

AFCA AND THE DECISION-MAKING THROUGH A LENS OF FAIRNESS

Ian Donald, Ombudsman, Australian Financial Complaints Authority (AFCA) and
Shail Singh, Ombudsman, AFCA

#NC2020



Ian Donald
Ombudsman, Australian Financial Complaints Authority (AFCA)




Ian has over 20 years' experience in the financial services industry. He was with the Financial Ombudsman Service from 2009 as Legal Counsel. He also worked in ASIC's Enforcement Directorate as an in-house lawyer and as a team leader with oversight of complex financial services investigations. He specialised in commercial and insolvency law in a private legal practice.

Appointed as an Ombudsman in September 2019, Ian predominantly makes decisions in investments and financial advice complaints, as well as banking and finance complaints.

Shail Singh
Ombudsman, Australian Financial Complaints Authority (AFCA)

Shail joined the Financial Ombudsman Service in 2010 as a case manager and progressed to senior case manager in 2013. In 2015 Shail began managing the Investments and Advice Unit 1, where his team focused on investments, traditional trustee and life insurance complaints. In 2018 he was appointed by the Board as an Ombudsman. Shail has significant experience dealing with financial planning, investments, stockbroking, CFD and FX disputes. Prior to joining FOS, Shail was a Financial Planner at ARA consultants from 2008 – 2010 and Legal Counsel for various organisations including the Medical Practitioners Board (2003 – 2005), Sara Lee (2000) and Worksafe Victoria (2005 to 2008). Shail has a Bachelor of Laws and Bachelor of Science from Melbourne University (1996) and a Masters in Law from Melbourne University (2005) and an advanced diploma financial services (2009).

AFCA's role

Who we are

A single financial services EDR scheme

- Three schemes (FOS, CIO and SCT) now one scheme
- Operational since 1 November 2018

Responsibilities

- resolving complaints
- identifying systemic issues and working with financial firms to resolve them
- supporting regulators by reporting certain matters to them
- promoting awareness of AFCA – including discussion of approach

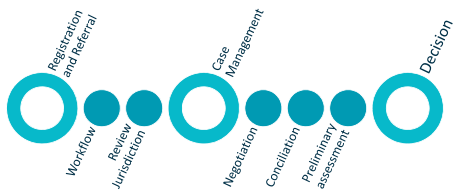


AFCA's role in financial complaint resolution

- In everyone's interest to have matters resolved quickly.
- Three way discussion / get parties talking.
- AFCA can:
 - act as a circuit breaker and help to build trust with customers
 - identify and focus on the real issues
 - help with financial difficulty issues which often accompany credit complaints
 - provide an independent view based on fairness
 - be flexible and adaptable to meet parties needs



Our complaint resolution process



What you can expect from AFCA



What we do

- Independent review of issues and merits of the complaint.
- Experienced complaint resolution staff with industry knowledge.
- Respectful engagement from our staff who will listen to your queries and concerns.
- Regular telephone contact.
- We will refer a request for a jurisdictional assessment promptly to our Rules team.
- Targeted requests for information to ensure we understand your perspective and position.
- A flexible and adaptable complaint resolution model.

AFCA's first 12 months of operations

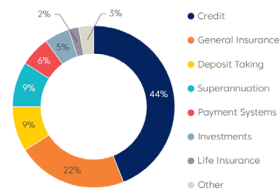


73,272 complaints received

As at 31 October 77% have been closed

\$185 million in compensation¹

Complaints received by product type ²



Challenges



40% more complaints than we had expected

Staff growth from about 340 to over 800

Identifying and employing qualified staff with relevant experience

Training and professional development

Ensuring consistency

Clearing FOS and CIO complaints

Investments and advice complaints



3,909 Investment and Advice complaints received

Top 5 products	Total	Top 5 industry types	Total
Foreign Exchange	1,127	Financial advisor / planner	928
Mixed Asset Fund/s	423	Foreign exchange dealer	487
Self-managed Superannuation Fund	367	Derivatives dealer	460
Superannuation Fund	355	Make a market	445
Shares	351	Bank	345

Complaints received – Investments and advice



	Nov-18	Dec-18	Jan-19	Feb-19	Mar-19	Apr-19	May-19	Jun-19	Jul-19	Aug-19	Sep-19	Oct-19
Investments and Advice complaints	275	241	368	293	273	238	422	409	350	443	282	315

Complaints accepted – Investments and advice



	Nov-18	Dec-18	Jan-19	Feb-19	Mar-19	Apr-19	May-19	Jun-19	Jul-19	Aug-19	Sep-19	Oct-19
Investments complaints	173	177	311	207	212	206	243	366	299	341	208	225

Closed by status – Investments and advice



3,197 Investment and Advice complaints closed (AFCA and FOS)

Status	%
Registration	26%
Case Management	54%
Preliminary Assessment	8%
Decision	12%

Investments and advice closed by outcome



Outcome	Number	%
Resolved by FF	915	29%
Outside Rules	876	27%
Negotiation	392	12%
Discontinued	385	12%
Decision in Favour of complainant	199	6%
Decision in Favour of FF	126	4%
Outside Terms of Reference	101	3%
Preliminary Assessment in Favour of complainant	69	2%
Conciliation	60	2%
Preliminary Assessment in Favour of FF	43	1%
Assessment	31	1%
Total	3,197	

Top 5 issues – Investments and advice



Issue	Total
Failure to follow instructions/agreement	1,031
Inappropriate advice	557
Failure to act in client's best interests	377
Incorrect fees/ costs	347
Misleading product/service information	237

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

AFCA's fairness jurisdiction

Introduction

- AFCA's fairness jurisdiction
- Our approach to decision-making
- Opportunity for stakeholders to contribute





What is the fairness project?

Articulation of how AFCA will assess financial firm conduct against existing legal and ethical obligations



The AFCA strategy

Purpose
To provide fair, independent and effective solutions for financial disputes

Vision
To be a world class ombudsman service

- > raising standards and minimising disputes
- > meeting diverse community needs, and
- > trusted by all

Strategy statement
Working with consumers, small business and industry, we will resolve and reduce financial disputes through innovative solutions, education and communication.
We will deliver to the Australian community services that are easy to use, free for complainants, efficient, timely and impartial.

Goals

- Australian community and government**
A fair ethical and trusted service that influences reform in the financial services sector
- Consumers and small business**
An excellent customer experience that meets diverse needs and delivers fair outcomes
- Members**
A valued member experience that helps members to improve internal practices to avoid or resolve disputes
- Our people**
Highly skilled and engaged people with the tools they need to deliver high quality outcomes

Values

- Fair and independent
- Transparent and accountable
- Honest and respectful
- Proactive and customer focussed




AFCA's fairness project

Our decision making 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
- Previous relevant Determinations of AFCA or Predecessor Schemes

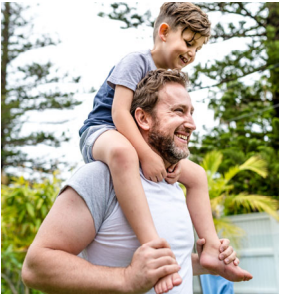

This is not new. Previous schemes had a similar jurisdiction.
The objective of the fairness project is to clearly articulate what we are already doing.



AFCA's fairness project

Our approach

- Procedural fairness
- Substantive fairness
- Relationship between financial firms and consumers

Why we are doing it

Clarity

Transparency

Consistency



AFCA's Fairness Framework Overview

	Framework component
Jurisdiction - What?	1 AFCA's fairness jurisdiction
	2 The fairness standard
Assess - How?	3 The fairness tool
	4 The roadmap
	5 Fair remediation
	6 The process map
Decision making - Why?	7 Procedural fairness
	8 Model engagement standard
Ensuring fair outcomes	9 Addressing unfair engagement
	10 Capturing fair outcomes



Fairness Standard

• Fair dealing

- Ensuring that one party does not take unfair advantage of another:
 - in the nature of the bargain struck
 - in the circumstances of entering that financial arrangement

• Fair treatment

- Ensuring that one party is not treated inequitably or in a way that is adverse to their interests

• Fair service

- Delivering quality, professional financial products and services in a manner that:
 - is fit for purpose
 - meets a consumer's legitimate interests and reasonable expectations

• Fair remediation

- A prompt and proportionate response when things go wrong



What the law and codes say about fairness



Play by the rules: including

- Keep promises made
- Be open and honest
- Do not take unfair advantage
- Be ethical and professional
- Reasonable care and skill
- Ensure services are fit for purpose
- Protect the money of others
- Provide value and benefit
- Serve the interests of others
- Consider consequences and impacts of your actions



What we might ask



1. Did the parties obey the law?
2. Did the parties make promises or representations they did not meet?
3. Did the parties act honestly, reasonably and in good faith with their dealings with each other?
4. Did one party take unfair advantage of another? Were specific circumstances or vulnerabilities considered?
5. Did the financial firm provide the product or service ethically, with reasonable care and skill and in accordance with industry and professional practice?

6. Did the financial firm meet the consumer's reasonable expectations about the product or service?
7. Did the product or service perform as expected and provide a fair value or benefit?
8. When acting for a consumer, did the financial firm act in the interests of the consumer or group of consumers as a whole?
9. How did the parties treat each other during their relationship or after concerns were raised?
10. What was the impact on the consumer and their experience of the service?



AFCA's Fairness Tool

Play by the rules, including:

- Keep promises made
- Be open and honest
- Do not take unfair advantage
- Be ethical and professional
- Reasonable care and skill
- Ensure services are fit for purpose
- Protect the money of others
- Provide value and benefits
- Serve the interests of others
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Fair dealing
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Fair remediation
A prompt and proportionate response when things go wrong

AFCA's Fairness Project

Next Steps – what is your response?

This is the start of our conversation with you

Meetings with peak industry bodies in late-February 2020

Formal consultation commences mid-March 2020

Internal immersion over the next 12 to 36 months

Legal and ethical obligations - summary

Obligation	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
Advise in the best interests of the client		Y	Y
FASEA Code of Ethics			Y

FASEA Code of Ethics

AFCA decision-makers must have regard to industry codes



This means that AFCA will consider the FASEA Code of Ethics for adviser's conduct from 1 January 2020.

AFCA's 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.

FASEA Code of Conduct

12 Ethical Standards



ETHICAL BEHAVIOUR

Comply with the law
Act with integrity

CLIENT CARE

Avoid conflicts of interest
Client must give informed consent
Appropriate advice / client must understand the advice

QUALITY PROCESS

Take into account broad effects of advice
Fees represent value for money
Accurate record keeping

PROFESSIONAL COMMITMENT

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
- ASIC's expectations

Application of the FASEA Code



Scenario

John is about to retire and has a SMSF with a \$1M in it. He has 75% of his funds invested in term deposits and 25% in blue-chip Australian equities.

He sees Mike who recommends a diversified portfolio. 25% in an Australian Equities Fund, 50% in a fixed interest fund and 25% in a US Property Fund. (John has agreed to a 50% defensive, 50% growth asset allocation).

All 4 funds are run by a related entity to John's licensee. The funds receive a 1.5 % fee based on the investments (\$15,000 per year). John says he does not receive any money from the funds.

Is the recommendation to invest in these funds a breach of the code of ethics?

Relevant Code provisions



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. (Extract)

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. (Extract)

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.

Discussion



Is there a conflict of interest?

Is vertical integration banned?

Is Mike allowed to recommend funds of a related entity?

Is it relevant whether Mike's remuneration is linked to the profits of the fund or not?

Does disclosure fix the problem?

Application of the FASEA Code

Scenario 2



Application of Code – Scenario 2

As part of the process Mary discovers Michael is much more aggressively invested than she thinks is suitable for his circumstances. She also has concerns about the economic outlook. However, because she does not specialise in this area she does not mention this to Michael and limits her advice to insurance recommendations (which are fantastic and completely suitable for Michael). Michael accepts these recommendations happily.

Is this a breach of the code of ethics?

Relevant Code provisions



Standard 1 – You must act in accordance with all applicable laws including this Code and not try to avoid or circumvent their intent. (Refer Best Interests – including scoping).

Standard 2 – You must act with integrity and in the best interests of each of your clients.

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. (Extract)

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.

Standard 10 – you must develop, maintain and apply a high level of relevant knowledge and skills.

Discussion



Can Mary scope out advice on the risk of the portfolio? Should Mary have said anything to Michael?

What about the fact that the licensee is allowed to provide holistic advice and Mary has the basic qualifications to do so? Does this change things?

What about the fact that Mary has realised this problem acting in good faith?

Does it matter that the client only wants risk advice?

What should she do/ how should she handle this?

More information



AFCA contact details

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Follow us on social media



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- Secure services: www.afca.org.au/members

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