SENTINEL WEALTH

AFCA Review

1 April 2021

Submission To Treasury

T 02 8908 5300
F 02 9285 0547
E info@sentinelwealth.com.au

Level 24, 56 Pitt St, Sydney NSW 2000
PO Box R683, Royal Exchange NSW 1225
sentinelwealth.com.au

Table of Contents

1. Background
2. AFCA's response to Sentinel
3. AFCA exhibits bias when accepting cases and doesn't apply the jurisdiction rules correctly,
4. AFCA exhibits bias in favour of claimants particularly if there's a perception that they are 'unsophisticated' or deserving of help,
5. AFCA doesn't apply the law and ASIC regulation guides,
6. AFCA does not apply the principles of fairness,
7. AFCA is not consistent in decisions on cases.
8. AFCA is being 'gamed' by those who understand the inherent biases.
9. Summary
10. Recommendations

1) Background

- SentinelWealth is a mid-size financial planning practice operating in Sydney. It was originally established in January 2005 and has operated successfully over this period.

- The current client base comprises approximately 350 families of generally high net worth. Current staff complement 12 including three advisers plus a CEO/adviser, 4 client service managers and 4 other staff with multiple roles.

- Revenue of approximately $3.3 million annually is all on fixed fees negotiated with clients annually via annual retainer agreements. Sentinel has operated on fixed fee annual engagement agreements for ten years.

- Sentinel is entirely privately owned and have no legal, financial or other links to service or product providers. It has always been very particular about the lack of bias in their advice process and have never accept gifts, conference sponsorships or any other forms of value from service or product providers even down to bottles of wine.

- The adviser involved, Mr F (GF), commenced employment with SentinelWealth in 2011 in the role of paraplanner. He came from a large dealer group called Count where he was in the technical team. He always showed a strong bent towards technical strategies and was very good in this respect.

- During his employment, he had demonstrated three particular strengths. First his technical knowledge, second his methodical process driven approach to completing tasks, and third his ability to gain the trust and confidence of those around him. He was on track to have a very successful career as a financial adviser.

- Sentinel has always had a very strong team, technical and a 'client first' culture reinforced regularly through weekly team meetings and training. The company is well known in the industry for it's client-centric approach and ethics.

What happened

- On the 14th March 2020, Mr F (GF) informed the CEO Justin Hooper (JH) that he had been engaging in activity outside of the authority and systems of Sentinel. He had been borrowing money from some clients (18) and non-clients (12) and had lost it through gambling. Losses have been difficult to estimate but are in the order of $5m-$7m.

- Although each case is slightly different, the typical situation was that Mr F made a general approach to some clients and a number of non-clients including his family and friends and used a template email in which he suggested a scheme in which the lender would be handsomely rewarded.

- In almost all cases, the lender signed a loan agreement with Mr F or his Family Trust, transferred the money to either his personal or Family Trust bank account and continued to liaise with him via his separate Hotmail account. In all Sentinel client cases, the correspondence was separated between standard Sentinel business (via the Sentinel email address) and the offline loan agreements (via Hotmail). The arrangement was kept private and confidential between Mr F and the lender.

- In almost every loan agreement, clauses similar to the one below were included:

  THE PARTIES ACKNOWLEDGE THAT THIS AGREEMENT HAS NOTHING TO DO WITH 'S ROLE AS A FINANCIAL PLANNER FOR SENTINEL WEALTH MANAGEMENT PTY LTD. FOR THE AVOIDANCE OF DOUBT:
  NO PART OF THE PROCEEDING DISCUSSIONS, RELATED INVESTMENT OR THIS AGREEMENT IS A FINANCIAL SERVICE PROVIDED BY SENTINEL WEALTH MANAGEMENT PTY LTD.

GF was unsuccessful with at least 20 other clients who after being sent his standard email, either didn't respond or declined the approach. None of these people informed Sentinel of the approach but all have subsequently apologised for not doing so.

Mr F was suspended on the 16th March and dismissed on the 23rd March 2020. The incident was immediately reported to ASIC and forensic specialists engaged including Deloitte and Sapere Forensic.

After very detailed investigations, it has been shown that it was impossible for Sentinel to have picked up these arrangements. Mr F set up the arrangement so that in every case, every one of the people involved effectively colluded with him to keep Sentinel in the dark. Meetings were held offsite, emails were via his private Hotmail account, money was transferred to his private, personal bank account and loan agreements had confidentiality clauses in all cases and a disclosure that it was not a Sentinel approved product or service. Prof. [redacted] in his final report summary said "As a summary point, it is noted that the nature of the misconduct, where GF appeared to operate outside of business rules and deliberately failed to record material that might otherwise be caught by the controls, might be reasonably characterised as deliberate and knowing circumvention of those controls. It remains uncertain that, even after recommending our recommendations, whether this type of misconduct by a trusted leader of a firm of this size might be captured by any enhanced controls framework."

After a detailed risk audit, Marsh Risk Specialists concluded that Sentinel has in place "more than 100 processing, preventative and detective controls to contain the 25 key risks events."

ASIC have been provided with all the detail and JH has signed a statement drafted by ASIC on the incident.

Response from Affected Individuals

Most of the affected individuals have accepted responsibility for their actions.

Three clients and three non-clients made claims via AFCA. All three of the non-clients have not reported the matter to the police or made statements. Total claims amount to $2,530,000.

None of the lenders raised the loan arrangements in the pre-meeting information requests from Sentinel over the time of the loans being in place.

2) AFCA Submission to Treasury

AFCA's submission to Treasury clearly states that AFCA's dispute resolution approach and capability are producing consistent, predictable, and quality outcomes. This has not been our experience and it would seem almost impossible to accept that ours are the only cases where these have occurred. In summary, our view is that AFCA:

1. Exhibits bias when accepting cases and doesn't apply the jurisdiction rules correctly,
2. Exhibits bias in favour of claimants particularly if there's a perception that they are 'unsophisticated' or deserving of help,
3. Doesn't apply the law and ASIC regulation guides,
4. Does not apply the principles of fairness,
5. Is not consistent in decisions on cases.
6. Is being 'gamed' by those who understand the inherent biases.

3) AFCA exhibits bias when accepting cases and doesn't apply the jurisdiction rules correctly

When addressing whether AFCA has the power to engage with these Complaints, the only relevant considerations under the AFCA Rules are whether:

- the complaints arise from a customer relationship [Rule A.4.3(a)]; and
- the complaints arise from the provision of a Financial Service by Sentinel Wealth to the Complainant [Rule B.2.1].

For AFCA to have jurisdiction, AFCA must satisfy itself that the answer to both questions is "Yes".

The basic facts of all complaints are materially identical. Mr F borrowed money from the Complainants and is now unable to repay those loans. The jurisdictional consideration for AFCA, when a Complaint is directed to Sentinel Wealth (the financial firm), is whether:

- the loans arise from a customer relationship; and
- the lending of money by the Complainants to Mr F constituted a Financial Service by Sentinel Wealth to the Complainants.

In each of the Complaints the answer to both questions is "No".

Dealing with each question in turn.

Customer relationship

Three claimants were not customers of Sentinel Wealth. Mr F's dealings with them did not and could not arise from a customer relationship. Three other claimants did have a customer relationship with Sentinel Wealth but the Mr F loans did not relevantly "arise" from that relationship. The terms of the loans themselves make plain that the arrangement was intended by all to be outside of their customer relationship with Sentinel Wealth.

Service by Sentinel Wealth to the Complainants

Firstly, and putting to one side that Sentinel Wealth is not itself a party to the lending arrangements the subject of these Complaints, as a matter of ordinary English usage there is no way that the extending of credit by a lender to a borrower can be construed as the provision of a service by the borrower to the lender. Just stating the proposition demonstrates it to be ludicrous.

Secondly, in circumstances where Sentinel Wealth itself is not a party to the loan arrangements and did not itself provide a Financial Service, for AFCA to have power this could only arise by reason of the extended definition of "Financial Firm' [see Rules, Section E.1.1 Financial Firm at point 4] that in certain circumstances deems an employee, representative, agent or contractor to be the Financial Firm.

Notwithstanding the above and a significant submission to AFCA arguing the question of jurisdiction including arguments submitted by [redacted], AFCA nonetheless accepted they had jurisdiction.

4) AFCA exhibits bias in favour of claimants particularly if there's a perception that they are 'unsophisticated' or deserving of help

In AFCA's submission at paragraph 2.22 it states, "decision makers and case managers assess complaints objectively and without bias, in accordance with AFCA's Conflict of Interest and Apprehended Bias policies and procedures."

This has NOT been our experience. The following issues have occurred during this incident:

- An AFCA case manager said the following to Justin Hooper CEO of Sentinel after a recommendation to award a non-client 100% for the amount of $365,000, "Don't take it so personally" and "It was a very difficult case to determine and both sides had very good arguments."
- In the Ms B case, contemporaneous file notes taken by Justin Hooper were ignored because the claimant denied that she said what was noted.

5) AFCA doesn't apply the law and ASIC regulation guides.

Rule A.14.2 provides that when determining any other complaint, the decision maker must do what she or he 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.

In three cases, two of which were never clients and did not have a customer relationship, notwithstanding the following legal issues the case managers found in favour of the claimants either fully or partially:

i. Senior Council opinion
ii. Ombudsman reasoning provided in a similar case (Ms F/Ms K)
iii. The acceptance that s917D was satisfied in a previous case where exactly the same clause was referred to, (ie there was clear and prominent notification)
iv. Regulation Guides providing clear guidance regarding ASIC's interpretation.

Regulation Guides could not be clearer

Regulation Guide 36.91 states:-
You may be acting as a principal and not as a representative if:

a. your conduct is not monitored and supervised by someone else
b. you hold out that you are a principal;
c. your conduct is not covered by anyone else's compensation arrangements (e.g. professional indemnity insurance);
d. client assets are held in an account in your name;
e. clients are directed to pay any fees owing for the provision of financial services to you or into an account in your name.

Mr F actions clearly showed that he was acting as a principal as he satisfied at least (b), (d) and (e) and possibly (c).

Regulation Guide 175 states:-

RG 175.131 The AFS licensee (or authorised representative) does not authorise the provision of advice by mere inactivity if it did not know or have reason to suspect that the advice might be passed on and attributed to it (University of New South Wales v Moorhouse & Angus & Robertson (Publishers) Pty Ltd (1975) 133 CLR 1 at 12–14 per Gibbs J).

RG 175.132 If the intermediary provides financial product advice to the retail client as its own, without attributing it to the AFS licensee (or authorised representative), it will not be financial product advice provided by the licensee (or authorised representative) to the retail client. This is the case even if the advice provided by the licensee (or authorised representative) to the intermediary helped that intermediary to formulate its own advice.

If advice was provided at all (which is denied as it was Mr F who was the borrower), it was provided by Mr F in his personal capacity.

6) AFCA have not applied the principles of fairness

- In paragraph 2.4 of their submission, AFCA states: "AFCA's fairness jurisdiction has been acknowledged and clarified by superior courts that have found our decision makers do not exercise judicial power - as they do not. Rather, the subject of the opinion of an AFCA decision maker is 'what is fair in all the circumstances'."

- AFCA submission 2.36: "However, AFCA is required to ensure a fair process and a fair outcome in the resolution of complaints - in accordance with the fairness tests."

- It should also be noted that in AFCA rules, liability only arises for the financial firm if there was actual or ostensible authority.

There is total agreement that Sentinel is not at fault. No accusation that Sentinel is culpable has been made by anyone and we have had Deloitte audit our processes, as well as our monitoring and supervision. Deloitte has stated very clearly that there was nothing Sentinel could have done to prevent this situation, citing in particular that Mr F deliberately circumvented Sentinel's practices and knew his actions were unacceptable. One of the critical elements of Mr F being able to keep his activities confidential from Sentinel was to ensure that none of the people he approached thought his proposed arrangement had anything to do with Sentinel. In order to achieve this, he made it clear that it had nothing to do with Sentinel. He knew that he could not afford for any lender to contact anyone at Sentinel, least of all the CEO. The people involved also knew this and assisted him to keep it confidential.

Sentinel believes that we are entitled to think that the affected clients should have not only declined this offer but also contacted someone at Sentinel to inform us of the approach. It is important to note that as part of the preparation for review meetings, clients are specifically

asked for an update of their circumstances including assets and liabilities. None of the affected individuals provided any information.

With respect to the individuals who were never clients, it is clear that there was no professional relationship:

- All three knew the adviser through personal connections. One was his uncle/aunt, another a good friend of his and the third, a school friend of his wife's.
- Most of the parties' communication was over text messages and the adviser's personal Hotmail account. His Sentinel email signature does not indicate a work mobile number nor his Hotmail address.
- Some of the loan agreements were signed by the adviser and his wife on behalf of their family trust.
- In some cases, the reasons given for the loans were to assist the adviser to fund the purchase of equity in the firm.
- There is no evidence in the communications that the adviser is retaining commission or any other fee for the transactions.
- There is no evidence that the complainants were onboarded as clients of Sentinel nor was any fees received or payments made to Sentinel. These non-clients were never sent an FSG.

The very thought of a financial adviser entering into a personal transaction of this kind with a client is abhorrent, and the affected clients should have let us know. When asked why they had not done this, a number apologised and said that they knew that Justin Hooper the CEO of Sentinel would immediately dismiss Mr F and they felt sorry for him knowing he had young children.

It would be understandable to feel sympathy for the affected clients. We have sympathy too but that doesn't mean that Sentinel should be held responsible for their loss. The affected clients' loss arose because, in highly unusual circumstances, they decided to take on the risk of entering into a personal loan with Mr F who, in turn, wrongfully gambled those funds. Responsibility lies with Mr F and the affected individuals.

Although the affected clients have approached AFCA to seek compensation from Sentinel, we are not aware of any attempt by them to recover their money from Mr F himself. We note that Mr F claimed in his confession to his victims that he was unable to pay, but we am not aware of any of the affected clients taking any steps at all to test this proposition.

Fairness should take into account responsibility for one's actions, and the consequences for parties who did, or did not, have control over the events that occurred.

Fairness, when viewed from an overall perspective, does not require the affected clients be compensated by Sentinel for the reasons outlined above. Even when viewed from the affected clients' perspective alone, fairness does not require them to be compensated by Sentinel having regard to their clear understanding of the personal nature of the loan and the risk they elected to take both in loaning the funds and in keeping the transactions from Sentinel.

Our PI insurer is completely denying indemnity. If SentinelWealth is held liable to the affected clients – effectively as the guarantor of their personal loan agreements with Mr F – then this is a loss entirely to SentinelWealth.

Although AFCA has been forced to dismiss four of the five cases mainly due to the DH Flinders case (one case will be discussed below), if AFCA made determinations in each claim by Mr F's victims along the lines of the recommendations in some of the initial cases, it would be devastating and could have been the end of SentinelWealth. If so, 12 people would have lost their jobs and their families would have been impacted in what is already difficult times. In addition, 330 families (many of whom are retirees) could lose their financial planner, with whom they have worked for many years and depend upon.

It does not seem fair that all of these people, who did not participate in the transaction, (and from whom the transaction was kept confidential) or elect to take on this risk, are adversely impacted. This is particularly so in the case of the employees, who could have intervened had the transaction not been hidden from them.

We are the first to accept that unethical practices need to be stamped out and those responsible held to account. That said, this does not require that SentinelWealth be made effectively a guarantor to this objectionable transaction, which it was recognised had nothing to do with SentinelWealth, and which the evidence clearly shows the affected clients knew had nothing to do with SentinelWealth.

Sentinel should be able to rely on the plain disclosure that was made to the affected clients and that the non-clients could not, and which had to be made and understood as an essential part of Mr Mr F's method. That is the outcome that is fairest to all concerned. In the case of non-clients, it is incumbent upon them to prove the customer relationship. To this day, two of the non-clients have never made any direct contact with Sentinel in any form whatsoever. They have not even sent an email to Sentinel complaining of their loss or that they believe they have been defrauded by a Sentinel employee. Our understanding is that these two claimants have also not made a statement to the police.

<u>Simply put, we were never party to the commercial arrangements, the people involved purposely colluded to keep the information from us, nobody has said Sentinel did anything wrong, nobody has yet been able to tell us how we can avoid this situation in the future but yet we are being</u>

held responsible. How can AFCA possibly argue that their handling of these cases is **"delivering fair, independent and effective solutions..."**

Two further points to note:

1. The latest dismissal by an AFCA ombudsman (the Ms F/Ms K case: 741935 dated 22 March 2021), has been treated in a logical and fair manner. This assessment provides Sentinel with much greater confidence of the fairness and logical approach but it provides a stark contrast to the recommendations in other cases.
2. However, as will be discussed below, the logic and reasoning behind this decision is significantly in contradiction with the other recommendations made at a case manager level where very similar circumstances.

7) AFCA is not consistent in decisions on cases.

In paragraph 2.17 of its submission, AFCA refers to Rule A.2.1(d) which provides that AFCA will support consistency of decision-making, subject to its obligations both under section 1055 of the Corporations Act and to do what is fair in the circumstances.
In paragraph 2.28 AFCA notes that it '...supports and monitors procedural and substantive fairness and the quality and consistency of our decisions...'.

In our experience, neither of the above have occurred. This inconsistency is of particular concern because in AFCA's own words, there is a very high correlation between recommendations and determinations.

In paragraph 2.40: 'Of the complaints finalised by determination, only a small proportion (9%) overturned a preliminary assessment provided to the parties. Of these, 4% of 'overturns' were due to new information being provided by the parties after the preliminary assessment was made. Only 5% of preliminary assessments were overturned in a determination due to a different interpretation of any relevant law or a difference of opinion of the basis of the facts.'

Furthermore, in paragraph 2.41: 'These results provide significant confidence that our preliminary assessment process delivers fair and appropriate outcomes for parties to a complaint, while still providing parties with a further opportunity for a final assessment of the merits of the complaint.'

To provide just two examples (there are others):

a. Mr H vs Ms M

These cases were primarily decided on the issue of s 917D, i.e. disclosure that the adviser was outside of his authority.

In the Mr H case, the following are extracts from the recommendation:

- Under section 917D financial firms are not liable for the conduct of authorised representatives acting outside of authority, if the lack of authority was clearly and prominently disclosed. The disclosures given by Mr F for the $232,000 loan were sufficiently prominent. However, there was no disclosure for the $60,000 loan.

Mr F advised Mr H he was acting outside of authority

Section 917D provides relief from liability in cases where lack of authority was clearly disclosed. The disclosure had to be clear and prominent, such as allowing a reasonable person to decide whether to proceed with Mr F's recommendation notwithstanding that it was outside of authority.

The email from Mr F to Mr H dated Wednesday 22 August 2018 discloses Mr F advised Mr H, he was acting outside the authority of the financial firm.

> *I want to point out again that this investment has nothing to do with the financial firm or my role as an adviser.*

In my view Mr F Mr F clearly and prominently disclosed his lack of authority. Mr F made it clear to Mr H he was acting outside of the authority of the financial firm.

Did the failure to disclose the lack of authority for the $60,000 loan cause a loss?

No. Based on his previous behaviour, I am satisfied Mr H would still have entered into the $60,000 if Mr F had disclosed the lack of authority.

The losses must be directly caused by the wrongdoing of the financial firm

Compensation for loss does not automatically follow a finding that the financial firm has breached its obligations. The onus is on complainants to prove they suffered a loss and that a breach by the financial firm caused that loss. This will generally be established by asking whether they would have acted differently and avoided or reduced their loss but for the breach.

When considering whether any wrongdoing directly led to the losses, AFCA will consider whether 'but for' the actions of the financial firm, the complainant would have avoided the loss. In considering this, there could be other intervening events that more directly lead to the loss and break the direct connection between the financial firm's actions and the loss.

Ms M Case

This case is for all intents and purposes very similar. Both Mr H and Ms M were clients, both signed agreements with clause 8.3. disclosing the lack of authority and both made loans to the adviser personally. In Mr H's case, a subsequent loan was made with no direct lack of authority disclosure.

However the two recommendations were completely different. In the Ms M case, the following reasoning was provided:

Is the financial firm responsible for Mr F's conduct in his dealings with Ms M between December 2019 and March 2020?

Yes. Under section 917A-E of the *Corporations Act* 2001, the financial firm is liable for Mr F's conduct, even though it was outside of authority. While section 917D provides an exception if the lack of authority was clearly and prominently disclosed, the disclosures given by Mr F were not sufficiently prominent.

The dealings were a financial service.

The email communications surrounding the money transfers in 2019 and 2020 do not disclose the specific purpose for which the money was transferred. Nevertheless, Mr F gave "financial product advice" in December 2019 in the record of advice (ROA).
The subsequent transfers of money are sufficiently "related" to the initial overture of providing a financial product advice. An ROA was given (financial advice, undisputedly a financial service in accordance to S763A of the Corporations Act) and this ROA was 'related to' the loan of $100,000.

Mr F did not clearly and prominently disclose his lack of authority

The financial firm argues that Mr F conduct was outside of authority and the complainant should have known that it was. In particular, it points to the loan agreement being entered into in Mr F's personal capacity and clause 8.3 of the loan agreement, which states:

"The parties acknowledge that this agreement has nothing to do with Mr F's role as a financial planner for the financial firm. For the avoidance of doubt, this agreement is not a financial service provided by the financial firm."

<u>The clarity and the prominence of the disclosure in my view was not sufficient.</u> (Our emphasis: Note that this clarity and disclosure was the same as that for Mr H). The disclosure has to be for the purpose of allowing a reasonable person to decide whether to proceed with a representative's recommendation notwithstanding that it was outside of authority. That was not the nature of the "disclosure" made by Mr F in clause 8.3. (Note: Sentinel provided AFCA with a

file note taken contemporaneously in which Ms M acknowledged that she understood it was outside of authority).

The disclosure should have been included in the ROA

The clause 8.3 of the loan agreement should also have been included. The absence of clause 8.3 in the ROA did not allow Ms M an appreciation of the risk involved in going outside of authority. It was not a good faith disclosure. I do not consider, on current evidence, that the financial firm is able to avail itself of the exception in s917D.

Note: This is a clear demonstration of bias. Is AFCA seriously suggesting that the adviser recommending a loan for which a disclosure of it being outside of authority, should then be disclosed in the ROA? This clearly evidences that the adviser and client were acting as principals and Sentinel was never contemplated in the transaction.
HOW IS IT POSSIBLE FOR TWO CASES WITH SUCH SIMILAR CIRCUMSTANCES, TO HAVE RECOMMENDATIONS SO DIFFERENT?

b. Ms F/Mr G vs Ms K

Ms F and Mr G were personal friends of Mr F. Ms K/Ms F are related to him. None of these parties have a customer relationship with Sentinel.

Ms F

In the recommendation, AFCA states:

Mr F has confessed to engaging in dishonest conduct

There is no dispute that Mr F has engaged in dishonest conduct by using the monies he received from the complainants in gambling.

A personal statement signed by Mr F on 20 March 2020 confirms that Mr F:

- obtained loans from his clients (including the complainants) and told them that he intended to use the loan proceeds to invest in shares. The loans were documented in loan agreements that he prepared, and the clients transferred the funds into his personal or family trust bank account,
- used most of the funds he borrowed from the clients to engage in online gambling activities.

This disclosure is consistent with the complainants' assertion of the facts. It is therefore unnecessary for me to determine if Mr F breached section 1041G of the Act.

NOTE: Even after Sentinel requested AFCA to ensure that the complainant had submitted police reports, AFCA stated that this was of no concern or impact on the case. Ironically, our understanding is that the NSW Police have a more than one case told the affected individuals that they regard these loans as civil not criminal matters.

Mr F did not (clearly and prominently) disclose his lack of authority

The financial firm would be exempted from its liability under sections 917A-B if the lack of authority was clearly and prominently disclosed to the complainants, before the complainants relied on the conduct. The disclosure had to be clear and prominent such
as allowing a reasonable person to decide whether to proceed with Mr F's recommendation notwithstanding that it was outside of authority.
The relevant provisions in the Act are deliberately drafted in a way to protect a consumer from technicalities about unauthorised conduct, which a consumer would not ordinarily understand.

There is no evidence Mr F clearly and prominently disclosed that his conduct was outside authority before the complainants first transacted with him. The initial email correspondences before the complainants engaged Mr F showed that he had the authority to transact on shares, for examples:

> *Mr F's email dated 17 April 2019 stated that: 'I have been carefully developing key contacts and have positioned myself to have access to buying more shares. My contact called today letting me know there is $200,000 of shares to buy'.*
>
> *Mr F's email 5 May 2019 stated that 'the [shares] the transfer form has been signed and I have a copy so the next step is to transfer funds to the seller'.*

This further supports the complainants' assertion that Mr F convinced them on a phone call in June 2019 that his position at the financial firm afforded him:

> *'with exclusive excess to trade shares that were not available to the general public, and that he had clients who wanted to sell shares and other clients who wanted to buy'.*

Mr F did not disclose that he was prohibited under his employment agreement and company policy to hold personal interest in shares, which appeared to the case. Where the communication was calculated to entice and deceive, I do not believe it is the kind of "clear and prominent disclosure" contemplated in s917D so that the financial firm may rely on it.

<u>Ms F/Ms K</u>

The recommendation in this case (admittedly by an ombudsman), is almost the exact opposite of the Ms F and Mr G cases. In this case, the following is an extract from the recommendation:

a. The complaint appears to be outside jurisdiction.

b. There was no formal professional relationship.

The complainants say they relied on the adviser as a senior planner at the financial firm, they corresponded with him at his professional email and postal address and they understood the adviser would retain commissions for the transactions, all of which led them to believe he was acting within a professional capacity.

I am not persuaded the parties' had a formal professional relationship because:

- one of the complainants is the adviser's aunt by marriage and the other is her sister and they therefore both knew of the adviser through personal connections
- most of the parties' communication is over text messages and the adviser's email signature does not indicate a work mobile number
- the complaint relates to conduct in 2020 and while initial correspondence was to the adviser's work email he has responded from his personal email and all further email correspondence is to that account
- there is no evidence in the communications that the adviser is retaining commission or any other fee for the transactions
- as the 2020 transactions relate to a profit sharing arrangement between the advisor and the complainants as individuals, it suggests a personal rather than professional arrangement

Further, there is no evidence that the complainants:

- were onboarded as clients of the financial firm
- received a copy of the financial firm's financial services guide
- made any payment for the adviser's professional services.

The relationship does not create liability for the financial firm

Liability only arises for the financial firm if there was actual or ostensible authority. I am satisfied that the adviser made a financial product recommendation, however given the nature of the

relationship was personal rather than professional, I consider the arrangement was outside the authority granted by Sentinel Wealth.

I am also satisfied the complainants have not relied on any holding out of the financial firm in relation to this conduct. While the complainants may have relied on the adviser's standing as a senior financial adviser at the financial firm to place trust in him, I am not satisfied this means that they understood his conduct to be within a professional capacity, or that they relied on his conduct being within that capacity.

While none of the factors listed above on their own conclusively mean the complainants did not consider the adviser to be acting a professional capacity, these factors cumulatively make this less likely.

For these reasons, I am not satisfied the complainants relied on the holding out of the adviser as a representative. I am satisfied that the overall conduct of the parties is sufficient to satisfy the requirements of s917D of the Corporations Act.

There is no reasonable prospect of success

As a result of the above assessment, there is no reasonable basis for any claim which may be presented to have any reasonable prospect of success as against the
financial firm, given it should have been clear this arrangement was not being provided in the adviser's professionally authorised capacity.

NOTE: This recommendation provides a logical assessment of the obvious situation. It makes the recommendations on similar cases impossible to reconcile.

8) AFCA is being 'gamed' by those who understand the inherent biases.

It is a little coincidental that a large number of cases were brought to AFCA in very close proximity to each other and that three of the complainants were represented by the same lawyer.
Those that understand the inherent biases of AFCA, in particular those lawyers who represent claimants, realise that there is absolutely nothing to lose by making a claim. The lawyers are able to generate additional fees and they know that AFCA will accept jurisdiction and have a bias to ruling in favour of the claimant.

9) Summary

The latest recommendation delivered by an ombudsman has been a total turnaround from what we have experienced over the last nine months. Given that the core circumstances of all these

claimants are the same, it clearly shows how incomprehensible the previous recommendations have been.

It is difficult to deny that there must be inherent biases at the core of AFCA. These biases seem to be to first accept cases which do not fall into jurisdiction and second to find a way to get money to claimants.

The Structure leads to moral hazard

No cost to the claimant no matter the outcome

The fact that people can make claims to AFCA at no cost to themselves and with the known bias in favour of the claimants, has resulted in a warped system and moral hazard. Together with the impact of the Royal Commission, the financial planning profession has been smashed with excessive and in some cases unfair and unmanageable legislation as well as market conditions making staying in business almost impossible.

The Professional Indemnity market has almost failed with premiums increasing at rates of up to 300% and policy wording resulting in unreliable policies. This situation is borne out by the necessity of additional funding by the industry for claims to insolvent firms.

AFCA promotes and encourages claims

AFCA behave like commercial enterprises promoting their products. They visit shopping centres as part of their promotional activity and encourage the public to make claims. In the recent NSW Supreme Court case DH Flinders vs AFCA, the court found that AFCA unjustly assisted and directed claimants and that its actions were not consistent with its obligation to deal with complaints in a way which is independent, impartial and fair and which provides procedural fairness to all the parties.

AFCA has no credibility amongst the financial services providers

Throughout this experience, we at SentinelWealth have sought advice from many professionals who have had AFCA experience. This includes lawyers who deal with AFCA, compliance people, senior managers and advisers. Without exception, two themes were common:

- None could believe that AFCA were taking cases from claimants who had never been clients,
- Every individual had a view that AFCA were very biased.

10) Recommendations

It may be that Sentinel is simply an unfortunate victim of the extremes that have taken place in the financial services industry. There is no doubt from our perspective, that the conditions under which financial planning firms are operating are extremely difficult and this incident has potentially created an example of how bad the implications can be for a firm that has done nothing wrong.

We are still struggling to deal with the significant threats to Sentinel and as a start would suggest that for AFCA to play a credible role in the industry, the organisation needs to significantly improve the way it operates and is perceived.

AFCA

1. There needs to be a better method of providing reliability to decision-making. At the moment, AFCA is a law unto themselves and their decisions cannot be challenged. AFCA is not bound by legal case law or their own precedents. There is no guidance on how decisions are made.
2. Rules of evidence: In our experience, AFCA ignores evidence at will. In one case, our file note taking contemporaneously was ignored on the basis that apparently the claimant denied what was said. In our view, some form of verbal evidence should be taken with an allowance for some testing of that evidence. Decisions are being made by AFCA which have enormous impacts on people's lives and the attitude shown to the evidence is flimsy.
3. Claimants who lose cases should bear the AFCA costs. This will ensure that a moral hazard around vexatious claims will be reduced. The cost of claims lost by the claimant should be borne by them and the claim not registered against the firm. Cases which are 'won' by the firm should also not be reported for purposes of PI insurance.
4. Right of appeal: Some form of right to appeal a decision and make verbal submissions should be available. The AFCA approach does not facilitate 'natural justice'.

Professional Indemnity Insurance

1. Limited liability cap per claim event – The financial planning profession should be similar to the accounting profession in the limits to liability.
2. Agreed policy wording and interpretation – The SentinelWealth PI policy includes an External Dispute Resolution extension as well as a Fraud and Dishonesty extension. However, the insurer has refused to provide indemnity on the basis of the APL exclusion. Greater clarity is required around the wording of policies and the interpretation of that wording.

Legislation

Section 917 D should be amended to deal with non-clients: It is unrealistic and unfair for a licensee to be held responsible for something an employee may say to a non-client.
Section 917 B currently makes the licensee liable for its authorised representatives whether or not they are acting within authority. Section 917D provides an exception if the representative clearly and prominently disclosed that they were not acting within authority. 917D also notes that a 'person must not hold out that conduct is within authority unless that is the case'.

Further clarification is necessary where 'the client' does not in fact have a customer relationship with the licensee but there has been no discussion about authority. It seems poor legislation which in practice is impossible to satisfy. How can a licensee, no matter how well they manage and supervise their representatives, be held responsible for what a representative says to someone who is not a client? The legislation needs to make the representative personally responsible for what they say to people who are not clients of the licensee. If responsibility is to be carried, it should be the person providing the 'advice' as is ASICs interpretation in RG 36 and 175.