



Examining AFCA decisions: Insights for improving financial planning practice

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In this article, we examine decisions made by The Australian Financial Complaints Authority (AFCA) between January and March 2023. AFCA is an independent organisation that provides dispute resolution services for consumers and small businesses seeking resolutions for their complaints against financial firms. AFCA's decisions are binding on the financial firms. Under the *Corporations Act 2001* (Corporations Act) Australian Financial Services License holders who serve retail clients must have a dispute resolution system that includes membership of the AFCA scheme.

The aim in reviewing these decisions is to extract themes that could be of value to financial advisers in their professional practice, as well as to those who may be engaged in the various stages of the dispute resolution process.

Getting best interests right

The Quality of Advice Review (QAR) and subsequent government response has seen the best interests duty featured in the news recently, with talk of substituting the best interests duty for a 'good advice' duty. Additionally, the QAR raises the possibility of removing some or all of the 'safe harbour' provisions set out in the Corporations Act.

As part of this discussion, it is worth remembering that:

- Standard 2 of the *Financial Advisers Code of Ethics 2019* (Code of Ethics) holds advisers to the standard of acting in the best interests of clients
- It is hard to act in line with the values of competence and diligence in the Code of Ethics, without acting in the best interests of clients, and
- Regardless of whether the duty to act in a client's best interests remains specified in the 'checklist fashion' of the safe harbour steps, it is also expressed in legislation in section 961B(2) of the Corporations Act.

The crucial starting point in giving good advice is properly understanding and accurately recording a client's goals. These goals should align with what the client would express to you as their adviser, or perhaps to a trusted friend, in terms of what they would like to achieve through obtaining financial advice.

Distinguishing goals from strategies

AFCA Determination 849519* gives us an illustration of an instance where the client's goals are confused with the strategies or methods of achieving the goals:

The decision shows that the following elements were *not* considered to be goals or objectives:

- retaining strategies available via particular products
- having superannuation benefits actively managed by specialists
- improving diversification, or
- investing cost-effectively and in line with the risk profile.

These statements were considered to be methodologies for achieving a goal or objective, not goals or objectives in and of themselves. In fact, it was found in the case that only one client objective was articulated:

...to provide for a comfortable debt-free retirement, achieving an income in retirement of at least \$41,160 per annum with additional benefits from the Centrelink pension.

This decision emphasises the need to accurately distinguish between client goals and the methods used to achieve them and underscores the importance of aligning financial advice with the client's true objectives.

When goals are limited or generic

Similarly, AFCA Determination 915169 was highly critical of the fact-finding process and the limited goals that were captured. Specifically, this decision took issue with goals recorded as follows:

1. You want to invest in line with your risk profile.
2. You want your investment portfolio to be constructed and managed by your financial adviser.
3. You want a diversified portfolio that is cost-effective yet has the potential to outperform its benchmark.
4. You do not need income from the investment.
5. You want to retain access to the funds.

Not surprisingly, the decision levelled criticisms as to the validity of these goals on the basis that; they only identified investment objectives; the first three were generic and could apply to every client; the fourth and fifth were not explored further to discover why no income was required from the investment, yet retaining access was also a priority and; none of the goals was particularly personal in nature.

In addition, it was observed that the client was not given either the opportunity to offer their own goals, or to review those that the adviser had captured from their discussions, prior to advice being provided.

The inadequacy of the fact-finding process is clear in this case as a substantial part of the complaint related to a goal of using the funds to purchase a property, which was not documented. Whether the client communicated this goal to the adviser was disputed by the parties, but the poor quality of the goal-identification process undertaken indicated that the adviser had failed to adequately understand the client's needs and objectives in formulating the advice.

Gaining informed consent

The decision also gives us an example of how *not* to gain informed consent. It is not always straightforward to demonstrate that a client has understood and agreed to proceed with advice. Some advisers point to formal documents like an authority to proceed, or contempora-

neous file notes detailing the discussion that took place. Others choose to record their meetings so there is a conclusive record of the discussion including questions and answers that help clients to make their decision before putting pen to paper.

However, it is hard to assert that your client understood your advice and its implications when it is delivered to them with a covering note such as the one sent in this case, which stated:

As discussed, I have attached the Statement of Advice with my recommendations. It is quite boring so I wouldn't recommend you read all of it. I will point out the main pages when we meet to discuss it.

Wholesale advice, done properly

AFCA Determination 900122 gives an example of a case where a financial firm undertook the proper process to determine that a client could be considered a wholesale client. Wholesale advice is subject to less stringent requirements than advice provided to retail clients. In this case, AFCA found in the firm's favour.

Who is a wholesale client?

The Corporations Act defines retail and wholesale clients—the default position being that all clients are retail clients unless an exemption applies to make them a wholesale client. Section 761G(7) of the Corporations Act sets out the meaning of retail client and wholesale client. Essentially, a client may be treated as a wholesale client where they have net assets of at least \$2.5 million or gross income of at least \$250,000 for the last two financial years as certified by a qualified accountant.

The complainant, Mr W, was the corporate trustee of a family trust. Mr W received advice to invest in a technology company which subsequently failed. He claimed that he was a retail client and was seeking to recover his losses. The financial firm's position was that Mr W was a wholesale investor who received advice that was appropriate at the time it was given, and that they (the financial firm) could not have reasonably known of conduct occurring at the technology company that would lead to the collapse of its share price.

Mr W claimed that at the time of the relevant conduct, the trust had two directors—himself and his wife. While Mr W accepted that he would be considered a wholesale client in his individual capacity, he claimed that as only one of two directors he had insufficient control of the trust to render it a wholesale client.

Before providing advice to Mr W the financial firm had obtained accountant's certificates confirming that the client met the assets test specified in sections 708(8) and 761G(7)(c) of the Corporations Act for wholesale



The quote

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clients. Further, the firm accessed the Australian Securities and Investments Commission (ASIC) database to establish that Mr W was listed as the sole director and secretary.

AFCA found that as Mr W was the sole director of the trust at all material times, it was reasonable for the financial firm to treat the complainant as a wholesale client. As a result, the lesser obligations that apply to wholesale advice were applied and no negligence was found on the part of the financial firm.

It is hoped that these AFCA decisions shed light on some areas of financial planning that have given rise to disputes and provide some insights that financial professionals can draw on to enhance their practices and deliver optimal outcomes for their clients. **FS**

**The decisions referred to in this article can be found by accessing the AFCA website at www.afca.org.au and using the case number search function.*