



# Investments and Advice Forum

August 2019

# Today's agenda

- > Welcome
- > A snapshot on complaint numbers
- > Trends for Investments and Advice
- > AFCA process and procedure update
- > Legacy complaints
- > Open discussion
- > Q&A

[www.afca.org.au](http://www.afca.org.au)



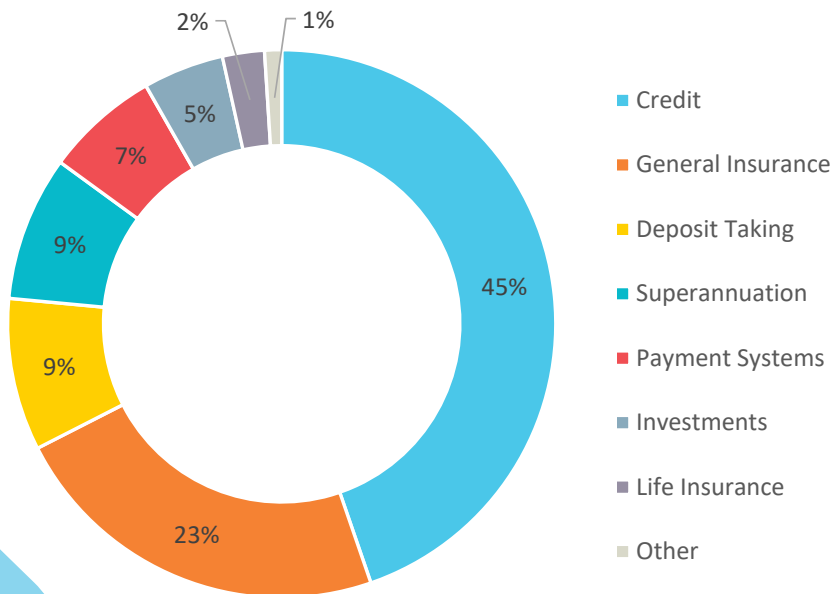


# Complaint statistics

Jacinta Ryan, Senior Manager - Investment and Insurance

# AFCA: The first seven months of operations

## Complaints received by product type <sup>1</sup>

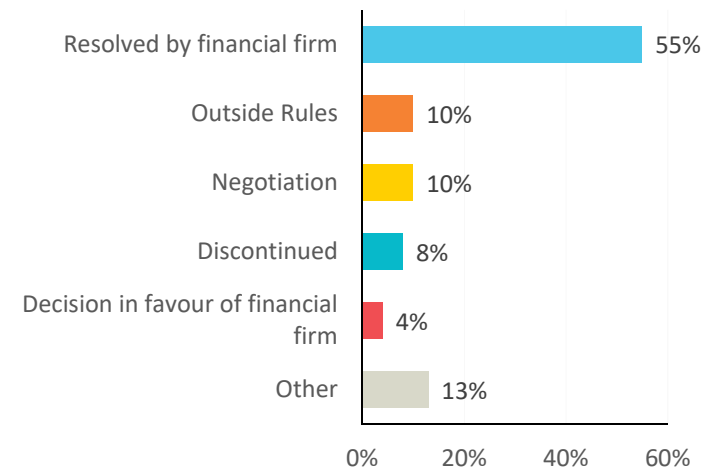


<sup>1</sup> One complaint can have multiple product line, product and issues.

**41,528 complaints received**

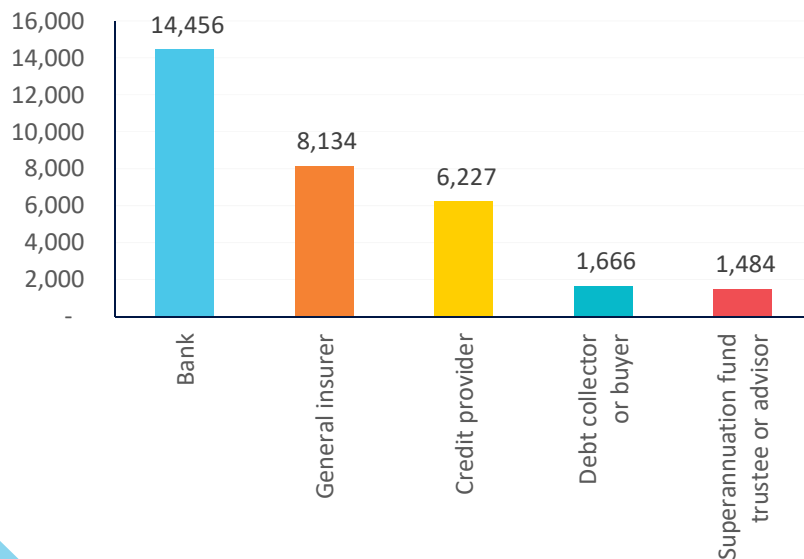
As at 31 May 2019 65% have been closed

## Complaints closed by outcome



# AFCA: The first seven months of operations

Complaints received by top 5 financial firm type



<sup>1</sup>This includes matters previously received by AFCA's predecessor, Financial Ombudsman Service, and resolved by AFCA since 1 November 2018.

**\$99 million in compensation <sup>1</sup>**

## Small business

We received **2,420** complaints from small businesses.

Most complaints were about misleading product/service information.



**13%** of licensee members had a complaint lodged against them in the first seven months

## Systemic issues

Definite systemic issues currently under investigation **83**

Total potential serious contraventions and other breaches identified since November **20**

# Investments and Advice: Top 5



## Investments

Issue	Total
Failure to follow instructions/agreement	350
Inappropriate advice	229
Failure to act in client's best interests	141
Incorrect fees/costs	133
Service quality	93

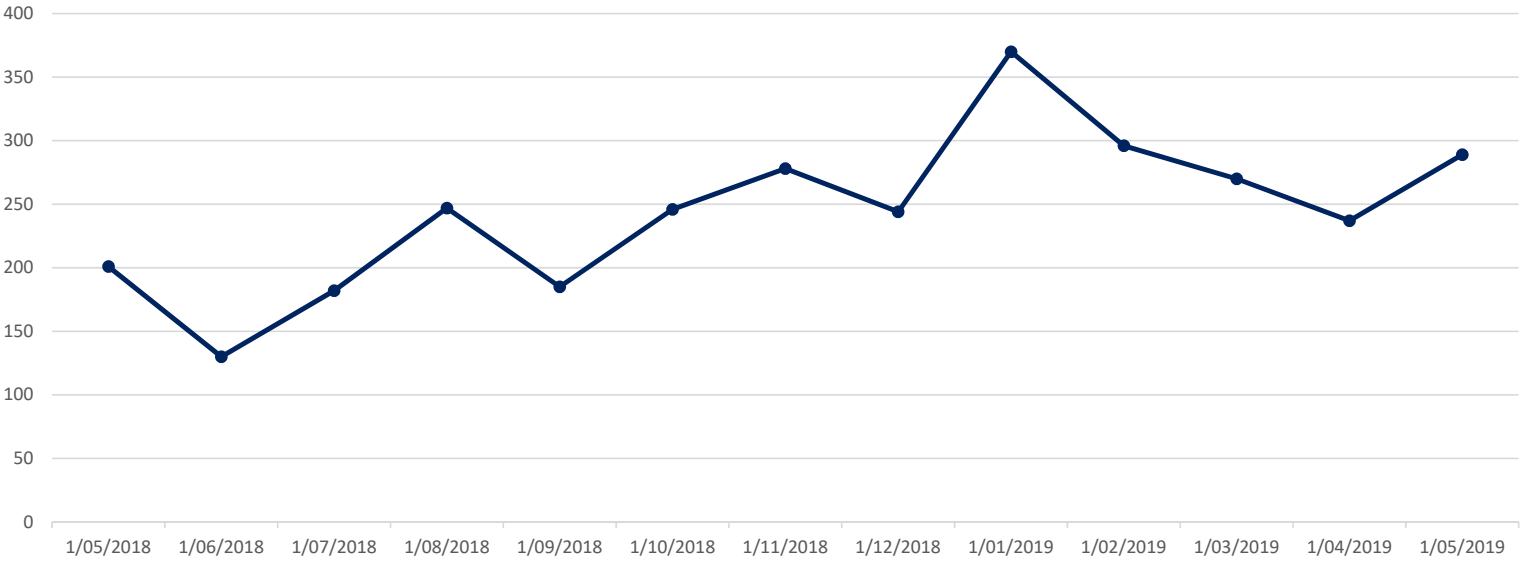
# Total complaints received: Investments and Advice

	1 November 2018 – 31 May 2019
Complaints received Investments and Advice	1,984

Top 5 products	
Foreign Exchange	478
Self-managed Superannuation Fund	201
Shares	169
Mixed Asset Fund/s	164
Retail Fund	81

Top 5 industry types	
Financial advisor / planner	476
Make a market	356
Derivatives dealer	288
Bank	176
Stockbroker	147

# Complaints received - Trends in Investment and Advice



	May-18	Jun-18	Jul-18	Aug-18	Sep-18	Oct-18	Nov-18	Dec-18	Jan-19	Feb-19	Mar-19	Apr-19	May-19
Investment and Advice complaints	201	130	182	247	185	246	278	244	370	296	270	237	289



## Investment and Advice complaints closed by status

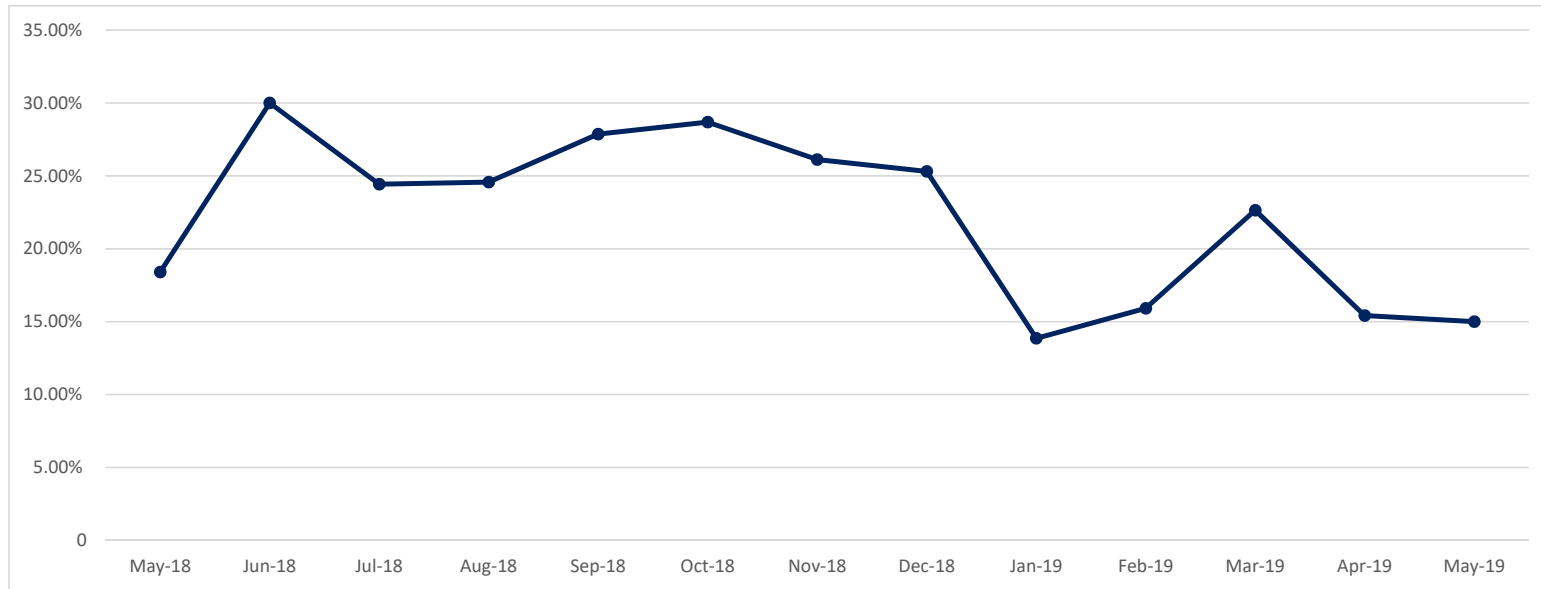
	1 November 2018 – 31 May 2019	
Complaints closed	1,469	
Complaints closed - Status	1 November 2018 – 31 May 2019 (Number)	1 November 2018 – 31 May 2019 (%)
Closed Before Referral	38	3%
Closed Case Management Level 1	198	13%
Closed Case Management Level 2	174	12%
Closed Decision	228	16%
Closed Preliminary View	143	10%
Closed Registration & Referral	408	28%
Closed Rules review	280	19%
<b>Total</b>	<b>1,469</b>	<b>100%</b>

# Investment and Advice complaints closed by outcome and age

Of the investment complaints closed from 1 November 2018 to 31 May 2019, it takes average of 97 days to close an investment complaint (AFCA and FOS)

Outcome	Number	%
Resolved by FF	462	31%
Negotiation	209	14%
Discontinued	202	14%
Outside Rules	301	20%
Decision in Favour of complainant	110	7%
Decision in Favour of FF	75	5%
Preliminary Assessment in Favour of complainant	36	2%
Conciliation	28	2%
Preliminary Assessment in Favour of FF	25	2%
Assessment	21	1%
<b>Total</b>	<b>1,469</b>	<b>100%</b>

# Resolution rate – Registration and Referral



Resolution Rate	May-18	Jun-18	Jul-18	Aug-18	Sep-18	Oct-18	Nov-18	Dec-18	Jan-19	Feb-19	Mar-19	Apr-19	May-19
I&A	18.40%	30.00%	24.40%	24.60%	27.90%	28.70%	26.10%	25.30%	13.90%	15.90%	22.60%	15.40%	15.00%

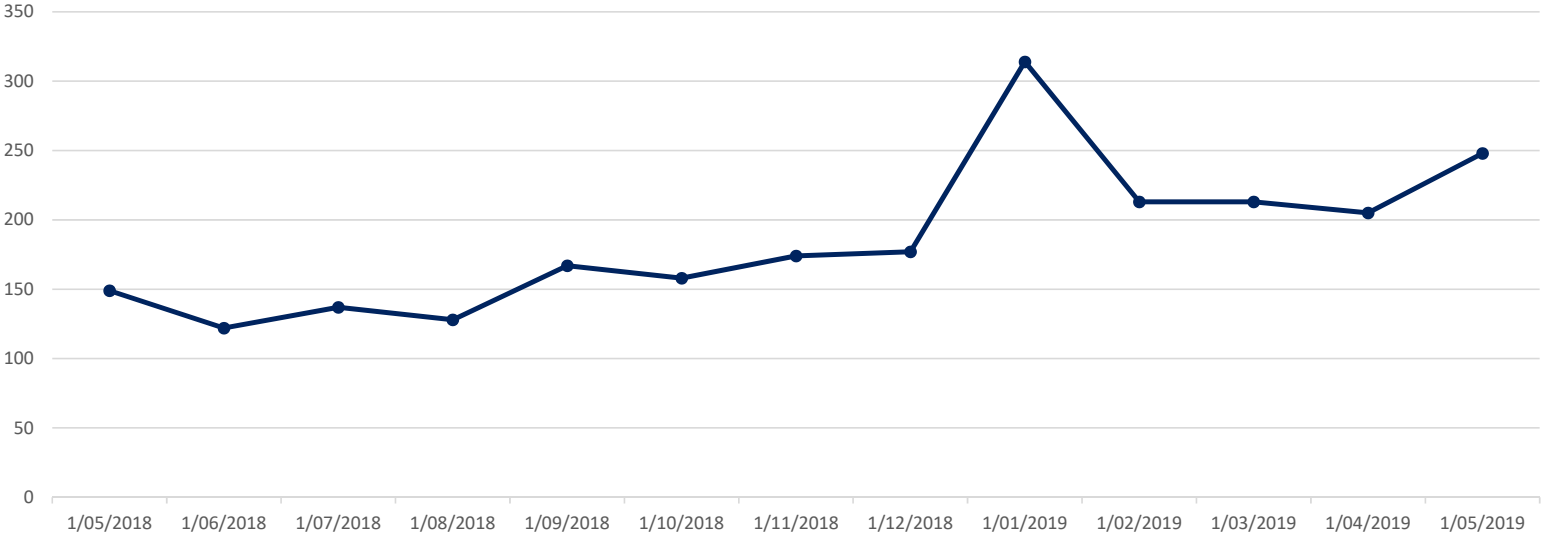
# Complaints progressed to workflow - No response

	Nov-18	Dec-18	Jan-19	Feb-19	Mar-19	Apr-19	May-19
No response from Financial Firm	50	68	65	48	74	72	72
Response and Financial Firm progression	124	109	249	165	139	133	176
Grand total	174	177	314	213	213	205	248
% of no response	29%	38%	21%	23%	35%	35%	29%

# Complaints accepted – Investments and Advice

	1 November 2018 – 31 May 2019
Investment and Advice complaints accepted	1,544

# Complaints accepted - Trends in Investments and Advice



	May-18	Jun-18	Jul-18	Aug-18	Sep-18	Oct-18	Nov-18	Dec-18	Jan-19	Feb-19	Mar-19	Apr-19	May-19
Investment complaints	149	122	137	128	167	158	174	177	314	213	213	205	248



# AFCA jurisdiction, process and procedures update

Jacinta Ryan, Senior Manager - Investment and Insurance

# AFCA fees and levies

## Funding requirements have been adjusted due to:

- > Significant increase in complaints
- > Significant growth in the organisation
- > Actions required in response to the Royal Commission final report

## Key factors:

- > AFCA has grown by more than 250 staff in 8 months
- > AFCA is now operating over 5 sites
- > Complaints currently tracking more than 40% higher than predecessor schemes, with no sign of reducing
- > Superannuation complaints more than double original forecast
- > IT changes, upgrades, recruitment and other support costs



# AFCA fees and levies

## Changes to:

- > User charge
- > Complaint fees
- > Super levy

Increases have been made in accordance with user pays funding model.

## More information:

- > Visit Secure Services
- > Call our membership team on 1300 56 55 62 or [membership@afca.org.au](mailto:membership@afca.org.au)



# AFCA reporting

## Transparent and accountable reporting and information

- > In line with the broader changes arising from the Royal Commission and regulatory changes, including ASIC regulatory guide 165, AFCA is making changes to its public reporting

## From 2019/2020:

- > AFCA will be naming firms in published decisions.
- > Changes to reporting on **definite** systemic issues – naming of firms involved
- > Changes to AFCA comparative reporting (requirement under RG267)
  - Complaints received numbers
  - Publish every 6 months
  - Come into effect for our AFCA 18-19 comparative reporting – Published in October 2019



# Legacy complaints

Jacqueline Pirone – Ombudsman, Investments and Advice

# Legacy complaints dating back to 1 January 2008

From 1 July 2019 until 30 June 2020, Australian consumers and small business can lodge complaints that would normally fall outside AFCA's time limits.

- > AFCA will follow our usual process to investigate these complaints which are known as Legacy complaints
- > This process begins with AFCA referring complaints back to financial firms to resolve
- > It is our expectation that firms will engage proactively with their customers to resolve these legacy matters themselves where possible, as part of their commitment to justly remediate the misconduct of the past and meet the community's expectations of fairness
- > Where firms are unable to satisfactorily resolve the complaints, AFCA will start investigating these matters from **1 October 2019**

# Our approach to Legacy complaints

- > AFCA will have regard to the relevant law, codes, industry practice that were in place (and decisions made) at the time of the disputed conduct
- > Approaches to assessing loss will reflect the current AFCA approach
- > We will be constantly reviewing our approaches to provide further guidance to members



# What is the same?

## AFCA will

- > Apply its Rules in accordance with the Operational Guidelines to assess jurisdiction
- > Apply 912A of the Corporations Act - Require the financial firm to provide information
- > Apply the appropriate decision making test including what is fair in all the circumstances
- > Make a decision based on the weight of information

## AFCA may where appropriate

- > Refer a matter to conciliation, provide a preliminary assessment or expedite to determination
- > Require a firm to provide a statutory declaration where material documents are not provided
- > Apply the free decision rebate policy to Legacy complaints

# What is different?

- > When a complainant became aware of the loss is not relevant in a Legacy complaint to assess jurisdiction
- > You can request that AFCA reconsider it's classification of the complaint as a Legacy complaint
- > 45 day IDR timeframe for non superannuation complaints whether or not it has been through IDR
- > Legacy complaint costs have a different funding structure;
  - fees will be higher, and
- > Complaints are likely to be complex and relate to matters raised in the Royal Commission
- > All Legacy complaints will be considered as standard or complex

# Morning tea



# Open discussion

Jacqueline Pirone – Ombudsman, Investments and Advice

# Top 10 tips for financial advisers

1. Take detailed file notes
2. Clear goals and strategy
  - > Eg. to retire at 65 on an income of \$50,000 pa, not just “wealth creation” or “capital security”
  - > How will the recommended strategy achieve the goals and objectives?
3. Turn clients away when appropriate
  - > If you don't offer the product or have the requisite expertise
  - > Consider carefully how to proceed if clients are seeking a return that does not match their risk profile



# Top 10 tips for financial advisers

## 4. Explain the risks

- > Especially for clients who want to act against your advice
- > Test the understanding / sensitivity testing
- > Explain the risk / reward trade off

## 5. Explain what types of services you are providing

- > General, personal advice and scaled advice (reasonable attempts to obtain information)
- > Execution only
- > One off or ongoing advice, fees



# Top 10 tips for financial advisers

## 6. Use templates carefully

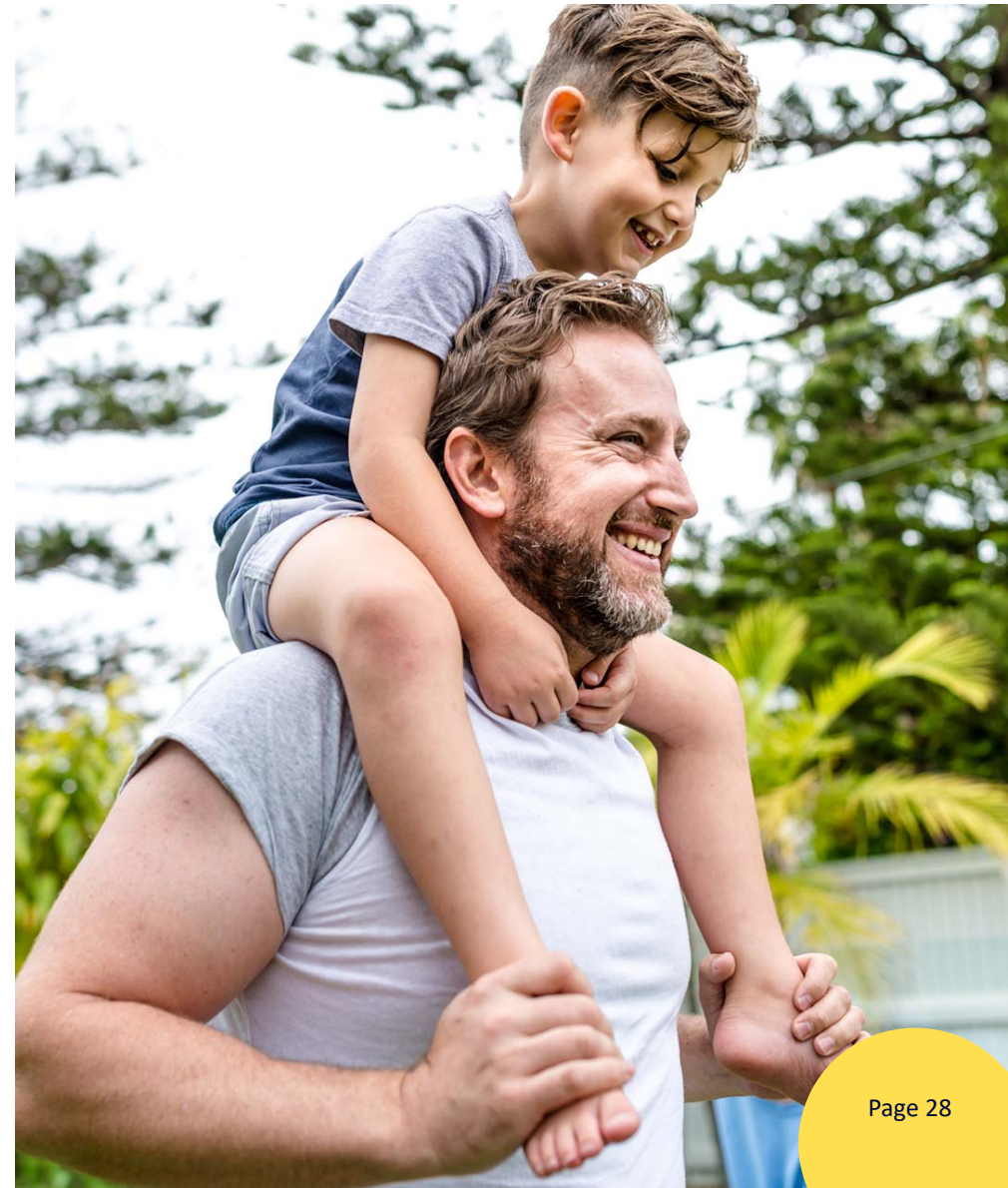
- > Errors, irrelevant references, reflect a lack of care and diligence
- > Don't use cookie cutter SOAs

## 7. Use risk profiling tools carefully

- > Consider inconsistencies in answers provided
- > Consider the client as a whole
- > Don't amend the risk profile lightly

## 8. Super switching and SMSFs

- > Need good reasons to recommend a switch
- > Need compelling reasons to recommend an SMSF, especially where the account balance is low
- > Set out alternatives



# Top 10 tips for financial advisers

9. Understand and explain the products
  - > Don't cut and paste from the PDS
  
10. Be clear about the advice relationship with clients you know
  - > Treat the person as you would another client
  - > Declare any conflicts



# Case study

Complaint number 488514

- > Personal Advice
- > Misleading and deceptive conduct
- > Calculating loss



## Facts

- > Complainant director of a corporate trustee of a Self-Managed Superannuation Fund (SMSF)
- > Looking for investment opportunities
- > Invested in two property developments
  - Invested \$90,000 in first property development, received distribution of \$6,300
  - Invested \$50,000 in second property development, received distribution of \$1,470

Complaint number 488514



# Parties submissions

## Complainant:

- financial firm provided inappropriate personal advice to invest in these projects
- Financial firm's representations about the projects were misleading

## Financial firm:

- general advice was provided
- was not required to provide information about the independent valuations

Complaint number 488514





# Did the financial firm give personal advice?

## Personal v General Advice

- > Is it factual information or is it advice?
- > Is it general advice or personal advice?
- > s766B Corporations Act – financial product advice
- > ASIC RG 244, Giving information, general advice and scaled advice
- > ASIC RG 175, Licensing: Financial product advisers- Conduct and disclosure

Complaint number 488514



# Did the financial firm give personal advice?

- > An authorised representative (AR) of the financial firm, Mr W contacted the complainant after the complainant viewed the website of the development manager
- > The AR explained the financial projections and risk management with the investments
- > The panel found that although the financial firm knew about the complainant's intended strategies, it was not personal advice

Complaint number 488514



# Did the financial firm engage in misleading or deceptive conduct?

- > Did the financial firm make a statement that was false or misleading (a misrepresentation)
- > Did the complainant rely on the misrepresentation to his detriment

Complaint number 488514



# Did the financial firm engage in misleading or deceptive conduct?

- > Complainant said he was misled in relation to the likely costs involved in completing the property developments and their final market value
- > Mr W and Mr M were promoting the projects to investors

## BUT....

- > Directors of the Development Manager (DM), the company responsible for the market assessment value and provision of other material included in the PDS
- > Mr W, was a director of the DM - business, to co-ordinate and oversee the successful completion of these projects, had knowledge of the independent valuations
- > At the time, the market assessment 'estimate' was the only figure of value presented to the complainant for him to rely on to make an investment decision
- > The adviser failed to disclose the independent valuation figure, information that would have influenced the complainant's purchasing decision

Complaint number 488514

## Dual capacity of Mr. M and Mr .W

- > Information held regarding independent valuations of the projects was because Mr. W was a director of the DM which was a separate entity to the financial firm
- > A conflict of interest that could not be managed

Complaint number 488514



# The complainant relied on those representations to invest

The representations included:

- > The inflated market value estimates made the returns of the projects seem attractive enough to induce the complainant's interest
- > The complainant was influenced, reassured by and relied on the representations made to him by the financial firm in making the decision to invest in the projects

Complaint number 488514



# Did the financial firm's conduct cause the complainant to suffer a loss?

- > Onus is on the complainant to show it was the financial firm's conduct that caused his loss
- > The panel was satisfied the loss was a direct result of the financial firm's misrepresentation

Complaint number 488514



## The complainant's conduct contributed to his loss

- > He had been a CEO of a financial firm
- > Had a higher than average understanding of risks associated with property development
- > Understood the importance of obtaining an independent valuation
- > Relationship with Mr. M and Mr. W was too familiar which potentially led to a lack of objectivity

Panel found:

- > Fair in all the circumstances to find both parties contributed equally to the loss

Complaint number 488514





# Inappropriate advice – Case study

Complaint number 443619

- > Best interest duty
- > Know your client
- > Inappropriate advice
- > Switching superannuation
- > Calculating loss on future scenarios



## Facts

- > The applicant held insurance in his original super account
- > Life
- > Comprehensive Income protection, and
- > Comprehensive Total and permanent disability (TPD)
- > The adviser was an employee of an authorised representative of the financial service provider
- > Applicant sought advice (August 2014) in relation to his insurances and reviewing his investment return

Complaint number 443619



## Facts

- > Adviser rolled the applicant's super into a different super account (second super account)
- > Didn't check whether the second super account offered the same insurances as the original super account
- > Applicant was only able to obtain:
  - Accidental IP and accidental TPD, and
  - Life cover with a different FSP.

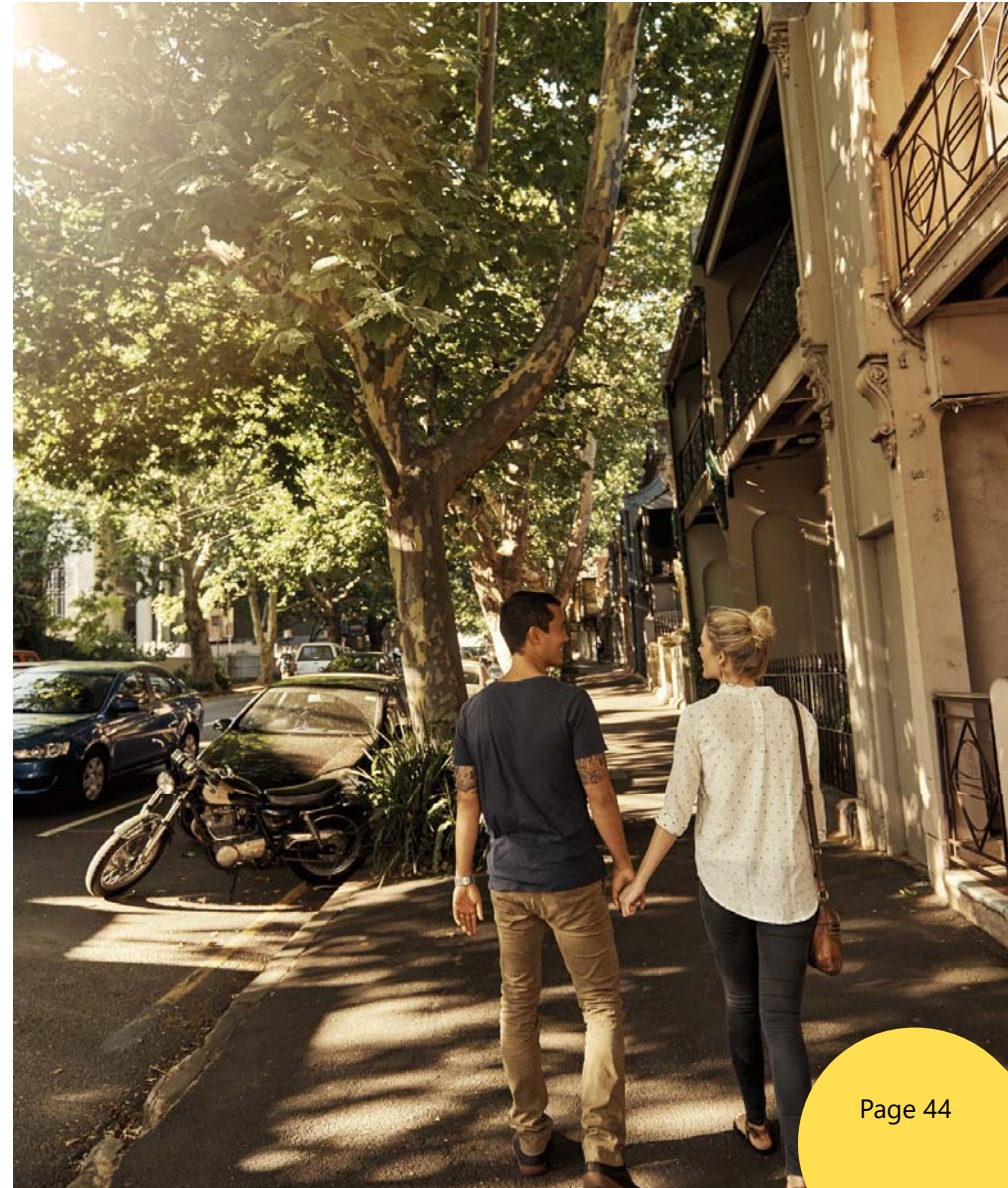
Complaint number 443619



# Did the FSP provide inappropriate advice to the applicant?

- > No dispute from either party the advice was personal
- > Section 961G of the *Corporations Act 2001* (Act) requires an FSP to ensure that any personal advice given to retail clients through their representatives (advisers) is appropriate and in the **best interests** of the client (Section 961B).
- > ASIC RG 175.224: *Consumers who seek financial advice expect that their adviser will act in their best interests and that, as a result, the advice provided will leave them in a better position.*
- > ASIC RG 175.225: *When assessing whether an advice provider has complied with the best interests duty, we will consider whether a reasonable advice provider would believe that the client is likely to be in a better position if the client follows the advice.)*

Complaint number 443619



## Did the FSP provide inappropriate advice to the applicant?

- > Applicant nor the FSP were aware the applicant held insurance policies with his original super
- > FSP's responsibility to make reasonable enquires about the applicant's relevant personal circumstances when it completed a fact find
- > Applicant signed an authorisation for the FSP to collect information
- > Both super products were held with the same FSP

Complaint number 443619



## Did the FSP provide inappropriate advice to the applicant?

The panel found:

- > FSP had a duty to know the advantages and disadvantages of entering in and out of different superannuation products and advise the applicant of these
- > FSP should have enquired further into the applicant's personal and health circumstances and whether he held any insurance before rolling over his original super
- > FSP failed to comply with his duty of care and obligations under the Act in undertaking an appropriate process

Complaint number 443619



# FPS's conduct

## Correspondence from the FSP:

*"It appears that the adviser overlooked the applicant's existing insurance cover.*

*Generally it is not appropriate to cancel existing cover before any new application is fully assessed. It appears in this case that the adviser was not aware of the existing cover."*

*"The authorised representative is aware that the applicant lost Total and Permanent Disability (TPD) and income protection insurance cover after receiving advice from the adviser...we confirm that the authorised representative has reached agreement with the FSP to offer the applicant reinstatement of his TPD and income protection cover on terms to be agreed."*

*"We submit that [the applicant] had a duty to exercise reasonable care in the provision of relevant information to [the adviser] and he failed to discharge that duty."*

- > The panel was not persuaded by the FSP's recent submissions which were inconsistent with the previous evidence provided by the FSP.

Complaint number 443619

# Did the FSP's advice cause the applicant to suffer loss?

- > Panel was satisfied the FSP's advice to switch super products was the direct cause of the applicant's loss
- > Reinstatement of the TPD and IP insurance policies was unsuccessful
- > Actuary reports were obtained to assist with calculating the applicant's loss
- > The first report considered the benefit levels and premiums based on the FSP's initial 4 years of premium rates and then estimated increases in future years based on industry data
- > The second report included revised calculations which used:
  - premium rates from the FSP's own future rates to age 65, as one loss calculation method, and
  - morbidity and mortality rates as an alternative loss calculation method

Complaint number 443619

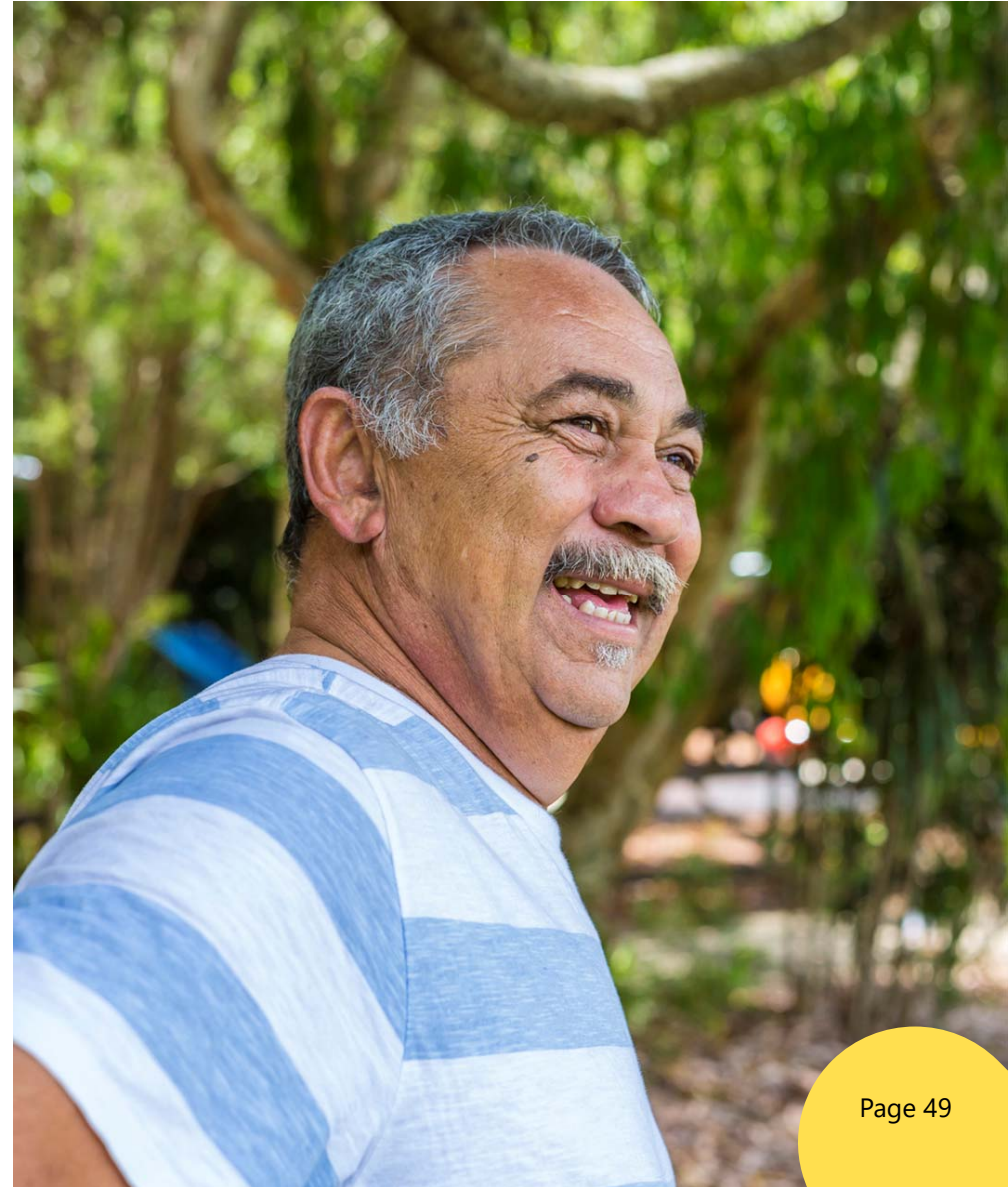


# Did the FSP's advice cause the applicant to suffer loss?

The panel considered and accepted:

- > the applicant's medical status at the time when the policies were cancelled, suggests the likelihood of him making a further claim would increase
- > a possible scenario may be that the applicant will never have another claim
- > the applicant's circumstances could change and he may choose not to purchase TPD and IP insurance, and
- > the applicant was 29 years old when the policies were cancelled. Loss is calculated from 29 to the age of 65.
- > The applicant did not contribute to, or fail to mitigate his loss

Complaint number 443619



# Wrap up and questions

## AFCA contact details

[afca.org.au](http://afca.org.au)

[info@afca.org.au](mailto:info@afca.org.au)

1800 931 678

GPO Box 3, Melbourne VIC 3001

## AFCA membership contacts

1300 56 55 62

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Thank you

