# The AFCA Approach to superannuation fees and charges

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

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 to require that something of value will be provided for each fee or charge debited to a superannuation product.

# 2 In detail

## 2.1 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.

## 2.2 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.

Where a fee or charge has been debited from a superannuation product, 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 or not 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.

## 2.3 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 a service was provided for the fee or charge.

## 2.4 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 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 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 fee or charge not been imposed.

## 2.5 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.

## 2.6 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* and the Corporations Regulations.

Where disclosure complies with the requirements of the Corporations Act and Regulations and the SIS Act and Regulations, 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.

## 2.7 Whether a service was provided for the fee

The Future of Financial Advice (FOFA) reforms effective from 1 July 2013 represented a legislative and industry shift, creating an expectation that something of value would be provided for each fee or charge debited from a superannuation product.

The FOFA amendments 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'.

### Fees charged before 1 July 2013 where no service was provided

Before 1 July 2013 fees to access financial advice were allowed and commonly charged as a source of remuneration for financial advisers. Examples include a contribution fee, review fee or other similar fee used to pay trailing commission.

AFCA considers that, before 1 July 2013, a fee or charge to access financial advice that was sufficiently and meaningfully disclosed, is fair and reasonable, even if a service was not provided. This is because AFCA cannot make a determination that is contrary to law.

This is not the case if a fee was charged for specific advice services under an agreement between a fund member and an adviser employed by, or on behalf of, a superannuation trustee. If AFCA cannot establish the service was provided where a specific service was required by the agreement, we would not consider the fee to be fair and reasonable and would expect the trustee to refund the fee.

### Fees charged after 1 July 2013 where no service was provided

AFCA is of the view that, from 1 July 2013, there is an expectation that something of value is provided in return for each fee or charge debited from a superannuation product. AFCA will consider what service or value was provided in return for the fee or charge. Access to a service is not the same as being provided with the service, even if an adviser is disclosed on the annual statement.

A trustee may not have records of whether a service was provided. If AFCA cannot establish that the fund member accessed a service or received something of value in return for a fee, we would not consider the fee to be fair and reasonable and would expect the trustee to refund the fee (from 1 July 2013 and with interest).

### Impact of 'grandfathering' provisions

The FOFA reforms permit conflicted remuneration for 'grandfathered' arrangements already in existence before 1 July 2013.

AFCA's approach to fees used to pay 'grandfathered' commissions is as follows:

- Genuine deferred sales commissions, payable for a limited period, instead of an upfront advice fee, for advice given before 1 July 2013: no refund is expected if the total amount charged is not disproportionate to the amount that would have been charged as an upfront advice fee.
- Trailing commissions or conflicted remuneration described as a fee (including if bundled into a 'product fee'): a refund of the fees charged from 1 July 2013 is expected, for any year in which nothing of commensurate value was provided in return for the fee.

# 3 Context

## 3.1 Case studies

### Case study 1

The complainant applied for membership of the fund through a financial adviser in 1994. In his application form he 'consented' to payments to the adviser in accordance with the disclosure document attached to the application form.

The disclosure document said that a trailing commission could be paid by the trustee to advisers to provide ongoing services to their clients.

The complainant met with the adviser initially for 20 minutes but never saw him again.

The complainant's annual statements did not separately disclose the trailing commission because it was paid from the trustee's fee and the trustee's fee was deducted from fund assets before unit prices were struck.

In September 2014 the complainant called the trustee to query his fees. He was told about the amounts being paid to the adviser and that he should contact the adviser for a refund if he hadn't received advice. He was told he could speak to the trustee's advice team about other advice options as an alternative.

The complainant did not do either of these things, closed his account on 22 March 2016 and subsequently made a complaint to AFCA.

AFCA asked the trustee whether it would consider refunding the amounts paid to the adviser but the trustee said it was relying on 'grandfathering provisions' to keep paying trailing commissions 'as instructed' by the complainant.

AFCA's view was that from 1 July 2013 – when the FOFA reforms and other changes to the fees allowed to be charged for superannuation accounts took effect – there was a general expectation that something of value would be given in return for amounts deducted from a superannuation account.

Because the complainant had received no ongoing service from the adviser and the trustee itself did not provide any other service in return for the amounts paid to the adviser, it was unfair and unreasonable for the trustee not to refund the amounts paid from 1 July 2013 to 22 March 2016. It was inconsistent with the trustee's fiduciary obligations to simply pass responsibility for the member's query to the adviser.

AFCA's substituted decision was that the trustee refund those amounts with interest.

### Case study 2

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

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.

## 3.2 References

### Definitions

| Term | Definition |
|---|---|
| Complainant | a person who has lodged a complaint with AFCA |
| Conflicted remuneration | has the meaning given by section 963A of the *Corporations Act 2001* (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 |

## Useful links

| Document type | Title / Link |
|---|---|
| AFCA Rules | afca.org.au/rules |
| SIS Act | *Superannuation Industry (Supervision) Act 1993* (Cth)<br>legislation.gov.au/Details/C2019C00307 |
| SIS Regulations | *Superannuation Industry (Supervision) Regulations 1994* (Cth)<br>legislation.gov.au/Details/F2019C00879 |
| Corporations Act | *Corporations Act 2001* (Cth)<br>legislation.gov.au/Details/C2019C00216 |
| Corporations Regulations | *Corporations Regulations 2001*<br>legislation.gov.au/Details/F2019C00865 |
| Corporations Amendment (Future) | *Corporations Amendment (Future of Financial Advice) Act 2012*<br>legislation.gov.au/Details/C2012A00067 |
| Corporations Amendment (Further) | *Corporations Amendment (Further Future of Financial Advice Measures) Act 2012*<br>legislation.gov.au/Details/C2012A00068 |

# Appendix – AFCA's superannuation jurisdiction

## 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 whether the unfairness and/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.

## 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.