

Topic: Funds disclosing fines
Hansard Page Ref: 43

Senator BRAGG: I want to ask questions about some cases in superannuation. I want to ask you about IOOF. I know that in some ways you'd be unable to comment in detail, potentially. I just want to understand, for the record, that ASIC's view on the IOOF matter is that IOOF should not have used members' funds to give a remedy to consumers for an alleged breach.

Ms Press: That's the matter that's currently before the court and it's under APRA, so we really can't comment on that.

Senator BRAGG: Even as the principal conduct regulator, you can't comment, because it's before a court?

Mr Price: It's sub judice. There may well be very difficult issues around the role of the parliament and the role of the courts when there's active litigation.

Senator BRAGG: I just thought I'd ask. I also want to ask about a matter to do with Hostplus. There was an ASIC media release on 9 May 2019 titled 'Super fund removes "independent" financial advice message and pays penalty'.

Ms Press: Yes.

Senator BRAGG: Just so I understand this in my own simple logic, is ASIC's view that Hostplus should not have been claiming that their advice was independent?

Ms Press: That's correct. It falls foul of the definition of 'independence' as defined in—

Ms Bird: Section 923A.

Ms Press: Thank you.

Senator BRAGG: For that infringement, Hostplus paid a \$12,000 penalty?

Ms Press: Yes, that's correct.

Senator BRAGG: To ASIC?

Ms Press: To consolidated revenue.

Senator BRAGG: Not to the super consumers centre?

Ms Press: No.

Senator BRAGG: In this case—as opposed to IOOF that has had an internal discussion about whether to pay a fine or to compensate members from either its shareholder capital or from the member reserve—in a case like Hostplus's, there is no shareholder capital?

Ms Press: Correct.

Senator BRAGG: Effectively then, these type of penalties will always be paid from members' money?

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ASIC response to Question on Notice

Ms Press: I would assume that's correct, yes.

Senator BRAGG: Where else would it come from?

Ms Press: It would be paid out of the reserve—yes, the general reserve probably.

Senator BRAGG: Would the members of that fund be notified?

Ms Press: I suspect that would depend on the protocols around the use of that reserve. I would suspect not directly, although under the new RG 97 requirements, we would require that any use of reserve be articulated as a fee.

Senator BRAGG: Let me just play this out. If there is a fund that doesn't have access to shareholder capital and it receives a substantial fine, where it draws that money from the members' funds, it doesn't necessarily have to disclose that to the members of the fund?

Ms Bird: If it were a substantial fund, we would expect it to

Senator BRAGG: You put out a media release on this matter—

Ms Bird: Yes.

Senator BRAGG: but, as we discussed, the *Fin Review* might cover that, but—

Ms Press: If it was a substantial amount of money—

Senator BRAGG: I should say, for the record, I like the *Fin Review*.

Ms Press: If it were a substantial fine or penalty, I'd suspect that it would be also an insurance issue.

Senator BRAGG: That is: it's an audit issue?

Ms Press: Yes, coming out of the professional indemnity insurance of the fund as opposed to the reserve portfolio of members.

Ms Bird: [Senator, so that we can give you a full answer, it might be best if we take on notice exactly how a fund would disclose a fine like that.](#)

Senator BRAGG: The default fund that ASIC uses is—

Ms Press: The default fund has just changed to be AustralianSuper.

Senator BRAGG: Again, that would be a fund without shareholder capital?

Ms Press: Correct.

Answer

Trustees of superannuation funds have several disclosure obligations through which they disclose information to members, such as product disclosure statements, periodic disclosures and financial reporting. None of these disclosure obligations specifically require the

disclosure of a fine payable from the capital of a superannuation fund in all circumstances. However, some or all of these requirements may require disclosure depending on the circumstances involved, such as the nature of the breach, the extent of the fine and the impact it may have on fees and costs. The timing for when disclosure is required differs depending on the obligation.

In the context of a substantial fine, there may be an obligation to disclose information by way of updating a PDS. If the fund has issued a full (long form) PDS, the Corporations Act requires disclosure of any information that might reasonably be expected to have a material influence on the decision of a reasonable person whether to acquire the product. If the fine is sufficiently substantial or the conduct sufficiently egregious, it may give rise to an obligation to update the PDS on this basis. The form of the disclosure will depend on the circumstances. If a fund is required to use a shorter PDS, the fine itself is unlikely to be referenced directly in the PDS due to the prescribed nature of the Corporations Act disclosure obligations. Most accumulation superannuation funds use a shorter PDS. Long form PDS requirements still apply to platforms, solely defined benefit and solely pension products.

Under either a shorter PDS or long form PDS regime, any consequential fee increase will need to be disclosed.

Where there is an obligation to update a PDS, a significant event reporting obligation is likely to also be triggered, requiring an update to be provided to members already in the product.

A trustee may also have to disclose a substantial fine in its periodic reporting to members or its annual financial reporting. A periodic statement is required to detail any change in circumstances affecting the investment that has not been notified since the previous periodic statement. A substantial fine may be information that should be detailed in a periodic statement on this basis. Annual financial reporting would need to disclose information to the extent of materiality thresholds applicable under accounting standards. Each of these reports will be made to members in accordance with a prescribed annual timetable. Copies of a fund's annual report are available on a fund website.

On other occasions, a trustee that has incurred a substantial fine will voluntarily put out its own disclosures about the fine and the events that caused the trustee to be fined. ASIC might consider whether this disclosure is misleading or not.

Finally, it is worth mentioning that in more rare circumstances, to the extent that a trustee has obligations under the continuous disclosure provisions of the Corporations Act, the nature of the fine may give rise to an obligation to publicly disclose information relating to the fine. Again, the extent of the disclosure required will depend on the circumstances.