



Law Council  
OF AUSTRALIA

# Development of the Framework for Comprehensive Income Products for Retirement

**Treasury – Retirement Income Policy Division**

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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.

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- 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

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# Introduction

This submission has been prepared by the Superannuation Committee (**the Committee**), which is a committee of the Legal Practice Section of the Law Council of Australia.

The Committee's objectives are to ensure that the law relating to superannuation in Australia is sound, equitable and demonstrably clear. The Committee makes submissions and provides comments on the legal aspects of virtually all proposed legislation, circulars, policy papers and other regulatory instruments which affect superannuation funds.

The Committee's response to the Discussion Paper entitled 'Development of the framework for Comprehensive Income Products for Retirement' (15 December 2016) is guided by its objectives as identified above. Where Discussion Questions relate to policy issues beyond the scope of the Committee no response is provided.

## Discussion Questions:

### A. Defining a CIPR

**1. How can trustees design CIPRs to deliver the best outcomes for their members? What are the trade-offs of different design approaches and features?**

A trustee has an obligation to act in the interests of members as a whole. Trustees may encounter difficulties designing a Comprehensive Income Product for Retirement (**CIPR**) that universally meets the needs of a diverse membership. From a legal perspective, a trustee's obligations should be deemed to be met if the CIPR meets certain objective criteria rather than a 'best outcomes' requirement.

A trustee should be free to offer more than one CIPR – with attendant safe harbour provisions – provided certain prescribed steps have been taken / factors taken into account and this nomination is reviewed for continued suitability on a regular (say three yearly) basis.

**2. Are there any lessons from defined benefit schemes that can be applied to the CIPRs framework?**

Defined benefit schemes will typically have an employer sponsor that 'underwrites' in some respects the funding of the specified benefits. A CIPR will not necessarily have such an underwriter so lessons may be limited, except possibly for the underlying investment strategy.

Certification, testing and specifications of products must address and disclose treatment of any ongoing surplus/profit in pooled arrangements and deficiency, particularly if product or provider failure were to occur.

**3. Do you agree with the proposed three minimum requirements of a CIPR? What are the alternatives?**

Although this is largely a policy matter, consideration could also be given to imposing certain minimum:

- portability requirements –to a certain minimum percentage of the prescribed actuarial value of a member's interest from time to time; and
- conditions on exit terms/fees/process (see our response to question 21).

**4. How important is achieving a minimum additional level of increased income to the introduction of the CIPRs framework?**

Policy issue – no submission.

**5. How should income efficiency be defined?**

Sufficient certainty is required. The Australian Government Actuary Paper on Actuarial Certification Test refers to: The certifying actuary should test that the proposed product specifications will on the best estimate assumptions provided, deliver constant real income in “expectation” for the required duration.

Similarly, “income efficiency” should be part of:

- initial certification; and
- annual/tri-annual recertification.

**6. What minimum level of increased income should be required; that is, what should be the minimum level of income efficiency? How should guaranteed products be accounted for?**

Although primarily a policy matter, perhaps consideration could be given to use something like the industry ‘Standard Risk Measure’ to try to explain simply:

- expected risk associated with variability of product returns;
- expected outcome risk/benefit or implied cost if product component guaranteed or not; and
- any circumstances in which any guarantee would not be fulfilled – i.e. guarantor failure.

**7. Which indexation option best achieves the goal of increasing standards of living in retirement?**

The Committee has no comment.

**8. Are there comparability benefits from specifying which indexation option would be required of a CIPR?**

The Committee has no comment.

**9. What elements/types of flexibility are most valued by individuals in retirement, and does flexibility need to be provided through a CIPR?**

The Committee has no comment.

**10. To what extent should savings outside superannuation be used to meet unexpected costs in retirement?**

The Committee has no comment.

**11. Is the proposed structure of a CIPR appropriate?**

Agree – the proposed structure appears tenable and consistent with other products provided through a superannuation fund. In the Committee’s view a CIPR should be

seen as a single financial product as far as a member is concerned, with direct and main recourse against the trustee as product provider.

**12. Are there are risks or issues with trustees partnering with third parties to enable them to offer certain underlying component products of a CIPR?**

Policy issue – no submission.

**13. Should trustees be able to offer one or multiple CIPRs as the mass-customised retirement income product offering to members? Why/Why not?**

Consideration should be given to permitting more than one CIPR per fund in order to better accommodate the needs of a diverse membership. Refer also to the Committee's answer to question 1 above.

**14. If funds were able to offer multiple CIPRs as the mass-customised retirement income product, on what basis would CIPRs differ?**

For the reasons stated above, the 'mass-customised' approach is flawed. Rather the approach should be for the 'CIPR' designation to provide a level of assurance to members that the product has been tested against certain core criteria.

Trustees should be able to offer multiple CIPRS for this reason with clear disclosure of the benefits and risks of each. For example, one CIPR may have a guarantee/annuity component, while another a pooled longevity component product.

**B. The Regulatory Settings for Trustees**

**15. What are the key impediments currently preventing trustees from offering a mass-customised CIPR to their members?**

Key impediments include the:

- passive nature of the trustee obligation – typically a trustee is administering a trust that has been settled by another sponsor – hence the obligation to create a 'suitable product' is not one currently known to trust law;
- differing retirement needs of members – therefore a single suitable product may not be possible; and
- complexity of longevity products which exacerbate disclosure obligations and advice risk.

Trustees must carefully consider whether it is in their members' best interests to offer a 'CIPR' type product. In particular, trustees will need to consider:

- whether the expected level of take-up (and growth) will justify the product investment, establishment and maintenance costs;
- whether members are potentially better served in the retirement de-cumulation phase by offering products of this nature; and
- that mere implied endorsement from Government may not be sufficient.

**16. Would a safe harbour for their best interest obligations remove a key impediment to trustees designing and offering CIPRs?**

This is a key protection. The advent of class actions cannot be underestimated as an impediment to innovation.

As important is the consideration of the form which any “safe harbour” provision takes. It should be carefully framed if it is to achieve its intended purpose – that form may need to change depending on whether a CIPR offering is to be mandatory or not for some or all super fund trustees. A model worth considering could be the original SIS defence (before recent amendments were made as part of Stronger Super reforms) structure for protecting trustees from investment earnings loss claims where they had implemented an investment strategy that had proper regard to specified investment criteria.

**17. Which trustees should consider offering a mass-customised CIPR to their members? Should the safe harbour be made available to all trustees or a certain population of trustees?**

Any MySuper licensed Trustee should be regarded as potentially suitable for provision of a CIPR. To provide some extra level of APRA prudential oversight to the offering of CIPRs, it may be appropriate to require a trustee to be MySuper licensed for it to be permitted to offer a CIPR. However, in principle any regulated fund trustee that is permitted to offer a CIPR should be subject to the same law in terms of the suitability of that offering to members and prospective members – including any safe harbour provisions.

**18. After an appropriate transition period, should the Government consider whether there should be an express obligation on trustees to offer a CIPR? If so, what length of transition period would be appropriate?**

Policy issue. However, given MySuper experience, there is likely to be sufficient competitive pressure to compel funds to offer CIPR to retain/attract retirement FUM if CIPRs credentials and value are demonstrated in practice. Regulatory compulsion may be undesirable and unnecessary to achieve policy objective.

**C. Ensuring that products meet the Minimum Product Requirements**

**19. What process should be used to ensure that a CIPR meets the minimum product requirements?**

Third party actuarial certification appears tenable. APRA certification may be undesirable because a more tailored certification is needed.

**20. Would it be appropriate for actuaries to provide third party certification? If so, what, if any, additional regulation of actuaries would be required?**

Perhaps require specialist accreditation in CIPR through the Institute of Actuaries.

**21. Should there be ongoing re-authorisation/re-certification requirements for CIPRs? If so how and how often should this be done?**

In principle it would appear appropriate to require re-certification every three years if original certification is required and perhaps as condition of access to continuing safe harbour protection in offering. Equally important will be to consider what should occur

if recertification is not achieved – both in terms of prospective and existing membership. Minimum portability and expected exit term conditions may be required to be set.

**22. What should the consequences be if a CIPR no longer met the minimum product requirements? Is it possible to avoid creating legacy products?**

Refer answer to 21 above.

**D. Facilitating Trustees to offer a CIPR**

**23. How can the framework facilitate trustees providing an easier transition into retirement for individuals, and what else can be done to meet this objective?**

CIPRs could be included as 'intra fund' advice enabling a more accessible and affordable advice offering.

**24. To which members would it be most appropriate for trustees to offer a CIPR? All members or only MySuper members?**

Suitable members only. Perhaps the legislation could set minimum conditions required to be met before a CIPR could be specifically offered to a member through some form of prescribed "nudge" process (noting that as with choice products, members should not be precluded from voluntarily investing in a CIPR):

- account above minimum specified balance;
- member has not made application for terminal illness benefit from fund (and member also required – as part of application if wishes to invest in CIPR – to declare and confirm not terminally ill or have life threatening illness/condition, e.g. life expectancy less than [x] years – years to be specified by actuary as part of certification of product suitability limits).

Could also consider provision of industry one page fact sheet to accompany any offer.

**25. In what circumstances should trustees not offer a CIPR to certain members?**

Refer above. Generic marketing of a CIPR product offer across fund membership should not be an issue. Targeted marketing would attract minimum requirements. Any application would need to meet minimum criteria as per question 24 above.

**26. Should the safe harbour only apply to the offering of a CIPR to certain members?**

Refer answer to question 24 above.

***Disclosure***

**27. What information about CIPRs should be conveyed to members by trustees during the pre-retirement phase and how often should this occur? Should this information, its form and frequency, be prescribed?**

More disclosure does not equate to better decision making. Keep it simple.

**28. When should the pre-retirement engagement between a trustee and a member commence and how frequently should it occur? Should this timing be prescribed?**

The Committee has no comment.

- 29. What is the best way to communicate the offer of a CIPR to members? Will warnings/ pre-conditions when offering a CIPR be effective? If so, which warnings/pre-conditions are necessary? If not, what is the alternative?**

Key features & product suitability summary to be preferred to PDS. Warnings about groups for whom not suitable.

- 30. What is the most appropriate type of disclosure document to provide further information about a CIPR to consumers and intermediaries such as financial advisers?**

“Normal regime” for any advice outside prescribed information provision although could consider intra fund advice inclusion.

### ***Competition***

- 31. What is the best way to assist individuals to assess the pros and cons of a CIPR?**

Subsidised advice intra fund advice or some form of user friendly suitability checklist.

- 32. What is the best way to foster competition in the CIPR market and broader retirement income product market?**

Flexible concept of CIPR.

- 33. Should CIPRs be able to be provided via direct channels and financial advice?**

Yes.

### ***Fees and pricing of CIPRs***

- 34. Is there a need for regulation of fees and pricing of CIPRs? What are the options?**

Yes. In return for “safe harbour” protection. Some pricing limits appropriate in line with the actuarial certification.

### **E. Products outside the Mass-customised CIPR framework**

- 35. Should a retirement income product that meets the minimum product requirements of a CIPR be labelled as such?**

Yes. It will need to stand out.

### **F. Other matters**

- 36. Is “MyRetirement” a more appropriate label for a CIPR in both the product and framework sense?**

There is a concern with the “My Retirement” label – given CIPRs will not be most suitable for all retirees.

- 37. Would portability foster competition between CIPRs as well as other retirement income products? If so, how could portability be built into the design of a CIPR,**

**should portability be mandatory or discretionary for trustees, and what would be the implications of this?**

The Committee has no comment.

**38. Should it be mandatory or left to the discretion of trustees to decide whether to allow for period certain guarantees in the design of CIPRs? What would be the implications of this?**

The Committee has no comment.

**39. What should be the maximum and minimum cooling off periods?**

The Committee suggests at least 28 days.

**40. Should the CIPRs framework accommodate (and if so, how):**

- a. joint CIPRs for couples?**
- b. Collective defined contribution schemes?**
- c. Aged care refundable accommodation deposits?**

The Committee has no comment.

## Contacts

The Committee would welcome the opportunity to discuss its submission further and to provide additional information in respect of the comments made above. In the first instance, please contact:

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