

Member e-Forums Day Two

Investment and Advice

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28 May 2020

Agenda

Complaints

Investment and Advice

- > Complaints
- > Top five issues – Investments and advice
- > Trends – SMSF financial advice complaints

COVID-19

- > Complaint trends for Investment and Advice

Case studies

- > AFCA's fairness approach to financial firm's conduct with complainants in relation to CFD(Contract for Difference) trading
- > Retail/ wholesale clients

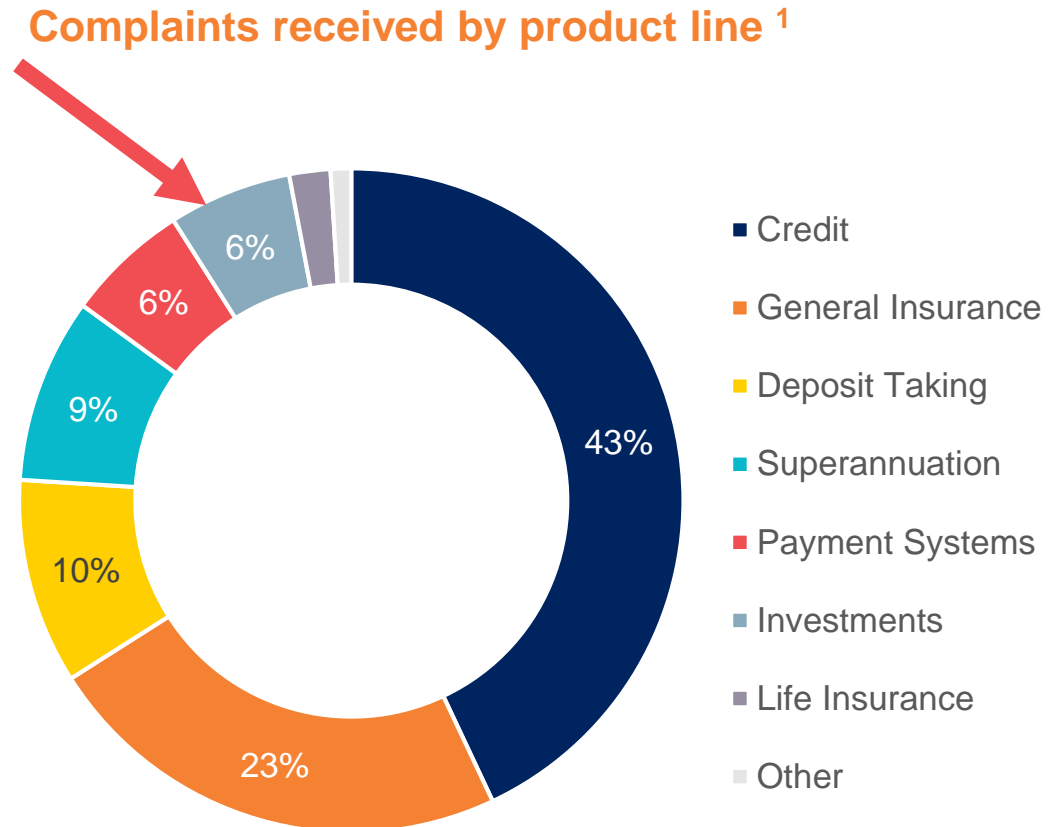


The last 12 months' operations

May 2019 to April 2020 (12 months)

\$233 million in compensation ²

76,086 complaints received
As at 1 May 2020, **78%** have
been closed

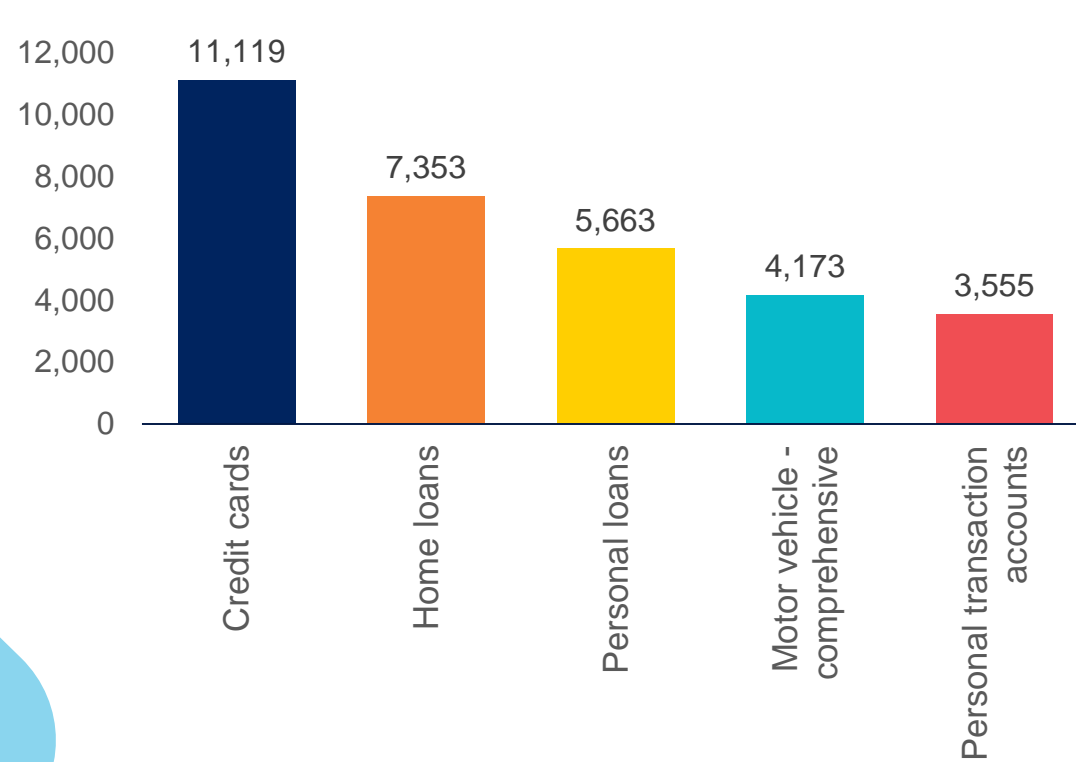


- 1 One complaint can have multiple product lines.
- 2 This includes matters previously received by AFCA's predecessor, FOS, and resolved by AFCA since 1 November 2018.

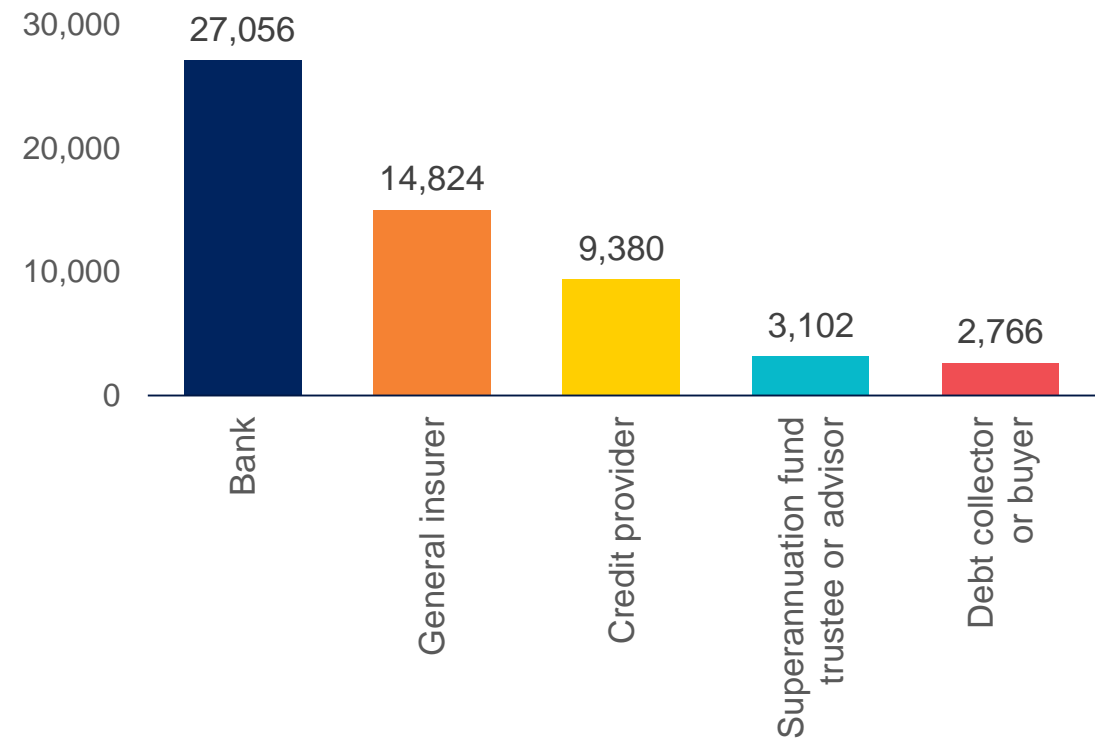
The last 12 months' operations

May 2019 to April 2020 (12 months)

Complaints received by top 5 product types

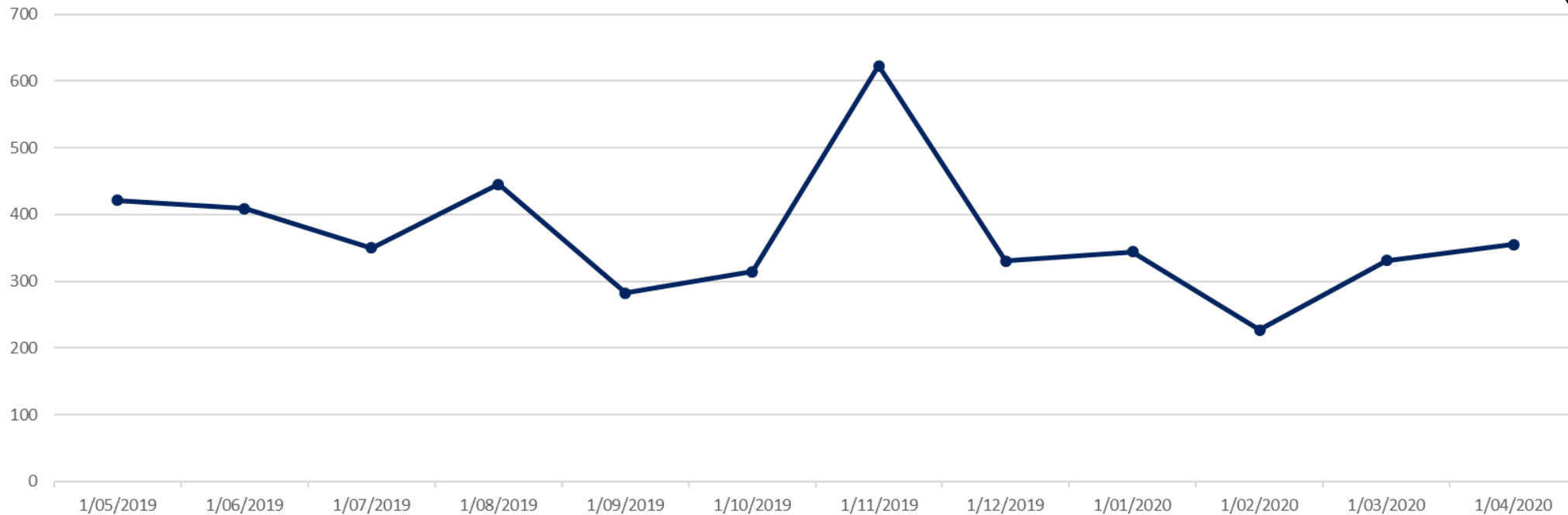


Complaints received by top 5 financial firm types



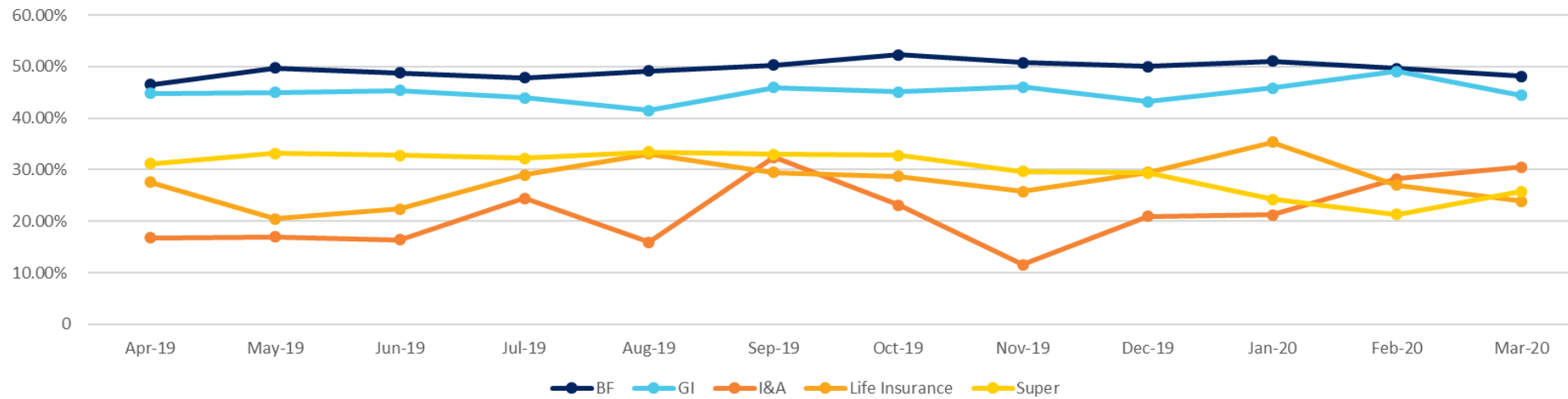
Complaints received

Investments and advice



| | May-19 | Jun -19 | Jul-19 | Aug-19 | Sept-19 | Oct-19 | Nov-19 | Dec -19 | Jan-20 | Feb-20 | Mar-20 | Apr-20 | Total |
|-----------------------|--------|---------|--------|--------|---------|--------|--------|---------|--------|--------|--------|--------|-------|
| Investment complaints | 421 | 409 | 350 | 445 | 282 | 314 | 623 | 330 | 344 | 227 | 331 | 355 | 4,431 |

Resolution rate at Registration and Referral *



| | Apr-19 | May-19 | Jun-19 | Jul-19 | Aug-19 | Sep-19 | Oct-19 | Nov-19 | Dec-19 | Jan-20 | Feb-20 | Mar-20 |
|----------------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|--------|
| BF | 46.50% | 49.70% | 48.70% | 47.80% | 49.10% | 50.30% | 52.30% | 50.70% | 50.00% | 51.10% | 49.60% | 48.20% |
| GI | 44.80% | 45.00% | 45.40% | 44.00% | 41.50% | 45.90% | 45.10% | 46.10% | 43.20% | 45.80% | 49.10% | 44.40% |
| I&A | 16.80% | 17.00% | 16.40% | 24.50% | 16.00% | 32.40% | 23.10% | 11.60% | 21.00% | 21.20% | 28.30% | 30.50% |
| Life Insurance | 27.60% | 20.50% | 22.40% | 29.00% | 33.10% | 29.50% | 28.70% | 25.80% | 29.50% | 35.40% | 27.00% | 23.90% |
| Super | 31.20% | 33.10% | 32.80% | 32.20% | 33.40% | 33.00% | 32.70% | 29.70% | 29.30% | 24.20% | 21.30% | 25.80% |
| Total | 43.00% | 44.30% | 43.50% | 43.80% | 43.30% | 46.40% | 47.00% | 43.70% | 44.40% | 45.70% | 46.20% | 44.40% |

* One month lag

Accepted complaints and non-response rate

Investments and advice



| | May-19 | Jun -19 | Jul-19 | Aug-19 | Sept-19 | Oct-19 | Nov-19 | Dec -19 | Jan-20 | Feb-20 | Mar-20 | Apr-20 | Total |
|---------------------------|--------|---------|--------|--------|---------|--------|--------|---------|--------|--------|--------|--------|-------|
| No response received | 69 | 58 | 60 | 65 | 78 | 90 | 58 | 33 | 103 | 119 | 63 | 52 | 848 |
| Response received | 173 | 308 | 238 | 277 | 130 | 135 | 183 | 498 | 120 | 152 | 119 | 159 | 2,492 |
| Total accepted complaints | 242 | 366 | 298 | 342 | 208 | 225 | 241 | 531 | 223 | 271 | 182 | 211 | 3,340 |
| % of no response | 29% | 16% | 20% | 19% | 38% | 40% | 24% | 6% | 46% | 44% | 35% | 25% | 25% |

Closed by status – Investments and advice



| Status | % |
|------------------------|-----|
| Registration | 24% |
| Case management | 56% |
| Preliminary assessment | 8% |
| Decision | 12% |

3,913 Investment & Advice complaints closed*

* AFCA and FOS

Complaints closed by outcome

Investments and advice – May 2019 to April 2020



| Outcome | Number | Percentage |
|--|--------------|------------|
| Outside Rules | 1,247 | 32% |
| Resolved by financial firm | 998 | 26% |
| Negotiation | 512 | 13% |
| Discontinued | 462 | 12% |
| Decision in favour of complainant | 251 | 6% |
| Decision in favour of financial firm | 170 | 4% |
| Preliminary assessment in favour of complainant | 86 | 2% |
| Conciliation | 77 | 2% |
| Preliminary assessment in favour of financial firm | 75 | 2% |
| Assessment | 25 | 1% |
| Outside Terms of Reference | 10 | 0% |
| Total | 3,913 | |

Investments and advice complaints

From 1 May 2019 to 30 April 2020



4,431 Investment & Advice complaints received

| Top 5 products | Total | Top 5 industry types | Total |
|-----------------------|--------------|-----------------------------|--------------|
| Foreign Exchange | 1,066 | Financial advisor / planner | 944 |
| Shares | 430 | Foreign exchange dealer | 486 |
| Superannuation Fund | 430 | Derivatives dealer | 480 |
| Mixed Asset Fund/s | 426 | Bank | 411 |
| Property Funds | 335 | MIS operator / fund manager | 405 |

Top 5 issues – Investments and advice



| Issue | Total |
|---|-------|
| Failure to follow instructions/agreement | 830 |
| Misleading product/service information | 725 |
| Inappropriate advice | 511 |
| Failure to act in client's best interests | 429 |
| Incorrect fees/ costs | 328 |

Trends – SMSF financial advice complaints

- > Inappropriate advice to establish an SMSF
- > Failure to provide ongoing advice
- > Inappropriate scoping of advice
- > Buying investment property (often in mining towns, often “off-the-plan”)
- > Conflicted advice



COVID-19

COVID-19 – Complaints trends

- > Not many at present
- > High number of FX/ CFD in registration due to market volatility
- > Anticipate more advisor complaints
- > More margin calls



Case studies

Scenario one

535317

- > The financial firm is a market maker for foreign exchange and contracts for difference (CFD)
- > The complainant opened a trading account with the financial firm on 5 June 2017.
- > He experienced substantial losses which he attributes to the conduct of the financial firm and its representatives.
- > The dispute was about:
 - personal and general advice (no warning provided)
 - misleading and deceptive conduct
 - whether the financial firm's conduct caused the complainant to suffer a loss
 - what was the appropriate compensation

Scenario one

535317

- > The financial firm submits the trade losses incurred by the complainant were the direct result of trades put by the complainant and the volatilities in the markets associated with these trades.
- > The complainant says he was under constant pressure and encouragement to trade.



Scenario one

535317

- > The approach to trading was described to the complainant in terms which gave an unreasonable impression of the returns it would generate or the level of risk involved.
- > Overall the panel was satisfied:
 - the statements made by representatives of the financial firm were misleading and designed to induce the complainant to continue trading.
 - the complainant relied on these statements to invest further amounts of money in forex trading.

Scenario one

535317

- > In this dispute the panel considered and applied the law:
 - Section 961 Corporations Act – Best Interest Duty
 - ASIC RG 244.38 – General advice warnings
 - Section 1041H Corporations Act – Misleading and Deceptive Conduct

Scenario one

535317

- > The panel also considered AFCA's fairness jurisdiction.
- > When determining a complaint an AFCA decision maker must do what 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

Scenario one

535317

> Overall, the panel was satisfied:

- The complainant's objective was to do forex trading and would have engaged in some trading
- The financial firm's business model and strategies were heavily recommended to the complainant with the intended effect to induce him to use them.

Scenario one

535317

- > The complainant invested \$373,000 with the financial firm and lost all that money in trading.
- > The panel found if the complainant had not been misled or induced he would not have made all the deposits.
- > The panel:
 - found the financial firm's treatment and dealing with the complainant was not fair in all the circumstances
 - found it was not fair for the financial firm to retain all the money
 - accepted the complainant would have traded at some level
 - considered the fair outcome was to place the complainant in the position he would have been in if he had not been misled

Scenario one

535317

> Evidence:

- In the initial phone calls with the financial firm, the complainant states he wanted to diversify his portfolio and do forex trading
- the complainant informed the financial firm he wished to learn more about forex trading and that he was not an expert

> On balance, the panel found:

- the complainant would have made half of the deposits to trade and,
- the financial firm was required to repay half of the money the complainant deposited.

Scenario one

535317

Non- financial loss

- > On five occasions the complainant emailed the financial firm about system failures.
- > The panel determined:
 - the trading platform was unreliable and did not deliver the service it was obliged to provide.
 - The customer service delivered by the financial firm to the complainant did not meet the expected standard and the system failures were evidence of an unreliable platform.
 - It was fair and reasonable in all the circumstances to award the complainant compensation for non-financial loss.
 - Compensation awarded - \$1,000 for each system failure when trying to use the financial firm's trading platform.

Scenario two

Retail/Sophisticated

- > John says the Financial Firm gave him misleading information about initial public offerings.
- > He is seeking compensation of \$1.7 million
- > Qualified accountant's certificate said that he held assets of \$2.5 million



Certificate

I / We understand that for the purpose of being classified as a ‘sophisticated investor’:

***the legal entities listed in the accountant’s certificate** (emphasis added) will be eligible to invest in boutique Sophisticated Investment offerings that arise from time to time. These offerings are not made pursuant to a disclosure documents and you, as a sophisticated investor client (sic) must make your own assessment on the merits, value and risks of any investment in these types of offerings.*

‘Sophisticated investors’ are exempt from normal disclosure requirements necessary to the provision of financial services of financial products (sic). These include various disclosure documents including but not limited to Disclosure Documents, Financial Services Guides, Statements of Advice and Product Disclosure Statements.

...”

The complaint

The complainant describes the circumstances in which he signed the SIA as follows:

“6. The sophisticated investor form I was told

1) That it gives me access to all the good and profitable deals not available to the ordinary investor.

2) this is where the real money is made

3) Do not bother with the details of the form just sign and get it back to [name] asap so we can make some real money

4) This is just a standard form they everyone users.” [Quoted verbatim]

Decision

The financial firm cannot rely on the Sophisticated Investor Acknowledgement

I am satisfied that:

the complainant didn't read the SIA as he was informed, and reasonably believed, the document to be a "standard form ... everyone uses"

the adviser didn't explain the consequences of the complainant signing the form,

the complainant was unaware of the consequences of signing the form

the complainant wasn't given adequate time to consider the SIA before signing it

Loss

The complainant has “cherry-picked” losing trades

The complainant has only complained about losing trades recommended to his SMSF by the financial firm’s adviser. On this basis, the complainant has calculated the SMSF’s loss as \$1,702,500. This is referred to as “cherry-picking”.

The problem with “cherry-picking” loss making trades is that it ignores the profitable trades and, therefore, the overall performance of the portfolio. It is for this reason that AFCA will usually take a portfolio-wide view on calculating loss.

Loss

The loss is the actual portfolio performance against an appropriate portfolio

In the circumstances, it is fair to measure the loss by comparing the actual performance of the SMSF's portfolio with the estimated performance of an appropriate portfolio (i.e., a portfolio that would have been in place had the adviser performed the services set out in the Client Service Agreement) during the period commencing 24 July 2014 up to, and including, 20 December 2016.

The 24 July 2014 and 20 December 2016 dates are, respectively, the date the complainant's SMSF commenced as a client of the financial firm and the date the complainant's SMSF ceased as a client of the financial firm.

I consider the appropriate advice would have been for the SMSF's portfolio to have been more conservatively invested in a basket of S&P ASX 200 shares.

Questions

More information

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Thank you

