



APRA



ASIC

30 June 2021

To: All RSE licensees

Further guidance on oversight of advice fees charged to members' superannuation accounts

Key points

- Members may benefit from financial advice provided through superannuation, and the law permits advice fees to be charged to members' superannuation accounts if particular requirements are met.
- Trustees need to consider their arrangements for overseeing fees charged to members' superannuation accounts in light of:
 - findings set out in this letter; and
 - law reforms introducing prohibitions on some advice fee deductions and consent requirements.
- Trustees can expect further follow up from APRA and ASIC in relation to their oversight practices.

Background

On 10 April 2019, the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) [wrote to superannuation trustees](#) about their obligations concerning the oversight of fees charged to members' superannuation accounts. In the letter, APRA and ASIC asked trustees to review their existing governance and assurance arrangements and to address any identified areas for improvement in a timely manner.

Since the letter, APRA and ASIC have engaged with trustees to understand the outcomes of their reviews and any actions they have undertaken as a result of these reviews.

This letter sets out guidance for trustees. The guidance applies regardless of the structure of the fund (including wrap funds and funds with external trustees). The guidance is informed by:

- our examination of trustees' reviews of their oversight frameworks and practices undertaken in response to our letter of 10 April 2019;
- cases identified during the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission);
- other relevant enforcement matters;
- cases which have led to remediation processes by several trustees; and
- the new requirements of the *Financial Sector Reform (Hayne Royal Commission Response No. 2) Act 2021* (Advice Fees and Independence Act).

The attached information is intended to be a further reference point for trustees in reviewing and improving their oversight framework and practices. It is not exhaustive guidance.

Regulatory framework relevant to trustee oversight of fee deductions

Trustees have a variety of broad obligations relevant to payments made from the superannuation fund, significantly various covenants set out in s52 and s62 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act). Further, since our letter of April 2019 law reform has resulted in a broader range of trustee conduct being subject to the Australian financial services licence obligations and other financial service conduct obligations in the *Corporations Act 2001* (Corporations Act).

On 2 March 2021, the Advice Fees and Independence Act received Royal Assent. The Advice Fees and Independence Act limits advice fee deductions from superannuation accounts and is the Government's response to Recommendations 2.1, 2.2, 3.2 and 3.3 of the Royal Commission.

On 25 March 2021, ASIC published two legislative instruments (one relating to ongoing fee consents and the other relating to non-ongoing or one-off fee consents) specifying requirements for advice fee consents as contemplated by the legislation (ASIC instruments).

Note: See [ASIC Superannuation \(Consent to Pass on Costs of Providing Advice\) Instrument 2021/126](#) (Non-Ongoing Fees Instrument) and [ASIC Corporations \(Consent to Deductions—Ongoing Fee Arrangements\) Instrument 2021/124](#) (Ongoing Fees Instrument).

Trustees should have taken steps to develop policies and make process changes necessary to comply with the Advice Fees and Independence Act requirements before they commence on 1 July 2021 for arrangements made from that date and on 1 July 2022 for all other arrangements. APRA and ASIC will be monitoring trustees' adherence to the legislative requirements and ASIC instruments' requirements once they commence.

General comments

In making payments out of a superannuation fund it is expected that trustees will have processes in place to ensure expenditure is appropriate. In relation to advice fees, the design of specific oversight practices will depend on the advice service model that superannuation funds offer to members.

Generally, APRA and ASIC expect that all trustees:

- have access to the requisite information, systems and suitably qualified people to enable the completion of activities forming part of a robust assurance framework;
- incorporate, as necessary, specific control testing reviews within annual audit programs; and
- produce on a regular basis exception reporting on standard processes to ensure any necessary remediation activities can be completed in a timely manner.

In entering into arrangements with financial services licensees or individual financial advisers to facilitate the payment of advice fees for members, trustees should have regard to the specific issues for assurance processes set out in the attached information. In this respect, trustees who have an understanding of the nature of the business model of the financial adviser will be better placed to implement robust and efficient assurance steps.

In circumstances where the trustee is not providing financial advice itself, the trustee's role is to have controls in place in relation to payments made from the fund for advice services. A trustee is not expected to make a detailed evaluation of the specific professional advice provided by the financial adviser.

Signed

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Attachment: Detailed information

Meaning of 'advice fees'

Unless otherwise specified in this document, the term 'advice fees' refers to all fees that are charged to a member for financial product advice they received, no matter how those fees are described or whether levied for non-ongoing or ongoing services.

It does not, however, include costs of advice that can be charged across all members consistent with s99F of the *Superannuation Industry (Supervision) Act 1993* ('intra-fund advice'). Appropriate controls in relation to intra-fund advice will have a different focus to the oversight framework discussed in this letter.

Specific issues for trustee decision-making, assurance processes and system functionality

Our letter of 10 April 2019 highlighted four key questions for trustees to consider in reviewing their oversight processes. The following sets out the specific issues, findings and guidance relevant to each question, arising from our assessment of trustee reviews.

1. *Are deductions explicitly authorised by members? Are the deductions consistent with the authorisations and disclosures made to members?*

Member consent and the role of attestations

Our review identified a wide range of practices in relation to the extent of reliance on consents and attestations, from some trustees relying solely on financial adviser attestations that advice has been provided, through to others who will not pay financial advisers without clear evidence of member consent.

Following commencement of the Advice Fees and Independence Act, trustees can deduct advice fees (other than fees for intra-fund advice) from a member's superannuation account *only* if they have the member's written consent, or a copy of it, and the consent meets requirements in the ASIC instruments: see [Example written consent form \(ongoing fees\)](#) and [Example written consent form \(non-ongoing fees\)](#). This obligation applies for new fee arrangements entered from 1 July 2021 and will apply from 1 July 2022 for all arrangements. As outlined further below, in no circumstances, even with consent, can ongoing advice fees be deducted from a MySuper account.

ASIC has issued the following legislative instruments:

- [ASIC Superannuation \(Consent to Pass on Costs of Providing Advice\) Instrument 2021/126](#) (Non-Ongoing Fees Instrument) requires the written consent to deduct non-ongoing fees from superannuation accounts to include information about the services the member will be entitled to receive for the fee.
- [ASIC Corporations \(Consent to Deductions—Ongoing Fee Arrangements\) Instrument 2021/124](#) (Ongoing Fees Instrument) does not require the written consent to contain information about services the client will be entitled to receive as this information is already included in the Fee Disclosure Statement (FDS) provided with ongoing fee arrangements.

Other oversight practices

Over-reliance on member consent should be avoided. Instead reliance on the consent should be combined with further trustee oversight practices, in particular, proactive reviews of a sample of Statements of Advice (SOAs) and/or related documents to evidence the provision of services, either where misconduct is suspected or as part of a regular review.

While member written consent shows that fees have been properly consented to, reviews of SOAs and other documents for a sample of members provide a further assurance that the expected services have been provided in respect of those fees. Reliance on attestations by financial advisers or advice licensees that services have been provided has limitations due to the potential for conflicts of interest, so cannot in all circumstances be relied upon.

Deductions from a member's account for advice fees must be communicated to members as part of annual statements, and should be evident in balance movements where members may check their balances through a member portal. Sufficient description should be included to assist members in understanding the payment that has been made (e.g. the description may include the name of the financial adviser or the financial adviser's business or licensee name).

Note: See cl 303(1) of Sch 10 of the Corporations Regulations 2001. See also Regulatory Guide 97 *Disclosing fees and costs in PDSs and periodic statements* ([RG 97](#)) at RG 97.141.

2. Have services been provided?

Legitimate provision of advice

In general, we found an area of weakness for trustees was the lack of formal processes for checking financial adviser identification and qualifications.

Similar to due diligence assessments required for outsourced service providers, trustees should undertake the following checks before setting up a financial adviser as someone to whom payments can be made:

- check the [Financial Advisers Register](#) to verify that the financial adviser is licensed to provide advice and is not banned;
- require proof of identification from the financial adviser; and
- where possible, make enquiries to understand the business model of the financial adviser or licensee as part of ensuring a robust assurance framework.

Trustees should have appropriate processes in place to identify situations that may require further investigation to confirm whether services had been provided. This is an aspect of ongoing assurance as well as a trustee's general obligations under s912A of the Corporations Act and should be reflected in the control measures trustees have in place.

Where trustees are aware, or become aware, of particular concerns in relation to advice or financial advisers, they should investigate these 'red flag' occurrences.

Fees for personal vs general advice

Trustees typically do not charge fees for general advice they provide, but we found that some trustees allow third-party financial advisers to charge fees for general advice services.

Because SOAs are not required for general advice, there may be more limited ability to check the general advice provided to members by third-party providers. For this reason, trustees should be cautious about permitting third-parties to charge fees for the provision of general advice, and consider how to implement tailored controls if this is permitted.

Reviewing advice provided

Another area of weakness we identified was in relation to advice reviews, where trustees did not meet our expectation that they undertake regular proactive reviews of a sample of SOAs, or related documents, either on a random or risk basis.

Reviewing SOAs and related advice documents would enable trustees to check that the expected financial advice service has been provided, and that it complies with the sole purpose test. Trustees are not expected to review individual pieces of advice for quality, value or appropriateness.

In order to have robust oversight practices trustees may need to incorporate random reviews of a sample of non-ongoing and ongoing advice documentation (i.e. SOAs, FDSs and written consents for fee deductions), taking into account relevant risk factors.

Trustees do not need to obtain a copy of every SOA produced. However, the capacity to access SOAs and related documents provided by financial advisers, on request, should generally form part of trustees' assurance processes.

Trustees and financial advisers should have arrangements to enable any appropriate reviews to occur, including communicating to clients that these reviews may occur, to address any privacy concerns clients may have.

Termination of fee payments for deceased members

Several trustees may have charged fees to the accounts of deceased members. We are engaging with those entities to understand the cause and extent of any breaches, and to determine the most appropriate regulatory response. This includes commencing enforcement action in relation to three trustees.

We remind trustees to ensure that administrative processes and system functionality is designed to immediately cease the deduction of ongoing advice fees following the notification of the death of a member.

Trustees should have administrative processes to manage the timely refund of any advice fees where errors have been identified.

3. Is the deduction consistent with the sole purpose test?

Sole purpose test considerations There appears to be continued uncertainty among trustees about the services for which fees can be deducted from member accounts in line with the sole purpose test.

We do not consider it sufficient to rely solely on statements from financial advisers or members that the sole purpose test has been met. To verify this, a trustee may need to better understand the advice authorisations of the AFS licensee, including guidance on the advice topics available to members, the costs associated with the services and any proportioning rules established for advice fee payments from superannuation and non-superannuation sources.

The Royal Commission stated that the sole purpose test means that superannuation assets can only be used to meet the cost of providing financial advice about 'particular actual or intended superannuation investments'.

This means that if advice is provided on a broad range of topics that includes superannuation investments, only a portion of the fee may be able to be met from a member's superannuation account.

Note: See Royal Commission, Final report, [Vol. 1](#), p. 240.

For example, advice about the following topics would generally be acceptable:

- consolidation of superannuation accounts;
- selection of superannuation funds;
- selection of superannuation products/investment options;
- asset allocations within a fund;
- taking pensions and/or lump sums (including seeking advice on how much to draw down);
- whether to salary-sacrifice into super or make deductible contributions (concessional contributions); and
- whether to make non-concessional contributions.

Conversely, the following areas of financial advice would not be consistent with the legislated sole purpose of a regulated superannuation fund:

- broad advice on how the member might best provide for their retirement; and
- how a member might maximise their wealth generally.

When it comes to the fund's model for advice provision, trustees should avoid two extremes:

The first extreme is where the sole purpose test is interpreted too leniently, where any advice with even a weak connection to retirement income is accepted as consistent with the sole purpose test. This model risks member account balance erosion.

The second extreme is where the sole purpose test is used as a member retention strategy and is interpreted to mean that the only advice that can be paid for out of a member's account is advice that promotes staying in the fund.

4. *Is the deduction in the best interests of members?*

Fee caps and prohibition for ongoing advice from MySuper

Of all assurance measures, we found that most trustees impose some sort of fee cap on advice services provided to members. For example, some funds cap upfront fees at the lower of a dollar amount or a percentage of the member's account balance. Other funds cap upfront and ongoing fees at a percentage.

While the use of fee caps is a positive sign that trustees are aware of the need to put measures in place to protect members from account balance erosion, trustees should give careful consideration to the size of any fee cap. A high fee cap is unlikely to safeguard against inappropriate balance erosion, particularly where there are automatic deductions of advice fees from members with low balance accounts. Where fee caps are used, trustees should consider the appropriateness of the level and structure of fee caps, particularly for low balance accounts.

Following commencement of the Advice Fees and Independence Act, trustees will be unable to deduct ongoing fees from MySuper accounts. From 1 July 2021, this prohibition applies for ongoing fee deductions under arrangements entered from 1 July 2021 and from 1 July 2022 for ongoing fee deductions under other arrangements. Trustees should have taken steps to prepare for this by developing policies and making necessary process changes to ensure that they can meet this requirement at commencement.

Justification for multiplicity of advice fees

We found a large number of poorly distinguished advice-related fees in relation to some products. Some trustees allow for a range of fees for advice services, or services in relation to advice, to be deducted from members' accounts. Examples are initial advice contribution fees, ongoing advice contribution fees, ongoing and one-off advice fees, advice brokerage fees, advice fees – insurance, advice service charges and advice portfolio management fees.

The existence of various types of advice fees risks confusing members and the charging of multiple fees risks eroding superannuation balances. Trustees should be able to demonstrate how each type of advice fee deduction it permits serves a necessary purpose. Care should also be taken to avoid situations where an advice fee is functioning more as a disguised product fee rather than reflecting the provision of advice (e.g. in vertically integrated businesses).

Fees for intra-fund advice will remain deductible from both MySuper and choice superannuation products following commencement of the Advice Fees and Independence Act. Trustees should ensure, in advance of commencement, that they and their financial advisers have a clear understanding of the limits of intra-fund advice, to reduce the likelihood of fee deductions being made in breach of s99F of the SIS Act.

Responding to member complaints Member complaints are a key risk indicator of systemic problems within a superannuation fund. Trustees' timely identification and resolution of systemic issues is likely to reduce member harm and prevent escalation of these matters to AFCA: see Regulatory Guide 271 *Internal dispute resolution (RG 271)*, which takes effect from 5 October 2021.

We have found that, in general, trustees are failing to actively investigate member complaints about the deduction of advice fees, with some trustees appearing to take the view that they are unable to investigate complaints raised about financial advisers, particularly unaffiliated financial advisers. In these cases, it is not uncommon for trustees to direct members to contact the financial adviser they complained about.

Trustees are not required to scrutinise every member complaint about a financial adviser, and in practice members are typically best placed to pursue individual complaints about the quality of advice.

However, trustees may need to act if there are systemic issues identified about a particular financial adviser and should generally actively investigate member complaints about deduction of advice fees when expected services were not provided. This is because trustees have obligations to ensure any money paid out of the fund is paid for a proper purpose and that the recipient was entitled to the payment.

Adequate investigation of member complaints about the deduction of fees where no services have been provided offers a protection against member balances being eroded by illegitimate advice fees.

Record keeping Trustees that are a fee recipient in relation to an ongoing fee arrangement will need to keep sufficient records so that their compliance with the Advice Fees and Independence Act requirements can be readily ascertained from 1 July 2022. This includes records of FDSs, member notifications to renew or terminate an ongoing fee arrangement, and member consents regarding advice fee deductions.

However, if a member gives the financial adviser written consent to deduct fees from a choice account before 1 July 2022 or varies or withdraws their written consent before 1 July 2022, the obligation to keep records of compliance applies from the date of the consent, variation or withdrawal.

Remediation We found that many trustees are failing to compensate members for monies improperly paid out of member accounts, such as in circumstances where member consent or authority for the deduction of fees has not been given.

Where remediation is required, trustees should take steps to recover, or facilitate the return of, fees paid to financial advisers and reinstate members' accounts within the superannuation system in a timely manner. We would expect that trustees would also communicate effectively with financial advisers about when members will or have been compensated.

Remediation (cont.) ASIC recently consulted on proposed updates to Regulatory Guide 256 *Client review and remediation conducted by advice licensees (RG 256)*, and has released [this field guide on consumer-centred remediation](#).

Further regulatory action

Poor oversight practices enable inappropriate behaviour by others. APRA and ASIC have identified instances of financial adviser misconduct where failures in trustee oversight have enabled third parties to access superannuation monies to which they were not entitled. Action by ASIC against the financial adviser after the event is no substitute for appropriate risk management practices by trustees.

APRA and ASIC will continue to engage with trustees about the robustness of their policies and practices for management and oversight of all fees charged to the superannuation accounts of members. APRA and ASIC reserve the right to exercise our powers in relation to any subsequent enforcement action required.