

Question No	QoN005-01
Topic	Members funds used to pay remediation
Committee Member	Senator Bragg
Reference	Written

QoN 005-01 Members funds used to pay remediation

I seek clarification in relation to the Australian Securities Investment Securities (ASIC) media release "*20-180MR Superannuation trustees compensate members wrongly classified as smokers*" on August 7 2020.

ASIC has revealed 7 super trustees that classified new members as smokers, and charged them high insurance premiums, and have all agreed to cease the practice. Only 4, however, have refunded consumers who may have been excessively charged premiums.

One of the funds in question is Intrust Super, a Queensland based fund that is backed by the United Voice union.

In relation to ASIC oversight and governance of Intrust Super, I would like to ask the following questions:

1. Were member reserves used to repay the excessively charged premiums;
2. If so, how was the use of member reserves disclosed; and
3. How is it equitable to use one members' reserves to pay another members' remediation?

The Intrust Super highlights concerns I have previously raised on two occasions during ASIC parliamentary oversight hearings on 13 September 2019 (attachment 1) and 15 July 2020 (attachment 2).

This appears to be a fund without shareholder capital remediating customers for trustee wrongdoing.

Answer:

1. Were member reserves used to repay the excessively charged premiums;

No.

ASIC has been advised by IS Industry Fund Pty Ltd, the trustee of Intrust Super, that:

- \$23,352.99 of the remediation payments, being the amount representing the premium differential between the smoker and general rate, has been funded by the trustee's insurer, and
- \$5,963.37 of the remediation payments, being the amount representing the investment earnings of the premium differential, has been funded by the trustee's administrator.

2. If so, how was the use of member reserves disclosed

See answer above – member reserves are not being used.

3. How is it equitable to use one members' reserves to pay another members' remediation?

As noted above, in this case superannuation fund reserves were not used to pay remediation.

Superannuation fund reserves are monies that have been set aside for a particular purpose. As the monies have been set aside, as opposed to being allocated to members, reserve balances do not form part of a member's allocated benefit.

Section 115 of the *Superannuation Industry (Supervision) Act 1993 (SIS Act)* permits a superannuation trustee of a registered superannuation entity to maintain a reserve for a particular purpose provided the governing rules of the entity do not prohibit the maintenance of a reserve for that purpose.

Generally, reserves are established by superannuation trustees to provide a source of funding to deal with contingent events and operational risks resulting from inadequate or failed internal processes, people and systems. One reason trustees may establish a reserve is to spread potential costs across different generations of members, which is an issue of equitable treatment.

The use of reserves by superannuation trustees is an issue primarily within the regulatory remit of the Australian Prudential Regulation Authority (**APRA**) and APRA has both standards and guidance about the equitable use of reserves, including:

- Prudential Standard SPS 515: Strategic Planning and Member Outcomes which states that APRA expects an RSE licensee's strategy for managing reserves would address how to equitably attribute the accumulation of reserves across different cohorts of members, including consideration of intergenerational issues.
- Prudential Practice Guide, SPG 114: Operational Risk Financial Requirement (ORFR) which states that APRA expects an RSE licensee would give primacy to the consideration of its duty to act fairly in dealing with classes of beneficiaries within each RSE and with beneficiaries within a class in all aspects of its ORFR strategy.

In *Australian Prudential Regulation Authority v Kelaher* 2019 FCA 152, Jagot J was asked to rule on the use by IOOF of the ORFR reserve to compensate members for loss resulting from decisions made by the trustee. Justice Jagot was clear that "*The propriety of the use of the ORFR (and any reserve) is to be determined by the statutory scheme and the instruments and policies which regulate the use of the reserve.*"¹

In that case Justice Jagot:

- recognised that a superannuation trustee's reserves can be used for the purposes for which they were established and maintained, including the compensation of members

found, given the particular circumstances of the case, that the use of the general reserve to compensate adversely affected beneficiaries ensured that members were treated equitably and fairly.

¹ See APRA v Kelaher, para 127.