

FINANCIAL PLANNING ASSOCIATION OF AUSTRALIA

**CONDUCT REVIEW COMMISSION
DISCIPLINARY PANEL**

REGARDING: **DARREN TINDALL**

DETERMINATION: **CRC 2016_2**

PANEL: Mr M Vincent, Acting Chair
Ms C Feher CFP
Mr G Cook CFP

DATE OF DETERMINATION: 21 December 2016

CATCHWORDS: *Code of Professional Practice – Code of Ethics – Ethics Principle 2: Integrity – breach – lack of honesty – lack of candour – submission of online insurance application false in material particulars – recommended transfer of insurance policy to new insurer without disclosures*

Code of Professional Practice – Practice Standard 7.1 – Members conduct themselves in a professional and ethical manner – breach – lack of high standard of professional conduct – lack of high standard of ethical conduct – submission of online insurance application false in material particulars – recommended transfer of insurance policy to new insurer without disclosures

Code of Professional Practice – Rules of Professional Conduct – Rule 7.2 – breach – engaging in act that was misleading, deceptive, dishonest and fraudulent – submission of online insurance application false in material particulars – recommended transfer of insurance policy to new insurer without disclosures

Code of Professional Practice – Code of Ethics – Ethics Principle 7: Confidentiality – breach – failure to protect and maintain client information in a manner allowing access only to those authorised – email to third party listing client names, insured incomes and policy balances

Code of Professional Practice – nature of *Code* – nature and interrelationship of Code of Ethics, Practice Standards and Rules

Disciplinary Regulation 2011 – sanction – expulsion

CASES CITED:

Re Anthony Walker CRC 2008_1

DATES OF HEARING:

1-2 June, 9-10 August 2016

PLACE MADE:

Sydney

APPEARANCES:

Mr M Murphy for the FPA
Mr A Suthers for Mr Tindall

DETERMINATION

1. The Panel decides:
 - (a) Breaches of Ethics Principle 2 of the Code of Ethics of the *Code of Professional Practice* are proven. Mr Tindall:
 - (i) acted with a lack of honesty and lack of candour by submitting an online application for life, TPD and income protection insurances on behalf of a client when he knew the application contained false answers as to the client's medical history; and
 - (ii) acted with a lack of honesty and lack of candour by recommending in a Statement of Advice that the client transfer insurances obtained as a result of the application in (i) to a new insurer without disclosing the client's medical history.
 - (b) Breaches of Rule 7.2 of the *Code of Professional Practice* are proven. Mr Tindall:
 - (i) engaged in an act of a misleading, deceptive, dishonest and fraudulent nature by submitting an online application for life, TPD and income protection insurances on behalf of a client when he knew the application contained false answers as to the client's medical history; and
 - (ii) engaged in an act of a misleading, deceptive, dishonest and fraudulent nature by recommending in a Statement of Advice that the client transfer insurances obtained as a result of the application in (i) to a new insurer without disclosing the client's medical history.
 - (c) Breaches of Practice Standard 7.1 of the *Code of Professional Practice* are proven. Mr Tindall:
 - (i) failed to conduct himself professionally or ethically by submitting an online application for life, TPD and income protection insurances on behalf of a client when he knew the application contained false answers as to the client's medical history; and
 - (ii) failed to conduct himself professionally or ethically by recommending in a Statement of Advice that the client transfer insurances obtained as a result of the application in (i) to a new insurer without disclosing the client's medical history.
 - (d) Breach of Ethics Principle 7 of the Code of Ethics of the *Code of Professional Practice* is proven. Mr Tindall did not protect client information in such a manner that allowed access only to authorised persons, by emailing a third party a list containing client names, insured incomes and policy balances.

[signed]

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Mr M Vincent, Acting Chair
Ms C Feher CFP
Mr G Cook CFP

THE PANEL'S REASONS FOR ITS DETERMINATION

[1] THE NATURE OF THE DETERMINATION AND REASONS

[1.1] What the Determination is about

[1.1.1] The Determination decides the outcome of a disciplinary hearing that has been held to inquire into allegations that Mr Tindall engaged in conduct in breach of the FPA's *Code of Professional Practice* ("*Code*").

[1.2] The purpose of these Reasons

[1.2.1] The purpose of these Reasons is to state the reasons for which the Panel has made the Determination.

[1.3] Who has made the Determination and Reasons

[1.3.1] The Determination and Reasons have been made by a Disciplinary Panel ("Panel") of the FPA's Conduct Review Commission ("Commission"). The Commission is established under the FPA Constitution and the FPA's *Disciplinary Regulation 2011* to review and regulate the conduct of FPA members.

[1.3.2] Members of the FPA, when commencing or renewing their membership, are bound by the Constitution and agree to be bound by any regulations made by the FPA Board. Such regulations include the *Code* and the *Disciplinary Regulation*.

[2] THE DISCIPLINARY PROCEEDINGS

[2.1] How the disciplinary proceedings came about

[2.1.1] On 21 August 2014 the FPA received a complaint concerning Mr Tindall. The complaint made allegations concerned work Mr Tindall had done for a client during November and December 2013, and an email sent by Mr Tindall in December 2013 containing client information.

[2.1.2] The FPA investigated the complaint.¹ During the investigations there was an interview held on 24 February 2015 between the FPA and Mr Tindall at the FPA offices. At the conclusion of its investigations the FPA reported to the Chair of the Commission recommending that disciplinary proceedings be commenced

¹ Complaints are made and investigated according to provisions in the *Disciplinary Regulation*.

against Mr Tindall. The proceedings were authorised, following which the FPA issued² a Notice of Disciplinary Breach to Mr Tindall.

[2.2] **The case to answer**

[2.2.1] The Notice of Disciplinary Breach alleged that conduct of Mr Tindall amounted to four breaches of the *Code*:

- A breach of Rule 7.2 of the *Code* in relation to an online insurance application that was submitted for a client that falsely failed to disclose medical conditions;
- A second breach of Rule 7.2 in relation to a recommendation in a Statement of Advice that the client transfer her insurance, including the insurance that had been received consequent to the first alleged breach, to a new insurer, again without disclosure of the medical history;
- That the instances of conduct allegedly breaching Rule 7.2 also breached Ethics Principle 2 of the *Code*;
- A breach of Ethics Principle 7 of the *Code* by sending an email that improperly disclosed client information.

[2.2.2] After Mr Tindall had responded to the Notice, the FPA recommended to the Chair of the Commission that the alleged breaches proceed to hearing before a Panel. The Chair determined that the alleged breaches should proceed to a hearing, but additionally determined that the alleged conduct also disclosed a case to answer as to breach of Practice Standard 7.1 of the *Code*.

[2.3] **The hearing**

[2.3.1] A hearing was initially scheduled for Monday 30 November 2015. The Notice of Hearing³ in respect of all 5 alleged breaches was sent to Mr Tindall's then solicitor. The FPA thereafter sent follow-up correspondence, including pre-hearing directions made by the Panel Chair, on a number of occasions. The FPA did not receive any responses until, on Friday 27 November 2015, an email from the solicitor advised that he no longer acted for Mr Tindall and that Mr Tindall had advised the FPA of that by email on 20 November 2015. The solicitor apparently did not think it necessary to advise the FPA that his instructions had ended.

[2.3.2] The FPA could not locate any such email, but was able to contact Mr Tindall directly by email. In one reply Mr Tindall stated that his solicitor's services had been terminated because the matter was at an end. On Mr Tindall's

² 11 August 2015.

³ Dated 27 October 2015.

version, the solicitor had also not thought it necessary to forward to Mr Tindall correspondence received from the FPA concerning the hearing.

[2.3.3] In the circumstances the Panel adjourned the hearing.

[2.3.4] Mr Tindall subsequently retained his current solicitor. A new hearing date of 4 March 2016 was set. Unfortunately that date also had to be vacated; primarily because of witness unavailability. The hearing finally commenced on 1 June 2016. After an adjournment on 2 June, the hearing resumed on 9 August 2016.

[2.3.5] At the conclusion of the hearing, on 10 August, a timetable was set for the parties to prepare written submissions. Given the contest as to events, the determination to be issued by the Panel would be confined to findings of whether there had been breaches of the *Code*. In the event the Panel was to find breaches proven, the parties would then have an opportunity to make submissions as to what, if any, consequent action was warranted.

[3] **THE CODE**

[3.1] **What the *Code* represents**

[3.1.1] As stated in its Introduction, the *Code* is a form of professional regulation and “is the key document detailing the obligations of FPA members in the financial planning profession.”

[3.1.2] It is intended to operate alongside government regulation and also inform licensee compliance requirements.⁴ It is designed to reflect the perspectives of members’ peers and other relevant professionals as to professional practice in financial planning.⁵

[3.1.3] The *Code* is thus the primary vehicle for professionalising conduct of those financial planners who are FPA members. The *Code* observes that professionalism “is a measure of clear expectations of professional conduct, individual commitment to those obligations and preparedness to be held accountable by peers and the community”.⁶

[3.1.4] As stated in its Introduction, the *Code* applies to all services provided by a member in their professional capacity; not necessarily limited to client relationships, but potentially extending to dealing with other members of the profession, other professionals and third parties.⁷

[3.1.5] The *Code* contains three enforceable components:

⁴ *Code*, Introduction, page 2.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Page 3.

- The Code of Ethics
- Practice Standards
- Rules of Professional Conduct.

[3.1.6] As stated, the current proceedings allege breaches of each of the Code of Ethics, the Practice Standards and the Rules.

[3.2] **The Code of Ethics**

[3.2.1] The Code of Ethics is described in the *Code* as follows:

The Code of Ethics is the top layer of professional regulation.

It establishes the ethical foundation for the other FPA standards of professional conduct including Practice Standards and Rules of Professional Conduct. ...

[3.2.2] The eight principles in the Code of Ethics serve as minimum benchmarks for professional behavior.⁸

[3.3] **The Practice Standards**

[3.3.1] The Practice Standards are intended to state the expectations of practice at the level of the reasonably diligent financial planner acting competently. They are intended to provide confidence and certainty about the professional obligations of members.⁹ They are to be read in conjunction with the Code of Ethics.¹⁰

[3.4] **The Rules**

[3.4.1] The Practice Standards represent the broad-based thematic rules of financial planning; the Rules of Professional Conduct are an elaboration of those rules.¹¹

[3.4.2] The Rules of Professional Conduct are introduced in this way:

The Rules of Professional Conduct are the third layer of professional regulation. The Code of Ethics outlines the ethical principles for the profession and the Practice Standards describe expectations of practice for FPA Members. The Rules of Professional Conduct (“The Rules”)

⁸ Page 6.

⁹ *Code* page 9.

¹⁰ *Code* page 8.

¹¹ *Ibid.*

establish detailed obligations attaching to FPA professional membership.¹²

[3.4.3] The Rules have been substantially revised from the Rules of Professional Conduct that were instituted in 1997. The *Code*, at page 10, lists the purposes and functions of the Rules. These purposes and functions are to:

- complement the Code of Ethics and Practice Standards;
- align with global standards and expectations;
- elaborate on the professional obligations arising from the 6 Step Financial Planning Process; and
- prescribe acceptable limits to specific practices, or the detailed application of Practice Standards.

[3.4.4] The *Code* goes on to comment: “Some Rules may be designed to encourage particular behaviours or to curb perceived risks of malpractice. ... The Rules in relation to Practice Standard 7 address general obligations of conduct as well as ongoing obligations that apply throughout the financial planning process.”

[4] **THE ISSUES FOR THE PANEL’S DETERMINATION**

[4.1] A number of the issues arise from the cases to answer stated in the Notice of Disciplinary Breach, together with the additional case to answer in regards of Practice Standard 7.1 stated in the Notice of Hearing. Additionally, the various submissions made by the parties have posed a number of issues for consideration.

[4.2] The issues are:

- The regularity of the proceedings.
- Whether Mr Tindall can be afforded a fair hearing and thus whether the Panel should be satisfied the allegations are substantiated.
- Whether the alleged breaches of Practice Standard 7.1 should be proceeded upon.
- Whether Mr Tindall completed the online application for insurance on the afternoon of 1 November 2013, and whether in doing committed a breach of any of Ethics Principle 2, Practice Standard 7.1 and Rule 7.2 of the *Code*.
- Whether Mr Tindall, in advising the client to roll over the UniSuper insurances to Asgard, committed a breach of any of Ethics Principle 2, Practice Standard 7.1 and Rule 7.2 of the *Code*.

¹² *Code* page 10.

- Whether in sending the email of 18 December 2013, Mr Tindall breached Ethics Principle 7.

[5] THE REGULARITY OF THE PROCEEDINGS

[5.1] Mr Tindall submitted that the proceedings are irregular and should be dismissed.

[5.2] The basis of the submission is that the Notice of Disciplinary Breach was deficient because it does not comply with clause 80¹³ or Schedule F¹⁴ of the *Disciplinary Regulation 2011*, in that no copy of the relevant sections Mr Tindall was alleged to have breached was attached to the Notice, and the Notice did not include the proposed date for a hearing. It was submitted the defects were not procedural defects of the type contemplated by clause 119 of the *Disciplinary Regulation 2011*.

[5.3] To address the submission it is necessary to consider both the meaning of the words that appear in the *Disciplinary Regulation* and also what the *Regulation* is designed to achieve.

[5.4] To attach something is to affix or connect it. For a paper document, an attachment might be expected to be physically joined to it. Where documents can and are in electronic form, attachment can occur electronically, as occurred here, since the Notice to Mr Tindall contains a URL link to the *Code*.

[5.5] However, the purpose of the requirement to attach the relevant provisions is to put the member on notice of the terms of the particular provisions alleged to have been breached. A Notice that simply provided a link to the whole *Code* would not discharge that duty; nor would a simple reference to the relevant provision; the member could rightfully request the FPA to identify the terms of the provision allegedly breached. The Notice to Mr Tindall achieved the notification objective by reproducing¹⁵ in the Notice each provision of the *Code* alleged to have been breached together with linking to the *Code*. There was no irregularity of any substance. No procedural defect of the type contemplated by clause 119 even arises.¹⁶ However, if there had been a failure

¹³ Clause 80 provides: “The Notice of Disciplinary Breach must include the elements set out in Schedule F. Schedule F may also include an indicative form for the Notice of Disciplinary Breach”.

¹⁴ Schedule F relevantly provides: A Notice of Disciplinary Breach issued by the FPA to the Member must: ... (j) attach a copy of the relevant section of the FPA’s Constitution, Disciplinary or other Regulations, policies, or by-laws the FPA alleges the Member breached. ... (l) Include the proposed date for a hearing before the Conduct Review Commission Disciplinary Panel, indicate that the Member will be required to be physically present in person at any hearing, and that the Member will be advised by Notice of Hearing in the event that the Disciplinary Proceedings are to proceed to a hearing.”

¹⁵ In the case of each of Rule 7.2 and Ethics Principle 2, slightly inaccurately.

¹⁶ Clause 119 provides: “Where a procedural defect occurs due to the FPA, this will not render the proceedings invalid.”

to “attach” the relevant provisions, that is exactly the sort of defect clause 119 is intended to address: the proceedings would not be invalid. Instead, any such defect should be addressed to cure whatever prejudice or unfairness arose.

[5.6] There is another reason why a failure to attach a relevant provision is not the sort of defect that would invalidate the proceedings. After a Notice of Disciplinary Breach has been issued, the *Disciplinary Regulation* permits additional allegations of breach to form part of the proceedings and be taken to hearing. That has occurred in the present case, where the Chair determined that the allegations of conduct said to constitute breaches of Ethics Principle 2 and 7 and Rule 7.2 also disclosed a case to answer in respect of Practice Standard 7.1.¹⁷

[5.7] The procedure by which a matter proceeds to hearing is that after a response has been received from the member to a Notice of Disciplinary Breach, the FPA makes a further report to the Chair of the Commission recommending a course of action to be taken.¹⁸ The FPA may recommend that the matter proceed to a hearing. The Chair determines whether the matter should proceed to hearing.¹⁹ Where that occurs, the FPA issues a Notice of Hearing, which appoints a time and place for the hearing.²⁰

[5.8] It is difficult to see the utility in Schedule F requiring a proposed date of a hearing, when no decision has yet been made as to whether a hearing should occur.

[5.9] The Notice to Mr Tindall did not include a proposed date for a hearing. A proposed range of dates for the hearing was communicated in later correspondence; Mr Tindall was asked which day or days were most suitable.²¹

[5.10] In order to promote the workability of the *Disciplinary Regulation*, the Panel favours interpreting the requirement to include a proposed date for a hearing in the Notice as follows: where, at the time the Notice is issued, a hearing date has been proposed, that date must be included in the Notice. In the present case, a hearing date was proposed after the Notice was issued and thus was not included in it.

[5.11] Even if the Panel is wrong in that interpretation, the Panel considers a failure of this nature to be a procedural defect of the type contemplated by clause 119. Nor was there any prejudice or unfairness to Mr Tindall; in fact Mr Tindall was advantaged by having his preferences taken into account before the hearing date was set (and once it was certain the hearing would go ahead).

[5.12] The proceedings are not irregular and should not be discontinued.

¹⁷ Chair’s determination of 16 October 2015 in response to the clause 92 report from the FPA.

¹⁸ Section 7.4 *Disciplinary Regulation 2011*.

¹⁹ Section 7.5 *Disciplinary Regulation 2011*.

²⁰ Section 7.6 *Disciplinary Regulation 2011*.

²¹ FPA email 20 October 2015.

[6] **A FAIR HEARING**

[6.1] Mr Tindall submitted he could not be afforded a fair hearing and on that basis the Panel should not be satisfied the allegations were substantiated.

[6.2] It was submitted Mr Tindall the absence of a particular witness, who was one of the principals of the firm that employed Mr Tindall at the time of the alleged conduct, precluded a fair hearing. The witness had provided a statement, together with other documents, to the FPA. However, on the day that person was to also give oral evidence to the Panel, the FPA received a communication that the witness declined to give evidence on the basis of legal advice received. The witness was in fact the person who had initiated the complaint.

[6.3] The submissions on behalf of Mr Tindall listed some 15 matters for which the evidence of the witness was “crucial”, and went on to say: “It is not sufficient for the CRC to say that, since it cannot compel [the witness] to give evidence, there is nothing more that can be done. ... What the CRC must go on to say is that, in those circumstances, it cannot afford Mr Tindall a fair hearing and on that basis is not satisfied that the allegations are substantiated”.

[6.4] The Panel interprets “in those circumstances” to refer to both the listed matters and the inability of the Panel to compel the witness to give evidence.

[6.5] It is correct to say the Panel cannot compel a witness to give evidence. The *Disciplinary Regulation* does not contain any such power in respect of a member. It may be doubted whether such a power could be conferred. Even for a member the subject of disciplinary proceedings, the highest relevant duty imposed is for the member to be physically present for the duration of the hearing.²²

[6.6] As it happens, the particular witness is an FPA member, and the *Disciplinary Regulation* does impose a duty upon FPA members to provide reasonable assistance to the FPA in connection with any disciplinary proceedings.²³ By clause 70 of the *Disciplinary Regulation* a failure to provide reasonable assistance when requested constitutes a Special Breach of the *Disciplinary Regulation* and renders the member liable to a fine.²⁴ The duty does not appear to be confined to the member the subject of the disciplinary proceedings. The submissions made on behalf of Mr Tindall comment that consideration needs to be given to clause 70.

²² Clause 104 *Disciplinary Regulation 2011* – unless the hearing is conducted on the papers.

²³ Clause 67 *Disciplinary Regulation 2011*. A member commits a Special Breach of the *Disciplinary Regulation* by failing or refusing to provide reasonable assistance when requested by an Investigating Officer in an investigation (clause 70).

²⁴ Clause 124.

[6.7] In answer to the submission, the Panel considers that a witness would not be under a higher duty to assist than would the member under investigation. The circumstances do not warrant consideration of clause 70.

[6.8] In declining to make himself available, the potential witness is exercising a right. However, the unwillingness to be available at the hearing, which, in circumstances where a statement has already been made and documents provided, amounts to an unavailability to answer questions, including questions in the nature of cross-examination, is certainly unhelpful for the Panel in circumstances where there are a number of contested facts. The Panel's ability to make findings to the requisite standard of satisfaction might be hampered. The Panel notes that Mr Tindall had been under the supervision of the witness and that Mr Tindall and the witness had also been in dispute on matters other than the complaint.

[6.9] It is necessary for Mr Tindall to have a fair hearing. What then of the matters said to preclude a fair hearing? The Panel considers that the appropriate approach is to take into account the unavailability of the witness when considering individual findings it needs to make.

[6.10] Mr Tindall's submissions make one other point under the heading of a fair hearing: that Mr Tindall had not received all the evidence before the Panel, despite the client consenting to that information being provided as long as it was not retained. That submission is a reference to the hearing participants becoming aware, during the hearing, that the bundle of documents given to two Panel members differed from those given to the Chair of the Panel and Mr Tindall: in a number of places text had been obscured in the latter version. Questioning of the client on behalf of Mr Tindall was affected by the obscuring of a relevant email address. It was submitted at the time on behalf of Mr Tindall that he was prejudiced in being able to put his case. The hearing was adjourned. Subsequent enquiry ascertained that no other information of any significance had been unavailable to Mr Tindall; Mr Tindall's representative accepted that position when the hearing resumed at a later date. Mr Tindall has suffered no ongoing unfairness.

[7] **PROCEEDING TO CONSIDER PRACTICE STANDARD 7.1**

[7.1] It is said on Mr Tindall's behalf that the alleged breaches of Practice Standard 7.1 were dismissed on the first day of hearing.

[7.2] The submission is mistaken. The transcript²⁵ records an acknowledgement on behalf of Mr Tindall that if the allegations of conduct said to breach the nominated Ethics Principles and Rules were also said to breach Practice Standard 7.1, then Mr Tindall was able to proceed. It was indeed the FPA's position that the allegations of conduct claimed to be in breach of Ethics

²⁵ Page 13.

Principles 2 and Rule 7.2 were also said to breach Practice Standard 7.1.²⁶ No other conduct was alleged.

[8] THE ONLINE INSURANCE APPLICATION AND SUBSEQUENT RECOMMENDATION TO ROLL OVER TO A NEW SUPERANNUATION FUND – ALLEGED BREACHES OF ETHICS PRINCIPLE 2, PRACTICE STANDARD 7.1 AND RULE 7.2 OF THE CODE

[8.1] Allegations concerning the online insurance application of 1 November 2013

[8.1.1] The FPA alleged that 1 November 2013 Mr Tindall improperly made an online application in the name of his client for death and TPD insurances, each for \$500k, and for income protection insurance, within the client’s existing UniSuper superannuation account. This was alleged to have occurred in the presence of the client.

[8.1.2] It was alleged that Mr Tindall himself logged in to make the application having earlier obtained from the client her login details, and that he then submitted incorrect or false answers to questions asking as to the client’s medical history. It was alleged Mr Tindall knew or should have known the answers were incorrect.

[8.1.3] The FPA alleged such actions did not to meet the duty to disclose to the insurer matters that were or could reasonably be expected to be relevant to the insurer’s decision to accept the risk, and if so, on what terms. They allegedly also breached the ongoing duty to the insurer to disclose until such time as the cover was issued and confirmed.

[8.1.4] The FPS alleged that as a result of that conduct, the insurer issued cover to the client; cover she might not otherwise have been entitled to.

[8.1.5] The FPA alleged that in so doing Mr Tindall committed breaches of each of Ethics Principle 2, Practice Standard 7.1 and Rule 7.2 of the *Code*.

[8.2] Allegations concerning the recommendation to rollover to Asgard

[8.2.1] The FPA alleged that Mr Tindall, in advising the client to roll over the UniSuper insurances to Asgard, committed further breaches of each of Ethics Principle 2, Practice Standard 7.1 and Rule 7.2 of the *Code*.

[8.3] Whether Mr Tindall made the online application of 1 November 2013

²⁶ FPA’s pre-hearing submission, 27 November 2015.

[8.3.1] There is no dispute that an online application was made on the afternoon of 1 November 2013. Nor is there any dispute that the application failed to disclose important parts of the client's medical history, as questions concerning the client's history of particular conditions were falsely answered no.

[8.3.2] What is disputed is how the application came to be made. The client says she sat in the room with Mr Tindall whilst he made the application; watching him and conversing with him as he did so. Mr Tindall says that did not happen, and that he had no knowledge as to how the application came to be made. He denied any wrongdoing.

[8.3.3] The Panel had available to it written statements from both the client and Mr Tindall. There was a transcript and recording of an interview held between the FPA and Mr Tindall on 24 February 2015. The Panel also had before it various other documents, mainly records relating to the client file. Given the seriousness of the allegations, the Chair had given leave for Mr Tindall to be represented at the hearing by a legal practitioner. Both the client and Mr Tindall gave oral evidence to the Panel, and the legal practitioner and the FPA representative were given leave to ask questions of witnesses.

[8.3.4] Mr Tindall came into contact with the prospective client at a local field day. There was no dispute that a major purpose of the client in engaging Mr Tindall concerned her insurance situation. The client's evidence was that at that time she didn't know what life insurance she had, and didn't know TPD insurance existed.²⁷

[8.3.5] At that time the client held superannuation with both UniSuper and HostPlus. There was life and TPD insurance as part of the HostPlus account of \$226,180. There was no insurance with UniSuper.

[8.3.6] A meeting was arranged and took place at Mr Tindall's workplace during the afternoon of 30 October 2013.

[8.3.7] At issue is how much was known by the client as to her insurance situation and was communicated to Mr Tindall during the first meeting.

[8.3.8] In her statement²⁸ and in her oral evidence²⁹ the client says that she believes she took with her to the meeting a UniSuper benefit statement dated 31 December 2012, and also a letter from UniSuper dated 1 August 2013 that had enclosed a statement as at 30 June 2013. The benefit statement showed zero balances for death insurance and TPD insurance. The copy of the statement dated 31 December 2012 is annotated "equiry@unisuper.com.au" [sic]. In the interview with the FPA in February 2015 Mr Tindall said that annotation looked like his writing.³⁰ Mr Tindall subsequently stated he had no recollection of being

²⁷ Statement paragraph 4; transcript 1 June 2016 pages 17,18.

²⁸ Paragraph 11.

²⁹ Transcript 1 June 2016 page 28.

³⁰ Transcript page 20.

given those UniSuper statements.³¹ In his oral evidence to the Panel he referred back to what he had said in his statement.³²

[8.3.9] The client said that she and Mr Tindall discussed him getting online access to her superannuation accounts, to see how much superannuation and insurance she had.³³

[8.3.10] Mr Tindall has said various things as to what the client told him at that meeting as to her insurance. In his statement of 24 March 2016³⁴ he said the client advised him she had insurance through two superannuation funds, including UniSuper. In the interview Mr Tindall had with the FPA in February 2015, he said that at the first meeting the client advised that she had two superannuation funds that had insurances in them. He said in his statement he only became aware that at the commencement of advising the client did not have UniSuper insurance in place, when later put on notice by the FPA.³⁵

[8.3.11] However, early in his oral evidence to the Panel Mr Tindall said that the client didn't know what insurance she had. If she did, it would have been recorded³⁶. Mr Tindall didn't recall if the client had said she had life insurance with UniSuper.³⁷

[8.3.12] Later in evidence Mr Tindall affirmed as his current position what was said at paragraph 19 of his statement – that he believed the client held existing insurance through UniSuper when she became a client.

[8.3.13] There are a number of records of the meeting: an electronic filenote, a workbook, and an entry made into an electronic "WIP" (work in progress) system.

[8.3.14] The filenote recorded, amongst other things, that:

- the client was seeking superannuation and insurance advice;
- the client advised her medical conditions, which included a heart condition suffered from birth, and 3 surgical procedures undergone within the previous 9 years;
- the client was advised that with her conditions it would be best to seek guidance from experienced underwriters and get pre-assessment of her situation as to getting (insurance) cover;
- she was given guidance as to different types of insurance;
- during the meeting Mr Tindall was able to speak by telephone to one underwriter, and left email and telephone messages for another;

³¹ Statement paragraph 31.

³² Transcript page 43. Mr Tindall mistakenly referred to paragraph 19; the Panel understands him to have meant to refer to paragraph 29.

³³ Transcript 1 June 2016 page 29; statement paragraph 12.

³⁴ Paragraph 32. At paragraph 19 he states it was his belief the client held existing insurance through UniSuper.

³⁵ Statement paragraph 24.

³⁶ Transcript 10 August 2016 page 8.

³⁷ Transcript 10 August 2016 pages 8-9.

- access authorities and a client workbook were completed “and all requirements for rollovers to be researched were retrieved such as statements”;
- Mr Tindall would do research on the client’s funds; and
- the next meeting was scheduled for 13 November 2013.

[8.3.15] The filenote did not record anything as to the client’s current superannuation or insurance. The WIP entry was briefer than the filenote, but was consistent with it.

[8.3.16] The page in the workbook for risk insurance details was not completed, but marked “TBR”. Mr Tindall said in evidence that was his writing and stood for “to be researched”.³⁸

[8.3.17] Mr Tindall acknowledged that the workbook and file note were consistent with the client not knowing what she had.

[8.3.18] Other than Mr Tindall’s assertions, there is no evidence supportive of the fact that the client told Mr Tindall she had existing insurance with UniSuper. The Panel finds the client did not say that to Mr Tindall. The finding has the advantage of according with the reality that no such insurance existed at that time.

[8.3.19] What light can other surrounding events shed on who made the online insurance application?

[8.3.20] The Panel had available copy of a screenshot from a mobile phone. Under Mr Tindall’s phone number appeared 3 message bubbles. The first was partially obscured. In the first bubble – an outgoing bubble – were copies of an exchange of messages. One of the messages was timed 01/11/2013 12:01 and read in part: “Your username is [client’s initial dot surname]. ... UniSuper Management Pty”.

[8.3.21] The next two messages were incoming messages. The first read: “All working, password is [...] Cheers Darren”

[8.3.22] The last message was timed at 01/11/2013 13:10 and read “[client name], HostPlus has insurance with it, yeah, but they have your maiden name, I will send the form back to you, please send back to me with your marriage certificate and we will get this changed and get that Insurance. Regards Darren”.³⁹

[8.3.23] There was also an email from HostPlus at 12.17 pm to the “admin” box at Mr Tindall’s workplace that confirmed online registration and provided a

³⁸ Transcript 10 August 2016 page 8.

³⁹ There was then obscured text which Mr Tindall thought was a reference to the group he worked for.

temporary password. The email was forwarded to Mr Tindall's email address at 12.26 pm.

[8.3.24] There was also a WIP entry for 1 November, which read in part:

Confirmed with [the client] that she was happy for me to access her Super through the online sites on her behalf and retrieved both Superannuation and Insurance details, [the client] attended office to retrieve Change of name form for HostPlus. DGT

[8.3.25] There were online printouts dated 1 November 2013 from UniSuper as to the client's details, account balance, transaction history, and beneficiaries. They contained no printout as to insurance.

[8.3.26] The online insurance application was confirmed by an email sent to the "admin" box of Mr Tindall's employer at 4.21pm on 1 November 2013.

[8.3.27] The client says she did not obtain the UniSuper statements online on 1 November, nor register for "Self Serve" with HostPlus that day, her recollection being that Mr Tindall was going to do that himself, but that she had earlier set up the UniSuper online access, and sent those details to Mr Tindall by text message and corresponded with Mr Tindall by text message.⁴⁰

[8.3.28] The client says that she was contacted by Mr Tindall to come in and drop off or sign some forms. She then, after work, attended at Mr Tindall's workplace, at which time she says the fateful online insurance application to UniSuper was made.

[8.3.29] Mr Tindall says in his statement that he did not recall the UniSuper statements printed 1 November 2013 – but did not print them. He maintained in oral evidence that he did not print the UniSuper statements because in his view the WIP entry was only in respect of HostPlus.

[8.3.30] In his oral evidence Mr Tindall denied accessing the HostPlus account using the login information that had been made available to him that day via the email from HostPlus. In the interview with the FPA Mr Tindall had said that the online access arrangements, as recorded by the WIP entry, related to both UniSuper and HostPlus and the WIP entry meant he had gone in to get details. When taken in oral evidence to that part of the interview, he first said he couldn't remember what he had said, and then that he would withdraw anything he said to the FPA because he had been under duress. This is despite Mr Tindall's statement of 24 March 2015 by its own terms being expressed as being given "in conjunction with" what was said to the FPA on 24 February 2015.

⁴⁰ Statement paragraphs 12, 13, 15. Transcript 1 June 2016 pages 29, 52, 80. At a later meeting with the principals of Mr Tindall's employer in a meeting on 18 June 2014 the client had apparently said to them that Mr Tindall had set up email access for both accounts, but that was corrected by the client in an email a week later.

[8.3.31] Mr Tindall said in his oral evidence he had no recollection of the text messages. He also said they did not appear to relate to UniSuper. Despite a number of questions, he did not directly answer whether the text messages indicated he had logged on.

[8.3.32] The Panel rejects Mr Tindall's evidence that he did not access the client's HostPlus account that day. The Panel finds that Mr Tindall accessed the client's HostPlus account, and that access was recorded in both the WIP and the text messages. The Panel finds that Mr Tindall found out or confirmed that the client held insurance with HostPlus, as recorded in one of the text messages.

[8.3.33] The Panel rejects Mr Tindall's evidence that the WIP entry refers only to HostPlus; in the Panel's view it refers to both UniSuper and HostPlus. The Panel finds that Mr Tindall accessed the client's UniSuper account on 1 November 2013. Accordingly, he would have seen information, consistent with that in the printouts made that day, that showed the client did not then hold insurance with UniSuper.

[8.3.34] By 8 November 2013 Mr Tindall had prepared the client's Statement of Advice. At 6.15 pm that day Mr Tindall forwarded the SOA for compliance checking. The SOA recorded, as existing insurance:

- \$500,000 Life and TPD insurance from UniSuper with an annual premium of approximately \$175;
- Income Protection from UniSuper of \$1000/month with a 90 day waiting period and 2 year benefit period and premium of approximately \$46 annually; and
- \$226,180 Life and TPD Insurance from HostPlus with an annual premium of approximately \$51.

[8.3.35] Clearly, by 8 November 2013, Mr Tindall knew of the insurance with UniSuper. How does he say he became aware of it?

[8.3.36] His answers have varied. As recounted earlier in these reasons, in the interview with the FPA and in his statement he said the client had told him about insurance with UniSuper in the first meeting. In oral evidence, he said that he became aware of it through the third party authority that he received. He didn't recall when that was but that there would have been a date on the authority.

[8.3.37] The Panel had before it a copy of a written authority to UniSuper. It was dated 4 November 2013. (There was also one to HostPlus of the same date).

[8.3.38] The WIP for 4 November recorded in part:

Third party authorities sent to UniSuper and HostPlus, have online access to details as per [client's] authority. DGT

[8.3.39] The authority to UniSuper had some handwritten annotations at the life and TPD insurance sections. Next to a box titled “Life Insured” was handwritten “500,000” and “\$175.00”, and in a box titled “Life Sum Insured” was again written “500,000”. In or next to boxes for TPD was written “\$45.90” “1,000 WEEK 3 MONTHS 2 YEARS”. The annotations appeared to be in Mr Tindall’s handwriting but he did not give any oral evidence concerning the annotations or when they were made. Nor were they referred to in the FPA interview or his statement. The annotated figures, of course, approximated those in the statement of advice.

[8.3.40] The inference is that at same point in the period 1 to 8 November Mr Tindall obtained those figures online. Yet Mr Tindall, at various points of his interview, statement and oral evidence, was at pains to say he did not have the means to go online to access client information⁴¹ did not go online to obtain client information,⁴² or did so only in the client’s presence with consent,⁴³ or if not in the client’s presence then with their consent.⁴⁴

[8.3.41] In re-examination, Mr Tindall’s legal representative put to him that there would be no reason to send third party authorities if he had the information he needed to log in. Mr Tindall agreed with that proposition. However, in the interview Mr Tindall had said that when research was done with superannuation funds, a document was sent to the fund to authorise getting information back from the fund.

[8.3.42] There was no evidence before the Panel that dated any information being received from UniSuper after 1 November, until a statement was received from UniSuper on 8 November.⁴⁵ However that UniSuper statement was as at 30 June 2013 and showed \$0 death and TPD insurance amounts.⁴⁶

[8.3.43] It was not until 13 November that there was any statement from UniSuper that recorded any insurance; and that was a printout from the online site. The statement recorded the number of units of insurance as zero.

[8.3.44] It was only on 3 December that a certificate of currency of insurance was received from UniSuper.

[8.3.45] The Panel rejects Mr Tindall’s evidence that he became aware of the client’s insurance with UniSuper by means of a third party authority.

[8.3.46] The client was subjected to extensive questioning from M Tindall’s legal representative, particularly as to varying accounts she had subsequently given

⁴¹ Interview transcript page 19; transcript 10 August 2015 pages 33, 45.

⁴² Transcript 10 August 2016 page 27.

⁴³ Interview transcript pages 19, 20; statement paragraph 3; transcript 10 August 2016 page 30.

⁴⁴ Interview transcript pages 24, 25, 27; transcript 10 August 2016 page 31.

⁴⁵ This is recorded in the WIP for 8 November 2013.

⁴⁶ The statement had been sent by email by UniSuper to “admin” at Mr Tindall’s firm at 6.14 pm on 8 November 2013, forwarded to Mr Tindall at 6.22 pm and is recorded as read by him at 10.10 pm that night.

concerning the events she says happened on the afternoon of 1 November 2013.

[8.3.47] It was submitted on behalf of Mr Tindall that “examination of those parts of [the client’s] evidence and the changes in it over time indicate that there is a complete lack of consistency in her evidence, which goes beyond issues of recollection and strikes at the heart of the CRC’s ability to accept her as a witness of truth”.

[8.3.48] The Panel disagrees. In the Panel’s view the client was a truthful witness. She was also a reliable witness. In the Panel’s view the variations in the client’s account over time were not material, and were satisfactorily explainable as differences arising from the passage of time and the context within which each recollection was being given.

[8.3.49] It was submitted on behalf of Mr Tindall that determination of the issue of whether Mr Tindall made the online application would come down to an issue of credit between the client and Mr Tindall.

[8.3.50] The Panel does prefer the evidence of the client to that of Mr Tindall concerning the making of the online insurance application. The Panel considers the client, who was subjected to extensive questioning, did her best to recollect events. In contrast, Mr Tindall was an evasive and unconvincing witness, whose evidence was at times inconsistent or implausible. Instances of inconsistency and implausibility have already been recounted.

[8.3.51] However, the Panel disagrees that the issue simply comes down to credit. The Panel has also been assisted by the documents available to it concerning the surrounding circumstances. The Panel considers the client’s recollection of events is consistent with the evidence of the surrounding circumstances; Mr Tindall’s much less so.

[8.3.52] The available documents, together with the Panel’s assessment of the witnesses, have already enabled the Panel to make a number of findings that in the Panel’s view have a bearing on the likelihood that Mr Tindall made the online insurance application on 1 November 2013. To recap those findings: the client did not say to Mr Tindall she had existing insurance; Mr Tindall accessed both HostPlus and UniSuper online on 1 November 2013 and at the time he logged on would have seen there was no insurance with UniSuper; and Mr Tindall did not obtain the UniSuper insurance details from a third party authority that he received. Recall that by 8 November Mr Tindall was well aware of the details of the insurance policies, as he included those details in the Statement of Advice.

[8.3.53] The Panel is satisfied on the balance of probabilities that Mr Tindall made the online application for insurance to UniSuper on the afternoon of 1 November 2013.

[8.4] **The recommendation to roll over insurance**

[8.4.1] The SOA, which was presented and accepted on 13 November 2013, recommended a superannuation strategy of rolling over the existing superannuation balances into a new superannuation account with Asgard. The insurance strategy recommended by the SOA was takeover by Asgard/AIA of the HostPlus and UniSuper life & TPD insurances and of the UniSuper income protection insurance, together with application to Macquarie for a further \$500k life & TPD insurance through a new Asgard superannuation account.

[8.4.2] There is no dispute that Mr Tindall prepared the SOA and was responsible for making the recommendations contained within it.

[8.4.3] The client having accepted the recommendation, steps were taken to have the UniSuper superannuation and insurance subsequently rolled over into a fund with Asgard.

[8.4.4] Whether the recommended rollover amounts to a breach in large measure depends upon the Panel's findings that Mr Tindall made the online insurance application on 1 November 2013.

[8.5] **Whether any breach of Rule 7.2 has occurred**

[8.5.1] Rule 7.2 provides:

A Member must not, in the conduct of professional and business activities, engage in any act or omission of a misleading, deceptive, dishonest or fraudulent nature, nor must the Member engage in any act or omission that is likely to mislead or deceive.

[8.5.2] Terms used in Rule 7.2 pick up words used in the wider law: "misleading" or "deceptive" conduct in relation to financial services is proscribed by the *Australian Securities and Investments Act 2001*.⁴⁷ Fraud is a concept known to the criminal law. However the use of these words and others in Rule 7.2 has a different focus: they are designed to establish norms of conduct.⁴⁸

[8.5.3] There is much overlap between each of "misleading", "deceptive", "dishonest" and "fraudulent". One difference may lie in the intent of the actor: something misleading, deceptive, or even fraudulent, may occur without being intended; that does not appear to be possible where an act is dishonest. "Fraudulent" in Rule 7.2 means "obtained through deception"; it does not have to be criminally fraudulent.

[8.5.4] The Notice of Disciplinary Breach relevantly alleged that Mr Tindall knew or ought to have known that certain answers as to medical conditions were false

⁴⁷ Section 12DA. Similarly, false or misleading representations are proscribed under the Australian Consumer Law.

⁴⁸ *Re Antony Walker CRC 2008_1*.

or otherwise incorrect, and that they thereby did not meet the duty of disclosure to an insurer. The recommendation to transfer all insurance to Asgard was also alleged to breach the duty of disclosure to an insurer.

[8.5.5] The FPA submissions state it to be “uncontroverted” that two fraudulent insurance applications were made from which the client obtained a financial advantage, that the copy of the UniSuper application is a record of the first fraudulent application; that the two applications are intrinsically linked as key elements of a common fraudulent enterprise, and that the relationship between the client and Mr Tindall was solely professional. The reference by the FPA to two applications refers firstly to the online application of 1 November and secondly to the rollover to Asgard.

[8.5.6] The FPA submitted the totality of the evidence would satisfy the Panel on the balance of probabilities that the fraudulent enterprise was devised by Mr Tindall alone and executed by him taking advantage of the client’s vulnerability.

[8.5.7] Mr Tindall’s submissions did not address the terms of Rule 7.2.

[8.5.8] The Panel finds that incorrectly answering “no” in the online insurance application to a number of specific questions asking about the client’s medical history was not honest, was misleading, and was deceptive and fraudulent; it amounted to “engaging in an act of a misleading, deceptive, dishonest [and] fraudulent nature”. The Panel also finds the conduct occurred in professional activities.

[8.5.9] The Panel finds the breach of Rule 7.2 proven in making of the online insurance application.

[8.5.10] The Panel finds that in making the recommendation to roll over the UniSuper insurance to Asgard, Mr Tindall engaged in an act “of a misleading, deceptive, dishonest [and] fraudulent nature”. The Panel finds the conduct occurred in professional activities.

[8.5.11] The Panel finds a breach of Rule 7.2 proven in relation to the recommendation to roll over the UniSuper insurance to Asgard.

[8.6] **Whether any breach of Practice Standard 7.1 occurred**

[8.6.1] Practice Standard 7 concerns professional obligations. Practice Standard 7.1 states:

PS 7.1 Members conduct themselves in a professional and ethical manner

The member conducts him or herself in accordance with high standards of professional and ethical conduct within the financial planning profession and as a Member of the FPA.

EXPLANATION

The Member understands, abides by and upholds applicable laws, the FPA's Constitution, Code of Ethics, Practice Standards, Rules of Professional Conduct, Disciplinary Regulations and other associated regulations, collectively known as the FPA's requirements. The Member ensures that his or her professional and ethical conduct, including relationships with clients, fellow Members, and third parties presents professionalism and enhances the good reputation of the profession. The Member acknowledges that good professional conduct extends beyond the Member's obligations to his or her clients, and includes prospective clients, fellow Members, employees, colleagues, the FPA and the public in general. For example, the Member presents a true and fair impression of the Member's competencies, services and relationships with other financial services providers to the public in general.

[8.6.2] The core of PS 7.1 (the "Element") is that section which is italicised. The question is whether Mr Tindall has conducted himself in accordance with high standards of professional conduct or ethical conduct.

[8.6.3] In the Panel's view "professional and ethical conduct" is to be read disjunctively; that is, there will be a breach of Practice Standard 7.1 where a member fails to conduct themselves with a high standard of *professional* conduct; there will also be a breach of Practice Standard 7.1 where a member fails to conduct themselves with a high standard of *ethical* conduct.

[8.6.4] The FPA submits that if Mr Tindall's conduct breached Rule 7.2, the conduct would likely also breach PS 7.1, particularly if the Panel was to conclude the conduct was deliberate or pre-meditated, dishonest or fraudulent, or, if conduct by omission, reckless.⁴⁹ Because, as stated above, the Rules of Professional Conduct are an elaboration of the Practice Standards, in the Panel's view, any contended breach of a Rule will suggest a related Practice Standard may also have been breached. However, a breach of a Practice Standard may occur whether or not a Rule has been breached. One reason for this is that there may not be a rule relevant to the circumstances. Another reason is that the Practice Standards and the Rules are expressed differently.

[8.6.5] Accordingly, in the Panel's view, the correct approach is to consider whether there has been a breach of a Practice Standard independently of consideration of whether a particular Rule has been breached.

[8.6.6] In the Panel's view, by making of the online insurance application, Mr Tindall failed to conduct himself in accordance with a high standard of professional conduct or ethical conduct.

⁴⁹ Submissions 27 November 2015; confirmed in post-hearing submissions.

[8.6.7] The Panel finds a breach of Practice Standard 7.1 proven in making of the online insurance application.

[8.6.8] The Panel finds that in making the recommendation to roll over the UniSuper insurance to Asgard, Mr Tindall failed to conduct himself in accordance with a high standard of professional conduct or ethical conduct.

[8.6.9] The Panel finds a breach of Practice Standard 7.1 proven in relation to the recommendation to roll over the UniSuper insurance to Asgard.

[8.7] **Whether any breach of Ethics Principle 2 occurred**

[8.7.1] Ethics Principle 2 states:

Principle 2: Integrity

PROVIDE PROFESSIONAL SERVICES WITH INTEGRITY

Integrity requires honesty and candour in all professional matters. Financial planners are placed in positions of trust by clients, and the ultimate source of that trust is the financial planner's personal integrity. Allowance can be made for legitimate differences of opinion, but integrity cannot co-exist with deceit or subordination of one's principles. Integrity requires the financial planner to observe both the letter and the spirit of the Code of Ethics.

[8.7.2] Integrity is not defined in Ethics Principle 2; rather, the Principle states that integrity requires both honesty and candour. This requirement conforms to a general definition of integrity: a quality of being honest and having strong ethical principles. In Ethics Principle 2 "honesty" can be taken to mean truthfulness; "candour" can be taken to mean openness and honesty, or frankness.

[8.7.3] There is thus an underlying principle of correct and full disclosure in Ethics Principle 2. The Panel considers the ethical Principle of Integrity should be interpreted consistently with the duty of utmost faith required in respect of insurance, where there is a duty to disclose all material facts.

[8.7.4] The duty is expressed to be required in "all professional matters". This is a broad duty in that it applies to dealings with third parties, such as insurers. However, by being expressed to be in respect of *professional* matters, it may be narrower than, for example, a duty expressed to apply to "business-related activities".⁵⁰

⁵⁰ See eg Ethics Principle 5: Professionalism. It may also, for this reason, be narrower than the ethical Principle of Integrity that appeared in the FPA's 1997 Professional Standards.

[8.7.5] The Notice of Disciplinary Breach alleged that by virtue of the alleged conduct with respect to the two breaches of Rule 7.2, Mr Tindall “knew or ought to have known that his conduct was misleading, deceptive, dishonest and/or fraudulent” and “breached the trust bestowed on him by his client and his Licence”. The Notice thus reproduces language found in Rule 7.2, rather than in Ethics Principal 2.

[8.7.6] Whilst there are differences in what Ethics Principle 2 and Rule 7.2 are directed to, there is substantial overlap. Something dishonest or fraudulent is clearly not “honest”. Something misleading or deceptive may not have been candid.

[8.7.7] The FPA’s submissions did address honesty and candour. It was submitted honesty was to be assessed according to standards of ordinary people. The Panel doubts such a standard will always be appropriate: a professional may be kept to a higher standard. Mr Tindall’s submissions did not address the terms of Ethics Principal 2.

[8.7.8] Answering “no” in an insurance application, to questions concerning medical history where such history exists, is neither truthful nor candid. The Panel finds it amounts to a lack of “honesty and candour” in a “professional matter”. Accordingly, the Panel finds that Mr Tindall has failed to provide professional services with integrity.

[8.7.9] The Panel finds a breach of Ethics Principle 2 proven in relation to the online insurance application.

[8.7.10] The Panel also finds that in circumstances where insurance had been obtained without disclosure of medical conditions, to recommend to roll over that insurance to a new superannuation policy also amounts to a lack of honesty and candour in a professional matter.

[8.7.11] The Panel finds a breach of Ethics Principle 2 proven in relation to the recommendation to roll over the UniSuper insurance to Asgard.

[9] **ALLEGED BREACH OF THE ETHICAL PRINCIPLE OF CONFIDENTIALITY – THE EMAIL OF 18 DECEMBER 2013**

[9.1] Unrelated to the work Mr Tindall did for the particular client, on 18 December 2013 Mr Tindall sent an email to a former work colleague. The email said: “Hi Mate, You tell me if I made the right decision” and annexed a spreadsheet listing client names, dates of SOAs, funds under management, risk policy balances and revenue figures. The recipient replied: “Love your work Dazza. You deserve all the success brother. Speak soon...”. Mr Tindall admits he sent the email.

[9.2] The FPA alleged that in sending the email Mr Tindall breached Ethics Principle 7 of the *Code*. Principle 7 requires confidentiality. It states:

Principle 7: Confidentiality

PROTECT THE CONFIDENTIALITY OF ALL CLIENT INFORMATION

Confidentiality requires client information to be protected and maintained in such a manner that allows access only to those who are authorised. A relationship of trust and confidence with the client can only be built on the understanding that the client's information will not be disclosed inappropriately.

[9.3] In other words: access to client information requires authorisation.

[9.4] Whether there has been a breach of the ethical Principle of Confidentiality does not depend on why a disclosure might have been made; nor does it depend on whether someone uses information received without authorisation. However, the circumstances in which an unauthorised disclosure occurs, and any consequences of the disclosure will be relevant to assessing its seriousness.

[9.5] Ethics Principle 7 is distinct from and additional to whatever obligations a member might have at law, such as under the Privacy Act, to respect the privacy of a person.

[9.6] The Notice of Disciplinary Breach particularised the breach as follows:

The information attached to the Member's email to [the third party]:

- i. is personal information consistent with that gathered from clients of [the firm] in the provision of financial planning services;
- ii. was disclosed without the knowledge or consent of [the firm];
- iii. was disclosed contrary to the purposes for which it was collected; and
- iv. was disclosed in the absence of apparent reason related to the ordinary business of [the firm].

[9.7] It was submitted on Mr Tindall's behalf during the hearing⁵¹ and in submissions that it was unclear how exactly Ethics Principle 7 had allegedly been breached, it being "insufficient to simply say that it is a breach of the ethics principle".⁵² However, the Notice gave particularisation.

[9.8] It was also submitted on Mr Tindall's behalf that given the state of the evidence the allegation could not be proven.

⁵¹ Transcript 1 June 2106 pages 96, 98.

⁵² Submissions 28 September 2016, seventh page.

[9.9] The elements of Principle 7 are:

- client information;
- disclosure; and
- authorisation.

[9.10] The copy of the emailed spreadsheet available to the Panel and Mr Tindall had boxes of the column under the heading “Clients Name” blacked out, so that individual clients could not be identified, but there was no dispute that the spreadsheet contained information relating to clients.⁵³

[9.11] The Panel finds that the figures in the lists of dates of SOA, funds under management, risk policy balances and revenue figures each constitute information relating to a particular client, and are “client information” in terms of Principle 7.

[9.12] As Mr Tindall has admitted sending the email, with its attachment, to another person, the Panel finds there has been disclosure (of the client information). To pick up the language of Principle 7: by sending the email, Mr Tindall “allowed access” to the information by the recipient.

[9.13] The last question is whether the disclosure was authorised or unauthorised.

[9.14] Each of the two principals of the firm said in their respective statements that they did not have prior knowledge of Mr Tindall’s use of the information in that way, and, if they had known, they would not have consented. Each also said they were unaware of any reason in the ordinary course of the firm’s business as to why Mr Tindall used the information in that way. Each said that the use of the information appeared to be contrary to the firm’s privacy policy.

[9.15] One of those principals gave evidence to the Panel. In response to a question as to what knowledge she would expect that the clients would have that the information would be sent externally to the business, she replied that they would have had no such knowledge. She added it was against the firm’s privacy policy.

[9.16] The firm’s privacy policy was before the Panel. Given its terms, however, the Panel considers the status and operation of the firm’s privacy policy uncertain.⁵⁴ Mr Tindall said in his statement that he was not provided with a copy of any privacy policy during his employment.

⁵³ Transcript 1 June 2016 page 127; evidence of Mr Tindall 10 August 2016, page 83.

⁵⁴ The document is headed “PRIVACY POLICY – Confidentiality [sic] Information (Reference to Agreement)”. There is no explanation in the document as to what agreement is being referred to. No witness gave evidence on that point. The policy provides: “The Employee must properly and securely use, handle, keep and store the Confidential Information in such a manner as will

[9.17] The Panel does not rely on the privacy policy.

[9.18] The firm's Privacy Statement, extracted from its Financial Services Guide, was also before the Panel. It relevantly said:

Who else will have access to my personal information?

Your financial advisor and [the firm group] may disclose your personal information (as necessary):

- To industry bodies, [firm] employees, agents, contractors or external service providers that provide financial, administrative or other services for the purposes of your investments. External service providers may include consultants, business partners, product providers and mail houses.
- ...
- ...
- If you consent.

[9.19] Mr Tindall agreed in evidence that he would go through that part of the Financial Services Guide with each client. He was, however, reluctant to concede that when clients gave information, they were doing so consistent with the Privacy Statement.⁵⁵

[9.20] The Panel considers the evidence establishes that when Mr Tindall obtained client information, he was aware of the terms of the Privacy Statement, communicated the terms to his clients, and collected information on that basis.

[9.21] In terms of the Privacy Statement, unless the disclosure amounted to a disclosure "for the purposes of [a client's] investments", the disclosure would have been in breach of the Privacy Statement.

[9.22] Mr Tindall did not claim the purposes of disclosure had anything to do with any of the clients' investments. Rather, Mr Tindall said in his evidence to the Panel that he sent the email in circumstances where the recipient had been a mentor to him. Mr Tindall said he didn't feel it was a breach of privacy because it was a mentor and mentee having a conversation via email.

[9.23] Mr Tindall also said he recollected having a discussion with his principal about the email. He said the principal was not happy about no longer being the mentor. There was no complaint about sending the email, but there was no discussion of the attachment.

keep it confidential at all times". However, the policy does not say what the "Confidential Information" is.

⁵⁵ Transcript 10 August 2016 pages 93-94.

[9.24] As already stated, the principal declined to make himself available at the hearing before the Panel. This is one instance to be cautious in making findings; as discussed in section [6] of these reasons. However, even on Mr Tindall's evidence, there is no claim that the principal authorised the sending of the information. (Even if he had, that would have presumably still been a breach of the Privacy Statement, just one in which the principal also had a role). Further, on Mr Tindall's own evidence, the principal of the firm only became aware of the disclosure after it had occurred.

[9.25] As is also acknowledged in the Privacy Statement, disclosure may occur where there is client consent. It was submitted on Mr Tindall's behalf that there was no evidence that any person whose name may have appeared on the list did not give consent to that use. That might be called a courageous submission. There was the evidence from the other principal that the clients would have no knowledge the information would be sent externally. In any event, the likelihood of consent having been given (in this case by every client) can be inferred from the circumstances. There is no need to have direct proof of consent in order to support a finding there was no consent.

[9.26] The Panel finds it more likely than not that there was no consent given by the clients whose information was disclosed.

[9.27] The Panel finds that the disclosure was not authorised, in that it was in breach of the Privacy Statement contained in the Financial Services Guide, and had not been consented to by the clients concerned.

[9.28] Accordingly, breach of Ethics Principle 7 is proven.

[9.29] The Panel further notes that Mr Tindall does not appear to have comprehension that his actions amounted to a breach of confidentiality. In the Panel's view Mr Tindall appeared to have, even by the time of the hearing, a cavalier attitude to his obligations. He downplayed the significance of his actions by pointing out that the recipient of the disclosed information was in a different part of New South Wales and thus not likely to put the information to use. He regarded disclosing the information "a reflection of success".

[9.30] The FPA characterised Mr Tindall's actions as boasting. The Panel sees some force in that characterisation.

[9.31] Further, the Panel notes Mr Tindall's regret at having sent the information appears to be based only on having subsequently been subjected to the disciplinary proceedings.

[10] **NEXT STEPS**

[10.1] Where a Panel finds a breach proven, the enquiry of the Panel into the member's conduct becomes one of determining whether the balance of the interests of the public, the financial planning profession and the community lie

with assisting the member to understand, correct and rehabilitate any conduct found to be in breach, and/or sanctioning the member for that conduct for the protection of the community or the profession.⁵⁶

[10.2] In the present proceedings, the Panel stated at the conclusion of the hearing that it would limit the Determination to findings of whether breaches of the *Code* had occurred. That course was taken because of the extensive factual dispute. Following publication of the Determination the parties would then have an opportunity to then make submissions as to what, if any, further action was warranted given the Panel's findings.

[10.3] The *Disciplinary Regulation* contains requirements⁵⁷ in accordance with which the FPA is to notify a member of the Panel's Determination, and also by which any request for review of a Panel Determination is to be lodged.⁵⁸ It seems appropriate that the timetable for the parties to make written submissions as to what action the Panel should take to assist or sanction Mr Tindall, should conform to the notice and application for review timetables.

[10.4] The Parties have 21 days from notification of Mr Tindall by the FPA of the Panel's Determination (in accordance with the *Disciplinary Regulation*), to exchange and lodge with the Commission any written submissions they wish to make addressing the matters specified in clause 111 b) of the *Disciplinary Regulation 2011*.

END OF REASONS

⁵⁶ Clause 111 *Disciplinary Regulation 2011*.

⁵⁷ Clauses 132-134, and Schedule C.

⁵⁸ Part 14 and Schedule C.