APRA interferes with Financial Advice

By Phil Anderson – Acting CEO and General Manager, Policy and Professionalism
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Over recent years APRA has become a much more important influence on financial advice. In April 2019 they issued a letter jointly with ASIC on the oversight of fees being deducted from superannuation accounts, and then later in 2019 they announced intervention measures with respect to the Individual Disability Income Insurance (IDII) product. On 30 June 2021, they issued a further joint letter with ASIC on oversight of advice fees charged to members' superannuation accounts. They even suggested that super fund trustees should be reviewing a sample of Statements of Advice that financial advisers have provided to their clients. We have long argued that this is inconsistent with Privacy obligations, which is an issue that has recently been raised as part of the Senate Estimates process.

What also stood out, is the way the letter warned trustees about trusting financial advisers:

> "Reliance on attestations by financial advisers or advice licensees that services have been provided has limitations due to the potential for conflicts of interest, so cannot in all circumstances be relied upon."
>
> "We do not consider it sufficient to rely solely on statements from financial advisers or members that the sole purpose test has been met."

It is therefore timely to reflect on the role and the influence of APRA. Importantly, APRA is the prudential regulator responsible for life insurance and superannuation funds. They have an important role to play in these two sectors that are critical to financial advice. Specifically, they are responsible for oversight of the super trustee duties to members and the sole purpose test.

Intervention in Life Insurance

In life insurance, APRA are responsible for prudential supervision, and they chose to intervene in the IDII market in 2019 to address issues with profitability. These intervention measures are still in the process of being implemented, however they have already had a big impact and the majority of existing clients have already seen some very large increases in their premiums. Following a Senate Estimates hearing in March 2021, APRA were asked via a Question on Notice, "What is APRA doing to protect the interests of these retail life insurance clients? Has APRA paid attention to the scale of some of these increases and if so, please outline the scope of these increases?". Surprisingly, the answer was "APRA's regular data collections do not include detail on premium increases for specific products, such as legacy products and level premium products. APRA is however aware of significant premium increases for broader product types, in particular disability income insurance products."

It is quite surprising, when clients are receiving premium increases of as much as 70%, that the regulator responsible for the intervention is not collecting data and closely monitoring the impact of their intervention in terms of the cost to consumers. We can only contrast this with the way premium increases for health insurers are overseen.

Oversight of Advice Fees paid from Superannuation Funds

On 10 April 2019, APRA issued a joint letter, with ASIC, to Super Fund Trustees on the oversight of fees charged to members' superannuation accounts. This letter required trustees to undertake an investigation of their control measures with respect to advice fees by 30 June 2019. Financial advisers found this letter offensive as it specifically warned against trusting financial advisers – "We emphasise that care needs to be

taken to ensure that controls do not place undue reliance on assurances or attestations from financial advisers." The letter also suggested that "Best practice would be to obtain effective consumer authorisation to charge the fees on a regular basis". APRA and ASIC were also suggesting that trustees should take steps to confirm that the agreed services were actually provided. In the context of regulatory reforms already recommended by the Royal Commission this seemed excessive.

Compliance with Privacy obligations

The complication in doing what they proposed, is that the trustees are not a party to the agreement between a financial adviser and their client, which is often established through a Statement of Advice (SoA). The SoA, however contains a lot of personal details on the client's current financial and personal situation. It will also include information on cash holdings and any other superannuation fund that they choose to hold. It is clearly not appropriate that SoAs be shared with the client's super fund(s).

As a result of this letter from APRA and ASIC, some superannuation funds started to request copies of SoAs from advisers. The AFA objected to this on the grounds of it being a breach of Privacy obligations and the information in an SoA could be used by the super fund for the wrong purposes. We raised our concerns with both ASIC and APRA in 2019.

On 6 April 2021, this issue of Privacy obligations was challenged when APRA received a Question on Notice from Senator Slade Brockman following a Senate Estimates hearing, asking about trustees requesting copies of SoAs:

> "I understand that it has become common for super fund trustees to request documents from financial advisers to prove the provision of services, such as Statements of Advice, that could contain personal information that should not be made available to these trustees. **To what extent is APRA aware of these practices and what steps have you taken to address the issue that the provision of such information by financial advisers might breach the privacy obligations?**"

APRA finally provided a response to this question on 1 June 2021, which included the following:

> "We understand there is a range of practices employed by trustees in this area and **APRA has not been prescriptive in describing how trustees should do this**.
>
> APRA and ASIC have continued to work together on this matter. An update to the April 2019 letter is currently in preparation and will be issued in the next few months. This will provide more details as to the agencies' expectations.
>
> **Ultimately trustees must design and implement their own arrangements to ensure they are meeting their legal obligations in the best interest of members**."

When APRA and ASIC issued a follow up letter to super fund trustees on 30 June 2021, it clearly demonstrated that they already expect trustees to review SoAs, which blatantly contradicts the answer provided by APRA on 1 June 2021 in response to Senate Estimates.

> "Another area of weakness we identified was in relation to advice reviews, **where trustees did not meet our expectation that they undertake regular proactive reviews of a sample of SOAs**, or related documents, either on a random or risk basis.
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> **Reviewing SOAs and related advice documents would enable trustees to check that the expected financial advice service has been provided**, and that it complies with the sole purpose test."

In less than a month, APRA have gone from describing the situation in terms that they have not been prescriptive, to specifically stating that they have had expectations that trustees review SoAs.

In this letter, there is, at best, a cursory reference to Privacy obligations. Is it really sufficient to have trustees communicate to their members that they may demand copies of documents that contain private personal information to prove that what clients have already consented to is okay?

> "Trustees and financial advisers should have arrangements to enable any appropriate reviews to occur, including communicating to clients that these reviews may occur, to address any privacy concerns clients may have."

These requirements are excessive

Not only do these requirements for trustees ignore the Privacy Act obligations, which is putting clients at risk, it is also excessive and will add significant administrative burden for financial advisers.

Let's look at what is already in place. From 1 July 2021, new arrangements are in place which require all ongoing fee clients to receive a Fee Disclosure Statement each year, that sets out the services provided, and fees paid over the last year, and the services to be provided over the next year and the fees to be charged. Clients need to sign this document to confirm their agreement to continue. A client consent form detailing the fees also needs to be provided to the product provider each year. Fees are also disclosed in annual product statements, and clients have the right to terminate fees at any time. Also, if they do believe that they have been unfairly charged, then they can complain to the licensee and the Australian Financial Complaints Authority, which is a free ombudsman service. There are already multiple layers of consumer protection.

The Banking Royal Commission didn't require this

I am sure that some in the media and from the activist consumer groups will argue that the Banking Royal Commission demonstrated the need to do more. Well, we would argue that the Royal Commission looked at this issue from an institutional perspective, not a small business financial adviser perspective, and in any case only 10 individual advisers were reviewed through the Royal Commission hearings and fee for no service was not a focus of these individual adviser matters. The recommendations of the Royal Commission have been implemented, so why do the regulators think that they need to demand that so much more is required?

Whilst it is important to acknowledge that super fund trustees have more obligations than banks, it is illustrative to consider what the equivalent requirement would be if banks needed to do something similar. Can you imagine banks requiring gyms or streaming services to get client consents for direct debits signed every year and providing evidence of usage of these services?

We request this expectation be reviewed

The bottom line is that financial advisers are professionals, subject to high standards, and they should be trusted. There are already a lot of demanding regulations in place. All these additional measures just add further to the cost of providing financial advice and inconvenience clients by adding significant complexity and disruption. Is this really necessary and should it be the role of Government agencies to demonstrate such lack of trust in financial advisers who provide a critical service to the Australian population? It is appropriate that financial advisers and super funds both argue against this excessive, unnecessary, and costly interference.