



# Member forums

Investment and Advice  
17 November 2020

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# Welcome

Our Decision Makers – Who are we?



# Today's session includes

- > Our Decision Maker Team
- > Complaint Statistics
- > Case Studies



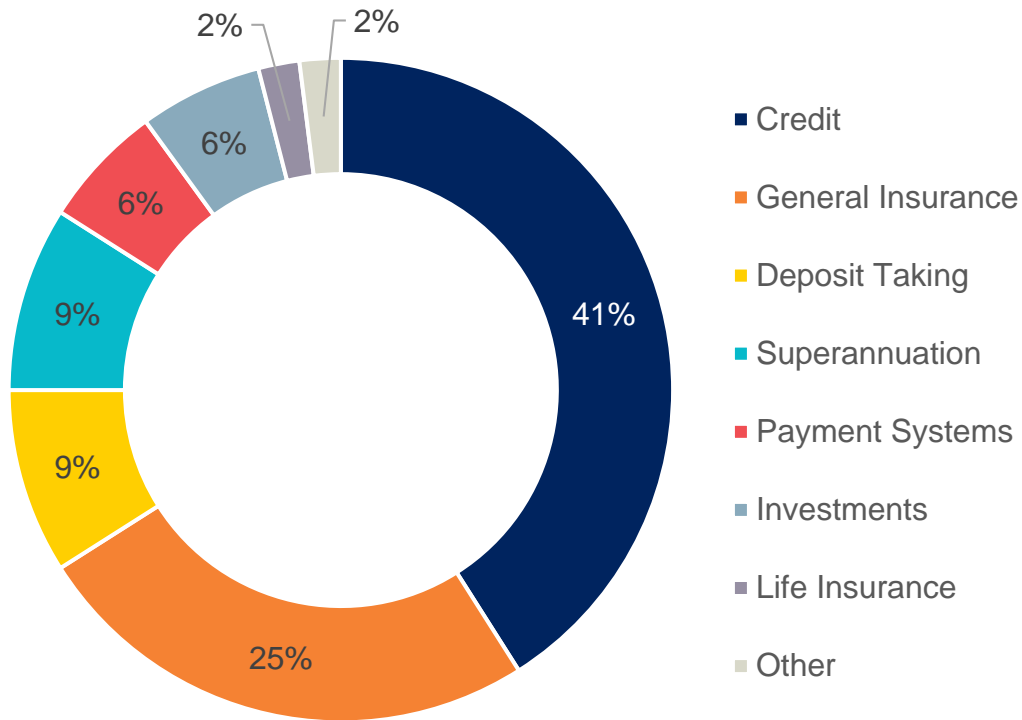


# Complaint stats

# AFCA Overall - The last 12 months

1 October 2019 to 30 September 2020

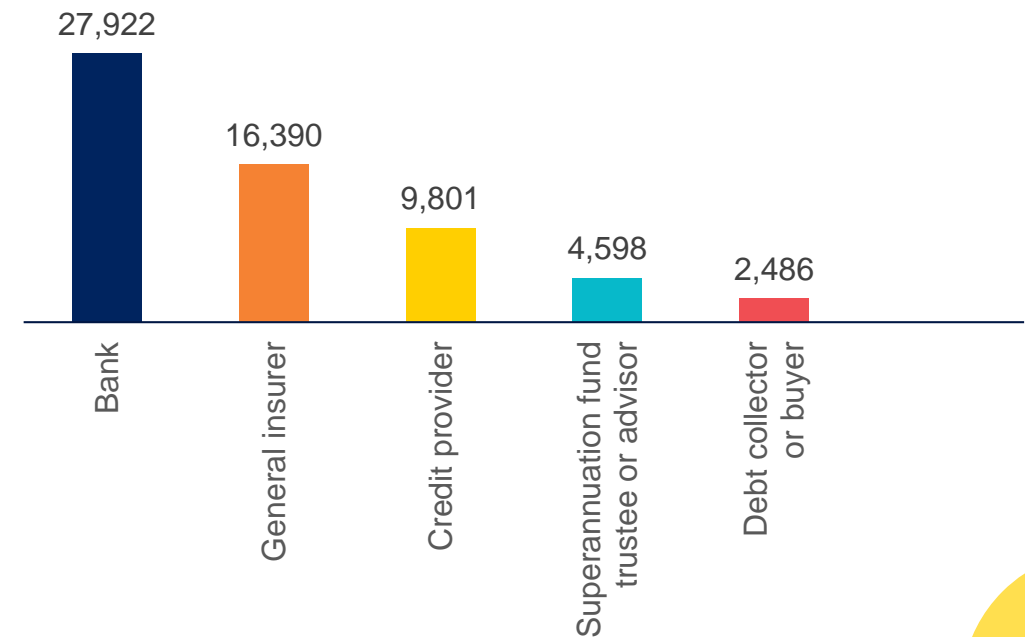
Complaints received by product line



**80,833 complaints received**

As at 30 September 2020  
**79% have been closed**

Complaints received by top 5 financial firm types



<sup>1</sup> One complaint can have multiple product lines.



# Investments and advice complaints



## Complaints received

**4,615** complaints received

**24%** resolved at Registration and Referral stage

### Top five investments and advice complaints received by product <sup>1</sup>

Product	Total
Foreign exchange	759
Shares	528
Superannuation fund	451
Mixed asset fund/s	430
Property funds	368

### Top five investments and advice complaints received by issue <sup>1</sup>

Issue	Total
Misleading product/service information	757
Inappropriate advice	585
Failure to follow instructions/agreement	575
Failure to act in client's best interests	469
Service quality	380

## Complaints closed

**4,261** complaints closed <sup>2</sup>

More than **\$53.4** million <sup>3</sup> in compensation and refunds was awarded or obtained through AFCA's dispute resolution work

**50%** of complaints resolved by agreement, or in favour of complainants

Average time to close a complaint

**117 days**

### Stage at which investments and advice complaints closed

Stage	Total
At Registration	1,056
At Case Management	2,410
Preliminary Assessment	328
Decision	467

### Average time taken to close investments and advice complaints

Time	Total
Closed 0–30 days	15%
Closed 31–60 days	23%
Closed 61–180 days	42%
Closed greater than 180 days	19%

<sup>1</sup> One complaint can have multiple products/issues.

<sup>2</sup> This includes 1,306 complaints received before 1 July 2019, and 2,955 received from 1 July 2019 to 30 June 2020.

<sup>3</sup> This includes matters previously received by AFCA's predecessor, Financial Ombudsman Service, and resolved by AFCA between 1 July 2019 and 30 June 2020.

# Complaints closed by outcome

Investments and advice – October 2019 to September 2020



Outcome	Number	Percentage
Outside Rules	1,427	32%
Resolved by financial firm	1,135	26%
Negotiation	631	14%
Discontinued	458	10%
Decision in favour of complainant	246	6%
Decision in favour of financial firm	207	5%
Preliminary Assessment in favour of financial firm	111	3%
Preliminary Assessment in favour of complainant	98	2%
Conciliation	85	2%
Assessment	17	0%
Outside Terms of Reference	7	0%
Determination Trustee decision substituted	1	0%
<b>Total</b>	<b>4,423</b>	<b>100%</b>

# COVID-19 approach

- > AFCA worked closely with the Government, regulators, peak bodies, consumer groups and our members to respond proactively to the challenges of COVID-19.
- > Where appropriate, we have modified our existing approaches and outcomes (e.g. to extend time for property sales).
- > We extended some of our timeframes temporarily.
- > We provided factsheets and information.





# COVID-19 complaints

Investments and Advice: open and closed complaints by product

Product	Total	Open	Closed
Investments & Advice	130	66	64



# Case studies



# FASEA Code of Ethics



Obligation	Section 945A	Best Interests	Best Interests and Code of Ethics
	Prior to 1 July 2013	1 Jul 2013 to 1 Jan 2020	1 January 2020 onwards
Know your product	Y	Y	Y
Know your client	Y	Y	Y
Provide Appropriate Advice	Y	Y	Y
Taken any other step at the time the advice is provided that is in the best interests of the client		Y	Y
Code of Ethics			Y

# AFCA must have regard to industry codes



- > When determining any other complaint, the AFCA Decision Maker must do what the AFCA Decision Maker considers is fair in all the circumstances having regard to:
  - Legal principles,
  - Applicable industry codes or guidance,
  - Good Industry Practice and
  - Previous relevant determinations of AFCA or Predecessor Schemes.
- > This means that AFCA will consider the FASEA Code of Ethics for adviser's conduct from 1 January 2020. The code covers standards of ethical behaviour, client care, quality process and professional commitment.
- > AFCA role is not to enforce the code, but we must have regard to it in our decision making. Breaches could result in non-financial loss awards.



# Legislative Basis for the Code



- > Mandatory from 1 January 2020.
- > Code is a legislative instrument and forms part of the law.
- > Importantly, the Code is principles based rather than a checklist. The Code requires relevant providers to exercise their professional judgement in the best interests of their client guided by the values and standards of the Code.

# It's a Values Based Code

The legislative instrument states:

“Collectively, financial planners and advisers are members of Australia’s newest profession. As such, while they formerly provided a commercial services, they should be committed to offering a professional service – informed by a code of ethics intended to shape every aspect of their professional conduct.”

- > It is a values based code and advisers must always act in a way that demonstrates, realises and promotes the following values:
- > Trustworthiness
- > Competence
- > Honesty
- > Fairness
- > Diligence



# 12 Ethical Standards



## Ethical behaviour

## Client care

## Quality process

## Professional commitment

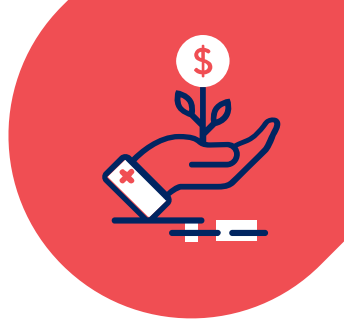
- > Comply with the law
- > Act with integrity
- > Avoid conflicts of interest
- > Client must give informed consent
- > Appropriate advice / client must understand the advice
- > Take into account broad effects of advice
- > Fees represent value for money
- > Accurate record keeping
- > Act in good faith (not mislead / deceive)
- > Maintain knowledge and skills
- > Co-operate with ASIC and monitoring bodies
- > Uphold ethical standards of the profession

# AFCA's approach to the FASEA Code

AFCA will only assess adviser conduct against the Code where the conduct has occurred after 1 January 2020

AFCA will take a measured and considered approach to interpreting the Code's provisions by giving the Code its practical meaning taking into account:

- > The intentions and objectives of the Code
- > The current environment that the Code operates
- > FASEA's guidance (New Guidance released in October)
- > ASIC's expectations (facilitate approach particularly with regard to standards 3 and 7)
- > No code monitoring body as yet





# Case Study 1



- > Couple with 2 young children seeks financial advice.
- > One is working limited hours while raising the children, but has full time earning potential of about \$115k.
- > The other earns \$115k plus overtime. They have a combined \$131k in super and are in the process of selling an investment property worth \$1 million.
- > Their key objectives are:
  - Short term - to purchase a family home with an anticipated purchase price of \$1.6 million.
  - Medium term - to build superannuation
  - Longer term may be interested in purchasing an additional property.

# Case Study 1

## Advice

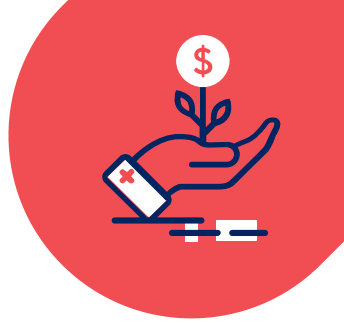
- > The adviser recommended that after the sale of the investment property the couple should:
  - direct \$50,000 of the sale proceeds to their superannuation as a non-concessional contribution
  - direct the remaining proceeds to the new home purchase
  - establish an SMSF
  - rollover their most of their existing superannuation to the SMSF
  - Borrow within the SMSF to purchase an investment property up to \$450,000 borrowing 70% of the purchase price
  - retain remaining SMSF funds in an offset account for future investment opportunities.



# Case Study 1

## Related company involvement

- > The financial firm is part of a group of companies that includes a real estate agency. The advice emphasises the importance of property selection to the strategy and refers the couple to the realty arm. The realty arm works with the adviser and the couple to provide a property recommendation to align with the SOA. The real estate agency received a 6.6% commission on the property sale.



# Issues

- > Is this a conflict of interest?
- > Does disclosure fix the problem?
- > Is the adviser allowed to recommend property from which a related entity profits?
- > Is advice in the best interests of the complainant?





# Relevant Provisions of the Code



- > Standard 2 – You must act with integrity and in the best interests of each of your clients.
- > Standard 3 - You must not advise, refer or act in any other manner where you have a conflict of interest or duty.
- > Standard 5 – All advice and financial product recommendations that you give to a client must be in the best interests of the client and appropriate to the client’s individual circumstances.
- > Standard 6 – You must take into account the broad effects arising from the client acting on your advice and actively consider the client’s broader, long-term interests and likely circumstances
- > Standard 7 – The client must give free, prior and informed consent to all benefits you and your principal will receive in connection with acting for the client, including any fees for services that may be charged.
- > Standard 9 – All advice you give, and all products you recommend, to a client must be offered in good faith and with competence and be neither misleading or deceptive.

# Case Study 2 – Case Number 655484



- > The Stirling First Group offered what it described and marketed as an alternative to traditional retirement villages.
- > In exchange for a lump sum payment, which would generally be an investor's life savings, the SF Group offered a 40-year lease (a 5-year term with 7 further 5-year options), which was supposed to be paid for by an investment. The investment was either the SIT or the S Preference Shares.
- > On 12 April 2018, the complainants invested \$276,792 in the S Preference Shares to enter the lease arrangement. The scheme did not work as intended and the SF Group went into voluntary administration on 10 June 2019.
- > After their legal representatives negotiated with the landlord, the complainants have been allowed to stay in the property until 9 August 2021 and have an option to purchase it at that time.

# The complaint and response



- > The complainants say Mr M made the following false statements:
  - they would have security of tenure and would not be forced to leave their home during the 40-year term of the lease
  - their money would be invested in a secure trust account in the SIT and
  - it would generate a high rate of return to cover the rent under the lease for up to 40 years.
- > The financial firm says Mr M did not make any such statements, rather he clearly indicated that he was not authorised to provide advice on the S Preference Shares.
- > Critically, it says at a meeting on 6 April 2018, Mr M explained to Mrs B, consistent with his internal email to a Mr SB, that he:
- > *“was not licensed to provide general advice on S and that Mr and Mrs B would need to meet with [Mr J], the director of S, to obtain further information”.*

# Issues

- > Did Mr M and/or Mr J make misleading representations?
- > Did the complainants reasonably rely on the representations to their detriment?
- > Is the financial firm responsible for Mr M's conduct?  
Have the complainants suffered a loss as a result of the conduct?



# Decision



- > Did Mr M and/ or Mr J make misleading representations?
  - The panel is satisfied that Mr M made representations as alleged by the complainants, and that those representations were misleading. Mr M failed to disclose key risks of the underlying investment.
- > Did the complainants reasonably rely on the representations to their detriment?
  - The complainants did rely on Mr M’s misrepresentations particularly that they were investing in a secure investment to fund the lease to their detriment. The panel is also satisfied that a reasonable person in the complainants’ circumstances would have relied on the misrepresentations in the same way.
  - Lawyer involved.
  - Other material which it is not responsible for



# Loss

- > Is the financial firm responsible for Mr M's conduct?
  - The financial firm is responsible for Mr M's conduct pursuant to section 917B of the Corporations Act (Act). The exception in section 917D does not apply.
- > Have the complainants suffered a loss as a result of the conduct?
  - The financial firm's conduct caused the complainants to suffer a loss.
  - Took into account benefit of rent.



# Wrap up and Questions



## AFCA contact details

- > Website: [www.afca.org.au](http://www.afca.org.au)
- > Email: [info@afca.org.au](mailto:info@afca.org.au)
- > Telephone: 1800 931 678
- > Address: GPO Box 3, Melbourne VIC 3001

## AFCA membership contacts

- > Telephone: 1300 56 55 62
- > Email: [membership@afca.org.au](mailto:membership@afca.org.au)
- > Secure services: [www.afca.org.au/members](http://www.afca.org.au/members)

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**Thank you**

