AFCA: Biased Fairness

Submission by WT Financial Group Limited to Treasury to assist with its review of the Australian Financial Complaints Authority (AFCA)

WT Financial Group Limited

Level 11, 95 Pitt Street

Sydney NSW 2000

Tel: 02 9248 0422

26 March 2021

Index

About the submitter....2

Submission Introduction....2

Cultural Consumer Bias....4

Operational Consumer Bias....5

Inexperienced Case Managers....6

Moral Hazard....7

Professional Indemnity Crisis....8

Recommendations....9

Appendix 1....11

Appendix 2....13

Appendix 3....14

Appendix 4....17

Appendix 5....19

About the submitter

WT Financial Group Limited is an ASX-listed diversified financial services group that contains two distinct channels - being its primary business-to-business operations under its Wealth Today Pty Ltd subsidiary and brand; and its complementary direct-to-consumer operations under its Spring Financial Group brand.

Through its subsidiary entities it holds two AFSLs. One that has around 100 authorised representatives operating under a "dealer group" structure; and a second that previously has salaried advisers providing services direct to consumers.

It also holds an ACL.

As such it has three separate AFCA member entities within its group. Accordingly, it is well placed to make a submission based on first hand experience in dealings with AFCA.

Submission Introduction

This submission focuses on Part 1 and Part 4 of Treasury's submissions guidance and specifically on AFCA's dispute resolution of financial product advice disputes.

For ease of reference, we repeat Part 1 and Part 4 of Treasury's guidance here:

> *Submissions should address the following:*
>
> ***Delivering against statutory objectives***
>
> 1. *Is AFCA meeting its statutory objective of resolving complaints in a way that is **fair**, efficient, timely and **independent**? [Emphasis added]*
>
>   1.1. *Is AFCA's dispute resolution approach and capability producing **consistent**, **predictable** and **quality** outcomes? [Emphasis added]*
>
>   1.2. *Are AFCA's processes for the identification and appropriate response to systemic issues arising from complaints effective?*
>
>   1.3. *Do AFCA's funding and fee structures impact competition? Are there enhancements to the funding model that should be considered by AFCA to alleviate any impacts on competition while balancing the need for a sustainable fee-for-service model?*
>
>   *Please provide specific examples or case studies to support your responses. These may be provided to Treasury confidentially with any personal details of complainants and case references numbers omitted.*
>
> ***Internal review mechanism***
>
> 4. *Is there a need for AFCA to have an internal mechanism where the substance of its decision can be reviewed? How should any such mechanism operate to ensure that consumers and small businesses have access to timely decisions by AFCA?*

The issues we raise in this submission talk to the five emphasised words in Part 1:

- Fair
- Independent
- Consistent
- Predictable
- Quality

In our direct and repeated experience with AFCA, we do not believe that any of these five adjectives can confidently be used to describe either their posture or their outcomes.

This submission will comment on the following:

- Cultural Consumer Bias
- Operational Consumer Bias
- Inexperienced Case Managers
- Moral Hazard
- Professional Indemnity Crisis

We will address each of these with supporting material found in the Appendices.

Cultural Consumer Bias

The symptoms of Consumer Bias are numerous, but the AFCA Roadshow to solicit complaints has to be mentioned and near the top of the list. A 77 stop tour that started in Tasmania in September 2019 under the guise of raising consumers awareness about their rights.

This coincided with an extension of the statute of limitations for a complaint back to January 2008. This is no accidental timeline as it would cover all GFC related losses. This extended timeline was also at direct odds with an adviser's seven year record keeping obligation, exposing advisers to undefendable allegations.

The roadshow subtly encouraged the conflation of "losses" with "bad advice" and in so doing invited consumers to have a "free shot" at the possibility of recovering some losses, under the guise of being poorly advised.

As David Locke, AFCA CEO, said in September 2019[1]:

> If it's something you've **felt** strongly enough to complain about to your friends and family, **chances are you have a case to pursue**. [Emphasis added]

If an organisation repeatedly promotes "number of complaints" and "compensation awarded" as public metrics, it is quite logical to conclude that both culture and operations will work towards maximising both numbers. These numbers become a reason for being. They are repeatedly touted in AFCA's annual reports.

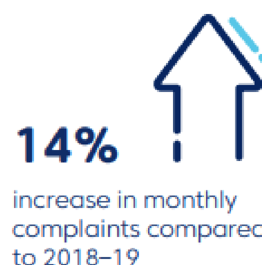
AFCA's latest 2019-2020 Annual Review promotes the 14% increase in complaints. An increase, in no small part, due to the Roadshow that started in September 2019.

Year at a glance

Between 1 July 2019 and 30 June 2020

Complaints received

80,546
complaints received



AFCA was not set up to be free legal aide. It was not meant to be an ideological, client oriented advocacy.

This organisational bias, if not caused by AFCA's monopoly status, is certainly fostered, and shielded by it. As there is no right of appeal or review, AFCA has a monopoly on the final outcome.

Being judge, jury and executioner without oversight or accountability is unlikely to breed balance and cultural course correction.

[1] AFCA launches national Financial Fairness Roadshow | Australian Financial Complaints Authority (AFCA)

Operational Consumer Bias

This consumer biased top-down culture then permeates operations.

We have had numerous experiences where AFCA seems to be committed to arriving at a predetermined conclusion. A characteristic of a Kangaroo Court.

If a client has lost money, it seems to be assumed that somewhere in the file is evidence of poor advice that led to that loss. It is a view that denies client agency and informed risk taking and decision making. And denies the presumption of innocence that the adviser in entitled to by law.

No client file is perfect, especially files that span several years. The imperfection of client files has been weaponised against the adviser and single items, wrinkles or even words are used to justify a judgment against an adviser.

See examples in Appendix 1 and Appendix 2.

The best example of word choice weaponisation is AFCA's relationship with Risk Profiles.

Risk Profiles are a dubious norm that exists within financial planning and has no basis within either law or ASIC regulatory guides. As part of Knowing Your Client, the law merely states that a client's "risk tolerance" is understood as part of that knowledge base. This can and should be done wholistically, with the norm of a questionnaire merely being one of many data points. There is no standard risk profile in the industry, and they can vary dramatically from one practice to the next both in length, depth, and word choice.

Knowing this, AFCA has chosen to treat the Risk Profile, and the words chosen as labels that flow from them as holy gospel. There is a complete exaggeration of their value, and this exaggeration is often used against the adviser. A client might have stated elsewhere in the file their comfort with risk, either in file noted conversation or actual historical actions and investments that confirm their tolerance to risk. But if the questionnaire categorises them differently, that is often given precedence.

This over reliance on Risk Profiles as psychological categorisation tools was an approach debunked by AFCAs predecessor FOS. There has been a regression on this front.

See examples in Appendix 3.

Inexperienced Case Managers

The majority of Case Managers we have dealt with have shallow or non-existent financial advice backgrounds.

Files involving significant wealth, structures and complexity are regularly assigned to people that lack the knowledge and experience to determine what is “fair”. Often the Case Manager is coming to terms with the law and the regulatory guides for the first time while handling the complaint. This inexperience combined with poor internal communication and oversight we believe to be the primary reason for the arbitrary and inconsistent nature of Recommendations and Determinations.

See examples in Appendix 4.

The hope that poor Recommendations made by Case Managers might be corrected at the Panel/Ombudsman (Determination) stage is also unfounded. There is regular dialogue between the Case Managers and an Ombudsman during the process that leads to a draft Recommendation, meaning that AFCA, as an organisation, is invested in the outcome and will rarely overturn a Case Manager’s Determination.

In addition, even in the event that an Ombudsman was to correct a flawed/poor Recommendation issued by an inexperienced Case Manager, the financial firm would have to incur thousands of dollars in additional cost simply to overturn a poor Recommendation.

The Case Manager and an Ombudsman (or Ombudsman led Panel) are on the same side of the table. They become conflicted. There does not seem to be an objective, independent review of Determinations by unconflicted parties.

This is a structural organisation and operational flaw.

Moral Hazard

AFCA has created a moral hazard by underwriting advised consumer risk taking.

The conflation of financial loss with poor advice may be a windfall for some clients that can take advantage of it and have a "free shot" at the adviser with AFCA's assistance. The hope is that some weakness in the adviser file can be relied on to recover some losses.

But it is clearly a negative for the whole advice industry that has become more tentative, gun shy and risk averse. Many Australian's need to take risks with their capital to attempt to achieve levels of return that make a reasonable retirement, within a reasonable timeframe, possible. An advice industry that has been clubbed into submission by an EDR, and that has become risk averse will not be a source of guidance and advice of how to best manage that risk taking.

AFCA's bias is a moral hazard that encourages advised clients to consider their advisers culpability for risks they were happy to take, after the fact. AFCA has monetised hindsight bias for a lucky and/or savvy group of advised investors. Unadvised investors aren't so lucky.

See examples in Appendix 2.

AFCA Recommendations repeatedly awarded compensation for clients with no actual, realised losses. Short term unrealised losses have been quantified and awarded while allowing the investor to retain the "loss making" investment and pick up all future gains.

Only at our repeated behest did AFCA then adjust the Determinations to require the client to sell the asset first and realise the loss, thus creating an altogether different type of moral hazard and underwritten incentive to dump the asset.

See examples in Appendix 5.

Professional Indemnity Crisis

The market for professional indemnity of retail financial advice in Australia has near collapsed, some would argue it has already done so.

The history of how this happened is both long and complex, but for most industry participants it is clear that the final nail in the coffin has been hammered in by AFCA.

Many insurers have made the decision to pull out of the space as they do not believe that complaints, they are called in to defend and cover will get a fair and independent hearing at AFCA.

The moral hazard that AFCA has created is a risk that cannot be priced into professional indemnity policies and premiums.

The consequences of this market collapse are both obvious and catastrophic:

- Fewer AFSLs able to obtain cover, which simply means fewer advisers able to operate and assist Australians.
- Much higher premiums (doubling or tripling) for those that do obtain cover. A cost that is passed onto consumers making advice even less affordable and skewing the service towards the wealthy few rather than the average Australian.
- Overseas insurers opportunistically entering the space with exorbitant premiums and diminished terms (much lower quality “paper”). AFSLs are being forced into these lower quality policies as without them they cannot keep their doors open.

Recommendations

In conclusion, we make the following recommendations:

Cultural Change

AFCA, as an organisation needs a resetting cultural change.

This would require internal training so that all of the people operating in the business understand that they are not consumer advocates. That their role, on behalf of the members, is to be a fair and independent dispute resolution service. No more and no less than that.

Case Manager Assignment – Simple vs Complex Cases

Matters need to be assigned to people with the relevant experience.

Simple Fee-For-No-Service complaints, where the adviser didn't give a review and didn't earn their annual service fee, can be handled by anyone. But complex matters involving, for example, complex products, retirement planning, SMSFs, trusts, defined benefit funds etc. need to be handed to Case Managers with the relevant experience.

Cross Examination

Further, complex matters that involve significant awards or claims, need to be conducted in a court based environment. It can be a low cost one, and a no costs one for the consumer, similar to what you would see with Fair Work Australia.

It's all too easy for consumers to become keyboard warriors and make outlandish claims via email, constantly pushing more and more at the Case Manager often being guided by the Case Manager. Contrast that to a courtroom environment, with an Ombudsman sitting at the front, and the opportunity for the financial services provider or their representative to cross examine on particular points. That's where you can get to the truth of complex and important matters.

Right of Appeal

Finally, regardless of decisions, the member needs the right to appeal outside of AFCA to a third party, that’s not conflicted, such as the Administrative Appeals Tribunal.

The only alternative at the moment is the prohibitively expensive option of the courts. The courts are likely to ultimately decide that you made a contract as the member. That you agreed for AFCA to be judge, jury and executioner within that contract. That you permitted them to disregard the law and introduce this notion of what they think is fair.

So the courts don't provide the relevant protections. There needs to be an ability to appeal to an Administrative Tribunal.

Solution for Professional Indemnity crisis

Serious consideration will need to be given to a government step-in to the public indemnity insurance market to ensure that not only can licensees continue to operate but consumers are afforded protection.

Ultimately if the crisis continues spiralling in the current fashion, we can envisage many licensees being forced into a position of needing to put companies into administration thereby losing cover for consumers for historical claims.

Appendices

Appendix 1

The consumer bias in AFCA Case 627203 is evident throughout the complaint file but is most apparent in two circumstances:

1) Investment property valuation; and
2) Contemporaneous evidence being ignored.

Investment Property Valuation

In this case, AFCA determined the advice to be inappropriate which then resulted in a process of asset valuation and then loss calculation. In this case, given some eight (8) months passed between recommendation and determination, there were two separate discussions over the appropriate value to be used in the loss calculation.

The first valuation was assessed prior to the recommendation being issued and the financial firm provided written confirmation from the lender who provided the LRBA to the complainants' SMSF to settle the property. While the lender stated that they would not provide the valuation report, they provided written confirmation that the valuation came in at $440,000. Further to this, the lender confirmed, again in writing, that the maximum loan-to-value ratio was 70% meaning that the property could not have been valued below $440,000 as the loan provided was $308,000. This was again confirmed within the loan documents and the initial loan statement.

To further their case, the complainants offered two "valuations" of their own which came in the form of two off the cuff short emails from two real estate agents stating the property would likely sell for between $365,000 and $390,000. Neither agent had any experience in valuation nor were they certified practicing valuers (CPV).

In the recommendation, the case manager took the mid-point of the two appraisals provided by the complainant and discarded the valuation provided by the financial firm as it was apparently "unverified".

The second valuation was sought again by AFCA prior to the determination being issued. Given the time that had passed, the financial firm paid for a new formal valuation to be completed by a separate CPV. This time it came in at $445,000 and the report was provided to AFCA in full.

The complainants relied again on the previously supplied emails as to their assessment of value.

In the response received from AFCA with respect to the valuation provided, the financial firm were told, by the lead Ombudsman, that she had concerns over the validity of the valuation provided by the financial firm and expressed her opinion that real estate agent appraisals were more accurate based on her review of the comparable sales.

It is incredible that someone holding such a high position at AFCA feels comfortable disregarding the opinion of a genuine subject matter expert in favour of the opinion of someone with no expertise in said subject matter. This is not mention that the ombudsman herself held a no experience in property valuation.

Contemporaneous Evidence Being Ignored

AFCA states that:

> "*We give more weight to written records created when the alleged conduct took place rather than records created at a later date. Contemporaneous evidence is more likely to accurately reflect what was said"*

A critical part of the strategy, that was designed in collaboration with the client, was their clear view that they did not want to invest in shares. They wrote this in their fact find and signed off that it was correct, it was confirmed again during the strategy call and then finally it was written in their SoA and signed off that it was correct a second time.

In the recommendation the case manager went directly against AFCA's policy with respect to contemporaneous evidence in stating:

> "*complainants clarified during course of the AFCA complaint, their intention was that they did not want direct share portfolio. Complainants state they were open to holding shares in managed funds. I accept this as a plausible explanation".*

It is apparent that the case manager read words into the file that did not exist simply to support the position that he wanted to make, that is, that the financial firm provided inappropriate advice.

Appendix 2

The consumer bias in AFCA Case 645539 is evident in the way that AFCA has ignored the fact that this is, and always was, a complaint about investment performance.

AFCA's scheme rules and operational guidelines state that it cannot consider complaints that are solely about investment performance of a financial investment. Given the complaint did not concern non-disclosure or misrepresentation, AFCA should not have considered it.

The initial complaint, as well as subsequent submissions by the complainant made it evidently clear that this was an investment performance complaint, but AFCA had no interest in seeing it that way. The complainants repeatedly complained about the rent reducing and the capital growth not being in line with their expectations but at no point did they complain that property was an unsuitable asset class for them.

There is no question the complainants were entirely comfortable, and familiar with, the risks associated with geared residential property. They had bought, built or developed no less than seven (7) separate properties using debt, they purchased another investment property with debt about 18 months after implementing the financial firm's advice and one of the complainants was a CPV who's job is to ascertain risk with respect to real property.

While the above seems to paint a clear picture that the complainants would not ever have made the argument that property was not suitable for them, it was confirmed beyond doubt at the conciliation call.

During the conciliation, prior the recommendation, the complainants were asked if they would have made a complaint if the property had risen in value, to which they stated they would not. The complainants made it very clear that they were complaining about the fact the property was perceived to have gone down in value. Attending this conciliation call was the AFCA conciliator as well as the case manager.

The financial firm raised this with AFCA on several occasions only to be ignored as it did not fit the narrative that AFCA, and the case manager, wanted to pursue.

Appendix 3

There have been multiple cases in which AFCA has weaponised risk profiles to attack the appropriateness of advice, the main examples of this are:

a) 627203

b) 645539

c) 677150

FOS stated in the Circular Issue 6 in 2011:

> *"It is important to remember that whatever method is used it is only a tool for FSPs to use as a part of the process of determining clients' tolerance to risk. FOS also recognises that skilled advisers can secure their clients' informed consent without using risk profiling tools."*

ASIC stated in Report 362 in Recommendation 11:

> *"Advisers should ensure that risk profiling tools are just one of the methods used to understand their clients' risk profile, and that any limitations of such tools are considered when recommending a client strategy".*

a) 627203

In 627203, the case manager relied entirely on the outcome of a risk profiling tooling (the risk profile questionnaire) to claim the investment strategy was inappropriate rather than determining the complainants' tolerance to risk.

Such a myopic view is not only illogical, it goes against the position taken by AFCA's predecessor scheme (FOS) and ASIC.

We appreciate that gearing generally increases the risk of an investment, however it does not then follow that all geared investments are riskier than all ungeared ones. It is critical to assess the gearing ratio, the risk of margin call (if any), the volatility of the underlying and the ability to meet repayments.

In this case, the complainants; were both specialist medical doctors with high earning potential, had 30 years until retirement, had a gearing ratio of sub-70%, were borrowing just $300,000 with a term of 25 years, the security was inner city residential property with zero risk of margin call and the complainants subsequently decided to borrow $1.8M of owner occupied debt outside of super against a non-income producing asset.

At the time the strategy was designed, the complainants said they were comfortable with gearing and already owned a geared investment property in their own name which they were selling to fund their owner-occupied home.

The financial firm's view is that we went into great detail to know our client in determining an appropriate strategy.

The case manager chose to ignore all of this information and instead decided that, because of the outcome of an eight-question risk profiling survey, the advice was inappropriate.

b) 645539

As with case 627203, case 645539 again highlights AFCA's deliberate approach to pick a single aspect of a file to attack the advice, rather than looking at the file in its entirety. In this case we have another example where the case manager determined the advice to be inappropriate solely because of the outcome of an eight-question risk profiling survey.

Further to the points outlined in Note 2 above, the complainants; were 15 years from retirement, preferred property over shares, had experience trading options, had no super, owned a debt free

investment property and an owner occupied home with $200,000 debt, one of the complainants was a qualified CPV, their biggest concern was losing money in share markets or managed funds and wanted to be financially free and not rely on others in retirement.

It is clear to the financial firm that due to the lack of super and the debt on the owner-occupied home that the only option to build any further retirement wealth was through gearing. The only other alternative was a guarantee that they would be heavily reliant on others (Centrelink) throughout retirement.

The case manager elected to ignore all of this information and proceeded to determine that, as a result on an eight-question risk profiling survey, that the advice to invest in geared real property was inappropriate.

c) 677150

Unlike the previous cases, 677150 has yet to issue a recommendation however, it has been made clear by the complainants that their complaint is an investment performance complaint, yet AFCA continues to hear it.

In October 2019, the complainants provided a submission to AFCA in writing that stated:

> "leveraging itself was not the problem. Leveraging into inappropriate investments was the problem"

From the above it is clear that the complainants had no issue with gearing. It also is not in question as to whether the complainants had the expertise or ability to understand the risks of gearing. Not only had the complainants invested in geared property before, the below is an excerpt from the one of the complainants LinkedIn profiles:

Big Four Bank

Group Finance - Business Engagement Manager - BPB/ IB&M

May 2006 – Present · 14 yrs 11 mos
Sydney

My current role is managing a team of business/ technical analysts charged with enhancing management reporting for Business and Private Bank/ Institutional Banking & Markets Finance teams – that is for the corporate customer side of [redacted]
Reporting is primarily focused on supporting KPIs of customer sales teams including actual v plan for revenues and balances.
Delivery of enhancements requires:
• Interaction with BPB/ IB&M Finance teams to gather requirements and approve solutions
• Interaction with various development teams (Data Delivery/ Data Warehouse/ Reporting/ Product System) to build the solutions
• Detailed understanding of how product system measures are loaded into the Group Data Warehouse and posted into General Ledger
• Detailed understanding of current reports – and Report Delivery team processes
My team manages a mix of small and medium size changes, producing requirement and solution documentation and testing. Larger changes are handled via specific project teams and my team assists in providing requirements, solution design advice, testing and deployment approval to these projects.

Further to this, at the conciliation call on 3 March 2020, attended by both the conciliator and the case manager, the complainants again stated that "leverage was not the problem". When asked if they would have complained had they bought into a market that had risen (Sydney was given as the example), they responded that they would not. They then went on to state that if they had bought in Sydney, the strategy would be ok in their eyes.

If the complainants are ok with leverage, would have been ok if the asset they bought had gone up, the complaint can only be solely about investment performance.

Appendix 4

Since the start of the 2018 calendar year we have ten complaints that have reached AFCA which are at various stages of the process. As a firm that specialised in property and SMSF advice, out of those ten, nine are complex cases of advice that all involve geared property recommendations with eight of those nine also including SMSF advice and LRBAs.

A key aspect of financial advice is that one can only advise on a product or service that they are qualified and suitably experienced in. The same should go for advice review and remediation.

The first stage in the AFCA process is registration and referral whereby AFCA determines whether or not it has jurisdiction and, if it deems that it does, then proceeds to refer it to a suitably qualified case manager.

There is no question this part of the process is failing.

Due to the nature of the AFCA process, it is often not until months later than a financial firm gets any ability to assess the skillset or knowledge base of the case manager. By this time, it is generally too late to get any value from bringing in a new, suitably qualified, case manager as the ability to come in with fresh eyes is gone. The new case manager will simply review the existing notes, speak to the former case manager, potentially read their flawed recommendation and cherry pick the file to support their colleague.

Case 627203, 645539 and 677150 are all cases where an inexperienced case manager was appointed initially, removed later down the track only for the financial firm to have poor recommendations issued that were written to support their colleagues previous flawed ideas and opinions.

Examples of this inexperience can be found in retrospectively using modern day standards and law to judge historical advice.

In cases 627203 and 691451 both case managers, who were since removed following complaints from the financial firm, sought to retrospectively apply modern day guidance with respect to SMSFs starting balances. Both case managers made reference to the ASIC Info Sheet 2016 to state that a minimum starting balance for an SMSF was $200,000 and therefore was not appropriate for the complainants.

Aside from missing the numerous sections of that ASIC press release that provide aspects that can lead to an SMSF making sense under that balance, the case managers ignored (or were simply unaware) that; (1) the SoAs pre dated the info sheet and no such guidance or law existing at the time of the advice and (2) an ASIC press release (Info Sheet) does not constitute law.

In case 677150 the case manager, prior to being removed after a complaint from the financial firm, requested evidence of alternative options or strategies being considered while assessing the appropriateness of an SoA written and provided in early 2012. When it was raised that the consideration of alternatives came in as a part of the FOFA reforms on 1 July 2013, the case manager incorrectly pointed to the reasonable basis requirement. The case manager was then provided with ASIC and FOS' positions stating that advice does not need to be ideal, perfect or best, and that it does not require alternative considerations:

ASIC guidance

RG 175.113 All personal advice must comply with the 'suitability rule' (or 'reasonable basis for advice rule'): s945A. Under this rule, where a providing entity provides personal advice to a retail client, each of the following three elements must be satisfied:

(a) the providing entity must make reasonable inquiries about the client's relevant personal circumstances;
(b) the providing entity must consider and investigate the subject matter of the advice as is reasonable in all the circumstances; and
(c) the advice must be 'appropriate' for the client.

RG 175.117 To comply with the Act, personal advice does not need to be ideal, perfect or best, but it must satisfy each of the three elements set out in RG 175.113.

Following this response, the case manager refused to engage further and threatened that a failure to provide evidence of alternative considerations would be factored into the merits of the complaint by AFCA.

In the same case, the same case manager also sought to apply the FPA code of conduct to a financial firm that is not, and never was, a member of the FPA.

Appendix 5

Out of the ten complaints we have had since 2018, eight of these complaints relate to unsold assets that that have dropped in value since they were purchased. That is to say, the complainants are yet to suffer loss.

Out of these eight complaints, five have issued recommendations of which all five were in the favour of the complainants and requested significant compensation payment without commenting on the concept of direct financial loss or whether the asset could be held or whether it would need to be sold.

The financial firm has since complained to AFCA and challenged the concept of a direct financial loss. AFCA has since issued determinations on these five cases which are:

(1) 18/0715

(2) 624981

(3) 627203

(4) 645539

(5) 668287

Prior to the issuance of the determinations, AFCA informed the financial firm of the approach they would take, which was to inform the complainants that they would need liquidate the properties in order to receive compensation. Further to this requirement, AFCA assured the complainants that the financial firm would be liable for any, and all, loss that was incurred regardless of the sale price.

It is clear to the financial firm that AFCA's approach on these cases has created a moral hazard that it has not yet determined how to solve.

To the financial firm the moral hazard is clear in that the complainants are able to dump the asset at any price, knowing that the financial firm will be required to cover any shortfall between the predicted value used in the determination and the actual sale price.

This is the literal definition of moral hazard.

In a normal sale, an Investor is driven to act properly in order to achieve the maximum sale price they can in the market. The fair market price. In the scenario created by AFCA, there is no such pressure as their loss has been underwritten by the financial firm at the direction of AFCA.

Even if the underwriting of loss does not create a circumstance where the Investor looks to dump the asset to maximise impact to the financial firm, it is likely that a lower sale price is achieved than if the pressure of loss was borne by the complainants themselves.

Further to this, the notion of telling the Investor that "if you sell, you will receive money" creates a moral hazard.

That AFCA waited until after issuing recommendations (all in favour of the complainant) to ask the complainants whether they wanted to sell or retain the assets is wrong, as the answer to the question is now driven by the fact that he/she believes that he/she will receive payment if he/she sells. The decision made by the complainant now, is largely driven by the risk-free award that comes with the sale and not whether the complainant genuinely does not feel the investment was appropriate.

In our eyes, there is no question that it is unethical for AFCA to recommend outcomes that create such moral hazards.

We raised this issue to AFCA on each and every one of the cases listed above and received no response on this issue.

We requested that AFCA outline to us how it intended to navigate this moral hazard that they created in order to arrive at a potential outcome that is fair, impartial, and ethical and received no such response.