HERBERT SMITH FREEHILLS

The Intra-Fund Advice ("IFA") Matrix

This article explores and seeks to demystify **intra-fund advice** (or **IFA**) and to provide well-needed legal illumination. It does so by identifying the key legal building blocks that need to be considered to properly understand intra-fund advice.

ASIC Guidance

There isn't a plethora of guidance around the nature and parameters of intra-fund advice. In a helpful note dated 4 December 2020, entitled "Clarifying intra-fund advice", ASIC makes a canonical statement that: "Intra-fund advice has no special status over other personal advice". This article followed on from ASIC's work in ASIC Report 639 "Financial advice by superannuation funds" in 2019, which further explored how funds are providing IFA.

In ASIC's clarifying note, it also notes that IFA has been subject to confusion, and as a unique type of advice with its own special status. ASIC sees IFA not as a type of advice but rather, as a cross-charging mechanism, which can apply to both general and personal advice.

In our opinion, IFA is, with respect, both of these things.

It is both limited (or scoped) advice concerning interests held by members and other beneficiaries in a superannuation fund, as well as a mechanism for cross-charging the entire fund for the cost of that advice.

Personal Advice?

ASIC's clarifying note assumes that IFA is personal advice.

Most funds regularly provide general advice in the form of marketing and collectively charge their membership for the cost of providing that advice. This type of general advice is not typically considered IFA.

Undoubtedly, personal advice is the mainstay of IFA. ASIC notes that "... in providing personal advice an adviser must take into account the member's financial objectives, situation and needs". This is an entirely correct statement.

It should be supplemented with the observation that personal advice includes "deemed personal advice"; that is, advice where a reasonable person might expect the provider to have considered one or more of the person's objectives, financial situation and needs" (section 766B(3)(b) of Corporations Act).

Deemed Personal Advice?

The issue of deemed personal advice is a central one which emerged from the case of *Westpac Securities Administration Ltd v ASIC* [2021] HCA 3.

In this case in the High Court appeal, relevant observations of Gordon J include:

- Section 766B(3)(b) poses an objective test based on the circumstances at the time the advice was given, referring to a reasonable person's expectation standing in the shoes of the person receiving the advice (at paragraph [57]).
- The standard of expectation in section 766B(3)(b) is wider than what a reasonable person would merely expect. It is one of reasonable possibility, not reasonable probability (at paragraph [58]).
- The phrase "to have considered" bears its ordinary meaning. This means section 766B(3)(b) captures circumstances where a reasonable person might expect the provider to have taken into account, had regard to, or given attention to, one or more of the person's objectives, financial situation and needs (at paragraph [59]).
- Section 766B(3)(b) is concerned with the circumstances of the retail client. If a provider of advice urges a particular course of action, it is more likely that a reasonable person would expect the adviser to have considered the recipient's personal circumstances. This is especially true in the present case because:
  - the course of action involves consolidating multiple superannuation accounts, which is a significant issue for most members;
  - **there is a pre-existing trustee-beneficiary relationship of dependence between the adviser and the member**; and
  - the adviser elicited and confirmed the member's objectives using social proofing to show these objectives were common and relevant.

    Given these circumstances, a reasonable person would assume that the adviser had considered their personal objectives and that no other matters/advice needed to be considered before the member accepted the recommendation and roll over their external super account (at paragraph [81]).

The risk of deemed personal advice is therefore a real one for trustees of superannuation funds as the Court is essentially saying that a trustee, as a fiduciary, is required to act in the best interests of beneficiaries and hence, those beneficiaries could reasonably expect that advice provided by the trustee would take into account a beneficiary's personal circumstances.

Trustees should consider how such a possible expectation of a member that their personal circumstances are being considered might be neutralised, such as by use of appropriate disclaimers to confirm that a trustee is not providing personal advice.

The IFA legislative matrix – Section 99F

This then brings us to making sense of sections 99F and 99FA of the SIS Act and their interplay. As flagged earlier, section 99F essentially deals with the capacity of trustees to charge for intra-fund advice. The section operates and applies as follows.

The central prohibition is that a trustee must not pass on the cost of providing financial product advice in relation to a member of a fund or to any other member of the fund where each of the following criteria are met:

- where the advice is provided by either the trustee or another person acting as an employee or under an arrangement with the trustee; and
- where the advice is personal advice; and
- the advice is provided in any of the following circumstances:
  - where the individual member has not yet acquired a beneficial interest in the fund and the advice relates to whether the individual member should acquire such an interest;

- where the advice relates only to a beneficial interest in the fund (and no other financial product) except:
  - a related person fund;
  - a related insurance product for the member and the fund;
  - a cash management facility within the fund;
- where the advice relates to whether the individual member should consolidate that member's beneficial interests in two or more superannuation entities into a beneficial interest in a single superannuation entity;
- where the individual member reasonably expects periodic reviewing advice, the provision of further personal advice (whether recommendations in the original or any later advice are implemented and the result of that implementation);
- in other prescribed circumstances.

It follows that a collective of members can be charged advice fees where certain advice is provided to, and pertains to, an individual member. In other words, where advice does not fall into any of the banned scenarios listed in section 99F, the cost of that advice can be collectively charged to the member of the fund.

The IFA legislative matrix – section 99FA

Section 99FA regulates the ability of a trustee to charge amounts against an individual member's interest in the relevant fund.

The first point to note in the context of section 99FA is that it only permits such charging in respect of personal advice. Some providers previously charged for general advice out of superannuation moneys on an individual basis, and these arrangements are now prohibited.

Of course, a key ingredient of section 99FA is that the trustee can only charge such amounts if the relevant member furnishes to the trustee a written request or written consent in the prescribed form.

The next point to note is that the section 99FA stipulations do not apply to the scenario envisaged in section 99F, namely where the cost of providing financial product advice is shared between the relevant member and other members of the fund.

A few observations should be made in relation to the pertinent deletions from the previous version of the section that preceded this final form as passed by Parliament.

The first relates to the previously proposed requirement that the relevant advice fees charged did not exceed the cost of providing the advice. This provision imported an implementational issue which needed a fix. It would have prohibited the charging of advice fees that exceeded the actual cost base of the relevant provider of the advice.

The second proposed requirement was for the advice to be wholly or partly about the member's interest in the fund, which would have required a trustee to effectively vet every piece of advice given to the member to ensure adherence with this requirement.

These provisions were ultimately not implemented, following engagement by the advice industry.

The trustee has existing obligations which would require the trustee to take relevant measures to be satisfied as the deduction of advice fees being consistent with the common law duties of prudence and care and the statutory duty ensuring that the fund is maintained for genuine retirement purposes – the so-called sole purpose test.

The trustee also has a range of other legal obligations which apply to the charging of advice fees to the fund, such as the MySuper charging rules in section 29V of the SIS Act, which define what is an "advice fee", as well as obligations in the SIS Regulations to determine the costs to be charged against members benefits (including the costs of advice) in a fair and reasonable manner.

Scoping of Personal Advice

As mentioned above, ASIC regards (rightly) intra-fund advice as limited advice. This interfaces with section 961B of the Corporations Act which under the reasonable steps provisions contained in section 961B(2)(b)(i) requires the identification of the subject matter of the advice that has been sought by the client (whether explicitly or implicitly). This provision is generally understood to preclude the unilateral offer of limited advice by the adviser; in other words, restricting the ability of an adviser to scope down full personal advice unilaterally. Rather limited advice, in this case intra-fund, should be seen to flow from an express or implicit need emanating from the client for personal advice which is solely for intra-fund advice.

ASIC notes in RG 175, more broadly in connection with limited advice, that an adviser can determine the scope of the advice only after identifying the subject matter of the advice sought by the client (at RG 175.292). An adviser needs to use their judgment in defining the scope of their advice and must ensure that the scope is consistent with the client's circumstances and the subject matter of the advice being sought. (at RG 175.293).

Standard of care applying to intra-fund advice

To do justice to this topic would require a dedicated article in itself.

In short, there should not be seen to be a prescriptive set of reasons or steps a trustee would need to implement to satisfy its general law and statutory duties in relation to a trustee's oversight of intra-fund provided by either itself or a third-party adviser.

Certainly, there are some core criteria or principles which flow from these oversight obligations; such as formulating guidelines for monitoring and vetting of advice provided to a member on some reasonable basis (e.g. a reasonable process).

Finally, one has to consider the ramifications and consequences to a trustee of an adviser breaching the sole purpose test.

Sole purpose test

There is a mismatch where the trustee must comply with the sole purpose test, but often third-party advisers will determine the scope of advice. An adviser could choose to advise on topics outside of superannuation, without the knowledge of the trustee, meaning that fund moneys will have been expended on advice unrelated to superannuation.

It is difficult to see that deviations of advisers' advice from the sole purpose test will automatically entail a breach by a trustee of the so-called sole purpose test provided:

- the trustee has frameworks in place to instruct the relevant advisers as to the parameters of the sole purpose test including monitoring and vetting procedures; and
- the trustee is not aware of or reckless to (or arguably negligent in respect of) such deviations.

The rationales for this conclusion are:

- maintenance of the fund for approved retirement purposes (as required by section 62 of the SIS Act, the so-called sole purpose test) is a broad-based obligation which it is submitted should be assessed against the totality of the fund's activities;
- it is submitted that the word "purpose" connotes some element of subjective purpose, (whilst also extending to an objectively assessed purpose) if the trustee is not aware of (and could not reasonably be expected to be aware of) deviations by the adviser in terms of charging for non-fund advice from the fund, then it is difficult to see how the trustee has not maintained the fund for the prescribed purposes. Otherwise, a trustee could be seen to breach the sole purpose test in the case of third-party fraud or inadvertent breach by it of the payment conditions; and
- furthermore, an actionable breach of the sole purpose test depends on whether the criteria for a breach of a civil penalty provision apply.

Those criteria start with an assessment of misfeasance by the trustee; namely, has the trustee intentionally or recklessly breached the requirements of section 62?

This is highly unlikely to be the case if the trustee has been simply unaware of the adviser deviations and has put in place reasonable measures and processes as canvassed earlier. Whilst a civil penalty provision can be breached for lesser

conduct, it seems unlikely to us that an action would/could be brought in the circumstances described earlier.

All the above is consistent with the regulators' view in "Further guidance on oversight of advice fees charged to members' superannuation accounts" (issued by APRA and ASIC dated 30 June 2021) which is expressed in the following terms:

> **A trustee is not expected to make a detailed evaluation of the specific professional advice provided by the financial adviser.**

This supports the position that trustees are not expected to undertake a detailed assessment of advice, such as to assess whether advice represents "value for money" for a member.

Interaction with best interests duty ("BID")

It could be observed that intra-fund advice bears an uneasy relation with the BID contained in section 961B of the Corporations Act.

Why is this so?

The BID requires that the relevant advice be appropriate to the client, "had the provider satisfied the duty under section 961B to act in the best interests of the client" (section 961G of the Corporations Act).

The first point to note is that if personal advice is to be limited, then a reasonable investigation of other suitable financial products would not seem to be required; viz "a reasonable investigation into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered as relevant to advice on the subject matter" (section 961B(2)(e)(i)).

The second point to note is that consideration of outside interests and holdings held by the member would also not be required as a generality.

However, there still remains a question as to whether consideration of outside holdings would need to be considered as part of intra-fund advice if consideration of such interests was so intrinsically connected to the particular piece of intra-fund advice, such as where consideration of insurance needs of the members within the fund would reasonably require consideration of the member's insurance cover held outside of the fund. This could be in fact required by section 961G of the Corporations Act which stipulates that: "The provider must only provide the advice to the client if it would be reasonable to conclude that the advice is appropriate to the client, had the provider satisfied the duty under section 961B to act in the best interests of the client."

The ability of a trustee to examine the outside interests of members in certain circumstances is consistent with the original reference in section 99FA, subsequently deleted in the version passed by Parliament that personal advice which must include limited advice must relate at least partly to a member's interest in the fund, viz "the financial product advice is personal advice and is wholly or partly about the member's interest in the fund".

Ultimately there is an uneasy relationship between the express requirements of the BID in the Corporations Act, which effectively mandates that an adviser consider certain topics, and the requirements of section 99F of the SIS Act, which conversely ban an adviser from advising on certain topics in the context of intra-fund advice.

The BID requirements are set to be amended in the upcoming next phase of legislation implementing recommendations from the Quality of Advice Review. We are looking forward to seeing what amendments the Government will propose, and hope that they seek to address this legislative disconnect.