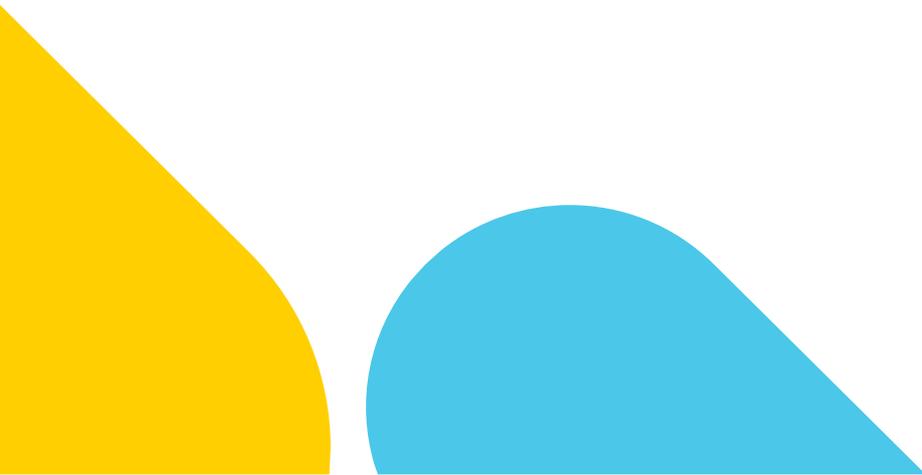
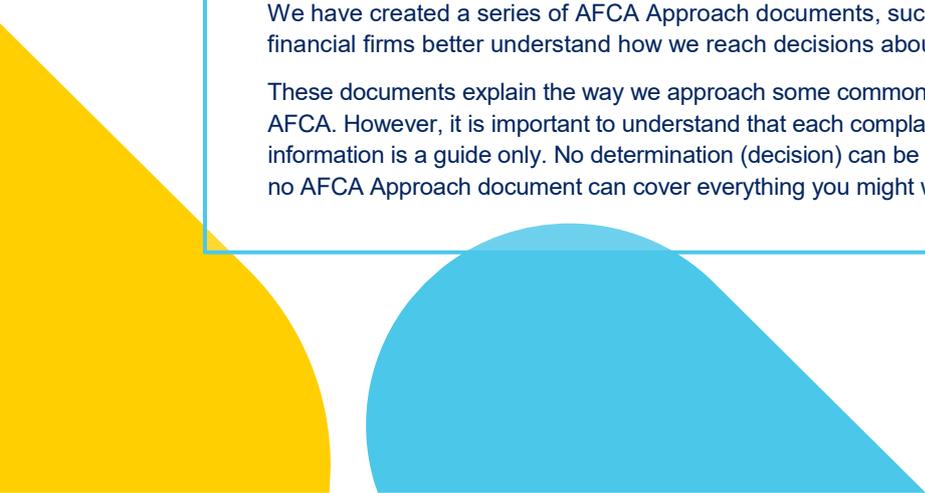


# The AFCA Approach to misleading conduct

June 2021

<b>1</b>	<b>Purpose</b> .....	<b>3</b>
1.1	Scope .....	3
1.2	Summary .....	3
1.3	Who should read this document? .....	3
<b>2</b>	<b>Jurisdiction</b> .....	<b>4</b>
2.1	AFCA’s purpose .....	4
2.2	AFCA’s jurisdiction .....	4
<b>3</b>	<b>Approach</b> .....	<b>5</b>
3.1	Understanding the general principles .....	5
3.2	Identifying types of misleading conduct.....	6
3.3	Assessing misleading conduct complaints .....	7
3.4	Awarding compensation .....	8
<b>4</b>	<b>Application</b> .....	<b>10</b>
4.1	Case studies.....	10
<b>5</b>	<b>References</b> .....	<b>14</b>





We have created a series of AFCA Approach documents, such as this one, to help consumers and financial firms better understand how we reach decisions about key issues.

These documents explain the way we approach some common issues and complaint types that we see at AFCA. However, it is important to understand that each complaint that comes to us is unique, so this information is a guide only. No determination (decision) can be seen as a precedent for future cases, and no AFCA Approach document can cover everything you might want to know about key issues.

# 1 Purpose

## 1.1 Scope

The purpose of AFCA's approach documents is to explain how we look at common issues and complaint types. This document sets out our approach to misleading conduct. The approach has been adopted from AFCA's predecessor scheme, the Financial Ombudsman Service.

This approach is consistent with AFCA's obligation to deal with complaints in a cooperative, efficient and timely way and to make decisions that are fair in all the circumstances. It is important to understand that each complaint that comes to us has a unique set of facts and this information is a guide only.

## 1.2 Summary

Misleading and deceptive conduct is conduct that leads, or is likely to lead, a person into error. Misleading and deceptive conduct in relation to financial products or services is prohibited under the Australian Consumer Law.

Misleading and deceptive conduct can occur through statements, acts, omissions or silence, even if there is no intention to mislead.

When assessing complaints about misleading conduct, AFCA will:

- ask complainants and financial firms to supply relevant information
- consider all the available information to conclude what is most likely to have occurred
- for complaints (other than within AFCA's superannuation jurisdiction where the test is different) we will do what, in our opinion, is fair in all the circumstances, bearing in mind legal principles.

If AFCA finds that a financial firm has engaged in misleading conduct, the remedy is generally to assess loss by determining what the complainant would have done differently if they were not misled.

## 1.3 Who should read this document?

- Anyone who wants to understand how AFCA resolves complaints involving misleading and deceptive conduct.

## 2 Jurisdiction

### 2.1 AFCA's purpose

AFCA is the independent external dispute resolution (**EDR**) scheme for the financial services sector. AFCA's purpose is to provide fair, independent and effective solutions for financial disputes. We do this by providing fair dispute resolution services. We also work with financial firms to improve their processes and standards of service to minimise future complaints. In addition to resolving financial complaints, AFCA identifies, resolves and reports on systemic issues and serious contraventions of the law.

### 2.2 AFCA's jurisdiction

AFCA can consider complaints against financial firms that are members of AFCA.

When a complaint is not resolved by agreement, negotiation or conciliation, we make a decision. Our decision reflects what is fair in all the circumstances having regard to legal principles, applicable industry codes or guidance, good industry practice and previous decisions of AFCA or predecessor schemes (which are not binding).<sup>1</sup>

When assessing conduct of a financial firm, we have regard to the law, codes, and standards of industry practice that were in place at the time of the conduct.

We may decide that a financial firm must compensate a consumer for direct financial loss, indirect financial loss or non-financial loss.<sup>2</sup> We may also decide that a financial firm is required to take, or refrain from taking, particular actions. If a consumer accepts our decision, the financial firm is bound by that decision.<sup>3</sup>

#### Fair in all the circumstances – complaints other than superannuation complaints

Our decisions are intended to reflect what is fair in the circumstances of each complaint. This includes providing a fair outcome in cases where we find an error or breach has occurred.

In assessing what is fair, we apply a standard of fairness which focuses on concepts such as fair dealing, fair treatment and fair service. This allows us to assess the conduct of a financial firm over the life cycle of the firm's relationship with its customer.

The primary focus of our investigation is to assess whether the financial firm breached its obligations to the consumer. However, we also consider the conduct of the consumer when determining a fair outcome.

---

<sup>1</sup> See AFCA Rule A.14.2.

<sup>2</sup> See AFCA Rule D.3.

<sup>3</sup> See AFCA Rule A.15.3.

## Fair and reasonable – superannuation complaints

In a superannuation complaint, we consider whether the decision of the trustee or insurer, in its operation in relation to the complainant, or the conduct, was fair and reasonable in all the circumstances.<sup>4</sup> We cannot make a determination that would be contrary to law or the governing rules of a superannuation fund, or the terms and conditions of an applicable insurance policy.<sup>5</sup>

### 3 Approach

#### 3.1 Understanding the general principles

##### What is misleading conduct?

Conduct is misleading when it is likely to lead someone into error or lead them to believe something that is false. Whether particular conduct is misleading will depend on all the circumstances of the conduct and whether it is likely it would lead a reasonable person in the class of people it is directed to into error.

Misleading conduct can happen when a financial firm:

- makes a representation about something that is incorrect
- acts in a way that misleads a complainant
- does not say or do something (such as correct a complainant's apparent misunderstanding) when it should.

Misleading conduct can occur even if the financial firm did not intend to mislead the complainant or the complainant could have found out the true position by looking into the matter further.

AFCA may not find a financial firm's conduct was misleading under the law just because a complainant was actually misled. AFCA will consider whether the conduct would have misled a reasonable person in the class of people who it was directed to.

For example, if a complainant says that a representation in an email misled them, AFCA will assess whether it is likely the representation would have misled a reasonable person with the collective attributes of all the email recipients. If the complainant was the only email recipient, AFCA will assess whether the representation would have misled a reasonable person with the complainant's attributes.

---

<sup>4</sup> Section 1055 of the *Corporations Act 2001 (Cth)*.

<sup>5</sup> Section 1055(7) of the *Corporations Act 2001 (Cth)*.

## Which laws apply?

Section 12DA of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and section 1041H of the *Corporations Act 2001* both prohibit misleading conduct in relation to financial services.

Section 1041H of the Corporations Act states:

“A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.”

Section 12DA of the ASIC Act states:

“A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.”

## 3.2 Identifying types of misleading conduct

### Can ‘silence’ be misleading?

A financial firm might mislead a customer by staying silent when it is reasonable to disclose important information.

This can occur where in the circumstances a customer has a reasonable expectation that the lender will disclose certain information. In such circumstances a failure to do so might be considered misleading conduct by silence.

Take loan break costs, for instance. If the customer asks the financial firm directly about the cost to break a fixed-rate loan but the financial firm remains silent or gives an incomplete response, the financial firm’s conduct might be considered misleading and it might be liable to pay compensation.

There is also a reasonable expectation that relevant product information will be disclosed by:

- financial advisers in their advice processes
- financial firms in their product disclosure statements, advertising, certificates of insurance and other verbal and written product information.

### What about predictions and opinions?

A prediction or opinion is not necessarily misleading if it turns out to be incorrect.

However, a person making a representation about a future matter, such as a profit or investment forecast, must have reasonable grounds for doing so and present

information in support of these. Forecasts should be accompanied by a warning that forecasts are not guaranteed to occur.

An opinion will be misleading if there are no reasonable grounds to hold the opinion or the person expressing the opinion did not actually hold the opinion.

Without supporting information, AFCA may assume the person did not have reasonable grounds to make the representation.

### 3.3 Assessing misleading conduct complaints

#### What information does AFCA need?

When assessing a misleading conduct complaint, AFCA looks at all the circumstances of the case. We consider two main questions:

- 1 did the financial firm mislead the complainant?
- 2 if so, did the complainant suffer a loss by relying on the financial firm’s misleading conduct?

We usually request the following information:

Party	Information
Financial firm	A statement outlining the relevant officer’s recollection of what was said (using direct quotes where possible). (If the officer no longer works for the financial firm, we expect the financial firm to make reasonable efforts to contact them for a statement.)
	A copy of any call recording, file notes and emails recording conversations and correspondence with the complainant.
	A copy of any call recordings between the financial firm and the complainant, including before and after the time of the relevant conduct.
Complainant	Details of what the alleged misleading or deceptive conduct was, why it was misleading or deceptive and how the complainant says they relied on it to their detriment.
	Where the misleading or deceptive conduct was part of a conversation, a recollection of the conversation (using direct quotes where possible).
	Any contemporaneous records showing the alleged representation was made or any written document containing the representation.
	Information showing what loss was incurred because of the misleading conduct.

We will consider the case in its context. For example, if the misleading conduct relates to text in a brochure or any other form of writing (such as an email or a letter), we will review the whole document and the circumstances in which the document was given to the complainant.

### How do we reach a view in these complaints?

AFCA is not a court of law. We cannot take or test evidence on oath or require third parties to give evidence. Instead we consider:

- available documents
- the recollections of the parties
- all relevant circumstances, including the complainant's conduct.

We give more weight to written records created when the alleged conduct took place because they are more likely to accurately reflect what was said.

If there are no records, we will decide what is most likely to have occurred based on the information we receive. If there are conflicting recollections and these are evenly weighted, we may find that a complainant's claim cannot be established.

## 3.4 Awarding compensation

### What is the remedy for misleading conduct?

We may award compensation<sup>6</sup> when we find a complainant has suffered loss by relying on a financial firm's misleading conduct. To assess compensation, we consider how much worse off the complainant is. We compare the complainant's current position with their likely position had there been no misleading conduct<sup>7</sup>.

We will consider:

- what steps the complainant took because of the misleading conduct
- what costs or obligations they incurred when they took those steps, and
- what other opportunities they lost because they took those steps.

We will also consider any benefits they obtained (such as the value of funds they received under a loan contract) in calculating their net loss from the misleading and deceptive conduct.

Put another way, we review all the known facts of the complaint to make a decision about what net loss the complainant suffered because of the misleading or deceptive

---

<sup>6</sup> Or in a superannuation context, decide that compensation is payable

<sup>7</sup> While generally the remedy in misleading conduct cases will not be to make the misleading statement come true, this position can be effected by specific code and legal obligations. For example, such a remedy may be appropriate for Insurance Complaints, having regard to the duty of utmost good faith in *the Insurance Contracts Act 1984 (Cth)*.

conduct. This may involve considering what position the complainant would have been in if the financial firm did not mislead them and they did not act in reliance on that misleading conduct.

We may consider whether a promised benefit was available elsewhere in the market and whether the complaint lost the chance to gain that benefit.

### **Example**

A financial firm misled the complainant by saying that an investment would pay a 10% per annum rate of return. The investment only paid a 4% per annum rate of return. The financial firm was found to have engaged in misleading and deceptive conduct. AFCA did not require the financial firm to pay the full 10% per annum return. Instead, AFCA determined the complainant would not have made the investment if they had known the 10% rate of return would not be paid and instead would have made an investment with a 5% per annum rate of return. The loss was calculated on this basis i.e. based on the difference between the 4% per annum return actually earned and the 5% per annum rate of return the alternative investment would have paid.

### **When will AFCA not award compensation?**

We are unlikely to award compensation if a complainant cannot show they:

- relied on the misleading conduct, and
- took steps or made commitments that caused them loss.

The available information must support the complainant's claim.

### **Example**

A financial firm incorrectly told a complainant that they could roll over their term deposit for a further two years at an interest rate of 2% per annum. The actual interest rate available at the time was however only 1.8% per annum. AFCA found the statement was misleading. However, the complainant decided to transfer their term deposit to another financial firm at that time anyway, so AFCA found the complainant did not rely on the misleading statement. The misleading statement did not cause the complainant loss, so it would not be fair for the financial firm to pay them compensation.

## 4 Application

### 4.1 Case studies

The case studies below are based on AFCA determinations. While previous determinations (by AFCA or by its predecessor schemes) are not binding precedents, where relevant they may inform AFCA's approach to an issue.

#### Case study 1 – Misleading conduct inducing property purchase (AFCA Case 683894)

A property developer approached the complainants in 2013 offering them an investment opportunity in a property development. The property developer referred the complainants to a broker. The broker helped the complainants obtain a loan to purchase a property from the developer.

During the loan application process, the broker told the complainants their surplus monthly income would significantly increase after they purchased the property.

AFCA found the broker misled the complainants because this representation was not accurate. AFCA also found the complainants relied on the broker's misrepresentation when they entered into the loan contract and purchased the investment property.

AFCA required the broker to compensate the complainants for their net financial loss from the loan and property purchase, including:

- the \$124,000 capital loss they suffered when they re-sold the property
- \$16,600 in interest costs, and
- a \$4,000 LMI premium they paid the lender.

#### Case study 2 – Apportionment of loss for loan break costs (AFCA Case 789823)

The financial firm, a mortgage manager, told the complainants the fixed rate period on their home loan was due to expire on a particular date.

The mortgage manager was mistaken, and the fixed rate period was still due to run for an additional 12 months beyond that date.

When the complainants refinanced their loan, they incurred a break fee of \$5,100.

AFCA found that the mortgage manager had misled the complainants and caused them to suffer financial and non-financial loss.

AFCA considered the complainants' pre-existing position and compared it to the position they ended up in after the misleading representation.

The interest rate on their new loan was lower than the interest rate applicable to the previous fixed rate loan. AFCA subtracted the benefit the complainants obtained from

the lower interest rate on the new loan from the amount of the break fee the lender charged them to determine their net financial loss from the mortgage manager's error.

This approach to calculating the complainants' net loss aimed to return them to the position they should have been in without the misleading representation, which is that they would not have paid the break cost or refinanced to the new loan with a lower interest rate.

AFCA required the mortgage manager to compensate the complainants for their financial loss of \$1,190.

AFCA also required the mortgage manager to pay the complainants \$1,000 compensation for the stress and inconvenience its error caused them.

### **Case study 3 – Misleading conduct complainants did not rely on (AFCA Case 768411)**

A broker assisted the complainants to obtain a loan to complete the construction of their residential property. During the application process, the broker made misleading representations that:

- the bank would not grant pre-approval until it had a signed fixed price building contract, and
- the bank would approve the loan with a reduced loan amount.

AFCA found that the broker corrected the first misleading representation the same day it made the representation. The complainants did not take any steps in reliance on the misleading representation or incur any loss before the broker corrected it.

AFCA found the complainants did not rely on the second misleading representation because they decided to discontinue their loan application and did not pursue a loan with a reduced loan amount.

The broker made a related representation that the bank would likely require a signed fixed price building contract before granting final approval. AFCA found this representation was not misleading because the broker had a reasonable basis to make the representation, considering correspondence from the bank and the bank's policies.

### **Case study 4 – Misleading statement about life insurance policy exclusion (AFCA Case 543539)**

The complainant made a claim on his income protection policy. The insurer declined the claim, relying on a standard exclusion in the policy for all claims arising from mental illness.

The complainant said he was not informed of the exclusion when he applied for the policy and was misled to think he was covered for all conditions except back

conditions. During the sales call the insurer asked the complainant some questions about his medical history. He said he had had depression and back pain.

The insurer said he was eligible for cover and there would be an exclusion for back related conditions, and read out that exclusion, and then said *'everything else is all good though'*. The insurer did not mention a blanket mental illness exclusion during the call, nor was it referred to in the summary of the application later sent to the complainant or the welcome letter.

AFCA found that the insurer misled the complainant to believe that all conditions except back conditions were covered. The insurer was required to pay the claim, and pay the complainant \$3,000 for non-financial loss.

### Case study 5 – Reliance on phone call (AFCA Case 706063)

The complainant disputed an increase in administration fees when she transferred from an employer plan to a personal plan with the fund.

The complainant said she called the fund to see what she needed to do as she had left her employer. The complainant said she was advised she could move to the personal plan of the fund but was not advised this would result in higher fees.

The complainant called the former trustee as she started a new job and wanted to know how she could nominate her account with the former trustee to receive contributions. The consultant advised the complainant she could not stay in the employer plan if she had left the employer which established the account for her. The consultant advised the complainant she could transfer to a personal plan if she wished to remain in the fund. The consultant said:

*"Basically your account will remain the same, the only thing that would change is if you did have income protection"*

Fees were not mentioned by either party during the phone call and the complainant was advised she needed to complete a form to transfer to the personal plan if she wanted to stay with the fund.

AFCA was of the view the trustee provided the complainant with potentially misleading information as the consultant's statement was vague and could be interpreted to mean fees were the same in both the employer and personal plans.

The transfer form completed by the complainant required her to agree to the fees contained in the Product Disclosure Statement (PDS). The complainant's representative said whilst the complainant signed a declaration agreeing to the fees, she did not read the PDS.

AFCA found it was unreasonable for the complainant to rely on the phone call in circumstances where at the time of completing the transfer form the complainant declared she consented to the fees in the PDS, alerting her to the applicable fees for

the personal plan. AFCA also found the complainant did not protect her own interests by consenting to fees in a PDS she did not read.

### **Case study 6 – Reliance on investment recommendation (AFCA Case 681587)**

The complainant was a Self-Managed Superannuation Fund represented by its director, Dr M. Dr M said the financial firm's adviser made a number of misrepresentations which she relied on to make a decision to invest \$800,000 on behalf of the complainant.

In providing advice to invest the \$800,000, the adviser made representations about the amount which could be expected from half-yearly coupon payments, the likelihood of an annual return of 11.4% and an annual income of around \$35,000. The adviser also omitted to make any representations about the security of the investment, despite having opportunity to do so.

Dr M was able to establish via contemporaneous documentation the representations had been made (or omitted in the case of the security issue) and satisfied the panel that had she received the correct information, she would not have proceeded with the investment on behalf of the complainant. The panel was satisfied instead the monies would have been invested in a bank term deposit and so awarded compensation to place the complainant as close to the position it would have been in as possible.

## 5 References

### Definitions

Term	Definition
Complainant	individual or small business that has lodged a complaint with AFCA
AFCA	Australian Financial Complaints Authority
FOS	Financial Ombudsman Service
SCT	Superannuation Complaints Tribunal
Financial firm	a financial services provider that is a Member of AFCA
Superannuation provider	a superannuation trustee, RSA provider, approved deposit fund trustee or life company issuing a superannuation annuity

### Useful documents

Document type	Title / Link
Rules	<a href="http://www.afca.org.au/rules">www.afca.org.au/rules</a>
Legislation	<i>Australian Securities and Investments Commission Act 2001</i> <i>Corporations Act 2001</i>