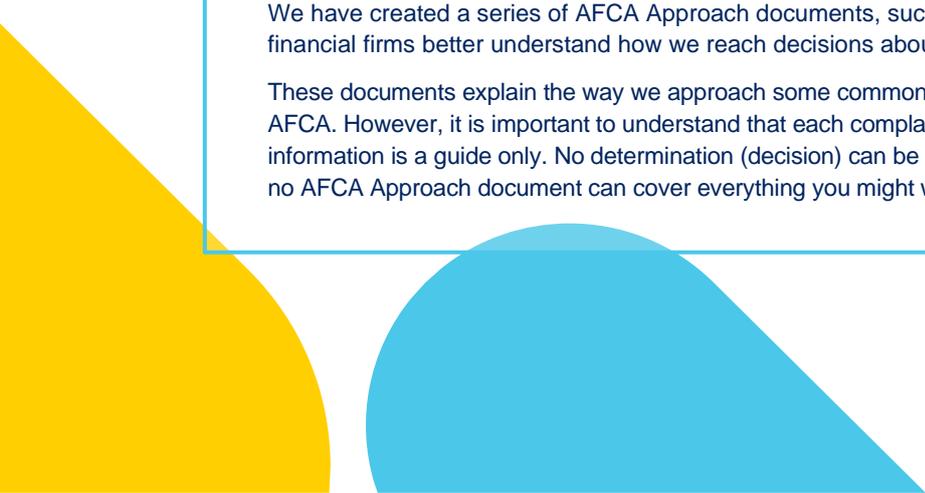


# The AFCA Approach to superannuation fees and charges

February 2023

|          |   |           |
|----------|---|-----------|
| <b>1</b> | <b>At a glance</b> .....  | <b>3</b>  |
| 1.1      | Scope .....   | 3         |
| 1.2      | Summary .....   | 3         |
| <b>2</b> | <b>In detail</b> .....  | <b>3</b>  |
| 2.1      | Assessing complaints about fees .....   | 4         |
| 2.2      | What information does AFCA need? .....  | 5         |
| 2.3      | Permitted fees in superannuation .....  | 5         |
| 2.4      | Permitted fees under the governing rules.....   | 5         |
| 2.5      | Disclosure of fees and charges .....  | 5         |
| 2.6      | Advice fees and conflicted remuneration.....  | 6         |
| <b>3</b> | <b>Context</b> .....  | <b>8</b>  |
| 3.1      | Case studies.....   | 8         |
| <b>4</b> | <b>References</b> .....   | <b>9</b>  |
| 4.1      | Definitions.....  | 9         |
| 4.2      | Useful links .....  | 9         |
| <b>5</b> | <b>Appendix – AFCA’s superannuation jurisdiction</b> .....                                  | <b>10</b> |
| 5.1      | What are AFCA’s remedial powers for superannuation complaints about fees and charges? ..... | 10        |
| 5.2      | Reviewing decisions (and related conduct) .....   | 10        |



We have created a series of AFCA Approach documents, such as this one, to help consumers and financial firms better understand how we reach decisions about key issues.

These documents explain the way we approach some common issues and complaint types that we see at AFCA. However, it is important to understand that each complaint that comes to us is unique, so this information is a guide only. No determination (decision) can be seen as a precedent for future cases, and no AFCA Approach document can cover everything you might want to know about key issues.

# 1 At a glance

## 1.1 Scope

AFCA often receives complaints about fees charged to a superannuation product. Commonly, the complainant says they were unaware of the fee or charge, or they have not received any service for the fee or charge and are seeking a refund.

This document sets out our approach to assessing complaints which allege that a fee or charge debited from a superannuation product was not disclosed and/or a corresponding service was not provided. It does not relate to complaints about insurance premiums.

There are some important differences between AFCA's superannuation jurisdiction and its broader jurisdiction. The Appendix to this document sets out the approach that AFCA takes in determining superannuation complaints.

## 1.2 Summary

If a complainant has expressed dissatisfaction about a fee or a charge to a trustee, AFCA will consider whether the trustee's decision not to refund the fee or charge was fair and reasonable. In reviewing the trustee's decision, AFCA will consider whether a fee or charge debited from a superannuation product was lawful, adequately disclosed and that a service has been provided to the fund member.

In AFCA's view, legislative reforms in 2013 have shifted expectations such that it would generally be unfair or unreasonable for a trustee not to refund a fee or charge if something of value was not provided for each fee or charge debited to a superannuation product (except in relation to certain 'grandfathered' arrangements).

# 2 In detail

## Jurisdiction

Rule C.1.2(a) of the AFCA Rules states that AFCA can only consider a complaint about the level of a fee, premium, charge or interest rate in some circumstances.

AFCA cannot consider a complaint where the complainant is merely dissatisfied that a fee or charge is higher than another fund's fees or that a fee or charge has increased, unless the increase is disproportionate and without justification.

AFCA can consider a complaint about fees and charges where the complaint is:

- about a misrepresentation, or failure, by the trustee to properly disclose a fee, premium or charge.

- that the trustee calculated or applied the fee, premium or charge incorrectly, given its governing rules or any agreement in place. This may be a general issue affecting other fund members, beneficiaries or holders, or it might be specific to the complainant.
- about a breach by the trustee of a legal obligation or duty in relation to the fee, premium or charge.

## 2.1 Assessing complaints about fees

A superannuation trustee has fiduciary obligations requiring it to properly supervise fees and charges being debited from the superannuation interests of fund members.

If a complainant has complained to the trustee about fees or charges debited from their superannuation interest, then, in considering the complaint, the trustee will decide whether it should refund the fee or charge. If the complaint comes to AFCA, AFCA will review the trustee's decision not to refund the fee or charge. AFCA must consider whether the trustee's decision was fair and reasonable in its operation in relation to the complainant in the circumstances.

In reviewing whether a trustee's decision not to refund a fee or charge is fair and reasonable, AFCA will consider whether:

- the fee could be charged under the trust deed and law at the time
- there was sufficient and meaningful disclosure in the information provided to the complainant about the fee and its operation
- there was a service provided in return for the fee.

We take this approach regardless of how the fee or charge is labelled and whether the fee or charge was deducted from a superannuation account or from investment returns before they were allocated to fund members.

AFCA will always consider the individual facts and circumstances of a complaint when deciding if a trustee's decision not to refund fees or charges was fair and reasonable in its operation to the complainant.

When considering what is fair, AFCA will consider a range of factors including, but not limited to, whether:

- the parties obeyed the law
- there were promises made that were not kept
- there was unfair advantage taken by one of the parties
- the product or service provided fair value
- an appropriate standard of care and skill was exercised.

## 2.2 What information does AFCA need?

A trustee responding to a complaint about a fee or charge should provide information to support:

- that the fee or charge falls within one of the fee types that can be debited from a superannuation account;
- that the fee or charge can be charged under the fund rules and law at the time;
- when and how the complainant was made aware of the fee or charge;
- what the fee or charge represented;
- how the fee or charge was calculated; and
- whether any service or value was provided for the fee or charge.

## 2.3 Permitted fees in superannuation

The *Superannuation Industry (Supervision) Act 1993* (SIS Act) sets out general rules in relation to fees and charges that can and cannot be debited from a superannuation product.

From 1 January 2013, the 'Stronger Super' changes to the SIS Act restricted the types of fees that can be charged for 'MySuper' products and introduced definitions for each type of permitted fee. Some general fee restrictions were also introduced.

AFCA considers that a trustee decision not to refund a fee or charge is unfair or unreasonable if the fee or charge is not permitted under the SIS Act. We would substitute a decision that appropriate action should be taken to restore the fund member's position, had the impermissible fee or charge not been imposed.

## 2.4 Permitted fees under the governing rules

In addition to a fee or charge being permitted under the SIS Act, a trustee can only receive remuneration as authorised by its trust deed. AFCA will consider whether any fee or charge representing trustee remuneration can be legally charged under the fund's governing rules.

Where a fee or charge falls within the category of a permitted fee under the law and the governing rules, AFCA will consider if there was sufficient and meaningful disclosure about the fee.

## 2.5 Disclosure of fees and charges

Up until 2002, the SIS Act and its regulations detailed all trustee disclosure requirements. From 2002, disclosure across all financial products became regulated by the *Corporations Act 2001*, the Corporations Regulations and legislative instruments.

Where disclosure complies with the requirements of the Corporations Act and Regulations, the SIS Act and Regulations, and any relevant legislative instruments, AFCA is likely to find it was sufficient. However, disclosure may not be sufficient or meaningful in circumstances where:

- the individual was unable to find out material information about the fee or charge e.g. what the fee or charge was for, or whether they could remove or reduce the amount of the fee or charge (if applicable);
- the disclosure was unclear, contradictory or misleading; or
- the trustee relied on a third party to disclose the fee or charge and is unable to demonstrate that disclosure occurred.

## 2.6 Advice fees and conflicted remuneration

The Future of Financial Advice (FOFA) reforms to the *Corporations Act 2001* prohibit a product issuer from paying 'conflicted remuneration' to a financial services licensee or representative. Commissions paid by a superannuation trustee to an adviser are 'conflicted remuneration'. In a superannuation context, these commissions are often directly charged to a fund member, through linking the member's account to an adviser. Fees for the provision of financial product advice are excluded from the conflicted remuneration provisions.

However, transitional provisions in the Corporations Act and Regulations applied, so that benefits (and commissions) given to a financial services licensee or representative under arrangements entered into before 1 July 2013 were not treated as being conflicted remuneration. These arrangements are generally referred to as 'grandfathered' arrangements and were allowed to continue until 1 January 2021. This means previously 'grandfathered' benefits that are given from 1 January 2021 are also subject to the ban on conflicted remuneration. After this date, commissions that are payable under previously entered arrangements must be rebated to product holders.

Considering the 2013 legislative changes as a whole, AFCA's view is that there was a legislative and industry shift at that time, creating an expectation that something of value would be provided for each fee or charge debited from a superannuation interest, except for those paid under 'grandfathered' arrangements.

### Fees charged before 1 July 2013 and commissions under 'grandfathered' arrangements

Before 1 July 2013, fees to access financial advice were allowed and commonly charged as a source of remuneration for financial advisers. AFCA generally considers that a trustee's decision not to refund a fee or charge for access to financial advice debited to an account before 1 July 2013 is fair and reasonable, as long as the fee was permissible, the agreed or required advice service was provided, and the fee was sufficiently and meaningfully disclosed.

If AFCA cannot establish the service was provided where a specific service was required by the agreement, we would not consider a trustee's decision not to refund the fee to be fair and reasonable and would expect the trustee to refund the fee with foregone earnings.

For commissions paid before 1 January 2021 under 'grandfathered' arrangements, AFCA will consider if a trustee has complied with their obligations under the arrangement and the governing rules of the fund.

### **Fees charged after 1 July 2013**

For fees charged from 1 July 2013, except for those paid under 'grandfathered' arrangements, AFCA will consider what service or value was provided in return for the fee or charge. If access to adviser services is promised under an agreement, our consideration will include if they were capable of being delivered and if there has been sufficient disclosure about them, including if they can be switched off.

A trustee may not have records of whether a service was provided. If AFCA cannot establish that the superannuation member accessed a service or received something of value in return for a fee, we would generally consider the trustee's decision not to refund the fee to be unfair or unreasonable and would expect the trustee to refund the fee with foregone earnings.

### **Rebate of 'grandfathered' commissions from 1 January 2021**

AFCA will consider if a trustee is complying with its legal obligation to rebate commissions deducted under 'grandfathered' arrangements charged to members from 1 January 2021.

## 3 Context

### 3.1 Case studies

#### Case study 1

The complainant sought a refund of fees on the basis the fees were extremely high.

The fund's governing rules allowed the trustee to deduct administration fees from the complainant's superannuation account.

AFCA could not consider the level of fees under its rules but could consider what service was received in return for the fees paid.

The complainant's account was maintained in return for the administration fees. In addition, she received a 'member protection' rebate for the years 2008 – 2013, when the administration fee did not exceed her investment earnings.

AFCA determined that the trustee's decision not to refund the administration fees deducted from the complainant's superannuation account for the period from 2008 – 2016 was fair and reasonable. This was because:

- the trustee's deduction of the fees was in accordance with its governing rules.
- the trustee disclosed the fees.
- the trustee provided administration services in return for the fees.

#### Case study 2

The complainant invested in an allocated pension in a fund in May 2013. The product included a financial advice fee (advice fee) embedded into the management fee paid for the 'bundled' product. The trustee says that in return for the advice fee the complainant was entitled to certain advice services, initially access to personal financial advice and, from September 2014, an annual review.

As part of a remediation program, the trustee made a partial refund of the complainant's advice fees with earnings for the years 2015, 2017 and 2019.

The complainant sought a refund of advice fees for periods in 2014, 2016 and 2018.

AFCA found:

- the advice fees were permitted to be charged under law and the trust deed
- the advice fees were adequately disclosed
- for advice fees in 2014, the service offering was access to advice. AFCA was satisfied the complainant had accessed and been provided with financial advice for this period

- the complainant was not provided with any substantive financial advice for 2016
- the complainant received an annual review in 2017 in accordance with the service offering.

AFCA affirmed the decisions of the trustee not to refund the complainant’s advice fees for 2014 and 2017, as fair and reasonable in their operation in relation to the complainant in all the circumstances.

AFCA set aside the trustee’s decision not to refund the complainant’s advice fee for 2016 as it was unfair and unreasonable in relation to the complainant in all the circumstances. AFCA’s substituted decision was for the trustee to refund the advice fee for 2016, with earnings calculated at the annual earning rates applicable to the complainant’s account over that period.

## 4 References

### 4.1 Definitions

| Term                       | Definition   |
|----------------------------|--|
| Complainant                | a person who has lodged a complaint with AFCA  |
| Conflicted remuneration    | has the meaning given by section 963A of the <i>Corporations Act 2001</i> (Cth)      |
| Financial firm             | a financial firm such as a superannuation trustee, who is a member of AFCA           |
| ‘Grandfathered’ commission | a trailing commission entered into before 1 July 2013 that continues after that date |

### 4.2 Useful links

| Document type                    | Title / Link  |
|----------------------------------|---|
| <a href="#">AFCA Rules</a>       | <a href="http://afca.org.au/rules">afca.org.au/rules</a>  |
| <a href="#">SIS Act</a>          | <i>Superannuation Industry (Supervision) Act 1993</i> (Cth)<br><a href="http://legislation.gov.au/Details/C2019C00307">legislation.gov.au/Details/C2019C00307</a>         |
| <a href="#">SIS Regulations</a>  | <i>Superannuation Industry (Supervision) Regulations 1994</i> (Cth)<br><a href="http://legislation.gov.au/Details/F2019C00879">legislation.gov.au/Details/F2019C00879</a> |
| <a href="#">Corporations Act</a> | <i>Corporations Act 2001</i> (Cth)<br><a href="http://legislation.gov.au/Details/C2019C00216">legislation.gov.au/Details/C2019C00216</a>                                  |

|  |  |
|--|--|
| <a href="#">Corporations Regulations</a>         | <i>Corporations Regulations 2001</i><br>legislation.gov.au/Details/F2019C00865   |
| <a href="#">Corporations Amendment (Future)</a>  | <i>Corporations Amendment (Future of Financial Advice) Act 2012</i><br>legislation.gov.au/Details/C2012A00067                  |
| <a href="#">Corporations Amendment (Further)</a> | <i>Corporations Amendment (Further Future of Financial Advice Measures) Act 2012</i><br>legislation.gov.au/Details/C2012A00068 |

## 5 Appendix – AFCA’s superannuation jurisdiction

### 5.1 What are AFCA’s remedial powers for superannuation complaints about fees and charges?

Division 3 of the *Corporations Act 2001* sets out additional provisions which relate to AFCA’s superannuation jurisdiction. These provisions impact the way in which AFCA determines superannuation complaints and the remedial powers it exercises.

When an AFCA decision maker determines a superannuation complaint, they have all of the same powers, obligations and discretions of the trustee or other decision maker whose decision or conduct is being reviewed.

An AFCA decision maker can only make a determination for the purpose of placing the complainant as nearly as practicable in a position that any unfairness or unreasonableness no longer exists.

In addition, an AFCA decision maker must not do anything that would be contrary to law or the governing rules of the fund.

When an AFCA decision maker determines a superannuation complaint, the AFCA decision maker steps into the shoes of the superannuation provider, but with the benefit of all information that the AFCA decision maker has before them.

### 5.2 Reviewing decisions (and related conduct)

If, after considering all information, the AFCA decision maker is satisfied that the superannuation provider’s decision (or related conduct) operated fairly and reasonably in relation to the Complainant in the circumstances, the AFCA decision maker must affirm it.

However, if the AFCA decision maker is not satisfied and considers there is some unfairness or unreasonableness in the operation of the superannuation provider’s decision, then the AFCA decision maker can take one of the following remedial actions:

- vary the decision;
- set aside the decision and substitute their own decision; or
- set aside the decision and send the matter back to the superannuation provider to make a new decision in accordance with the AFCA decision maker's directions.