

Trustee obligations relating to deduction of advice fees

User Guidance

This Paper has been prepared to assist users to navigate the duties and obligations of trustees when paying out advice fees from a superannuation fund. It has regard to the relevant provisions of the *Superannuation Industry (Supervision) Act* ("SIS"), primarily but not exclusively section 99FA of SIS, but does not seek to prescribe a particular approach to compliance with these provisions.

Disclaimer

The contents of this Paper (current at the date of publication set out in this document) are for reference purposes only. They do not constitute legal advice, are provided with no assumption of a duty of care to readers and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this Paper.

Introduction

There has been much discussion relating to this topic but as is often the case, more heat than light.

In particular, questions have arisen, which deserve to be answered, and which this Paper seeks to answer, principally around:

- 1 the extent to which a trustee must check/monitor/supervise the advice provided by a third-party licensee/adviser;
- 2 the extent to which a trustee must critically assess the quality of the advice;
- 3 the extent to which a trustee must critically assess the extent of the fees charged by the advisers including value for money.

Principal obligations

A useful starting point in this context is a snapshot of the trustee's relevant overarching obligations relevant to expending fund monies towards the provision of advice.

The principal obligations are as follows:

- 1 the relevant obligations under the statutory covenants contained in section 52 of SIS being:
 - (a) the duty to exercise reasonable care (section 52(2)(b));
 - (b) the duty to perform the trustee's duties and powers in the best financial interests of the beneficiaries (section 52(2)(c));
 - (c) the obligations under SIS Regulation 5.02 to ensure that the costs to be charged against a member's benefits are distributed in a fair and reasonable manner.

- (d) the obligation under the *Corporations Act 2001 (Cth)* to ensure that the financial service of providing superannuation services is carried out efficiently, honestly and fairly (section 912A(1)(a)).
- 2 The obligation under section 62 of SIS to ensure that the fund is maintained solely for certain specified retirement purposes.

Outworkings

It seems to the authors that the outworkings of these principal obligations, translated into the present context are as follows:

- standards of care and reasonableness so translated mean that the trustee must achieve a certain level of satisfaction as to the services being provided by a third-party adviser; we elaborate on this point below;
- this does not mean that a trustee must only pay advice related expenses from the fund if they are reasonable; it would be more accurate to say that the trustee must ensure expenditure from the fund is appropriate¹;
- in relation to the sole purpose test, the trustee is under an obligation cast in terms of ensuring the specified statutory retirement purposes are met; this should not be interpreted in our opinion as meaning that a trustee is strictly liable if an adviser's conduct cuts against the grain of the test; for example where an adviser might wrongfully charge fees for non-superannuation related advice. In other words a fund can be maintained for the specified purposes even if some application of fund monies is technically outside of the flags set by section 62, particularly if the trustee is unaware of, and has taken precautions against, this occurring;
- case law has established that the best interest covenant is primarily process driven and not outcomes driven. In our assessment, it does not add to the equation here in the sense of dictating additional measures beyond the ones required by the other covenants referred to².

Towards a formulation (and encapsulation) of a trustee's advice related obligations

We do not propose to rehash the specific obligations that apply to a trustee under section 99FA of the SIS Act. Rather, the following formulation/encapsulation flows from the principal obligations identified above.

We set these out in the form of principles:

Principle 1: Neutrality

The new drafting of section 99FA is neutral and permissive as to how a trustee can satisfy itself that monies outlaid from the fund are properly expended. This means that a trustee of a fund could satisfy itself that it will not breach section 99FA through a number of reasonable measures (discussed under Principle 5 below). This is consistent with the statement in paragraph 1.13 of the supplementary Explanatory Memorandum which notes:

"Under both the current and amended section 99FA, trustees may determine an appropriate approach to comply with section 99FA".

¹ See APRA and ASIC joint letter to RSEs June 2021 "Further Guidance on oversight of advice fees charged to members' superannuation accounts" (the "Guidance Note"): "In making payments out of a superannuation fund it is expected that trustees will have processes in place to ensure that expenditure is appropriate." (at page 2 of the Guidance Note)

² But see paragraph 4 of the Joint Guidance Note (viz Is the deduction in the best interests of members" (at page 8)

Principle 2: Appropriateness of expenditure

The trustees need not however apply a general yardstick of reasonableness (subject to the application of the next principle) to each item of expenditure relating to third parties' advice and in particular is not required to assess the value of the advice provided (subject to the application of the next principle) nor assess the quality of the advice provided³.

Principle 3: Swimming between the flags

A trustee should however apply a yardstick of reasonableness to ensure associated fund expenditure is not so unreasonable that it cannot possibly be a legitimate fund expense. For example, a trustee should formulate some boundaries of associated expenses in terms of quantity of expense; hence it should not allow manifestly unreasonable amounts to be paid out of the fund for advice related expenses⁴.

Principle 4: Comfort as to provision of advice

A trustee should be comfortable that advice (where the costs are met from the fund) has actually been provided.

This does not equate to "substantiation" in the sense of positive proof (such as sighting specific advice) that a relevant piece of advice has been provided but rather a trustee should have procedures in place to achieve this comfort through some form of monitoring or other positive measure (elaborated on in the Reasonable Measures principle below).

Principle 5: Reasonable Measures

Given the first principle of neutrality, in our view a trustee could satisfy itself that it will not breach section 99FA (or other applicable principal obligations such as the sole purpose test) through a number of possible measures⁵ including:

- information provided by the member including member attestations to the fact that personal advice was provided;
- the trustee investigating and obtaining⁶ its own information – for example:
 - audit and spot checks of advice, including sampling advice document extracts on a random or risk basis to confirm sole purpose compliance and the provisions of services;
 - reviewing member consent and fee forms to ensure they have been completed correctly; and
 - reviewing adviser activity on members' accounts.
- attestations provided by the relevant licensee/adviser;

³ "A trustee is not expected to make a detailed evaluation of the specific professional advice provided by the financial adviser" (at page 3 of the Guidance Note)

⁴ "Of all assurance measures, we found that most trustees imposed 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" (at page 8 of the Guidance Note).

⁵ "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" (at page 3 of the Guidance Note).

⁶ See Guidance Note at page 6 in relation to the regulators' "expectation that they undertake regular proactive reviews of a sample of SOAs, or related documents, either on a random or risk basis" and reference to "random reviews of a sample of non-ongoing and on-going advice documentation". (i.e. SOAs, FDSs and written consents for fee deductions) taking into account relevant risk factors" and "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".



- applying caps or thresholds as appropriate to the amounts of adviser fees (percentage and/or dollar based) that it would pay from the fund on an ordinary basis. This may also include monitoring adviser fees on low balances.

Note – whether measures are activated at a particular time, in combination, or at all, will depend on the specific circumstances of the fund and its arrangements with a particular licensee, as explained below.

It is further submitted that law relating to reasonable steps required in the context of certain statutory financial services obligations (“**Reasonable Steps Law**”) is equally relevant to this area of reasonable measures. In this regard, note the to-the-point observation in the RM Capital case, viz “Nor in any particular fact situation, is there necessarily one and only one set of reasonable steps which, if taken, would satisfy the requirement” (at paragraph 74).

Summary

A key upshot flowing from the above is that there is no one single mandated source of truth or technique which the trustee must deploy such as reviewing individual statements of advice.

Rather, as with Reasonable Steps Law, what measures are reasonable will depend on the specific circumstances of the fund and its arrangements with a particular licensee. For example, a trustee who has a high level of experience working with a particular licensee may be able to reasonably rely on attestations by the licensee in order to satisfy the trustee’s relevant obligations identified above.

A trustee who has not got that high level of comfort may engage in, and rely primarily on, spot checks and audits.

An important touchstone here is that the trustee gives adequate consideration to appropriate reasonable measures and maintains a suitable compliance regime around those measures. This latter point is reflected in paragraph 1.18 of the Revised Explanatory Memorandum which states:

“Consistent with meeting their obligations under the current 99FA, trustees should have in place robust assurance processes to satisfy themselves that advice deductions from members’ superannuation accounts comply with their legal obligations”.

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