extremely high estimate may make it apparent to the member that the benefit is likely to be more than adequate. Understanding these matters may influence the member to make a decision. However, an estimate alone does not refer to these decisions, identify the merits of any particular decision or provide any express 'call to action' for the member.
16. In our view, an intention to influence will be more apparent if a specific action is called for in the estimate. For example, if the estimate were to refer to, and be accompanied by, a form that enables the member to vary the level of contributions or alter their investment strategy, then this might demonstrate that the estimate is intended to influence the member to make a relevant decision. The information contained in an estimate is arguably not sufficient on its own to lead the member to any particular conclusion about any of the relevant decisions.
17. There is an element of judgment to be made in relation to whether something constitutes financial product advice because the test involves a consideration of whether the estimate "*could reasonably be regarded as being intended to have*" an influence in relation to a person's decision in relation to a financial product.
18. On one view, an estimate may not be regarded as being intended, on its own, to influence decisions of members in relation to the fund, in the relevant sense. Ordinarily, advice that is intended to influence a person to invest (or increase their investment) in a particular financial product would contain some commentary on the merits of the product. Generally, this is not present in a retirement benefit estimate and if the estimate could be viewed as influencing those with low balances to do something to increase their retirement savings, this is not specifically linked to the superannuation fund - it is more in the nature of a prompt for the member to undertake a broader review of their financial position.
19. Of course, an alternative way of looking at it would be to view the estimate as having been provided so as to influence members to increase their contributions by highlighting, for those who are unable to "translate" their account balance to a projected future retirement benefit.

## **Recommendation**

20. We think the industry would benefit from greater articulation by ASIC of its comments in RG 229 about when a retirement benefit estimate could qualify as containing factual information only, and when it might be considered to "cross the line" into the provision of financial product advice. The fact that ASIC has granted the Class Order relief and the lack of guidance about these matters has, in our experience, deterred trustees from providing estimates to members.
21. We appreciate that from a policy perspective, ASIC may prefer trustees to adopt a standard approach when preparing benefit estimates for members, but as the

---

<sup>5</sup> ASIC Regulatory Guide 36.26

provision of estimates is not specifically regulated under the applicable legislation, it is not possible to achieve this through Class Order relief. Trustees are not obliged to provide benefit estimates and we are not confident that the amendments proposed in the Consultation Paper will have a significant impact on the take up of the Class Order Relief.

22. Please feel free to contact me if any of the comments in this Submission require clarification.

**Ruth Stringer** | Partner  
**Lander & Rogers** Lawyers | Corporate

Level 19, 123 Pitt Street, Sydney NSW 2000

[www.landerson.com.au](http://www.landerson.com.au)