



FINANCIAL
SERVICES
COUNCIL

Advice fees for MySuper and Choice products (FSRC Recommendations 3.2 and 3.3)

FSC Submission – Exposure Draft legislation

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1. About the Financial Services Council

The FSC is a leading peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing \$3 trillion on behalf of more than 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world.

2. Introduction

The FSC welcomes the opportunity to provide a submission on the Exposure Draft *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures) Bill: Advice in Superannuation. (FSRC Recommendations 3.2 and 3.3) (ED)* relating to advice in superannuation which implement the following recommendations:

- Recommendation 3.2 – End to the deduction of advice fees for MySuper
- Recommendation 3.3 – Limitations on deducting advice fees from Choice and MySuper accounts

Further, the FSC supports the intent of both recommendations, we continue to have significant reservations about the practical impact of banning all advice fees from MySuper products. This will create a two-tiered system which is likely to reduce the accessibility of advice and distort consumer behaviours and lead to poor consumer outcomes.

The FSC recommends an alternative approach, which would allow MySuper members to access one-off advice while retaining a ban on ongoing fee arrangements.

This approach would be simple for consumers to understand, simplify oversight of fees, and prevent the poor consumer outcomes that are likely to result from a blanket ban on advice fee payments.

Other key issues raised in this submission include:

- the need for clear and appropriate transition timeframes;
- the need for clarity on the form of consent required by trustees to deduct fees from choice product;
- The need to ensure electronic forms of consent are expressly permitted, to simplify processes for consumers and to reduce administrative burden.

3. FSC Recommendations

1. Amend the commencement date to 1 January 2021, to provide sufficient time for development and implementation of the consent instrument.
2. Provide a single 12 month transitional timeframe for all existing arrangements entered into prior to the commencement date.
3. Amend the legislation to allow for one-off non-ongoing advice fees to be deducted from MySuper accounts, retaining the ban on ongoing advice fees.
4. Ensure consent can be appropriately aligned between advisers and superannuation funds without unnecessary information being collected by funds.
5. Ensure electronic forms of consent are expressly permitted, to simplify processes for consumers, ensure alignment with product fee structures, reduce administrative burden and compliance risk.
6. Allow trustees the flexibility to offer a more comprehensive, personalised consent mechanism that aligns with their own offering.
7. Clarify that, where an individual has both Choice and MySuper products/options within a single account, advice fees may be deducted from the Choice balance.
8. Clarify obligations in relation to technical aspects of the Bill.

4. Transition timeframes

The ED provides for separate transition dates for agreements which commenced pre- and post-FoFA.

The FSC appreciates the intent of this transition period is to help align with the end of grandfathered commissions for impacted consumers.

However, this is not a workable approach for superannuation funds, because trustees do not have information available to determine whether existing agreements are pre- or post-FoFA, as information about the length of ongoing agreements is not collected.

It is not feasible to collect information about individual agreements in order to facilitate compliance with this timeframe. Trustees would need to rely on the fee recipient to renew the agreement before the required compliance date.

A single transition date for all agreements, aligned with the changes for annual renewal and fee disclosure changes, would be significantly more workable for industry and simpler for consumers.

Recommendations

1. Amend the commencement date to 1 January 2021, to provide sufficient time for development and implementation of the consent instrument.
2. Provide a single 12 month transitional timeframe for all existing arrangements entered into prior to the commencement date.

5. Deducting advice fees from MySuper products (Recommendation 3.2)

5.1. Impact on member outcomes

The intent of the removal of advice fees from superannuation accounts is stated in the Explanatory Memorandum (**EM**) as providing protection for disengaged consumers from superannuation account erosion through ongoing fees for inappropriate advice.

The FSC supports the intent to protect consumers. However, the banning of all advice fees from MySuper as proposed in the ED will, in practice, worsen outcomes for many superannuation fund members.

This is because the change will create a two-tiered system that charges out-of-pocket advice fees to some members, but not others. The members most affected by this change would be those who are least able to afford these costs.

It is inevitable that fewer people will receive financial advice as a result of this change, as some people would simply walk away when they were unable to meet the full cost. This could materially impact the decisions they make in relation to their retirement savings, and in some cases substantially reduce their savings at retirement.

Importance of financial advice in superannuation

This increasing complexity of Australia's superannuation system makes it difficult for many Australians to navigate without financial advice.

Retirees have been advised to check at least twenty different items to determine their eligibility for Government assistance and other support for retirement income needs. The Retirement Income Review's consultation paper acknowledges the complex interactions of elements in the system (page 6), including the different means tests for the Aged Pension and for aged care (page 25).

The Productivity Commission explored the issue of navigating complexity of the superannuation system, noting that:

A broader underlying problem is that members at all stages find the super system too hard to navigate, and do not know where to turn for help. While there is no shortage of information, many members find it complex, overwhelming and inconsistent with their needs.

...

Access to information and affordable, credible and impartial financial advice is crucial — especially in the retirement phase — and its importance will only grow as the system matures.¹

Given this complexity, it is unsurprising that financial advice can also reduce worry. A recent survey of people over the age of 55 by Challenger and National Seniors found people were less likely to worry frequently if they had sought financial advice and when they thought the advice met their needs.²

Other studies have shown financial advice to benefit peace of mind, increase overall happiness and consumers' sense of security.³ A recent study commissioned by Fidelity Australia found 64 per cent of people with advice felt 'very' or 'reasonably' prepared for retirement, compared to 26 per cent of those without advice; and 50 per cent of people said their mental health improved as a result of advice.⁴

The need for advice in MySuper

Banning all advice fees from MySuper is only justifiable under two incorrect assumptions:

- advice about superannuation only includes advice about specific investments and is therefore not required by MySuper members; and
- all MySuper members are disengaged, and they do not seek advice.

However, in reality:

- many people have actively chosen a MySuper product, potentially via recommendation from their adviser, and
- many default members later become engaged in their superannuation (for example as they approach retirement) and seek advice about their savings and
- significant protections are already in place to ensure advice is provided appropriately.

For members undergoing (or planning for) significant life changes such as a family separation or retirement, there is a significant need for members who may previously have been disengaged to seek financial advice (see below).

¹ Productivity Commission (2018) *Superannuation: Assessing Efficiency and Competitiveness*, Report no. 91.

² National Seniors Australia. *Retirement Income Worry: Who worries and why?* Page 4. See: https://nationalseniors.com.au/uploads/0120203573PAR-RetirementIncomeWorry-ChallengerRpt-FNREV_1.pdf

³ IOOF. *The true value of financial advice*. See: <https://www.ioof.com.au/about-us/news-and-updates/selected/the-true-value-of-financial-advice>

⁴ See: <https://www.fidelity.com.au/insights/investment-articles/the-value-of-advice/>

Given the cost of comprehensive financial advice - the average advice fee is \$3,600⁵ - some individuals in need of independent advice may find this inaccessible if the full cost must be paid upfront.

The option to meet some of this fee through a superannuation account may significantly lower the barrier to accessing advice for many Australians who would struggle to pay the full cost of advice out of pocket. In addition, paying directly for advice related to superannuation personally reduces the tax efficiency of the advice fees. Advice fees paid personally, where they relate to superannuation, would generally not be tax deductible to the individual. This compares to the superannuation fund, which will generally be able to claim a deduction. The after-tax cost of advice therefore increases.

We are also concerned that due to how MySuper has been implemented within the industry (as an investment option within a super product), this may have unintended consequences for members seeking advice in relation to transitioning to retirement. Many funds offer their MySuper investment option within their Transition to Retirement (TTR) products as well as their accumulation products. Due to the changes to investment earnings within TTR products effective 1 July 2017, these investment options represent a beneficial interest in the super funds MySuper 'product'.

Potential gaming of the system

There is significant concern in the industry that members will switch partially or fully from MySuper into a choice option in order to pay for advice from their superannuation balance.

In many cases, this will be little more than an additional and unnecessary administrative burden for consumers, but for some members this may result in them moving into a product that is less suited for their needs.

Given over half of superannuation accounts at June 2019 were invested in the MySuper option (by default or by choice), there is potential for considerable gaming of this measure.

Consumer protections in financial advice

The advice sector has already undergone significant reforms to ensure a high level of consumer protection.

The Future of Financial Advice Reforms (**FOFA**) introduced the best interest duty, the opt-in requirement and fee disclosure measures to fundamentally lift the transparency and accountability of advisers to their client. The ending of advice commissions on new superannuation and investment products under FOFA along with the impending removal of grandfathered commissions, is also acting to protect consumer interests and increase accountability for financial advisers. Many of the issues raised in the Royal Commission relating to advice involved products paying advice commissions, a situation that will shortly no longer exist.

⁵ Adviser Ratings. '2019 Australian Financial Advice Landscape'

Implementation of Royal Commission recommendations will mean a shift to annual renewal, stronger standards of reporting compliance concerns and misconduct and a cessation of grandfathering.

There is ongoing work and consultation relating to industry standards to protect consumers. FASEA continues to consult on its Guidance on the Code of Ethics. The Guidance aims to bring about a substantial culture change with regard to consumer protection as advice businesses change their compliance systems.

5.2. Proposed approach

The FSC agrees with other superannuation industry stakeholders that there is a strong case for retaining the ability to deduct one-off non-ongoing advice fees for MySuper members, provided it is subject to the same requirements for the deduction of advice fees from super accounts as proposed under Recommendation 3.3.

This proposal still provides an additional layer of protection for MySuper members, as it prevents disengaged members being signed up to longer-term agreements where they may not want or need advice on an ongoing basis.

However, the proposal does allow for MySuper members to receive one-off advice on a level playing field with choice members and reduces the potential for poor member outcomes resulting from an inequitable system.

Recommendation:

3. Amend the legislation to allow for one-off non-ongoing advice fees to be deducted from MySuper accounts, retaining the ban on ongoing advice fees.

6. Deducting Advice Fees from Choice products (Recommendation 3.3)

6.1. Aligning consent

Changes to ongoing fee arrangements (OFAs) for financial advice as part of Royal Commission Recommendations 2.1 and 2.2 should align with changes to consent for fee deductions from superannuation products.

It will be vital to ensure that the customer consent requirements for advisers and superannuation funds can be appropriately aligned to minimise duplication, while providing seamless experience for consumers with adequate levels of transparency.

Further detail on this issue can be found in the FSC Submission in relation to Recommendations 2.1 and 2.2.

Adviser consent requirements

These issues are discussed further in the FSC's submission in response to Recommendation 2.1.

There is currently a lack of alignment between the ED requirements for annual renewal and disclosure of a lack of independence, and the process for obtaining written consent for payment of advice fees from superannuation.

Superannuation fund consent requirements

Trustees of Superannuation funds require consent to deduct advice fees from superannuation accounts.

In the case of OFAs, sections 962R and 962S of the Corporations Act require this consent to be provided through the adviser, while for non-ongoing arrangements this may be provided directly to the trustee.

However, from a practical perspective, trustees receiving consents may not have the ability to know whether they have come from the adviser or directly from the individual – for example, if the consent is mailed. A consistent approach to consent arrangements, regardless of the type of arrangement, would be simpler to administer.

However, it is important that this consent is still provided separately from broader consents in relation to adviser fee arrangements. Trustees of funds are concerned that providing one consent that covers an advice fee arrangement and an authority to deduct superannuation fees is likely to result in funds receiving information which is unnecessary and irrelevant.

Privacy breaches can occur if funds inadvertently collect information about another individual (eg if the financial adviser is giving advice to a family, only one of whom is the superannuation fund member), or if personal information about the client is disclosed in the client agreement (eg if the financial advice covers a range of issues for the client, beyond superannuation).

Some funds are likely to receive tens of thousands of consents each year, and if each of these is different there will be a significant administrative burden and increased costs associated with having to individually consider and accept or reject these consents.

Trustees should have the flexibility to develop their own form of consent using efficient, online opt-in mechanisms that it can make available to members. This additional flexibility would allow a member to be presented with personalised details of an existing arrangement, such as the duration, value and frequency of advice fee deductions from their account.

Online consent would also ensure alignment of the fee arrangement with the workings of the product involved (such as enforcing maximum advice fee amounts common in many superannuation products, calculation methods, limiting the proposed deduction frequency to those offered etc). This additional flexibility for trustees would provide greater consumer protections, greater efficiency for the trustee and a more seamless servicing experience for the members involved.

Consent instrument

Early provision of a consent instrument by ASIC which standardises the consent process and the above issues will be essential to facilitate compliance.

The FSC supports ASIC prescribing, by legislative instrument, the requirements for giving written consent to deduct advice fees from a superannuation account.

It will be critical to ensure that the consent instrument sets the minimum standard for the consent but also allows a trustee to use it as the basis for the development of their own solutions.

It would be desirable and beneficial to members for the Consent Instrument to be centred around member friendly language. It should avoid the use of complex language, legal references and be worded in a manner which is helpful to Members and does not cause concern or confusion.

For clarity and to reduce administrative burdens (ultimately for the benefit of consumers and fee recipients), electronic forms of consent should also be expressly permitted.

The FSC understands ASIC intends to consult shortly on a draft instrument, and we welcome this early engagement.

Given the work required to implement required changes to advice fees, including updates to PDS and other disclosure documents, systems updates and staff training, it will be necessary for ASIC to work closely with industry throughout the transition.

It would also be beneficial for ASIC to update RG 245 to ensure all parties are clear on how to practically implement the law and ensuring compliance.

Recommendations

4. Ensure consent can be appropriately aligned between advisers and superannuation funds without unnecessary information being collected by funds.
5. Ensure electronic forms of consent are expressly permitted, to simplify processes for consumers, ensure alignment with product fee structures, reduce administrative burden and compliance risk.
6. Allow trustees the flexibility to offer a more comprehensive, personalised consent mechanism that aligns with their own offering.

6.2. Definition of ‘product’

Many MySuper members will have multiple investment options within their account. In many cases, this will include some investment in a MySuper option as well as choice investment option.

The ED appears to consider that MySuper and choice options within a single account should be considered separately for the purpose of this legislation, and that advice fees could still be deducted from the choice portion of the member’s balance.

Trustees will require clarity on this issue in order to ensure they can appropriately communicate with members and implement transition arrangements.

Recommendation

7. Clarify that, where an individual has both Choice and MySuper products/options within a single account, advice fees may be deducted from the Choice balance.

6.3. Other technical feedback

Assignment of rights and what constitutes a new arrangement

There is currently no clear guidance that specifies when a variation to an ongoing fee arrangement is sufficiently substantial that it becomes a new agreement. Importantly, a trustee will have no ability to oversee this process, and is reliant on the ‘fee recipient’ to advise when a new OFA has been entered into and a new consent is required.

ASIC’s current guidance in RG245.51 states that the ‘fee recipient’ should determine whether an assignment results in the arrangement changing character to such a degree that it essentially becomes a new arrangement with a new disclosure day (962J repealed in the new law).

Variation or withdrawal of consent (Section 962U)

The ED lacks clarity regarding the correct process for trustees to follow where consent to deduct advice fees from a superannuation account is withdrawn.

Where the account holder/s withdraws their consent and the adviser takes five business days to provide this to the *account provider*, it is possible that during the five business days (plus the likely two or more days the account provider would need to process the request) for a fee to have been deducted.

It is not clear whether there is a requirement on the account provider (the trustee) responsible for deducting the fee and paying to the 'fee recipient' to refund any payments to the account holder/s back to the date that consent was withdrawn – section 962R considers that the deduction should not be made, however, timing may mean that the deduction still occurs.

Section 962FA(3) considers that where the client gives consent after a failure to comply with a provision referred to in subsection (1) in relation to the OFA, the 'fee recipient' is not obliged to refund the deduction or payment received as a result of the deduction made in accordance with the consent.

However, where the member does not comply with a provision in subsection (1) and does not give their consent after they fail to comply, it is not clear whether the trustee is required to refund (and claw back from the adviser) the amount paid during the 30 day renewal period, or refund fees back to the date when the account holder/s withdrew their consent.

While s962S(5) would suggest that the 'fee recipient' should not accept the payment, they are not in control of the timing of the payments. The requirement under section 962S(8) to return the payment to the account within five business days is also impractical given it takes time for the fees to be passed from the Licensee to the Adviser (where they are the 'fee recipient') and they would then need to arrange for the amount to be returned.

It would also be helpful to clarify that a consumer can make a request to stop deducting fees directly to the account holder (i.e. their superannuation fund) rather than having to withdraw consent through the fee recipient.

Alignment with non-superannuation arrangements

Practical consideration needs to be given to joint accounts and other non-superannuation accounts where section 962S(3) requires that all account holders give their consent to the 'fee recipient', and aligning this with requirements for superannuation consents as discussed in section 6.1 above.

Where the 'fee recipient' (and the account provider) are required to receive consent from multiple account holders, and where for practical reasons this could not be obtained on the same date, it will need to be clear to trustees what date would apply to the account for the date of consent.

Consideration will also need to be given to withdrawal of consent where there are multiple account holders. Is it currently implied that this would require all the account holders to consent to withdraw, rather than one being sufficient for the trustee to stop payments.

Personal advice

There is currently insufficient clarity in the drafting regarding the types of advice fees covered by section 99FA.

The Exposure Draft inserts a new section 99FA into SIS titled 'Cost of financial product advice – fees charged to member concerned' and amends the title of section 99F to 'Cost of financial advice – collectively charged fees'.

The existing section 99F applies in relation to personal advice, and section 99FA refers to "ongoing fee arrangement" which is defined in Part 7.7A of the Corporations Act (referenced in the ED) is in relation to personal advice.

It would be helpful to clarify whether only personal advice (and other fees which would meet the definition of personal advice) are intended to be captured.

Recommendation

8. Clarify obligations in relation to technical aspects of the Bill.