From: [redacted]
To: AFCA Review
Subject: Submission to AFCA review
Date: Wednesday, 24 March 2021 12:11:16 AM
Attachments: [redacted]

Dear Madam/Sir,

Thank you for the opportunity to comment on the review of AFCA under section 4 of the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018*.

It is submitted that AFCA has **not** been effective in resolving complaints in a way that is "fair, efficient, timely and independent" for superannuation. Although this submission arises out of my direct experience of lodging a complaint against my super trustee AMP, following the revelations in the financial services Royal Commission, it is made on behalf of all Australians short changed out of their retirement funds.

Extended consultation needed

As the **Terms of Reference** for this review of AFCA states: "the review will take account of feedback provided by consumers and small businesses" (page 2), it is submitted the deadline must be extended and an email sent to all current and past complainants to AFCA. This way they will have an opportunity to comment. I only found out about this review as I advise clients on federal law in my practice and therefore visit the parliament and treasury websites, for research.

Fairness

AFCA failed to take due account of the fiduciary duties which apply to superannuation trustees, including the duty to act in the best (financial) interests of beneficiaries. As the Australian Law Reform Commission stated (see the original complaint for the citation):

> *While superannuation schemes have features that distinguish them from traditional trusts, it does not necessarily follow that trust law applies differently to the superannuation trustee or that the duties and responsibilities of trustees are inappropriate for trustees of superannuation schemes. The duties of trustees have been developed, along with the concept of the trust, over many years and their fiduciary nature is highly appropriate to the needs of superannuation schemes.*

AFCA limits its consideration to the terms of trust deed, written by the trustee's lawyers to favour the trustee and some specific statutory provisions. As set out in the original complaint to AFCA (25 May 2020), AMP owes the complainant **fiduciary duties** which were breached (paragraphs 9-12). All Australians who were subject to the breaches of duty by AMP super are denied justice via AFCA due to this dangerous precedent, and risk facing the high cost of class action lawyers fees and litigation funding greatly reducing any compensation.

AFCA placed undue reliance on an obscure brochure, which according to AMP, was on their website sometime in 2004 (Customer Information Brochure). However, the brochure **was never mailed or emailed or otherwise provided to the beneficiary of the super fund. AMP admitted a "trailing commission" was paid to financial advisors whom the super account holder never met and never spoke to. For what service?**

The Treasurer's clear intention was to extend AFCA's remit back to 1 January 2008 to deal with misconduct identified in the Royal Commission: https://joshfrydenberg.com.au/latest-news/taking-action-on-the-banking-superannuation-financial-services-royal-commission-going-further-by-requiring-afca-to-extend-its-remit/ Despite the fact that the complaint was made in advance of the deadline, and qualified for this, AFCA has taken every technical argument possible to avoid dealing with the clear evidence found by a former justice of the High Court of Australia against AMP super in the Royal Commission.

Efficiency
Efficiency can be defined as "achieving maximum productivity with minimum wasted effort or expense". AFCA has too narrowly interpreted its role, relegating the authority to a 'calculator' simply checking whether the formula in the trust deed was correctly applied by the trustee in the annual statements. Hence, the extensive expertise of staff, which I experienced in a positive light during phone calls, is wasted as they are not allowed to apply their knowledge of the law beyond these narrow bounds.

Timeliness
The complaint was lodged with AFCA on 25 May 2020 and a Preliminary Assessment (Recommendation), that is, not even the final Decision, was only received on 3 March 2021. This is **282 days** or 9 months, 6 days just to reach the first stage.

AFCA now states " I am unable to give any indication of when a determination is likely to be issued." It is hard to imagine this would meet the expectations of the Australian community, keen to rebuild their superannuation following the challenges of the pandemic.

Independence
AFCA took an overly passive role with the super trustee, which raises questions about the structure of AFCA and whether this needs to be amended to enhance its independence. AFCA failed to be proactive and only relied on evidence provided by the trustee and did not investigate or action the requests in the complaint to seek additional information from AMP. This also goes to fairness as an individual complainant typically will not have the resources to obtain this information from a multi-billion dollar listed financial services company.

Suggested policy solutions

- Mandatory legal training for all AFCA complaint assessment staff on trustee duties, equitable and statutory

- Consider abolishing AFCA and working with States and Territories to empower tribunals such as VCAT to hear financial services and superannuation cases. This would enhance the independence of decision making. Government could work to implement a cost recovery scheme but this must be at arms'-length from the tribunal.

- AFCA Rules - repeal specific rules restricting remedies for superannuation complaints (paragraphs D 1.1-1.4). Remove all references from Part D of the AFCA

Rules to “other than a Superannuation Complaint”. Remedies should apply in the same way to all complaints including super complaints. **These existing Rules ’stack the deck’ against complainants (a lack of fairness)** who have had their super balances eroded by breaches of duty by their superannuation trustee and frustrate the Treasurer’s intention to "clear the air” following the Financial Services Royal Commission, evidenced by allowing an extended time period for complaints.

The original complaint to AFCA and Preliminary Assessment are attached below for your reference.

Happy to discuss.

Best regards,

Andrew Fernbach
www.govlaw.com.au
Lex bona voluntate servientes
[redacted]

Stay ahead with GOVLAW updates. Connect on Linked-in or Twitter.

Begin forwarded message:

From: [redacted]
Subject: RE: [EXTERNAL] Preliminary Assessment - [redacted], Andrew Fernbach and AMP Superannuation Limited - NOT ACCEPTED
Date: 22 March 2021 at 2:13:30 pm AEDT
To: 'Andrew Fernbach' [redacted]

Dear Andrew
Thank you for your response.
I will progress your complaint to an ombudsman for determination. I am unable to give any indication of when a determination is likely to be issued.
regards
[redacted]
Case Manager
Superannuation Team 1
[redacted]
www.afca.org.au

From: Andrew Fernbach [redacted]
Sent: Monday, 22 March 2021 12:06 PM
To: Info@afca.org.au; [redacted] [redacted]
Subject: [EXTERNAL] Preliminary Assessment - [redacted], Andrew Fernbach and AMP Superannuation Limited - NOT ACCEPTED

[EXTERNAL]

Dear [redacted]
Thank you for your professional approach, time and attention to the complaint. However, the AFCA Recommendation **cannot** be accepted. The reasons include:

- The Recommendation does not take due account of the common law which applies to superannuation trustees. The document only considers the trust deed, written by the trustee's lawyers to favour the trustee and specific statutory provisions. As set out in the original complaint to AFCA (25 May 2020), AMP owes the complainant fiduciary duties which were breached (paragraphs 9-12). This is illustrated by the section "**3.5 Relevant Law** " of the Recommendation which fails to consider the equitable duties which apply to AMP.

- AFCA has too narrowly interpreted its role, relegating the authority to a 'calculator' simply checking whether the formula in the trust deed was correctly applied by the trustee in the annual statements.

- AFCA failed to be proactive and only relied on evidence provided by the trustee and did not investigate or action the requests in the complaint to seek additional information (paragraphs 23-24) or refer systemic concerns to other regulators (paragraphs 15-19).

- AFCA took an overly passive role with the super trustee, which raises questions about the structure of AFCA and whether this needs to be amended to enhance its independence. The Recommendation states "He has not provided evidence specific to his complaint demonstrating why the Hayne Royal Commission findings apply in this case. " This is preposterous, given the information asymmetry and power relationship which exists between a complainant and one of Australia's largest companies. Clearly the expectations of the Australian community is that AFCA would play a role in ensuring fairness and equity and would seek information on behalf of the complainant.

- AFCA is not able to consider the amount of a fee unless the trustee has acted contrary to law, however AFCA **may consider the fees and charges as AMP breached its fiduciary duties under the law.**

- The Recommendation states: The trustee says in its submission on 23 November 2020 "**trail commission** was not deducted from [the complainant's] account and **was paid** from fees paid by all members of [the fund] as part of a commercial agreement between the Trustee and [the advice licensee]". [**emphasis added**] How can AMP demonstrate this was in my best interests since I never met with a financial advisor. Trail commission to whom? For what?

- The Recommendation states: Payments to financial advisors are disclosed on page seven of the 7 April 2004 Customer Information Brochure under the heading "What is paid to your financial planner". This brochure was never provided to the complainant, therefore

should not be relied on by the trustee. Disclosure must be fair and an obscure brochure on a website with numerous pages is not reasonable. Why was the brochure not provided by email or letter?

- The Recommendation states: The complaint is excluded to the extent that it relates to alleged conduct after 1 July 2008. The complainant made it clear as part of an appropriate monetary settlement, they would be prepared to 'opt out' of the AMP class action (letter to AFCA dated 4 November 2020). It is submitted this would satisfy the AFCA rules which include where a complainant "gives notice that he [sic] does not wish to participate in the proceedings". Again, AFCA has unduly read down its role, interpreting it so narrowly, all that is left is to act as calculator, comparing the trust deed formula against the annual statements, and unfortunately for the Australian community, simply a post box and rubber stamp for correspondence from industry.

- The Recommendation again interprets AFCA's jurisdiction too narrowly regarding Rule C.1.5: AFCA must exclude 'A complaint relating to the management of a fund or scheme as a whole'. It is submitted this does not apply here as the complaint is restricted to the member Andrew Fernbach and to the breaches of legal duty by AMP as affect the complainant's superannuation account. Taking the interpretation in the Recommendation to its logical conclusion, a super trustee could illegally debit amounts from all member's accounts, and they would have no remedy via AFCA since it concerns the scheme as a whole. A clearly absurd result.

If all AFCA is prepared to do for Australians subject to breaches of their legal duties by super trustees is simply check the calculations against trust deeds, which are themselves written by the trustee's lawyers in their favour, then AFCA could be simply abolished and replaced by an app (GOVLAW is *not* advocating this outcome). Complainants could simply upload their statements and wait for software to check it against the trust deed formula. To achieve justice for the Australian community, without leaving complainants to the high cost of class actions, AFCA **must** consider qualitative legal considerations, including equitable duties on the trustee, not just simple quantitative matters such as whether the trustee made the correct calculations.

The importance of superannuation to the Australian community

As included in the complaint to AFCA (25 May 2020), the High Court stated in *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, at [33]:

> *Superannuation is not a matter of mere bounty, or potential enjoyment of another's benefaction. It is something for which, in large measure, employees have exchanged value – their work and their contributions. It is "deferred pay"… Superannuation is a method of attracting labour. The legitimate expectations which beneficiaries of superannuation funds have that decisions about benefit will be soundly taken are thus high. So is the general public importance of them being sound.*

It is submitted AFCA must be proactive in support of the legitimate expectations which all Australians have as beneficiaries of superannuation funds, that their trustees, such as AMP **will act in their benefit** according to fiduciary and statutory duties and the "general public importance" of this referred to by the High Court in *Finch*.

Please confirm receipt of this email, given the April 2 deadline. Many thanks for your time and consideration.

Best regards,

Andrew Fernbach
www.govlaw.com.au
Lex bona voluntate servientes
[redacted]
Stay ahead with GOVLAW updates. Connect on Linked-in or Twitter.

Australian Financial Complaints Authority (AFCA) Complaint

WITHOUT PREJUDICE

Date: Monday, 25 May 2020
Complainant: Andrew John Fernbach
Account number: 924857095
Product: AMP Flexible Lifetime – Super

A. About this complaint to AFCA

'Financial Firm'

1. The relevant 'AMP' companies are:

   a) **AMP Life Limited** – contact details provided on superannuation statements for the **Flexible Lifetime – Super,** PO Box 300 PARRAMATTA NSW 2124

   b) **AMP Superannuation Limited ('ASL')** – listed in statements as the provider of any financial advice and as the **trustee** of the AMP Superannuation Savings Trust of which Flexible Lifetime – Super is a part.

   c) **AMP Limited** is the ultimate holding company. The **Australian Mutual Provident** Society was formed in 1849 as a non-profit life insurance company and mutual society. In 1998, it was demutualised.

2. 'AMP' is used below for simplicity and refers to the relevant corporate entity, generally ASL, as required by context. According to the **Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry** (**Royal Commission**), Final Report (Vol 2, page 105):

   ASL outsources its functions to AMP Life Limited (AMP Life). AMP Life owns 100% of the shares in ASL. In practical terms, AMP Life operates the two superannuation funds of which ASL is the trustee.

3. At the time of the Royal Commission, AMP superannuation funds had approximately $120 billion in funds under management and was the second largest pool of superannuation funds under management in Australia.

About the use of the Royal Commission report in this submission

4. The *Royal Commissions Act 1902* (Cth) provides that where a witness is compelled by a summons to give evidence to the Royal Commission, that evidence isn't admissible against a natural person in any civil or criminal proceedings. It is however, admissible against a corporation, such as AMP (section 6DD).

Background

5. As a member with AMP super, my benefits were transferred to the **Flexible Lifetime – Super** plan, following leaving my employer which had my super with AMP (20 April 2004).

6. While at the previous employer, I remember being told that the employer had negotiated an "good deal" and staff would not be charged any fees by the AMP superannuation fund. According to the *Transfer to Flexible Lifetime – Super Statement* (20 April 2004): "The ongoing administration fees that applied in your previous employer plan will continue to apply in your new plan." This is inconsistent with later actions by AMP.

7. AFCA has a **Legacy Complaints** jurisdiction and this application is made well in advance of the 30 June 2020 deadline. It is submitted AFCA may consider AMP's decisions and conduct on my account, at least dating back to 1 January 2008. Further detail on the grounds for this complaint is provided below.

Grounds for complaint

8. AMP as my superannuation trustee breached:

   a) the **general law fiduciary duties** on it as trustee, including to avoid a conflict of interest and duty, and any unauthorised profit from use of position (see paragraphs 9-12, below) and

   b) **statutory duties** under the *Superannuation Industry (Supervision) Act 1993* (**SIS Act**) (see paragraph 13, below).

   These breaches arose from AMP deducting money from my superannuation account or allowing money to be deducted associated with my account by related or contracted parties:

   a) without proper disclosure as to the amount or purpose or reason and whether it was a fee or commission

   b) without an associated service

   c) by putting the profit of AMP or related entities before my interests and

   d) by entering into outsourcing contracts where the trustee was 'passive' and failed to make proper enquiries to ensure it could fulfil its duties to members.

General law fiduciary duties on AMP as super trustee

9. The joint Report of the Australian Law Reform Commission and the Companies and Securities Advisory Committee, *Collective Investments: Superannuation* (1992) provides a useful starting point on the general law fiduciary duty of AMP (at [9.9]):

   > *While superannuation schemes have features that distinguish them from traditional trusts, it does not necessarily follow that trust law applies differently to the superannuation trustee or that the duties and responsibilities of trustees are inappropriate for trustees of*

superannuation schemes. The duties of trustees have been developed, along with the concept of the trust, over many years and their fiduciary nature is highly appropriate to the needs of superannuation schemes.

10. Further, Sir Robert Megarry, V-C, in *Cowan v Scargill* [1985] 1 Ch 270 stated (at 286-287):

> *The starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between classes of beneficiaries. This duty of the trustees towards their beneficiaries is paramount. They must, of course, obey the law; but subject to that, they must put the interests of their beneficiaries first. When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the* ***best interests of the beneficiaries are normally their best financial interests.*** *In the case of a power of investment, as in the present case, the power must be exercised so as to yield the best return for the beneficiaries, judged in relation to the risks of the investments in question; and the prospects of the yield of income and capital appreciation both have to be considered in judging the return from the investment.* (**emphasis added**)

11. Also, the High Court stated in *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254, at [33]:

> *Superannuation is not a matter of mere bounty, or potential enjoyment of another's benefaction. It is something for which, in large measure, employees have exchanged value – their work and their contributions. It is "deferred pay"... Superannuation is a method of attracting labour. The legitimate expectations which beneficiaries of superannuation funds have that decisions about benefit will be soundly taken are thus high. So is the general public importance of them being sound.*

12. To conclude, it is submitted AFCA's role in this complaint will support the legitimate expectations which all Australians have as beneficiaries of superannuation funds have that their trustees, such as AMP will act in their benefit and the "general public importance" of this referred to by the High Court in *Finch*.

SIS Act duties

13. The SIS Act duties include:

    a) acting in the **best interests** of their members in accordance with s 52(2)(c) of the SIS Act - Can the trustee prove that each year it conducted an assessment of the market and chose the best fund manager for the many Australians who are members and will depend on that money in retirement, or was it influenced by payment structures between AMP corporate entities? The **Royal Commission**, Final Report (Vol 2, page 154) found in regard to AMP that:

> *having regard to the deficiencies in reporting, and lack of steps taken by the trustees to satisfy themselves that they were doing the*

best they could for their members, I am satisfied that the trustees' implementation of their outsourcing arrangements may be conduct that was inconsistent with the covenant in section 52(2)(c).

The Final Report of the **Royal Commission**, (Vol 2, page 151) also found in regard to AMP that the:

theme in the evidence was the failure of the trustees to take steps to remedy the deficiencies *in information provided to them, or to seek information that would give them a proper understanding of decisions being made by others in the Group.* ***Nothing prevented them from actively testing the information provided to them by parts of the AMP Group****, or from seeking further information* ***to satisfy themselves that they had discharged their duties. But they did not do this.*** **(emphasis added)**

b) to ensure that, where there was a conflict between the duties of the trustee to the interests of the members, and interests of an associate of the trustee, the interests of the members could and would be given **priority** and that the **duties to the beneficiaries are met despite the conflict** and **not adversely affected** by the conflict, in accordance with s 52(2)(d) of the SIS Act – Again, can the trustee prove that each year it **prioritised** the interests of the many Australians who were fund members, over associates' profits - AMP corporate entities? Can it prove the interests of members were not adversely affected by fees for no service, fees which were not disclosed or secret commissions? The Final Report of the **Royal Commission** (Vol 2, page 156) found in regard to AMP that:

the trustees were not arming themselves with knowledge of conflicts that existed, or may exist, because of their outsourcing arrangements. And trustees cannot properly exercise their functions as contemplated by section 52(2)(d) without being aware of the conflicts that arise and, with that awareness, being prepared to take steps to test whether the interests of the beneficiaries are truly being preferred.

c) **not** to enter into any **contract** that would prevent the trustees from, or **hinder** the trustees in, properly performing or exercising the trustees' functions and powers under s 52(2)(h) of the SIS Act - Can the trustee prove that the outsourcing arrangements did not hinder their ability to act in the many Australians who were member's best interests with the information needed to do so provided to the trustee, and without conflict of interest? The Final Report of the **Royal Commission**, (Vol 2, page 159) found in regard to AMP that:

The trustees, by implementing their outsourcing arrangements in the manner in which they have, and rely upon as the explanation for their passivity, may have contravened the covenant in section 52(2)(h) of the SIS Act.

The Final Report of the **Royal Commission**, (Vol 2, page 151) also found in regard to AMP that:

> *The problem is not outsourcing in general... The problem is the extent to which **ASL**... can discharge, and are discharging, their duties to their members in light of their particular outsourcing arrangements and the approach they adopt to those arrangements in light of their position within the AMP Group. They have made themselves **submissive** to the decisions of those to whom they have outsourced their tasks.* (**emphasis added**)

AMP statements – details of costs

14. The AMP annual statements were downloaded from their online portal and are included with this complaint. By way of overview, evidence in support of this complaint includes:

    a) That amounts were withdrawn without disclosure to the fund member, potentially for over a decade. This was admitted in the account statement for 17 August 2018 (see paragraph 11, below)

    b) The 'Member Fee' did not appear on any statements from 2004 onwards until 7 August 2011 and then was increased annually. How was introducing this fee in member's best interest when the fee did not previously apply? What new services introduced in 2011 justify this fee, alternatively is it a 'fee for no service'?

    c) From the first Statement issued 5 October 2006, for a decade (until and including the 5 August 2016 statement) the only costs disclosed to members on these statements were 1) the 'Other management costs' which ranged from $433 to $752 (per annum) for the previous financial year and 2) from 2011 on, a membership fee which is generally below $100 (per annum).

    d) The 2017 and 2018 statements include new fees relating to "Investment fees" and "Administration fees" which totalled an additional $798 in 2017 and $871 on the 2018 statement. There is also another cost disclosed for the first time on the 2018 statement called the "Indirect costs of your investment" which is $164.65. The 2017 Statement includes this explanation:

        > *These changes don't mean you're being charged any additional or increased fees and costs – that is, there's no change to your existing fees and costs. Greater disclosure simply leads to greater transparency of existing underlying fees and costs.*

        This indicates that these substantial amounts were being deducted *without disclosure* over the preceding *decade*. It is submitted these should all be refunded with interest.

    e) The statements generally include the following quote to describe the 'management costs': "The amount shown allows for a 15% tax deduction that is available to AMP Life and passed on to you." This has the potential to

mislead beneficiaries - who may not notice this 'fine print' - into thinking the fees are lower than they really are. The tax rebate should be a separate line item, so members can properly judge the fees. The way this is set out is not in the best interest of members, but rather it would seem the AMP as trustee has given priority to related company profits. The Final Report of the **Royal Commission**, (Vol 2, page 201) stated (though in regard to another company): *If consumers are to be able to make informed comparisons between funds then they need to be able to understand the implications to them, in dollar or percentage terms, of a fund retaining excess contributions tax. Otherwise, it will be effectively impossible to compare a fund that adopts this practice, and therefore charges a lower face administration fee, with a fund that does not adopt this practice and charges a transparent administration fee that covers all administration expenses.* The later prohibition on this practice in ASIC's Regulatory Guide 97, is consistent with this submission that the practice was not in the Australian members of this super fund's best interests (RG 97.123).

f) The statements generally include a contact person or organisation other than AMP with earlier statements listing 'FP' next to this (short for 'Financial Planner'?). If there was a financial planner associated with my account did they receive any fees or commission? Note this is **not** disclosed on the statements. The many Australians who were superannuation fund members would suffer financial loss by having information withheld that a third party was being paid by AMP from their account, by not having an informed choice available to switch to another super fund.

Referral by AFCA to DPP (Victoria) - Industry wide issue – 'secret commissions'

15. The account statement for 17 August 2018 included the following statement:

> *We've updated other fees of your investment and indirect costs of your investment for the last financial year. These may now include costs that haven't previously been disclosed.*

Thus, AMP have admitted that amounts were withdrawn *without disclosure* to the fund member. As such, some amounts deducted were not included in the statements for over a decade and these amounts may be characterised as 'secret commissions' under Victorian legislation. This may raise a systemic issue under A.17 of the *AFCA Complaint Resolution Scheme Rules* (21 February 2020) for referral to "any other appropriate body" under Rule A.17.5(e) for the industry as a whole, to the Office of Public Prosecutions, Victoria.

16. AMP as a corporation may have breached the "secret commissions" prohibition under Victorian state law.[1] In Victoria, part of the definition is the term "agent" but this is defined to include "trustee". It is submitted this applies to the corporate superannuation trustee (AMP) who holds funds on behalf of many Australians. In

[1] *Crimes Act 1958* (Vic) section 176. See also, *Jamieson* [1988] VR 879.

some cases, the statements provided state, that an amount was deducted "not as a fee", which may be an attempt to avoid the "fees for no service" issue.

Referral by AFCA to APRA – issue of outsourcing

17. The APRA, *Prudential Standard SPS 231 - Outsourcing* requires Registrable Superannuation Entity (**RSE**) licensees to be able to demonstrate that outsourcing to an associated entity, such as another member of the AMP group, by the super trustee, is conducted on an *arm's length basis* and in the best interests of members (paragraph 16):

> *The RSE licensee must also identify and address the risks arising from the arrangement and be able to demonstrate that the arrangement is conducted on an arm's length basis and in the best interests of beneficiaries.*

18. It is submitted that the relationship between ASL, my superannuation trustee and the entities it outsourced to was not 'at arm's length'. This can be defined as:

> *Of or relating to transactions between two parties who are independent and do not have a close relationship with each other. Presumably, these parties have equal bargaining power and are not subject to undue pressure or influence from the other party.*

As already noted, the Royal Commission observed (see, paragraph 2, above):

> *ASL outsources its functions to AMP Life Limited (AMP Life). AMP Life owns 100% of the shares in ASL.*

19. Given my super trustee is owned by the company it outsources its functions to, there is an enormous power imbalance and a close relationship. Also, as mentioned (see paragraph 9, above) the Royal Commission also found the AMP outsourcing arrangement may be inconsistent with the best interests of members. This may raise a systemic issue under A.17 of the *AFCA Complaint Resolution Scheme Rules* (21 February 2020) for referral to APRA under Rule A.17.5(b).

AFCA is more appropriate than a Court

20. I appreciate and welcome the assistance with this case by AFCA as given the risk of an adverse costs order or AMP seeking security for costs at an early stage, it is unlikely to proceed through the courts as an individual action. Large corporations such as AMP hire corporate law firms and QCs, and their costs can run to millions of dollars for legal fees, especially where they seek to avoid the case setting an adverse precedent.

B. A fair and reasonable resolution to the complaint

21. The Commonwealth Parliament has decided that superannuation contributions being compulsory by Australian workers should be held on trust for these same

beneficiaries when they retire. That is, this is a special fiduciary relationship rather than just an ordinary business relationship and as such, the Parliament decided that superannuation trustees should be held to a *higher standard* at law.

22. I request that the AFCA hold AMP to that standard based on the general law and statute and make a determination regarding these savings intended for Australian members' retirement so that **the unfairness, unreasonableness, or both, no longer exists.**

Obtaining further information from AMP

23. As an important preparatory step to that determination, it is requested that AFCA first use its additional powers to obtain information from AMP, for a Superannuation Complaint as set out in sections 1054A and 1054B of the *Corporations Act 2001* and Rule A.9.4 of the *AFCA Complaint Resolution Scheme Rules* (21 February 2020). I am seeking AFCA's assistance as there is a significant power imbalance between the fund members and a multi-billion dollar diversified financial services entity and the resulting asymmetry in information available. Please obtain the following information from AMP:

    a) the details of any and all amounts deducted in relation to my account or associated investment funds since opening, whether by fee, commission or otherwise including the reason or purpose of each amount and whether any service was provided

    b) for the avoidance of doubt, the above should not be limited to, but include any amounts relating to:

        i. Any kind of adviser services
        ii. Any kind of insurance
        iii. Any kind of funds management service
        iv. Any kind of administration service.

    c) any information AFCA considers necessary to consider the systematic issues raised above (paragraphs 15-19).

24. If a member is notified of charges that were previously not disclosed, how can they be sure this is not the tip of the iceberg? What if other charges, fees or commissions were levied but not disclosed? For example, "Hillross Client Services" is mentioned as a contact but what fees or commission arrangement was in place with AMP? No personal financial advice was provided. Where 'fees for no service' took place, this must be refunded.

Account of profits

25. In Australia, an account of profits is an equitable remedy that may be granted in cases where a defendant has profited from an equitable wrong, such as a breach of the general law duties for a superannuation trustee. It is distinct from an award of damages in that it responds to the gain of the wrongdoer rather than the loss of the wronged party. An account of profits will deter super fund defendants who calculate that the gain to be made from breaching their fiduciary duties to their superannuation fund members in Australia, exceeds the cost of any

compensatory damages they may incur if the matter goes to court. It is submitted that an account of profits also be considered in addition to my loss directly from the breaches of trust, but also, due to the lack of disclosure, the chance for Australian fund members to make an informed choice on their super. In my case, to return to my former industry fund, which I have now done to mitigate my losses (Uni Super).

Request for AFCA to make a determination

26. I request that the AFCA make a determination on this complaint that AMP engaged in conduct and/or made decision(s) that were **unfair or unreasonable to myself as super fund member, or both.**

27. It is submitted that **'Decision'** carries a wide meaning as in administrative law, so can encompass financial calculations that affect a member, like a tax assessment from the Commonwealth. In this case, each financial calculation which affected the balance of my account as a superannuation fund member and each annual assessment and statement provided to me are examples of relevant decisions.

Request for AFCA to make a determination - continued

28. That AFCA make a determination and take actions under the *Corporations Act 2001* (section 1055) to place this complainant **in such a position that the unfairness, unreasonableness, or both, no longer exists.**

29. That AFCA make a determination and vary or set aside and substitute the decision(s) made by AMP to the effect that all statements (within AFCA's jurisdiction on time – see paragraph 30, below) are recalculated based on full disclosure by AMP and amounts deducted in relation to my account are refunded **with interest** (see paragraph 31, below) where:

    a) these were not disclosed on the member Statements (thus taken without the member's permission against their best interests and denying the member the ability to make an informed decision on whether to remain with the fund)

    b) these were deducted as part of a conflict of interest or breach of other general law duties by the trustee given the competing interests of other companies in the AMP group

    c) the trustee did not act in my **best interests** under section 52(2)(c) of the SIS Act

    d) the trustee did not give my interests **priority** under section 52(2)(d) of the SIS Act

    e) the trustee entered into contracts, such as outsourcing contracts, which **hinder** the proper performance of the trustee's powers under section 52(2)(h) of the SIS Act.

Timing

30. AFCA has a **Legacy Complaints** jurisdiction and it is submitted AFCA may consider AMP's decisions and conduct on my account, at least dating back to 1 January 2008.

Interest

31. Under the *AFCA Complaint Resolution Scheme Rules* (21 February 2020), D.6.1, AFCA may decide that AMP is to pay interest on a payment to the Complainant. Any interest accrues until the payment is made. It is submitted interest be calculated from the date of the cause of action or matter giving rise to the claim, for example each amount deducted in breach of duty, whether statutory or general law or without proper disclosure.

Recommendation

Case number	[redacted]
Complainant	Andrew Fernbach
Financial firm	AMP Superannuation Limited (trustee)

1 Overview

1.1 Complaint

The complainant held a superannuation account with the trustee from April 2004 to September 2019. He says the trustee charged excessive fees, which were not disclosed to him and for which no service was provided. The complainant alleges the trustee contracted with related entities prioritising its own profits over his best interests. He seeks refund of all fees paid from his account with interest calculated at industry average earning rates. The complainant also seeks an account of profits from the trustee due to its contracting related entities.

The trustee says all fees were disclosed to the complainant and correctly calculated. The trustee denies that it has charged the complainant any direct fee for which no service was provided. The trustee refuses to refund any fees taken from the complainant's account and refuses to pay an account of profits.

The complainant has not opted out of Federal Court representative proceeding VID 572/2019 alleging the trustee charged excessive fees after 1 July 2008.

1.2 Issues and key findings

Did the trustee sufficiently disclose fees and charges?

The trustee has sufficiently disclosed all charges against the complainant's account.

Did the trustee calculate and charge the correct fees?

The trustee calculated and charged the correct fees consistent with what it disclosed.

Has the trustee charged the complainant a fee without providing a service?

This recommendation is limited to addressing the trustee's conduct before 30 June 2008. There is no evidence that the trustee deducted any direct fee from the complainant's account before 30 June 2008 without providing a service to him.

Was the trustee decision not to refund fees and charges on the complainant's account fair and reasonable?

The fees and charges were calculated correctly based on what was disclosed. The decision not to refund fees and charges is fair and reasonable.

1.3 Recommendation

This recommendation is in favour of the trustee. The trustee is not required take any further action.

2 Reasons for recommendation

2.1 Did the trustee sufficiently disclose fees and charges?

The complainant received disclosure documents

The complainant made extensive and highly technical submissions in support of his complaint. He provided copies of his annual statements from 2004 when the account opened to 2019 when he closed it. The complainant does not say he did not receive annual statements or disclosure documents during the life of the account. He takes issue with the content of those documents and with things he says are not disclosed when they should have been disclosed.

The trustee provided mail records showing documents sent to the complainant after 2010. In view of the age of the matters raised in this complaint, it is reasonable that the trustee is not able to provide any further information about notices provided before 2010.

Having reviewed the available materials, I consider the account statements and disclosure documents referred to in this recommendation were made available to the complainant during the life of his account.

Fees and charges are authorised by the Trust Deed and legislation

The trustee is bound by the terms of the Trust Deed and superannuation legislation. The trustee is entitled to charge the fees permitted by the Trust Deed and relevant legislation.

The Trust Deed says:

> **Remuneration**
>
> 10.15 The Company may receive remuneration from the Superannuation Policies at a rate or in amounts or both notified to Members.
>
> 10.16 Except with respect to the Former Members and subject to rule 10.17, the Trustee is entitled to be paid remuneration out of the Fund at the rate of 3% per annum of each Member's Account Balance.
>
> …

The complainant supplied copies of his annual statements from 2004 until 2019 and the statement issued when he transferred into the personal superannuation product on 20 April 2004. I have summarised the fees paid between 2004 and 2008 in section 3 below.

Annual statements for years ending 30 June 2004 and 30 June 2005 show the complainant paid no direct account fees for those two years. That is consistent with the 20 April 2004 transfer statement which says “the ongoing administration fees that applied in your employer plan will continued to apply in your new plan”.

Regarding indirect fees, 2004 and 2005 statements say (in a sidebar at page 7 of the 2005 statement):

> See the Product Disclosure Statement and the Annual Report for more details about these investment options or other options that may be available.
> …
> We deduct:
> - Management Fees
> - Performance Based Fees (for some investment options)
> - other costs (specific to managing particular assets).
>
> These deductions
> - are different for each investment option
> - are based on the amount invested in the investment option
> - are allowed for before we set the unit prices or interest rates — they are not debited directly from your account
> - may affect your investment return.

There was no legislated definition of member fees until 2017

The complainant says the trustee disclosed a new member fee after 2011 and new investment and administration fees after 2017. He says these fees either must have been charged without disclosure before appearing in his statements or must be against his interests as ‘fee for no service’ arrangements.

The member fee introduced on 1 November 2010 is disclosed in the 2010 Annual Update. The Annual Update is incorporated into the complainant’s annual statement for the year ended 30 June 2010 which says “Important information. Please refer to your Annual Update and the Annual Report (available at [fund website details]) for details about your superannuation product”. The relevant part of the 2010 Annual Update is at part 3.4 of this recommendation.

The member fees recorded in the complainants 2011 and 2012 statements are lower than the amounts indicated in the Annual Update.

Prior to the *Superannuation Legislation (MySuper Core Provisions) Act* 2012 (Cth) (MySuper) there was no legislated definition of the fees a superannuation trustee could charge. Before MySuper, the trustee was free to charge any fees authorised by its Trust Deed and disclosed in disclosure material and account statements.

The MySuper legislation commenced on 1 July 2013 and all superannuation funds were required to comply by 1 July 2017. I do not accept the complainant’s 25

November 2020 submission that fees newly disclosed in the 1 July 2017 statement had been charged without disclosure before that time. This is because the apparently new fees disclosed in the complainant's 1 July 2017 statement are adequately explained by trustee bringing the complainant's policy into compliance with MySuper requirements.

Having reviewed the available material, I am not satisfied the trustee has improperly charged any fee before 30 June 2008. The trustee's fees after 1 July 2008 are the subject of Federal Court representative proceeding VID 572/2019 and are therefore outside the scope of this recommendation.

2.2 Did the trustee calculate and charge the correct fees?

AFCA cannot consider a complaint about the level of a fee or charge

AFCA Rule C1.2(a) says:

> AFCA must exclude:
> a) A complaint about the level of a fee, premium, charge, rebate or interest rate – unless:
> (i) the complaint concerns non-disclosure, misrepresentation or incorrect application of the fee, premium, charge, rebate or interest rate by the Financial Firm having regard to any scale or practices generally applied by that Financial Firm or agreed with that Complainant;
> (ii) the complaint concerns a breach of any legal obligation or duty on the part of the Financial Firm.

This means AFCA is limited to considering whether the fees charged by the trustee were disclosed to the complainant, authorised by the Trust Deed and calculated correctly by reference to what was disclosed and authorised. AFCA is also able to consider whether a fee has been charged contrary to a legal obligation of the trustee.

The complainant says the trustee breached its legal obligations to him under common law, breaching s.52(2)(h) of the *Superannuation (Industry Supervision) Act* 1993 (Cth) and Australian Prudential Regulatory Authority (APRA) prudential standards by:

- Putting its own commercial interests above the financial interests of fund members
- Entering into 'passive outsourcing' arrangements without ensuring those arrangements served the best interests of fund members.

The complainant relies on various statements by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Hayne Royal Commission) to support his arguments. He also refers to prudential standards issued by the Australian Prudential Regulatory Authority (APRA). He has not provided evidence specific to his complaint demonstrating why the Hayne Royal

Commission findings apply in this case. Nor has he provided any specific material to show how APRA prudential standards have been breached in his case. I am unable to draw any conclusions about this aspect of the complaint, from the Royal Commission statements or APRA prudential standards.

2.3 Has the trustee charged the complainant a fee without providing a service?

AFCA is unable to consider conduct after 30 June 2008

Consistent with the issues discussed at part 3.1 of this recommendation, AFCA is unable to consider alleged trustee conduct after 30 June 2008.

The complainant's annual statements between 2004 and 2008 identify a financial advisor and show no direct advisor fee deducted. The trustee says in its submission on 23 November 2020 "trail commission was not deducted from [the complainant's] account and was paid from fees paid by all members of [the fund] as part of a commercial agreement between the Trustee and [the advice licensee]".

There was no legal prohibition of 'fee for no service' conduct until the Future of Financial Services legislation commenced on 1 July 2013. Section 1528 of the *Corporations Act* 2001 (Cth) permits arrangements created before 1 July 2013, to continue after that time.

As a result, even if I was satisfied the trustee had charged a direct fee for financial advice without providing any service, that conduct would not have been illegal when it happened and could not be considered a trustee error. The complainant was not charged any direct fee for financial advice.

The complainant does not address the amount of what he says are undisclosed fees for no service. He concedes that "no commission to the financial planner was disclosed on the statements".

Payments to financial advisors are disclosed on page seven of the 7 April 2004 Customer Information Brochure under the heading "What is paid to your financial planner". Advisor fees include an "ongoing service commission" of 0.4% per annum of plan value. That information is consistent with legislative requirements before 1 July 2013.

The Customer Information Brochure was incorporated into the 23 April 2004 transfer statement by the statement saying at page three "When deciding whether to buy or keep any financial product, you should read the latest Customer Brochure or Product Disclosure Statement, available from AMP or your Financial Planner". This was

consistent with disclosure requirements in 2004. It is not an error or misconduct simply because higher disclosure standards are now required.

The management fee is not a 'fee for no service'

The complainant's 2006, 2007 and 2008 annual statements record fees charged as 'other management costs'. The fees are said to be the "approximate amount [which] has been deducted from your investment and includes all the other management costs that were not paid directly out of your plan". The 'other management costs' are an indirect fee charged for the service of managing the complainant's investments.

I do not accept that the 'other management cost' represents a fee for no service, or an undisclosed fee. Even if I did accept that the 'other management cost' represented a fee for no service, the conduct relevant to this recommendation predates the FOFA legislation and was not prohibited conduct when it happened.

2.4 Was the trustee decision not to refund fees and charges on the complainant's account fair and reasonable?

The complainant's submissions on 4 November and 25 November 2020 assert the trustee should refund all fees charged against his account over the life of the account, with interest at what the complainant says is an 'industry average earning' rate. He has provided calculations consistent with total loss after 1 July 2008. I acknowledge the complainant's position and the calculations he has provided. The calculations are outside the scope of this recommendation. They do not assist me in forming a view about fees and charges before 30 June 2008.

Having reviewed the available materials, I am not satisfied the trustee charged any fee not authorised by the Trust Deed or legislation in place when the fees were charged. Nor has the trustee failed to disclose fees to the complainant. On that basis I am satisfied that it is fair and reasonable for the trustee to refuse to refund any fees charged before 30 June 2008.

3 Supporting information

3.1 Issues not considered by AFCA

Part of the complaint is excluded because the complainant is participating in Federal Court representative proceedings

The complaint is excluded to the extent that it relates to alleged conduct after 1 July 2008.

That is because the complaint and the representative proceedings are about the same subject matter, and the Court is a more appropriate forum to consider some of the complainant's allegations and some of the remedies he seeks.

AFCA is unable to consider the trustee's conduct after 1 July 2008

The complainant has not opted out of Federal Court representative proceeding VID 572/2019, which alleges the trustee charged excessive fees and fees not permitted by law after 1 July 2008. The complainant's account with the trustee existed from April 2004 until September 2019. Under Federal Court rules, the complainant is a class member and participates in the representative proceeding unless and until he gives notice that he does not wish to participate ("opt out").

The complainant says in his submission on 4 November 2020 that he has not opted out of the class action proceeding.

AFCA Rule C2.2 says

> Examples where AFCA may consider excluding a complaint include:
>
> (e) If the Complainant has commenced legal proceedings in relation to the subject matter of the complaint unless:
>
> (i) the Complainant discontinues the legal proceedings; or
>
> unless he gives notice that he does not wish to participate in the proceedings.

I am satisfied the complaint should not be considered to the extent that it relates to alleged trustee conduct after 1 July 2008. That is because the complainant is participating in legal proceedings about the same subject matter as the subject matter of this complaint.

AFCA is not the most appropriate forum

AFCA rule C2.2 says

> Examples where AFCA may consider excluding a complaint include:
>
> a) If there is a more appropriate place to deal with the complaint, such as a court, tribunal, another dispute resolution scheme, or the Office of the

Australian Information Commissioner;

The complainant says the trustee has contracted with related entities in ways which put its own profits before his best interests ("conflicted remuneration"). He says the trustee should pay an account of profits in respect of that conduct.

The complainant relies on various statements by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Hayne Royal Commission) to support his arguments. However, he has not provided evidence specific to his complaint demonstrating why the Hayne Royal Commission findings apply in this case. I am unable to draw any conclusions about this complaint, from the Royal Commission statements.

Account for profits is a form of equitable damages. AFCA is not a court and cannot award equitable damages. The Federal Court is the more appropriate forum in which the allegations about related entity contracting and equitable damages can be resolved.

A further reason for AFCA to exclude this aspect of the complaint about alleged conflicted remuneration or contracting with related entities is the state of the law before 30 June 2008. AFCA must apply the law in place at the time of the conduct alleged.

The legislated prohibition on conflicted remuneration was introduced by the Future of Financial Advice (FOFA) legislation, commencing on 1 July 2013. The FOFA legislation does not apply retrospectively. It is not binding on the trustee within the scope of this recommendation.

AFCA is unable to consider the trustee's contracting arrangements

A consideration of whether the trustee has entered into contractual arrangements prioritising profits over the complainant's financial interests requires a review of the trustee's contractual arrangements. Doing so would be an examination of issues "relating to the management of a fund or scheme as a whole" which is contrary to AFCA rule C1.5(b).

AFCA is unable to consider the complainant's allegation that the trustee has contracted with related entities in a way that put its own profits above his best interests.

3.2 Summary of account statements 2004 – 2008

Record	Key points
20-04-2004 **Transfer in to personal plan**	No transfer fees charged: Important note The information in this document is of a general nature only, and is not based on your personal circumstances. You should only act on any opinion or recommendation in this document after considering whether it is appropriate for you. When deciding whether to buy or keep any financial product, you should read the latest Customer Brochure or Product Disclosure Statement, available from [the Trustee] or your Financial Planner.
30-06-2004 **Annual Statement**	No fee charged: Important note The information in this document is of a general nature only, and is not based on your personal circumstances. You should only act on any opinion or recommendation in this document after considering whether it is appropriate for you. When deciding whether to buy or keep any financial product, you should read the latest Product Disclosure Statement, available from AMP or your Financial Planner.
30-06-2005 **Annual statement**	No fee charged: **Fee changes** Introduced more competitive fees for most members and a simpler fee structure (in November 2004) announced in last year's 30 June Member Statement. • Increased Management Fees (from 1 November 2005) for the following investment options: [not relevant] **Your personalised fee structure** This section shows any current fees that are part of the personalised fee structure agreed with your financial planner. The standard contribution fee is 4.50%.

Record	Key points
	Refer to your Product Disclosure Statement for more information about your fees. Contribution fee 0.00% of any member payment we receive.
30-06-2006 **Annual Statement**	Other management costs $447.59 This approximate amount has been deducted from your investment and includes all the other management costs that were not paid directly out of your plan. Other management costs are • Charged to manage the assets backing your investment options and are allowed for before we set unit prices or interest rates, and • calculated monthly by multiplying the relevant monthly Management Fees (plus any Performance Based Fee, if applicable) by the average of the start and end of month balances of each investment option
20-06-2007 **Annual statement**	Other management costs $511.62 This approximate amount has been deducted from your investment and includes all the other management costs that were not paid directly out of your plan. Other management costs are • Charged to manage the assets backing your investment options and are allowed for before we set unit prices or interest rates, and • calculated monthly by multiplying the relevant monthly Management Fees (plus any Performance Based Fee, if applicable) by the average of the start and end of month balances of each investment option
30-06-2008	Other management costs

Record	Key points
Annual statement	$677.36 This approximate amount has been deducted from your investment and includes all the other management costs that were not paid directly out of your account.

3.3 Policy Document 1 September 1996

3.4 Charges against assets

[The Trustee] may value the assets in any one or more investment classes on such occasions as [the Trustee] thinks fit.

Before [the Trustee] calculates Unit Prices, charges are deducted from the value of assets or income, at the date of deducting the charge, in each investment class or Investment Option as follows:

(a) An [Trustee] administration fee of up to 2.5% per annum of the value of the assets in each Investment Option. [The Trustee] decides the exact percentage periodically and collects it in instalments. The fee applying at each Member's Plan Commencement Date is described in that Member's initial Member Statement; and

(b) any provisions [The Trustee] makes for taxes, duties or other charges under clause 3.5 in respect of each investment class; and

(c) brokerage, commission, stamp duty and any other costs

incurred in buying and selling assets of an investment class; and

(d) costs incurred in maintaining property or natural resource related investments of an investment class or which would have been incurred if that work had not been done by the investment manager; and

(e) an investment management fee and, for some External Investment Managers, related costs such as trustee and fund administration fees and expenses, which may usually be expressed as an annual percentage of the value of the assets managed by the particular External Investment Manager

for an Investment Option. The investment management fee and related costs are deducted periodically by the appropriate investment manager and may be varied from time to time. Reasons for a variation include but are not limited to changes in:

(i) investment managers;

(ii) the level of fees charged by investment managers;

(iii) the volume of funds under management;

(iv) the asset mix of an Investment Option; and

(v) taxation.

3.4 2010 Annual Product Update

3. Extending the charging of the Member Fee for [plan] members

Currently, members only pay a Member Fee where their account balance at the end of the month is less than $10,000 (ex GIO members only pay a Member Fee if their account balance is less than $100,000).

We are extending the charging of the Member Fee so that all members, regardless of their end of month account balance, will pay the monthly flat dollar fee. The dollar amount of the Member Fee will be $95.40 a year ($7.95 per month and $6.15 per month for ex GIO members, before the 15% tax deduction) until 1 July 2011 when it will increase in line with the Consumer Price Index (CPI). This fee will then increase on 1 July each year in line with CPI.

Page 10 of the annual Product Updated says the changed fee structure will commence on 1 November 2010.

3.5 Relevant Law

Corporations Act 2001

Section 1528

(1) Subject to subsections (2) and (3) , Division 4 of Part 7.7A, as inserted by item 24 of Schedule 1 to the amending Act, does not apply to a benefit given to a financial services licensee, or a representative of a financial services licensee, if:

(a) the benefit is given under an arrangement entered into before the application day; and

(b) the benefit is not given by a platform operator.

(2) The regulations may prescribe circumstances in which that Division applies, or does not apply, to a benefit given to a financial services licensee or a representative of a financial services licensee.

(3) Despite subsection (1), that Division does not apply to a benefit given to a financial services licensee, or a representative of a financial services licensee, to the extent that the operation of that Division would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph of the Constitution).

(4) In this section:

"application day":

(a) in relation to a financial services licensee or a person acting as a representative of a financial services licensee, means:

(i) if the financial services licensee has lodged notice with ASIC in accordance with subsection 967(1) that the obligations and prohibitions imposed under Part 7.7A are to apply to the licensee and persons acting as representatives of the licensee on and from a day specified in the notice--the day specified in the notice; or

(ii) in any other case--1 July 2013; and

(b) in relation to any other person who would be subject to an obligation or prohibition under Division 4 of Part 7.7A if it applied, means:

(i) if a notice has been lodged with ASIC in accordance with subsection 967(3) that the obligations and prohibitions imposed under Part 7.7A are to apply to the person on and from a day specified in the notice--the day specified in the notice; or

(ii) in any other case--1 July 2013.

Superannuation Industry (Supervision) Act 1993

Section 29V - Fees that may be charged in relation to a MySuper product

(1) The trustee, or the trustees, of a regulated superannuation fund that offers a MySuper product may only charge fees of one or more of the following kinds in relation to that product:

(a) an administration fee;

(b) an investment fee;

(c) a buy-sell spread;

(d) a switching fee;

(f) an activity fee;

(g) an advice fee;

(h) an insurance fee.

(2) An ***administration fee*** is a fee that relates to the administration or operation of a superannuation entity and includes costs incurred by the trustee, or the trustees, of the entity that:

(a) relate to the administration or operation of the fund; and

(b) are not otherwise charged as an investment fee, a buy-sell spread, a switching fee, an activity fee, an advice fee or an insurance fee.

(3) An ***investment fee*** is a fee that relates to the investment of the assets of a superannuation entity and includes:

(a) fees in payment for the exercise of care and expertise in the investment of those assets (including performance fees); and

(b) costs incurred by the trustee, or the trustees, of the entity that:

(i) relate to the investment of assets of the entity; and

(ii) are not otherwise charged as an administration fee, a buy-sell spread, a switching fee, an activity fee, an advice fee or an insurance fee.

(4) A ***buy-sell spread*** is a fee to recover transaction costs incurred by the trustee, or the trustees, of a superannuation entity in relation to the sale and purchase of assets of the entity .

(5) A ***switching fee*** is a fee to recover the costs of switching all or part of a member's interest in a superannuation entity from one class of beneficial interest in the entity to another.

(7) A fee is an ***activity fee*** if:

(a) the fee relates to costs incurred by the trustee, or the trustees, of a superannuation entity that are directly related to an activity of the trustee, or the trustees:

(i) that is engaged in at the request, or with the consent, of a member; or

(ii) that relates to a member and is required by law; and

(b) those costs are not otherwise charged as an administration fee, an investment fee, a buy-sell spread, a switching fee, an advice fee or an insurance fee.

(8) A fee is an ***advice fee*** if:

(a) the fee relates directly to costs incurred by the trustee, or the trustees, of a superannuation entity because of the provision of financial product advice to a member by:

(i) a trustee of the entity; or

(ii) another person acting as an employee of, or under an arrangement with, a trustee or trustees of the entity; and

(b) those costs are not otherwise charged as an administration fee, an investment fee, a switching fee , an activity fee or an insurance fee.

(9) A fee is an ***insurance fee*** if:

(a) the fee relates directly to either or both of the following:

(i) insurance premiums paid by the trustee, or the trustees, of a superannuation entity in relation to a member or members of the entity;

(ii) costs incurred by the trustee, or the trustees, of a superannuation entity in relation to the provision of insurance for a member or members of the entity; and

(b) the fee does not relate to any part of a premium paid or cost incurred in relation to a life policy or a contract of insurance that relates to a benefit to the member that is based on the performance of an investment rather than the realisation of a risk; and

(c) the premiums and costs to which the fee relates are not otherwise charged as an administration fee, an investment fee, a switching fee, an activity fee or an advice fee.

[redacted]
Case Manager
Australian Financial Complaints Authority