

Trust deed

This factsheet is about what AFCA needs from superannuation trustees when we request a copy of the relevant trust deed.

When assessing and deciding superannuation complaints, both AFCA and trustees rely on the fund's governing rules, which includes the trust deed, to ensure the decision made correctly references the terms under which the fund operates. This means it is important to confirm both the trust deed and the provisions in the trust deed upon which the trustee relied are 'correct'. Trustees may find it helpful to understand what AFCA means by the 'correct' trust deed in AFCA's request for information.

Why does AFCA need the correct trust deed?

AFCA cannot make a determination that is contrary to the fund's governing rules, including the trust deed. If AFCA relies on an incorrect provision of the trust deed in making a determination, we may have made an error of law.

It would be unfair to the parties for AFCA to make a decision based on incorrect provisions in the trust deed. Further, a party may appeal an AFCA superannuation determination to the Federal Court if we have made an error of law.

Why does AFCA need an executed trust deed?

The correct trust deed is the original executed trust deed as amended from time to time in accordance with the amendment power in the trust deed (or by court order).

AFCA is often provided with unexecuted working copies or consolidations of trust deeds and in some cases, unexecuted deeds (originals and amendments). AFCA appreciates the efficiency of an unexecuted consolidation or working copy of a trust deed but there is a risk it does not accurately incorporate the relevant amendments to the trust deed and does not represent the 'correct' trust deed.

What trust deeds can AFCA accept?

The 'correct' version of the trust deed will be:

- copies¹ of the original executed trust deed as amended (executed deed of amendment or a signed resolution of amendment in compliance with the amendment power in the trust deed or a court order, if applicable); or
- an executed consolidation applicable at the relevant date(s) of the dispute.

If signatures are redacted in an executed document, AFCA must receive a certification that the signatures of the person/s named in the document as signatories were duly affixed to the document. This must be provided by either:

- a trustee director or company secretary; or
- a solicitor holding a practicing certificate.

The certification must be endorsed on the first page of the document provided. AFCA expects that the names of the signatories will be visible on the document.

¹ AFCA accepts that a copy of the executed original document can be produced. This is consistent with section 48(1)(b) of the Evidence Act (Cth).

AFCA expects that the correct version of the trust deed will generally be available. However, where a trustee cannot provide an executed copy of the relevant trust deed (as amended), AFCA accepts its risk can be reduced if it receives a certification that the unexecuted consolidation or working copy of the trust deed is a true and correct copy of the deed provisions in force at the relevant date. This is provided by either:

- a trustee director or company secretary; or
- a solicitor holding a practicing certificate.

The relevant date should be stated as part of the certification by persons listed above, and the certification must be endorsed on the first page of the document provided.

What does AFCA expect when a new trustee takes over from an outgoing trustee or in a successor fund transfer?

AFCA is aware there will be cases where a trustee will become the trustee of another fund or group of members following a merger, takeover or in the event of a successor fund transfer.

The primary duty of a trustee is to carry out and adhere to the terms of the trust. This means it is expected that the new trustee will obtain the relevant governing rules, including the correct trust deed(s) and assurance from the outgoing trustee that they accurately reflect the applicable terms of the trust.

AFCA expects a trustee taking on the prior liabilities of an outgoing trustee to have mechanisms in place to obtain the correct trust deeds in force at all times prior to the outgoing trustee ceasing to be the trustee.

When might AFCA need more than one trust deed?

Depending on the nature of the dispute and the issues raised, there may be more than one relevant date when a trust deed is required.

This means AFCA will seek the trust deeds in force at each of the relevant dates to address the issues within the dispute. This is to ensure the trust deed(s) and the trust provisions on which the trustee relied, were the provisions in force at the applicable and relevant time.

Typically, AFCA will need the trust deed in force when the trustee decision under review was made. However, where the dispute relates to payment of a benefit, we will also need the trust deed in force when the benefit became payable.

Where AFCA has sufficient information to do so, we will specify the dates for which we need executed trust deeds, when we request trust deeds from the trustee.

What will AFCA do in the absence of an acceptable trust deed?

AFCA expects that all relevant trust deeds will be available in accordance with the trustee's obligations at law. If a trust deed cannot be provided to AFCA, we encourage you to contact your case worker or the superannuation manager to discuss.



Case example

Death benefit

Elizabeth died on 25 September 2020. The trust deed in force was the trust deed last amended on 17 November 2019.

The trustee determined to pay the benefit to Elizabeth's defacto spouse on 17 March 2021. On 1 February 2021 the trustee had amended the trust deed. The adult children of Elizabeth lodged a complaint with AFCA on 6 April 2021.

The relevant trust deed is the trust deed in force at the date of Elizabeth's death being 25 September 2020. The subsequent amendment of the trust deed does not alter this.

IP benefit

John has an accident at work in 2020 and becomes unable to work. He lodges an IP claim under the insurance policy he held through his superannuation fund. The claim is declined because John no longer held cover when he had his accident.

John joined the fund in May 2010 through his participating employer and was issued with IP cover. He left his participating employer in 2017 and his IP cover was cancelled.

John says he contacted the trustee's representative prior to leaving his employer and was told his IP cover would be transferred to the personal section of the plan when his account balance was transferred. John says because of this information he opted out of IP cover in his new employer's superannuation fund.

John lodges an AFCA complaint against the trustee saying that the trustee misled him to his detriment and the trustee should pay him the amount equivalent to the IP benefit being \$25,000. The trustee in April 2021 says its representative did not mislead John and it will not agree to compromise the claim.

In this scenario, AFCA would need executed copies of the correct trust deeds in force when John joined the fund in May 2010 and when John left his participating employer in 2017, and also, at the date of the trustee's decision in April 2021. (AFCA would also need copies of the insurance policy as at May 2010 to assess eligibility and when John left his participating employer in 2017 for cover cancellation terms).

