

**CONDUCT REVIEW COMMISSION
DISCIPLINARY PANEL**

REGARDING:	DARREN TINDALL
DETERMINATION:	CRC 2017_1
PANEL:	Mr M Vincent, Acting Chair Ms C Feher CFP Mr G Cook CFP
DATE OF DETERMINATION:	10 February 2017
CATCHWORDS:	<i>Disciplinary Regulation 2011 – protective nature of disciplinary proceedings – sanctions protective of public and profession – sanctions forward-looking</i> <i>Disciplinary Regulation 2011 – sanctions – expulsion – fines – breaches of Code of Professional Practice – online insurance application false in material particulars – recommendation to transfer insurance policy to new insurer without disclosures</i> <i>Disciplinary Regulation 2011 – fines – general and specific deterrence – quantification of – imposition where other sanction ineffective – Code of Professional Practice breached by failure to protect and maintain client information – email to third party listing client names, insured incomes and policy balances</i> <i>Disciplinary Regulation 2011 – payment of FPA's costs and expenses</i>
CASES CITED:	<i>NSW Bar Association v Evatt</i> [1968] HCA 20; (1968) 117 CLR 177

Clyne v NSW Bar Association [1960]
HCA 40; (1960) 104 CLR 186
Rich v ASIC [2004] HCA 42; (2004) 220
CLR 129
Australian Ophthalmic Supplies P/L v
McAlary-Smith [2008] FCAFC 8
McDonald v Australian Building &
Construction Commissioner [2011]
FCAFC 29
Leighton Constructions P/L v CMFEU
(No 4) [2006] WASC 317
Re Darren Tindall CRC 2016_2

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) Mr Tindall is expelled from membership of the FPA.
 - (b) Expulsion is to take effect upon Mr Tindall receiving notice, in accordance with the *Disciplinary Regulation 2011*, of this determination.
 - (c) Mr Tindall is to pay a fine of \$16,000.
 - (d) Mr Tindall is to pay to the FPA costs and expenses of the FPA relating to the FPA's investigation and the disciplinary proceedings in the amount of \$12,423.39.
 - (e) The fine and costs and expenses are payable by Mr Tindall within 21 days of him receiving notice, in accordance with the *Disciplinary Regulation 2011*, of this determination.

[signed]

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

THE PANEL'S REASONS

[1] THE NATURE OF THE DETERMINATION AND THESE REASONS

[1.1] Disciplinary proceedings brought against Mr Tindall

[1.1.1] Disciplinary proceedings had been commenced against Mr Tindall following investigation by the FPA of a complaint made against him. In the proceedings the FPA alleged Mr Tindall had committed a number of breaches of the FPA's *Code of Professional Practice* ("Code").

[1.1.2] The disciplinary proceedings were heard before the presently-constituted Panel of the FPA's Conduct Review Commission ("Commission").

[1.2] The outcome of the disciplinary proceedings

[1.2.1] The Panel made its decision on the disciplinary proceedings on 21 December 2016. The Panel's Determination and supporting Reasons were given in *Re Darren Tindall CRC 2016_2*. The Panel's Determination was:

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.
- (f) 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.
- (g) 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.

- (h) 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.

[1.2.2] At the conclusion of the hearing the Panel had said to the parties that it would limit its determination to findings of whether breaches of the *Code* had occurred, because there was extensive factual dispute. Following delivery of the determination addressing whether there had been breaches of the *Code*, the parties would then have an opportunity to make written submissions as to what, if any, further action was warranted given the Panel's findings.

[1.2.3] Given the Panel's decision and reasons in *Re Darren Tindall CRC 2016_2*, a timetable was set for the parties to exchange and lodge written submissions as to sanction. An extension of time was subsequently given by the Chair of the Panel for Mr Tindall to serve and lodge his submissions. The Panel has received written submissions from each of the parties.

[1.3] The Panel's present enquiry

[1.3.1] 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: clause 111 b) *Disciplinary Regulation 2011*.

[1.3.2] The sanctions that the Commission may impose are given by Schedule B to the *Disciplinary Regulation 2011*. The list of sanctions is reprimand, apology, suspension, remedial education, fine, undertaking, expulsion, supervised practice and other discipline.

[2] THE PARTIES' SUBMISSIONS

[2.1] The FPA'S submissions

[2.1.1] The FPA's submissions made 11 January 2017 submitted Mr Tindall's conduct was at the extreme end of conduct amounting to a breach. In view of the seriousness, the FPA submitted, it would not be desirable for the purposes of

clause 111 b) to impose a sanction of reprimand, apology or undertaking. Further, as Mr Tindall had submitted notice of his resignation from the FPA on 8 August 2014 (around which time he became a member of another professional association), it would not be practical to suspend his rights and privileges.

[2.1.2] Presumably for the same reason, the FPA submitted neither supervised practice nor remedial education would be practical.

[2.1.3] The FPA submitted that some comfort might be afforded by Mr Tindall being a member of another professional body, and subject to that body's disciplinary system. On the other hand, Mr Tindall had not "in any way acknowledged the conduct constituting the serious breaches and there are no reasonable grounds to expect that he will ever do so".

[2.1.4] The FPA's core submission was:

The combination of subjective and objective factors warrants no less than that the Member should be expelled from the membership of the FPA. The [Commission] has previously imposed maximum fines in combination with expulsion as a demonstration of the moral opprobrium for the conduct, to deter others. Any punitive effect of expulsion, or any other additional sanction, is far outweighed by the intended purpose of sanction in this case – the protection of the public.

[2.1.5] The FPA also sought payment of costs and expenses of its investigation and of the hearing.

[2.1.6] The FPA sought investigation expenses of \$578.87 relating to travel and accommodation incurred when interviewing witnesses.

[2.1.7] A list of expenses relating to the hearing was also claimed: \$11,844.52 relating to hearing dates on 1-2 June 2016; and \$7,599.04 relating to hearing dates on 9-10 August 2016. The hearing on all dates had taken place in the town where Mr Tindall, his solicitor and the witnesses resided in or nearby.

[2.1.8] In a short further submission on 12 January 2017 the FPA submitted that the Commission should expel Mr Tindall with immediate effect¹ as that would serve the public interest.

[2.2] Mr Tindall's submissions

[2.2.1] A written submission on behalf of Mr Tindal was made on 16 January 2017. Having acknowledged the Panel's findings that the alleged breaches had been committed, Mr Tindall's submissions accepted that he should be expelled from membership.

¹ Provided for by clause 139 *Disciplinary Regulation*.

[2.2.2] As to whether there should be any further sanction, Mr Tindall submitted:

When considering the purpose of imposing any further penalty, the individual or personal circumstances of Mr Tindall must be considered, as well as any relevant matter in mitigation. [*McDonald v Australian Building & Construction Commissioner* [2011] FCAFC 29] The *minimum* penalty which addresses punishment and deterrence, both personal and general, will be appropriate” [*McDonald*].

[2.2.3] Whilst the submissions for Mr Tindall went on to correctly state that no tariff exists – regard is to be had to the individual circumstances of the case – the above paragraph is problematic. It is not correct to describe the sanctioning process as penal.² Further, *McDonald* is not authority for the proposition that an appropriate penalty is the minimum that addresses punishment and deterrence.

[2.2.4] It was then submitted that the breaches of Ethics Principle 2 (Integrity), Practice Standard 7.1 and Rule 7.2 related to a single course of conduct, in which case it would not be appropriate to levy a fine for each breach. The circumstances were said to warrant application of the “totality” principle: (characterised as) an overall assessment, after determining a penalty for each breach, with consideration of the degree of overlap among breaches.³

[2.2.5] The submission somewhat obscures two separate “principles”. The totality principle is to have regard to the total or overall penalty once individual penalties have been set.⁴ The course of conduct assessment is different: it is an assessment of whether transgressions constitute a course of conduct, in which case it is appropriate to impose a smaller penalty for each contravention.⁵

[2.2.6] Mr Tindall’s submissions characterised his breaches as “a serious deviation from an appropriate standard”. He submitted a lesser fine should be imposed than the maximum submitted by the FPA. The factors which were said to warrant such an assessment were:

- the breaches did not relate to conduct intended to financially benefit Mr Tindall;
- the client’s allegation was of Mr Tindall attempting to help her by his conduct;
- a maximum fine would cause significant financial harm to Mr Tindall and his family;
- Mr Tindall was on 4 January 2017 banned by ASIC from providing financial services for a period of 5 years. (The Panel has not received any evidence concerning the banning or the circumstances that gave rise to

² The Panel addresses this point later in these reasons.

³ Citing *Australian Ophthalmic Supplies P/L v McAlary-Smith* [2008] FCAFC 8 at [71].

⁴ *McAlary-Smith* at [23].

⁵ *Leighton Constructions P/L v CMFEU (No 4)* [2006] WASC 317 at [70].

it). As a result of the banning, it was submitted, there is no need for the Panel to consider deterrence for Mr Tindall personally.

- At the time of the breaches, Mr Tindall was a relatively inexperienced financial planner.
- Mr Tindall's current firm, of which he is the sole director and financial planner, is his family's sole source of income (other than some social security entitlements). There are dependent children.

[2.2.7] It was submitted a total fine of \$18,000 was appropriate for those breaches.

[2.2.8] As to the confidentiality breach, the submission was that a fine of \$3000 was appropriate: the material was sent to a single person, who was within the industry, and there was no evidence that loss or damage was caused to any person whose personal information was forwarded.

[2.2.9] Mr Tindall's submissions accepted that he would be directed to pay the FPA's reasonable costs in accordance with the *Disciplinary Regulation*. However, the amount that should be paid was disputed. There were two heads of dispute: the first was whether Mr Tindall should reimburse costs for all of the hearing days; the second was whether a number of the individual items claimed fell outside what was claimable under the *Disciplinary Regulation*.

[2.2.10] Mr Tindall submitted that the costs of the second block of hearing dates, on 9-10 August 2016, not be paid as those hearing dates were only required in response to differences in the material before Mr Tindall and Panel members.

[2.2.11] Mr Tindall submitted that the FPA's hearing costs for a rental car, accommodation and meals should be excluded because expenses of those types were not referred to in Schedule B of the *Disciplinary Regulation*.

[3] THE APPROPRIATE SANCTION

[3.1] The nature and purpose of disciplinary proceedings and sanctions

[3.1.1] Disciplinary proceedings are "entirely protective, and, notwithstanding that [they] may involve a great deprivation to the person disciplined, there is no element of punishment involved": *NSW Bar Association v Evatt*.⁶

[3.1.2] *Evatt* applied principles derived from the earlier High Court case of *Clyne v NSW Bar Association*⁷, where the Court stated that an order in the nature of exclusion is "in no sense punitive in character. When such an order is made, it is

⁶ [1968] HCA 20 at [12]; (1968) 117 CLR 177 at 183-184. In practice, it may be difficult to draw a distinction between sanctions and penalties: see eg dicta in *Rich v ASIC* [2004] HCA 42; (2004) 220 CLR 129.

⁷ [1960] HCA 40; (1960) 104 CLR 186.

made, from the public point of view, for the protection of those who require protection, and from the professional point of view, in order that abuse of privilege may not lead to loss of privilege”.⁸

[3.1.3] The nature and purpose of any sanction decided by the Commission is thus protective. This is confirmed by clause 111 of the *Disciplinary Regulation*, whereby enquiry is to be made into “sanctioning the member ... for the protection of the community or the profession”.

[3.1.4] Sanctions, being protective, are forward-looking.

[3.2] **Expulsion**

[3.2.1] Mr Tindall failed to conduct himself professionally or ethically in breach of Practice Standard 7.1; he acted with a lack of honesty and lack of candour in breach of Ethics Principle 2; and engaged in acts of a misleading, deceptive, dishonest and fraudulent nature in breach of Rule 7.2.

[3.2.2] These breaches were constituted by two instances: submission of an online insurance application that was false in material particulars as to the client’s medical history, and a recommendation in an SOA to roll over the insurance thereby gained to a new insurer, without disclosure of the medical history.

[3.2.3] Mr Tindall’s submissions accepted that he should be expelled from membership.

[3.2.4] Given the conduct giving arise to the breaches, the Panel finds that expulsion is appropriate for the protection of the profession. The conduct is inconsistent with that required from FPA members for the profession to maintain its public standing and the confidence of the public in it. Mr Tindall, having denying the conduct occurred, demonstrates no acceptance of responsibility or acknowledgement. The Panel has no confidence any lesser sanction could be imposed that would meet the purpose of protection of the profession.

[3.2.5] Expulsion is also appropriate for the protection of the public. The public, which relevantly includes clients and industry participants such as insurers, need to be able trust the professionalism and ethics of the FPA’s members. Again, given Mr Tindall’s denials, the Panel has no confidence any lesser sanction could be imposed that would meet the purpose of protection of the public.

[3.2.6] As Mr Tindall has accepted he should be expelled, his expulsion will take effect upon receipt by him of notice in accordance with the *Disciplinary Regulation*.

⁸ [24]; 201-202.

[3.2.7] The Panel notes that the breach of Ethics Principle 7, the dissemination of confidential client information, would not otherwise support a sanction of expulsion, even given Mr Tindall's apparent lack of appreciation, and his lack of acknowledgement, of the breach.

[3.3] **Fine**

[3.3.1] The Commission may impose a fine of up to \$20,000 for each breach.⁹

[3.3.2] In the context of professional discipline, fines are a quantified demonstration of the opprobrium placed on conduct. The demonstration may be internal, to the membership (most particularly the member being disciplined), or external: the public can gauge the seriousness of the conduct being sanctioned by the response taken to it.

[3.3.3] Fines also have a deterring role for both the member being sanctioned and the wider membership.

[3.3.4] The Panel accepts that principles derived when setting penalties may provide guidance.

[3.3.5] The FPA's submission, reproduced above, did not seek a particular fine. The submission merely noted that the Commission had previously imposed maximum fines in combination with expulsion "as a demonstration of the moral opprobrium for the conduct, to deter others".

[3.3.6] Mr Tindall's submissions, perhaps wisely, interpreted the FPA's submissions as seeking maximum fines.

[3.3.7] There were two instances of breach of each of the Integrity Ethics Principle, Practice Standard 7.1 and Rule 7.2. The online application was the first instance of breach of each of those provisions. The recommendation to then roll over the insurance was the second instance.

[3.3.8] The structure of the *Code*, which contains three layers of requirements, each being more specific than the next, resulted in three breaches having been particularised for each instance of conduct. This will not occur in every case, however. For instance, the circumstances of an ethical breach might not be addressed by any particular rule.

[3.3.9] The Panel considers the correct approach is to impose a fine for each breach, having regard to the overlap.

[3.3.10] Similarly, the Panel accepts that the first and second instances of breach of each of Ethics Principle 2, Practice Standard 7.1 and Rule 7.2 should be

⁹ Schedule B item 5.

regarded as a course of conduct. (Indeed, that was how the FPA had characterised the conduct in alleging that the recommendation to roll over the insurance breached the *Code*).

[3.3.11] In the Panel's view the course of conduct was serious and capable of significantly undermining the faith of the public, which relevantly includes insurers, in the conduct of financial planners.

[3.3.12] The course of conduct and its consequences, on evidence to the Panel, proved stressful for the client. It may have put Mr Tindall's then employer, or the insurers, to some administrative cost. It did not, however, result in financial loss to the client or the insurers.

[3.3.13] As submitted on Mr Tindall's behalf, the evidence did not support a finding that the course of conduct resulted in a financial benefit to Mr Tindall. Rather, given the client's evidence, it was a grossly misguided attempt to "help" the client.

[3.3.14] The Panel accepts that at the time of the breaches, whilst Mr Tindall had been in the financial services industry for an extended period of time, he was a relatively inexperienced financial planner.

[3.3.15] However, as stated above, Mr Tindall, by his denials, failed to offer any acknowledgement of wrong-doing or acceptance of responsibility for his actions.

[3.3.16] Additionally, once the compliant was being investigated, Mr Tindall sought to resign from the FPA. Expulsion would be little sanction at all where the member seeks to terminate the relationship anyway. This is especially so where expulsion from membership of the FPA does not itself end the planner's ability to seek or maintain membership of another professional association or work in and around the financial planning industry.

[3.3.17] The ASIC ban can be given little weight. The Panel has no evidence as to the circumstances of its making. Similarly, any consequences it may have for Mr Tindall's business arrangements are removed from whether a protective fine is required.

[3.3.18] The Panel found that Mr Tindall breached Ethics Principle 7 of the Code of Ethics of the *Code* as he had emailed a list containing client names, insured incomes and policy balances to a third party, and thereby did not protect client information in such a manner that allowed access only to authorised persons.

[3.3.19] As submitted on behalf of Mr Tindall, only a single person received the communication, and there was no evidence of the information being used in any way. On the other hand, the Panel does not think it assists Mr Tindall that the recipient was in the finance industry.

[3.3.20] The Panel considers the breach was minor in nature and were it not for Mr Tindall's attitude to his conduct, would warrant a reprimand rather than a fine. What troubles the Panel, however, is Mr Tindall's apparent lack of comprehension that his actions amounted to a breach of confidentiality, and the regrets he has are only those of having to endure the disciplinary process. Ideally, the Panel would have preferred to imposed some sanction for this breach that had an educative role, in the hope Mr Tindall could constructively engage with the Panel's findings and reasoning. However, given the response of expulsion necessary for the other breaches, that option is not available.

[3.3.21] In the event Mr Tindall was to at some future point seek re-admittance to the FPA (an event which presently may appear difficult to conceive), those considering the application might want to consider conditions that address the Panel's concerns.

[3.3.22] The Panel imposes the following fines for having submitted the online insurance application that was false in material particulars as to the client's medical history:

- acting with lack of honesty and lack of candour in breach of Ethics Principle 2: \$2500;
- failing to conduct himself professionally or ethically in breach of Practice Standard 7.1: \$2500;
- engaging in an act of a misleading, deceptive, dishonest and fraudulent nature in breach of Rule 7.2: \$5,000.

[3.3.23] The Panel imposes the following fines for recommending in the SOA that the client roll over the insurance to a new insurer without disclosure of the medical history:

- acting with lack of honesty and lack of candour in breach of Ethics Principle 2: \$1500;
- failing to conduct himself professionally or ethically in breach of Practice Standard 7.1: \$1500;
- engaging in an act of a misleading, deceptive, dishonest and fraudulent nature in breach of Rule 7.2: \$2,500.

[3.3.24] The Panel imposes a fine of \$500 for having forwarded client information to a third party in breach of Ethics Principle 7.

[3.3.25] The total amount of the fines is \$16,000. The Panel considers that total amount is appropriate in the circumstances.

[3.4] **The FPA's costs and expenses**

[3.4.1] Clause 130 of the *Disciplinary Regulation* provides that when a Panel makes a determination concerning breach allegations, it may also make a determination that the member “pay the FPA’s costs and expenses incurred in the investigation and Disciplinary Proceedings.”¹⁰ Clause 130 goes on to say that Schedule B sets out the standard directions the Panel may make in respect to costs.

[3.4.2] Payment by a member of costs and expenses incurred by the FPA is not stated by the *Disciplinary Regulation* to be a sanction.

[3.4.3] Mr Tindall has accepted he would be directed to pay some portion of the FPA’s costs. The Panel’s considers such a direction as appropriate.

[3.4.4] When the matter was set down for hearing, the Commission and the parties gave their best estimates for how long the hearing would take, and some allowance was made for the notorious fact that hearings usually take longer than estimated. Two days were allocated for the hearing. However, unfortunately, it came to light during those two days that there were some differences between the bundles of documents that were before Mr Tindall and the Panel Chair, on one hand, and the other two Panel members, on the other. The difference affected the course of questioning. In the circumstances the Panel decided to adjourn the hearing until such time that the difference, and whatever significance it might or might not have, could be sorted out.

[3.4.5] The problem, and the steps taken to remedy it, did not arise due to fault on Mr Tindall’s part. Mr Tindall is not directed to pay those costs and expenses relating to the resumed hearing dates of 9 and 10 August 2016.

[3.4.6] The power given by clause 130 to direct payment of the FPA’s costs and expenses is expressed generally and without limitation. In the Panel’s view the expenses sought to be excluded by Mr Tindall – rental car, accommodation and meals – fall within the costs and expenses incurred in the disciplinary proceedings. There should not be any deduction in the amounts claimed for the hearing dates on 1-2 June 2016.

[3.4.7] Clause 130 does go on to say “Schedule B sets out the standard directions [the Panel] may make in respect to costs”. In the Panel’s view, the reference to Schedule B in clause 130 is not intended to limit which items relating to the investigation or disciplinary proceedings the Panel can direct to be paid. Rather, the standard directions are for the assistance of the Panel when drafting a direction for payment. “Standard” directions are only that: they may need to be modified to fit the particular circumstances.

[3.4.8] The Panel finds it is appropriate to direct that Mr Tindall pay the FPA’s costs and expenses in the sum of \$12,423.39; made up of investigation expenses

¹⁰ Note also that clause 166 provides that an application for review of a Panel determination is to be accompanied by a payment calculated by reference to the FPA’s costs as determined by the Commission.

incurred on 13-14 November of \$578.87, and costs and expenses of the disciplinary proceeding relating to the hearing on 1-2 June 2016, of \$11,844.52.

END OF REASONS