



# Keeping members informed about retirement options

Challenges faced by trustees in communicating with their members

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**A**s part of a current UNSW project researching the obstacles to the introduction of lifetime income streams faced by superannuation trustees, some interviewees have raised the legal restrictions on communicating with members.

This article is intended to explore these restrictions and make some additional suggestions on regulatory reform. It is not legal or financial advice; that can only be provided by those who are formally qualified.

## Anti-hawking

Section 992A of the *Corporations Act 2001* (Corporations Act) protects people against ‘unsolicited contact’ that is a ‘real-time interaction’—such as a telephone call or meeting—to discuss any financial product. Subsection (8) applies this to trustees who might want to discuss the commencement of a pension with its members. A superannuation fund can however advertise publicly or send emails or letters to its members without contravening the ‘anti-hawking’ provisions of section 992A (8).

ASIC Regulatory Guide 38 *The hawking prohibition* (RG 38) does say that a trustee can call a member “with information about differ-

ent retirement income products, provided that the trustee does not make an offer, request or invitation to the member.”

There is a fine line between informing a member about drawdown products offered by the fund, and actually ‘offering’ the product. It is hardly surprising that many trustees do not want to take the risk.

## Opportunities

Trustees may not want to phone members but are free to send emails or letters telling members that they might find it advantageous – for tax or other reasons – to begin a pension. While many members do not read emails nor letters, trustees can experiment with different alternative messages to get members to respond. Some superannuation funds appear to have success with single purpose campaigns. At least one fund has found that such a campaign has led to many members over 65 calling the fund and starting withdrawals.

## Regulatory reform

The anti-hawking legislation is to be welcomed as far as it prevents unwanted calls from companies that may not have your best interests at heart. It is an overkill to apply it to a superannuation fund of which one is a member and insulting to trustees. They have a duty to act in their members best interest to begin with, but the anti-hawking

legislation effectively assumes that direct interaction with members has a dishonest or ulterior motive. Trustees should be exempt from the anti-hawking provisions when they engage with their own members.

## Personal Advice

The problem is however wider—and deeper. Section 766B of the Corporations Act defines financial product advice and personal advice.

The former is widely defined as:

*a recommendation or a statement of opinion, or a report of either of those things, that:*

*(a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, ...; or*

*(b) could reasonably be regarded as being intended to have such an influence.*

This definition could be interpreted as covering this article and all opinions and submissions relating to financial products and would fail the ‘pub test’ by severely restricting conversations everywhere. It has to be taken to apply only to those who stand to gain some direct benefit from the ‘advice’, which is recommendation 3 of the Quality of Advice Review (QAR)—not yet accepted by government.

Personal advice is defined to apply where the provider has “considered one or more of the person’s objectives, financial situation and needs”, or a “reasonable person might expect the provider to have” done so. It requires a statement of advice (SOA). These are covered in excruciating details in part 7.7 of the Corporations Act. Trustees can provide the advice using financial planners or by using a computer—section 761(6). The advice does not have to be complete—it can be ‘scaled’ up or down—as long as appropriate warnings have been given, and of course is subject to the “best interest duty” in part 7.7A of the Corporations Act.

Superannuation trustees may not have an Australian Financial Services Licence (AFSL) that allows them to provide personal advice. Such trustees may provide factual information about products – but that information may fall into the definition of “financial product advice” and would need to add the small print warnings required by section 949A.

The problem is compounded because members reasonably think that the trustees are aware of their personal circumstances, which creates a risk of the advice being “personal”. The tests are applied objectively as well – that is, not what the trustee actually intended, but whether it could be said that, objectively, members could think that the trustee intended to influence them to make decisions about financial products.

This section provides an outrageous example where detailed prescriptions not only fails to be clear, but also undermines good advice. In the recent *Westpac Securities Administration Ltd & Anor v ASIC* [2021] HCA 3 (*Westpac v ASIC*) appeal, the issue was not whether the advice

was good or not but whether it was personal or general. The five judges of the High Court surely have more important issues to decide.

There is a further restriction in section 99F of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) that does not allow trustees to pass on the costs of some types of personal advice to other members of the fund. It does not seem to apply to once off advice on choosing a retirement product – because all members are likely to be in this position at some stage. The government has agreed in principle—or perhaps in part—to QAR recommendation 6 to remove this requirement.

## Opportunities

Trustees with a licence to provide financial advice can train staff to explain the benefits of lifetime pensions and include them in their on-line calculators and illustrations as long as the trustees provide an appropriate SOA. This should not be difficult to automate, even if the SOA will be so long that few members will read through it.

ASIC’s view of what is required for limited or scaled advice are set out in Regulatory Guide 244 *Giving information, general advice and scaled advice* (RG 244). The SOA should be complete, and the important consequences and risks summarised. The required expenditure for these services should not be difficult to justify as being in the best financial interests of the members – given that they may be able to spend more money in retirement.

## Regulatory reform

The QAR suggestion is that financial institutions including superannuation trustees should be permitted to offer all advice and that the SOA requirements be reduced. Their advice should however be ‘good advice’ – or presumably they should pay customers compensation if it is not. This would seem to be a significant step forward and the government has currently agreed, in principle, to these suggestions.

## Calculators and retirement estimates

Looking further at on-line options, *ASIC Corporations (Superannuation Calculators and Retirement Estimates) Instrument 2022/603* specifically exempts “superannuation calculators” and “retirement estimates” from being classified as personal financial advice—on condition that the calculations use ASIC’s default assumptions as to retirement age and does not “advertise or promote a specific financial product.”

ASIC defines a calculator as a “thing” that does a calculation “relating to a superannuation product but does not use information the provider knows about a user unless the information has been inputted by the user.”

A “retirement estimate” on the other hand is an estimate of the value in today’s terms or the lump sum at retirement or the annual income in retirement that is worked out using member data. The estimates can be “static”—paper



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### The quote

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based—or “interactive”—where members can change assumptions. Paragraph 6(2) limits static retirement estimates to members who are not drawing down.

For projections based on the use of an account based pension (ABP) in retirement, estimates need to use default assumptions that require the members’ accounts to be zero before or at age 92—for members under 87. This is rather reckless in ignoring longevity risk.

For superannuation calculators, given that a lifetime annuity does not require a drawdown assumption—paragraph 7(1)(a)(ii), trustees can illustrate the use of a lifetime annuity and a numeric confidence interval. The paragraph does not apply to retirement estimates however, but given the members are allowed to change the drawdown assumptions, lifetime annuities could be offered as an option.

Paragraph 7 also includes a number of required disclosures, including a statement that the result is not “intended to be relied on for the purpose of making a decision in relation to a financial product and that users should consider obtaining advice.”

### Opportunities

Trustees without a licence to provide personal advice can therefore include lifetime pensions in their own superannuation calculators and interactive retirement estimates. They do however have to take care not to “promote a specific financial product”. It is not clear, however, how trustees are to choose between the range of ABPs and lifetime annuities that are currently available.

ASIC Regulatory Guide 276 *Superannuation forecasts: Calculators and retirement estimates* (RG 276), speaks about reasonable investment earning and fee assumptions “based on specific financial products as long as the superannuation calculator does not advertise or promote those products.” The same approach would presumably apply to lifetime annuities. To be fair to members and to avoid “promoting a specific product”, trustees without a licence should presumably offer them illustrations of both ABPs and lifetime annuities.

Trustees with a licence to provide personal advice do not have to rely on the exemptions and so can include lifetime annuities and make recommendations using human advisers or digital advice tools – with the appropriate warnings. It might be argued that they have an obligation to do so in the interests of their members’ financial interests. It might further be argued that those without such a licence have an obligation to obtain one, to avoid giving members a misleading impression as to their potential retirement benefits.

### Regulatory reform

The regulations urgently need updating to explicitly permit trustees to include lifetime annuities in their illustrations. The Quality of Advice Review thought that industry discussions with ASIC should be sufficient to address these issues.

### In summary

- The anti-hawking provisions make it difficult to initiate a telephone conversation with members. Trustees can—and probably should—write to their members to offer some guidance on when tax free retirement benefits are available to them.
- Trustees with a licence to offer personal financial advice can offer any necessary advice to members who ask for it. They need to ensure that the advice is clear as to its limitations and assumptions, but these can be automated.
- Trustees without a licence are restricted in what they can say to members in person and on-line. They seem to be able to illustrate scenarios involving the use of lifetime annuities in interactive calculators and retirement illustrations they make available to members, and it might be argued that they should do so to meet the requirements of the Retirement Income Covenant. It does not seem that they can do so when providing printed illustrations. **FS**