



Law Council
OF AUSTRALIA

Legal Practice Section

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Dear Sir/Madam

CP 325 PRODUCT DESIGN AND DISTRIBUTION OBLIGATIONS

1. The Superannuation Committee of the Law Council of Australia's Legal Practice Section (**the Committee**)¹ welcomes the opportunity to make a submission to the Australian Securities and Investments Commission (**ASIC**) in relation to the CP 325 Product design and distribution obligations.
2. Thank you very much for granting the Committee a short extension of time in which to make a submission in response to the Australian Securities and Investments Commission's Consultation Paper 325 Product design and distribution obligations.
3. The Committee wishes to comment on the discussion in the draft Regulatory Guide (attached to the Consultation Paper) concerning investment options made available through (what the RG calls) a 'Choice superannuation product'. The relevant discussion is in Example 7 (at [101]) and Example 9 (at [121]).
4. At Example 7, ASIC says that where multiple investment options are available through a Choice superannuation product, there should be 'a single target market determination for the Choice superannuation product'. The Committee agrees with this statement. However, ASIC then goes on to say that the target market determination should be one 'that describes multiple target markets for each

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.

investment option or group of investment options offered as part of the product'. The Committee respectfully disagrees with this statement. The Act requires 1 target market determination and 1 target market for a Choice superannuation product. The target market for a Choice superannuation product may be made up of a number of 'sub-markets', but that is different from saying, as is suggested in Example 7, that there would be 'multiple target markets for' a Choice superannuation product. This is not mere semantics, as Example 9 illustrates.

5. Example 9 concerns switching between investment options, and includes this:

The fund website requires members to log in and they are then presented with potential investment options. To restrict the possibility of members selecting an investment option inappropriate for them, the trustee customises the options presented to members after they log in based on member characteristics information the trustee holds. When a member would like to select an option that they are likely not in the target market for, the website prompts the member to contact the fund to receive further information.

6. In this passage, ASIC appears to be suggesting that the design and distribution obligations operate at the investment option level, rather than at the choice product level. If that is ASIC's view then, again, the Committee respectfully disagrees. For one thing, the design obligations apply to a financial product, in this case a superannuation product and, specifically, a choice product. For another, the distribution obligations apply to 'retail product distribution conduct' and there is no reason to think that switching between investment options within a choice product ordinarily, or ever, amounts to 'retail product distribution conduct'.

7. The term 'retail product distribution conduct' is defined as follows:

retail product distribution conduct, in relation to a financial product, means any of the following:

- (a) *dealing in the product in relation to a retail client;*
- (b) *under Part 6D.2, giving a disclosure document in relation to an offer of the product to a retail client;*
- (c) *under Part 7.9, giving a Product Disclosure Statement for the product to a retail client; and*
- (d) *providing financial product advice in relation to the product to a retail client.*

8. The Committee accepts (albeit reluctantly) that conduct that occurs after a financial product has been acquired could fall within this definition (although that possibility sits most uneasily with the evident policy intention as described in the Explanatory Memorandum, including the reference at paragraph 1.80 of the Explanatory Memorandum to 'potential investors'). However, in relation to paragraph (a) of the definition, an investment switch by a fund member will rarely, if ever, involve the superannuation trustee varying the superannuation product held by the member. In relation to paragraph (c) of the definition, an investment switch by a fund member will rarely, if ever, involve a superannuation trustee giving a Public Disclosure Statement (PDS) (as opposed to information specifically about investment options) to the member. And in relation to paragraph (d) of the definition, an investment switch by a

fund member will rarely, if ever, involve a superannuation trustee giving financial product advice (as opposed to 'purely factual information') to the member.

9. The Committee is not suggesting that a control along the lines ASIC describes may not be sensible but the Committee does respectfully suggest that such a control is not required by the law. The Committee therefore suggests that it may be preferable to make some revisions to the relevant aspects of the draft Regulatory Guide before it is finalised.
10. The Committee also queries whether it will ever in fact be the case that superannuation trustees will hold sufficient information about members' characteristics that they are able to tailor their websites so that individual members are only able to access information about products, investment options and, we assume ASIC would include, insurance, based on those characteristics.
11. Further, while the Committee accepts that ASIC is not suggesting that the tailoring occur on a per member basis, members will access their fund's website on an individual basis and it would not be difficult to see that they may reasonably consider that the trustee is making a recommendation having considered their personal circumstances. Indeed it might be the case that the trustee will in fact be making a recommendation having considered the member's personal circumstances in this case. The website will put forward (and at least implicitly recommend) a particular set of investment options for the member (being those in the sub-set of investment options made available to them) and, if trustees follow the example provided by ASIC, they will do so based on 'member characteristics information' they hold. This is very likely to be personal advice – and yet the example says nothing about the risk that a trustee who follows the example will be very likely to give personal advice.
12. The Committee would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact the Superannuation Committee Chair, Dr Lisa Butler Beatty on [REDACTED]

Yours sincerely

[REDACTED]

Margery Nicoll
Acting Chief Executive Officer