FINANCIAL PLANNING ASSOCATION OF AUSTRALIA

CONDUCT REVIEW COMMISSION

DETERMINATION AND REASONS FOR DECISION

CRC 2012_3

PANEL MEMBERS: **PROFESSOR DIMITY KINGSFORD SMITH, CHAIR**

MRS SANDRA BOWLEY

MR GREG COOK

MEMBER: **YVETTE DANIEL**

DATE OF HEARING: **26 AUGUST 2011**

DATE OF FINAL DETERMINATION: 6 JULY 2012

PARTIES' REPRESENTATIVES: MR MARK MURPHY (FPA)

MS YVETTE DANIEL DID NOT ATTEND OR APPEAR

DETERMINATION AND REASONS FOR DECISION

I. SUMMARY OF DETERMINATION AND REASONS

The CRC finds that the member Yvette Daniel made investment recommendations to Mr and Mrs F (the complainants) that contained misrepresentations that were unresearched, unsuitable and failed to adequately explain the risks involved in those recommendations. The CRC Panel also finds that Ms Daniel acted so as to bring discredit to the financial planning profession. The Panel finds all of these breaches occurred at the highest level of disregard of the interests of the complainants. The final determination is set out at the end of these reasons in Part 8 and the sanctions the Panel imposes, in Part 9.

II. THE COMPLAINT

This is a complaint by the Financial Planning Association (FPA) in its disciplinary capacity under its Constitution and Disciplinary Regulations. The complaint is referred to the Conduct Review Commission (CRC) on the motion of the FPA's Investigations Officer, as a result of a complaint received by him from a client of Yvette Daniel (Daniel), a member of the FPA. The complainants complained that Ms Daniel engaged in misleading and deceptive conduct, failed to collect sufficient information to ensure appropriate advice could be given, did not develop a suitable financial strategy based on the available information, and did not explain the nature of the investment risks in terms that they could understand. Daniel was at the time an authorised representative of Storm Financial Pty Ltd (Storm Financial) a principal member of the FPA, the holder of an Australian Financial Services License and now in liquidation.

2.2 After investigation and correspondence between the FPA and Daniel, it was alleged that Ms Daniel had a case to answer under the FPA's Code of Ethics and Rules of Conduct (FPA Ethics and Rules). The case to answer alleged breaches of the Ethics and Rules as follows:

(a) **Charge 1 –** breached Rule 101 of the FPA Rules of Professional Conduct in that in the conduct of professional and business activities, the member engaged in an act or omission of a misleading, deceptive, dishonest or fraudulent nature. That Daniel had called Mrs F in order to encourage her to sign the Statement of Additional Advice of 2 August 2007. During the conversation Mrs F expressed some worry as to the source of the funding, as they did not wish to borrow more money. The FPA alleges Daniel stated that the money was 'coming out of the dam' meaning it was to be withdrawn from existing balances in a cash management account.

(b) **Charge 2 -** breached Rule 108 of the FPA Rules of Professional Conduct that in preparing oral or written recommendations to clients a member shall collect sufficient information to ensure appropriate advice can be given. Daniel did not conduct any independent inquiry into the complainant's specific financial goals in her conversations regarding Statement of Additional Advice (SOAA) of 2 August 2007. Also, the statements in the SOAA dated 22 January 2008 that 'If your personal circumstances have changed since we reviewed you last, you should contact your adviser or Storm to discuss changes' does not sufficiently discharge the positive obligation created by Rule 108.

(c) **Charge 3 -** breached Rule 110 of the FPA Rules of Professional Conduct that in preparing oral or written recommendations to clients, a member shall develop a suitable financial strategy or plan for the client based on the relevant information collected and analysed. This breach is based on the FPA's allegation that Daniel recommended a high risk strategy which used 100% debt to make significant purchases of volatile class assets, despite the complainants' selecting a conservative level of risk. This is despite a clear indication of the complainants' conservative risk tolerance from their initial SOA and telephone conversation with Daniel, and that the complainants could have met their retirement goals with a lower risk strategy.

(d) **Charge 4 -** breached Rule 111 of the FPA Rules of Professional Conduct that in preparing oral or written recommendations to clients a member shall provide an explanation of the nature of the investment risks involved in terms that the client is likely to understand. In particular, there was no independent explanation to the complainants of the possibility of risk of loss and the impact on them of such risk and volatility. Ms Daniel failed to make an independent disclosure and explanation of risk, and the SOAA's referral to the 'original letter of recommendation' is insufficient to discharge the obligation created by Rule 111, in relation to subsequent pieces of advice. Also, the risks described in the SOA are described in a general sense without any special consideration of the complainant's circumstances.

(e) **Charge 5 -** breached Ethics Principle No. 6 of the FPA Code of Ethics, namely Professionalism, that the member's conduct, in breaching the other Rules of Professional Conduct has led to discredit to the financial planning profession.

2.3 The CRC held a hearing of the above allegations on 26 August 2011. At the hearing the CRC took submissions from the FPA through its investigation officer and heard evidence from the complainants. The FPA presented evidence in a folder of exhibits numbered 1 to 20 (FPA exhibits). The complainants gave evidence by a statement and personally by telephone link.

2.4 Ms Daniel did not appear either herself or by a representative at the hearing. On 27 August 2010, Ms Daniel responded to the FPA by email indicating that she did not intend to participate in the FPA's investigations or respond. Ms Daniel again declined to respond to the charge notice issued on 10 May 2011.

2.5 There is a typed transcript of the entirety of the hearing conducted on 26 August 2011 which is also referred to in these reasons by relevant page numbers.

III. BACKGROUND TO THE COMPLAINT

Ms Daniel is a member of the FPA. Ms Daniel was an authorised representative of the Storm Financial Pty Limited ("Storm") from 4 April 2005 to 18 June 2009.

3.2 In 2004, the complainants were referred by their son to see Mr S to assist with their financial planning affairs. At the time Mr S was a representative of Company A. Only Mrs F attended the meeting, where they discussed their financial position. Mrs F is unable to recall what else was discussed, and no formal or written advice was provided at or following this meeting

3.3 The complainants received invitations from Mr S to attend investment seminars run by Storm Financial. At this time, Mr S was no longer a representative of Company A and had moved to being a representative of Storm. Throughout 2005 and 2006, the complainants attended one or two investment seminars, which covered the general topic of the share market. The complainants were not interested in investing in the share market and did not enjoy or understand the information presented.

3.4 In September 2006, the complainants , R (aged 57) and D (aged 58) decided to see Mr S, as they were concerned about whether they had saved enough for retirement and wanted advice about retirement planning. The complainants gave evidence that Mr S said words to the effect:

(a) *"Shares in Storm Index Funds are safer than buying shares."*

(b) *"Storm Index Funds are a combination of the top 200 Australian listed companies and can also give you exposure to particular segments of the stock market, such as mining and banking."*

3.5 On about 16 February 2007, the complainants saw Mr S again in Storm's office at Mackay, Queensland. At the beginning of the meeting they said to Mr S words to the effect:

(a) "Whatever you recommend we don't want any investment that is too risky."

(b) "We want to retire in comfort, but don't know how much we need to do so."; and

(c) "We are both happy to work to 65 years."

3.6 A statement of Advice ('SOA') was entered into on 27 April 2007, with Mr S as the Complainant's advisor. The complainants explained that at this time Ms Daniels was not involved in giving them financial advice; however they had met her through Mr S. They described that "*I had met her at the information evenings that they had but...I hadn't actually sat down with her to have a conversation with her until January*" (Transcript, Page 9). At this point in time, the complainants had the following assets:

ASSETS		**LIABILITIES**	
Cash	$242,000	Expected Outlays	$40,000
Shares	$21,000		
Cash value of Life Insurance Cover	$34,000		
Combined Superannuation	$243,000		
Family Home	$500,000		
Investment	$210,000		

Property			
TOTAL	**$1,250,000**		**$40,000**
NET ASSETS	**$1,210,000**		
RETIREMENT BASE	**$710,000** (Net Asset less Family Home)		

The recommendations in the SOA of 27 April 2007 were implemented – this was complete by early July 2007.

3.6 In August 2007, the complainants received a package in the mail entitled 'Your Next Step'. This package was sent out by Daniel and contained a SOAA recommending the complainants make further investments. There had been no further review of the complainant's financial circumstances before the issue of the SOAA. Before the complainants could make an appointment to see Mr S to discuss the recommendations, Daniel rang Mrs F on her mobile and had a conversation in which the FPA asserts that Daniel assured Mrs F that the money was "coming out of the dam" (the Macquarie Bank cash management account) and did not involve further borrowings.

3.7 Based on that conversation, Mrs F told Mr F that the investment did not mean more borrowings, and that it was 'coming out of the dam' (Transcript, Page 10). They signed the paperwork and took it back into the Storm office. They did this every time a 'Next Step' SOAA document arrived in the mail, as instructed to by Daniel (Transcript 15). The FPA asserts that at no time did Ms Daniel or anyone else at Storm explain to the complainants exactly what the paperwork in this series of SOAAs was about, nor the risks that were involved.

3.8 In January 2008, the complainants had a meeting with Ms Daniel to discuss how their investments were going. Ms Daniel's words were to effect "*I keep a good eye on what was happening with the market*" and "*It's best not to tell us what to do...you'll do far better than trying to tell us when to put money into the market.*" (Exhibit 1, Page 7)

3.9 From August 2007 to January 2008, the complainants were given advice in SOAAs to borrow the amounts in the table below. Ms Daniel provided the advice to the complainants for all of them, except that of 15 April 2008:

No.	**Date**	**Investment Amount**	**Increase in Margin Loan**	**Fees**
1	2 August 2007	$50,000	$53,630	$3,630
2.	17 August 2007	$41,000	$43,977	$2977
3	15 October 2007	$250,000	$268,563	$18,563
4	19 December 2007	$55,000	$59,084	$4,084
5	22 January 2008	$25,000	$26,856	$1,865
6 (Not Daniels)	15 April 2008	Nil	$20,000 (For Holiday)	Nil
TOTAL		**$421,000**	**$472,110**	**$31,119**

The FPA alleges that none of these pieces of advice for which Daniels was responsible were given in accordance with the FPA Code of Rules and Ethics, and involved the breaches set out in the breach notice.

3.10 In October 2008, the share market fell significantly whilst the complainant's margin loan had increased to $580,000. The complainants received and accepted advice from Storm to sell down 100% of their portfolio, and requested full redemption of their Storm Index Funds. Storm arranged to sell all of the Storm Index Funds, the complainants receiving approximately $515,000 (October 2008). When Storm was closed, the FPA recommended another financial planner in Mackay, who recommended cashing in the Storm Index Funds that were left, $190,000 (January 2009), giving total return of $705,000.

3.11 By January 2009, the complainant's financial position was the following:

ASSETS		**LIABILITIES**	
Cash	$32,000	Margin Loan	$580,000
Shares	Nil	Equity Loan	$584,000
Cash value of Life Insurance Cover	Nil		
Combined	$243,000		

Superannuation	(approx)		
Family Home	$500,000		
Investment Property	$210,000		
Index Funds Proceeds	$705,000		
TOTAL	**$1,690,000**		**$1,1640,000**
NET ASSETS	**$526,000**		
RETIREMENT BASE	**$26,000** (Net Assets minus Family Home)		

3.12 In summary, the FPA alleges the complainant's lost $684,000 in net assets ($1,210,000 - $526,000) over the 18 month period from July 2007 to January 2009. As a result of the reduced asset values and significant borrowing, the bank required repayment of outstanding loans. The complainants transferred the proceeds of the Storm Index Funds to fully repay the margin loan, and were left with $125,000 in cash. However, they still had $584,000 outstanding on their home equity loan. They are currently considering legal options. As a result of the stress from the financial loss, Mrs F is currently suffering from depression and Mr F has been hospitalised due to a stress-related stroke. They have been forced to retire due to ill health and at the age of 60 and 61, respectively, are living on a disability and carer's pension.

IV. THE FPA'S POSITION

FPA Rules of Professional Conduct 101 – Misleading and Deceptive Conduct Allegation

4.1 The FPA alleges that Ms Daniel made misleading representations to the complainants that:

(a) Ms Daniel called and firmly requested Mrs F to sign the SOAA dated 2 August 2007. The recommendations in that advice were to "*increase the SIZE of your capital base by borrowing an additional $53,630 from your existing loan with Macquarie Margin Lending*." (Exhibit 4A) During this conversation, Mrs F expressed some worry as to the source of the funding. She stated '*where is the money coming from, we don't want to borrow any more money'*. The complainants had already borrowed $638,000 as advised in SOA dated 27 April 2007 (Exhibit 3A). In response, Mrs F's evidence was that Ms Daniel stated that the money was "*coming out of the dam"* (Transcript, Page 10) meaning it was to be withdrawn from the cash from existing borrowings already in the Macquarie cash management account; and

(b) According to the SOAA dated 2 August 2007, the application for further indexed funds was to be made using increases in the complainant's margin loan. The FPA contends that Ms Daniel's statement that the money was "*coming out of the dam"* (Transcript, Page 10) was a misleading and deceptive statement.

4.2 The complainants gave evidence that statements to the effect of paragraph (a) were made to them during a telephone conversation with Ms Daniel. "*And then I said* '*is the money coming out from the DAM?' and she said 'yes'.*" (Transcript, Page 10). Ms Daniel's representations caused Mrs F to understand that the funds were coming from her DAM, meaning it was to be withdrawn from existing funds in the cash management account, which had been borrowed previously. Mrs F states that she was misled there.

4.3 The FPA notes that the SOAA of 2 August 2007 does state that an extension in the complainant's margin loan is recommended. Mrs F gave evidence that when she first read the SOAA she thought it was suggesting that new borrowings be made (Transcript p9 & 10). This is also what she says in the follow up letter to the FPA dated 11 November 2011, a copy of which has been furnished to Daniel with this determination. The understanding from reading the SOAA that further borrowings were indicated, is what prompted her questions to Daniel on the phone, about where the money was coming from (Transcript p11, 14-15, 16-17). Mrs F repeats this evidence too, in her letter to the FPA of 11 November 2011. Mrs F gave evidence that Daniels' answers to her questions about where the money for further investments was coming from, was what reassured her that further investments could be made without further borrowings (Transcript p 12, 15). This evidence too is repeated in the letter of 11 November 2011.

At the hearing Mrs F gave evidence that (Transcript p16) she had not signed any other documents such as loan applications for the additional amounts recommended in the SOAA. Prompted by questions from the Panel, and after the hearing in this matter, further searches of documents provided by the liquidators of Storm Financial revealed that in addition to the SOAAs which recommended margin loan extensions, the complainants had signed an authority addressed to Macquarie Margin Lending to request the extension of their margin loan in relation to each of the five SOAAs they entered, including that of 2 August 2007. The FPA wrote to Mrs F in October 2011 seeking an explanation of the signing of the requests to extend the margin loan, they asked:

(a) How do you explain signing 5 margin loan extensions with your evidence that you signed only the SOAAs (Transcript p16); and
(b) How in the light of the signed requests, do you explain the evidence that you did not understand you had a margin loan, until after Storm Financial collapsed (Transcript p25)?

Her reply of 11 November 2011 did not address the first question above. In relation to question b), it simply reiterated the story already told at the hearing about finding out after the Storm collapse, about the fact of the margin loan. These additional documents were sent to Ms Daniels with the next to last draft of this determination, to allow Ms Daniels to respond to this additional evidence. She did not do so.

4.4 FPA argued that the evidence showed Mrs F's overall lack of understanding and confusion in respect of the whole financial advice process that started from the original strategy and persisted through to the end. They argued that this level of confusion, induced by Daniels' failure to explain adequately, was fertile ground on which Daniels' misrepresentation that the money was 'coming out of the dam' could be relied on by the complainants, to engender a belief that no more borrowings were being made.

FPA Rules of Professional Conduct 108 – the Failure to Collect Sufficient Information Allegation

4.5 The FPA alleges that in breach of FPA Rules of Professional Conduct 108, Ms Daniel did not conduct any independent inquiry into the complainant's specific financial goals ($48,194 pa in retirement). Also, the FPA contends that Rule 108 is a positive obligation to make inquiries into the client's circumstances before a SOAA is issued, or else before the recommendations are implemented. The statement 'If your personal circumstances have changed since we reviewed you last, you should contact your adviser or Storm to discuss changes' in the 22 January 2008 SOAA is not sufficient to discharge the obligation created by the above rule. The FPA further contends that even if Ms Daniel had relied on the information contained within the original Confidential Financial Profile the information was defective. The defect exists because Mr S (the member responsible for the initial client interview and the initial statement of advice) did not ascertain the financial effect of the planned annual holidays upon the complainant's retirement scheme. The financial impact of these holidays is not insignificant. The FPA believes that a conservative estimate of the outlay for the holidays is $10,000, a significant portion of the complainant's expected annual expenditure in retirement.

4.6 The FPA asserted that despite investigation there is no record of any further inquiries made by Ms Daniel in relation to the complainant's circumstances to determine if there was a change since the original SOA advice of April 2007. The FPA obtained no such documents from Storm Financial's liquidator KordaMentha, and none from the member. The member has not responded or denied the allegations.

FPA Rules of Professional Conduct 110 – the Failure to Provide a Suitable Financial Strategy Allegation

4.7 The FPA alleges that in breach of the FPA Rules of Professional Conduct 110, Ms Daniel failed to develop any suitable financial strategy or plan for the complaints before making her recommendation that they make further investments and loans.

4.8 The complainants selected the option 'I am prepared to accept volatility if in the medium to long term the investment growth is higher and the risks over that term are minimal or eliminated,' in their Confidential Financial Profile (Exhibit 2A). The complainants believed they were selecting a conservative level of risk, yet Ms Daniel continued to recommend a high risk strategy involving the use of 100% debt to make significant purchases of a volatile asset class. The complainants gave evidence that during the phone conversation in August 2007 between Ms Daniel and Mrs F, Mrs F stated "*we don't want to borrow any more money.*" (Transcript, Page 10). The FPA contends that this is a clear indication of the complainants conservative risk tolerance. Yet between August 2007 and January 2008, Ms Daniel recommended the complainant's purchase $421,000 of index funds using $472,110 of debt.

4.9 Based on the complainant's current lifestyle, predicted future earnings and forecasted retirement age, the FPA assert that a lower risk strategy could have met their financial goals. The FPA contends that the recommendations in the five SOAAs by Ms Daniel, which increased the complainant's margin lending for investment in volatile assets in the Storm Index Funds was unsuitable. This caused the complainant's to increase their LVR ratio to the point where their total debt (as constituted by the margin loan and the equity loan) exceed the value of their asset. This strategy is not consistent with a conservative level of risk and the FPA argued, in breach of Rule 110.

4.10 During the period in which the four SOAAs were issued there is no material change in the circumstances or goals of the complainant's. Yet in the short period between August 2007 and January 2008, Ms Daniel recommended the complainant's purchase index funds using debt, which dramatically raised their Loan-to-Value ratio on their margin loan. Given the fact that there was no material change, the FPA argued that there are no grounds on which the suitability of these additional loans may be justified.

FPA Rules of Professional Conduct 111 – the Failure to Provide an Explanation of Risk Allegation

4.11 The FPA alleges that Ms Daniel failed to provide an adequate explanation of the risks involved in the strategy and recommendations she made to the complainant's. There was no independent explanation to the complainant's of the possibility of risk of loss and the impact on them of such a risk and volatility.

4.12 The SOAAs state that the client should 'refer to your (the client's) original letter of recommendation.' The FPA asserts that this is insufficient to discharge the obligation created by Rule 111, as the Statements of Additional Advice have the effect of increasing the complainant's margin loan which materially alters their risk position. As such, the FPA contends that Ms Daniel should have made an independent disclosure and explanation of risk. The disclosure of risks made in the original Statement of Advice is insufficient to discharge the obligation created by Rule 111. In this document, the risks were described in a general way without any special consideration for the complainant's circumstances. In particular, the initial Statement of Advice does not address how interest payments on the loans taken out to fund the purchase of indexed funds, and living expenses, are to be funded while the complainants are not making a steady income. The cash flow work sheets in the 16 February 2007 Statement of Additional Advice clearly show cash reserves going into deficit. These deficits were to be funded by increased borrowings which have the effect of further increasing the complainant's risk position. No disclosure of this fact and explanation of risk was evident upon the face of the document.

FPA Code of Ethics Rule 6 – Bringing Discredit to the Profession Allegation

4.13 The FPA argued that as a result of the conduct alleged in the paragraphs above, Ms Daniel has brought the profession of financial planning into discredit.

V. THE MEMBER'S POSITION

5.1 As has already been stated, Ms Daniel neither attended nor appeared at the hearing. Ms Daniel also chose not to respond to the Breach Notice of 10 May 2011. Ms Daniel was provided repeated opportunities to respond to the charges laid against her, and chose to not to respond. Ms Daniel was provided notice of the hearing date, and chose not to respond or attend. The hearing went ahead after a telephone call from the FPA's Investigation Officer on the morning of 26 August 2011 confirmed that Ms Daniel would not be attending.

5.2 The following account of Ms Daniel's position is therefore taken from the limited correspondence between herself and the FPA.

Actions were Performed with the Highest Integrity and Honest Intentions

5.3 Daniel's email (dated 27 August 2010) in response to the FPA's notice of a complaint, maintained that her actions at Storm Financial were done with the highest of integrity and honest intentions.

VI. THE LEGAL QUESTIONS

FPA Rules of Professional Conduct 101 – Misleading and Deceptive Conduct Allegation

6.1 FPA Rule 101 prohibits acts or omissions of a 'misleading' nature. By contrast with the prohibitions in the Australian Securities and Investments Commission Act the FPA rule does not prohibit conduct 'likely to mislead'. It follows that conduct which has caused confusion or uncertainty in the minds of clients will not alone be enough to mislead. However, circumstances which do induce confusion or uncertainty are very much more likely to result in misleading conduct being relied upon, and loss occurring. They are also more likely to allow proof that conduct was objectively misleading.

6.2 Rule 101 is silent about whether intention to mislead is required. Following the interpretation of the Australian Securities and Investments Commission Act provisions, and because of the burden of proving intent, the CRC considers it appropriate that a breach of Rule 101 is not confined to conduct which is intentional, and that a member acting honestly may nonetheless engage in misleading conduct.

6.3 Generally for conduct to be misleading there must be a representation or conduct amounting to a representation (e.g. silence which allows a misunderstanding to persist) inducing error or misconception. The other person must rely on that conduct. It is possible for factually true statements to be misleading if the associated circumstances contribute to error or misconception. In the same way, silence may be misleading.

6.4 Misrepresentation made in one part of a document may still mislead even if corrected in another part, but where it is unlikely that the average client would look or make the connection back to the original misstatement. This is a danger in long, complicated documents, and in investment recommendations that are too complex for inexperienced clients to understand. Documents which are overly long and arrangements which are overly complex are fertile grounds for liability for deceptive and misleading conduct to thrive. It is for these reasons that ASIC has connected the failure to be 'clear, concise and effective' with misleading and deceptive conduct. It is also one reason for the requirement in the FPA Rules that recommendations are explained to clients in a way that they are likely to understand.

6.5 There are two further legal points to be made about the allegations of misrepresentation arising from the failure to explain and clarify whether the money for the investments was further borrowings or from funds already in the complainant's Macquarie cash account. Ms Daniel did not explain properly where the funds were coming from, and according to Mrs F's evidence, responded with a 'yes' when Mrs F inquired whether the money was coming from existing funds. (Transcript, Page 10). The first point is that silence can amount to misleading conduct. This position is express in the terms of FPA Rule 101 which includes the word 'omission' in its description of 'conduct' which may be misleading. It is also clear from the legal interpretation of the term 'conduct' in many other contexts in Australian law – and we see no reason to deviate from that interpretation in seeking the meaning of the FPA Rules when they are intended to be protective of member's clients. To determine otherwise would leave a large gap in that protection.

6.6 The second point is that even a statement which is literally true, can be misleading depending on the circumstances. If the clear purpose of an inquiry is directed to a wider fact (eg will there be new borrowings?) and the answer is directed to a narrow technical or literal matter (eg 'yes' the money is coming out of the 'dam') then that may be misleading if relying on it was reasonable.

FPA Ethics & Rules 108 – the Failure to Collect Sufficient Information Allegation

6.7 Rule 108 of the FPA Rules requires an adviser to 'collect sufficient information to ensure appropriate advice can be given'. Clearly the main thrust of this requirement is in relation to giving initial advice. The wording of the rule is wide enough and common sense understanding of financial advising practice suggests, it would also apply to additional or supplementary advice. Rule 108 applies the obligation whenever a member is 'preparing oral or written recommendations to clients'.

6.8 Clearly too it is reasonable to adjust what it takes to discharge this rule to the circumstances. An adviser will have to do much more where a client's affairs are complex than if they are simple. If a client is particularly vulnerable (eg their need for advice is for investing a damages award after catastrophic injury) more extensive and diligent enquiries and information collection will be required than, say, for a twenty-something just starting in the workforce with no significant assets or liabilities. Likewise, where an extensive investigation of the affairs of a new client have been done recently, this rule will *usually* be discharged by relatively limited further enquiries. However, Rule 108 cannot be discharged by no enquires at all.

6.9 To discharge Rule 108 in giving supplementary or additional advice, the member has to enquire at least enough to be certain that the client's objectives, financial situation and needs are not significantly altered from the previous investigation. Further, previously gathered information can only be relied on where the additional advice does not change already implemented financial recommendations. Again, prior information can only be relied on where new recommendations do not proceed on a basis different to the advice previously given. The only way a member can know about these matters, is to make an irreducible minimum of enquiries of the client.

6.10 In the same vein, it does not discharge Rule 108 to impose (in writing or otherwise) an obligation on the client to tell the adviser if circumstances have changed. Of course it is good practise to alert a client to the need to keep an adviser up to date. But that does not excuse an adviser from making enquires commensurate with the circumstances before giving advice, additional or otherwise. Some clients will not understand what kinds of information a member needs to make suitable recommendations – they will not appreciate that their circumstances have changed. It is up to the member to make the enquiries: this is demanded by the text of Rule 108 and it is necessary to discharge an adviser's suitability obligation. It is also required to be able to act professionally.

FPA Ethics & Rules 110 – the Failure to Provide a Suitable Financial Strategy Allegation

6.11 The material words of FPA Ethics and Rules 110 require the planner to 'develop a suitable strategy or plan for the client'. This plan must be 'based on the relevant information collected and analysed' a reference to the requirement to collect information from the client in FPA Rule and Ethic 108. These two rules operate together, and are two sides of the one coin. The planner collects information from the client to make an assessment of the type of strategy or plan that would meet the client's needs. This strategy may be to do nothing: or it may be to go home and pay off the mortgage and continue to make the highest contributions to an existing super fund that are affordable. Many Australians need only quite modest financial plans, at least in the earlier stages of their lives.

6.12 The identification of a suitable financial product does not have to result in recommending the 'best', the rule requires only that what is recommended is suitable. In short the FPA Ethics and Rules prescribe a two-step approach to a suitable recommendation: collection and analysing of client information to identify client needs and research and analysis to match the needs with suitable recommendations (usually but not always, acquiring financial products). The overall result is the development and implementation of a financial plan.

6.13 The adviser must match the plan and its implementation to the client's needs, not the client to the strategy and products. If the plan or strategy and its implementation is not based on meeting needs it will not satisfy the suitability obligation.

6.14 We have already said the role of the financial adviser is to discern the client's needs and put them into financial terms. Those needs include the need to be at peace with the level of risk they assume when the plan is implemented. That need may well convert into different (and lower earning) financial terms for risk adverse clients than for those who are perhaps younger or for many other reasons may tolerate higher risk. It is not acceptable for the planner to either ignore the risk preferences of the client or to persuade them to accept (or appear to accept) a higher level of risk than they wish to assume. The role of the planner is to develop a plan that is suitable for the client's needs, including the need to be content with the risk levels assumed.

6.15 Continuing on, it is also unacceptable to simply assume that an investment additional or supplemental to an existing SOA will be suitable with out further inquiry or consideration. This too, is matching the client to the product, not the product to the client. As with information gathering under Rule 108, there will have to be an irreducible minimum of consideration given to the suitability of the additional investment. In some cases where a thorough investigation and suitability assessment has been made recently it may take less analysis to decide that an additional investment, made on the same general basis as the recent SOA, is suitable. This would likely be the case, if for example the new investment increased diversification, or involved a conversion from a more risky to a less risky investment of a similar type.

Where however, what is being recommended increases the risk significantly, by reducing diversification, increasing borrowings or loan to valuation ratios, then there is a clear need for a thorough suitability reassessment. Where the client has clearly said they do not want to increase borrowings, and increasing them is the basis of the recommendations, then it is virtually inconceivable that such recommendations could be suitable. This is even if those additional borrowings were contemplated in a recent original SOA.

6.16 Finally on the question of suitability, it is not to the point for a planner to say that he or she has made disclaimers, or obtained concessions or made disclosure which exempts them from the operation of the suitability obligation. The best view of the effect of exemptions, disclaimers and disclosures on the suitability obligation, is that they are virtually useless in reducing liability. Certainly under s945A of the Corporations Act 2001 there is no room at all for reducing liability flowing from the obligation to have reasonable grounds for advice by any of these devices. Similarly, using contract terms to position the client so their behaviour may be seen as akin to contributory negligence is also ineffective. We see no reason in principle and no compulsion or encouragement from the actual words of the FPA Ethics and Rules, to deviate from the Corporations Act 2001 position in the interpretation of FPA Ethics & Rules 110.

FPA Ethics & Rules 111 – the Failure to Provide an Explanation of Risk Allegation

6.17 Rule 111 requires that an explanation of risk is given to customers 'in terms that the client is likely to understand'. An understandable explanation of risk is at the heart of informed client consent to the investment strategy they are agreeing to. A failure to properly inform a client about risk can result in allegations of misleading behaviour, discharge of the customer contract for breach and negligence in the discharge of advisory responsibilities. Explanations of risk that the client is likely to understand have two crucial components. Firstly, they must be explanations that are directly relevant to the risks involved with the strategy or products that the financial planner is actually advising them to take. An explanation of risk that is general as to product categories or asset allocation or as to other factors such as market volatility, tax liability or change in legal rules, is inadequate. It may be useful to orient the client in a general way, but it is quite beside the point in discharging the obligation to set out the particular risks that might diminish clients' financial wellbeing arising from the specific plan or products being advised. Inadequacy in so doing is likely to disguise the real risk involved: it may as a result lead to inadequate assessment of suitability of a strategy or product, or even to the making of misrepresentations as to the nature and effect of risks.

6.18 Secondly, to comply with Rule 111 the planner has to explain the risk to the client in terms the client can understand. This will usually involve a one-to-one meeting with the client, in which virtually every page of the SOA they are about to sign is explained. This is consonant with the point just made, that it is the precise risks to be assumed by that client that must be disclosed and explained. It is not the general risks of an investing approach that might be explained in a seminar with others present, that is the object of this rule. It is the precise risks of the individual's proposed strategy that must be explained. And the explanation must be done in a fashion that responds to the client's level of financial literacy and experience, to the complexity of the strategy or products – 'in terms that the client is likely to understand'.

FPA Ethics & Rules 6 – the Bringing Discredit to the Profession Allegation

6.19 FPA Ethic 6 uses the word 'discredit' which the Macquarie Dictionary says means to 'injure reputation or esteem' or 'to destroy confidence in'. There is overlap with the word 'disrepute'. In a prior determination, after much discussion, the CRC concluded that for an FPA member's conduct to discredit the profession of financial planning, a member's conduct would require some 'moral deficiency' or be 'grossly inappropriate'. We adopt this meaning for this determination as well.

VII. OUTCOME AND REASONS

FPA Ethics & Rules 101 - the Misleading and Deceptive Conduct Allegation

7.1 Panel generally accepted the truthfulness and accuracy of the evidence given by Mrs F. She said that prior to her phone conversation with Daniel she had read the documents received in the post: 'When I initially read it I thought it meant we had to borrow money' (Transcript p 10). And then: 'But I didn't know where - I didn't know where we had to borrow money from, because – it didn't make sense to me, but it sounded like we had to borrow money' (Transcript p10). This confusion is repeated when she was specifically asked about wording in the SOAA which expressly recommended an increase in the size of 'your existing margin loan with Macquarie Margin Lending'. She replied 'I know that – I know the money would be borrowed but I thought it was out of the DAM....No, it never entered my head that they would be borrowing again from Macquarie other than the, you know, the DAM we had'(Transcript p12). This evidence demonstrates a quality of confusion about arrangements and processes that is consistent with recommendations not having been explained in a way that Mrs F could understand. Mrs F repeats this evidence, in her letter to the FPA of 11 November 2011

7.2 However, in some places Mrs F's evidence was indecisive and even wrong. When asked whether she trusted Daniels that the money for the investments under the first SOAA was not a loan, she gave an equivocating and indirect answer (Transcript p12). Later Mrs F was asked a number of times whether she had signed any loan authority or application documents to extend the Macquarie Margin Loans, at the time of signing each of the SOAAs. Again, her answers were indecisive and equivocating (Transcript p15-16). When questioned further, Mrs F gave evidence that she had signed only the SOAAs and no other documents (Transcript p16).

7.3 Mrs F gave evidence that Daniels' answers to her questions about where the money for further investments was coming from, was what reassured her that further investments could be made without further borrowings (Transcript p 12, 15). This evidence too is repeated in the letter of 11 November 2011.

7.4 Mr and Mrs F provided evidence at the hearing that they thought the money would be borrowed out of the "DAM" and that "*it never entered my head that they would be borrowing again from Macquarie*" (Transcript, Page 12). It was in fact the case that the face and content of the loan authorisations clearly state in the heading, in bolded capitalised letters, that it is regarding a "MARGIN LOAN". The letters and forms which were signed by the complainant's required them to consent to "increase the SIZE of your capital base by borrowing an additional $53,630 from your existing margin loan with Macquarie Margin Lending" (Exhibit 4A).

7.5 In relation to the FPA's allegations that Ms Daniel made misleading representations about the safety of investing using the Storm Financial strategy it is important to recall the context in which these representations were made.

The Storm Financial SOA and SOAAs given to the complainant's were long and contained a lot of information which the complainants had difficulty in comprehending. Daniels did not seek to have any further conversation with the complainants that might have clarified this confusion. If anything, the evidence suggests that she sought to take advantage of the complainant's confusion, or was utterly indifferent to it. She certainly made no efforts to ensure that the complainants were well informed about the recommendations she was making to them.

7.6 Mrs F gave evidence that she asked Daniel whether the money was coming 'out of the DAM' ie the Macquarie Bank cash management account, because she was confused. It may be that the new money from the extension of the margin loan was in fact going to transit through the DAM. But what Mrs F was asking, and what Daniels must have known, was whether the new investments would be made with funds already borrowed, or with new borrowings. Saying the money was coming from the DAM may have been literally true in a narrow operational sense, but given the purpose of Mrs F's inquiry was about new borrowings, the affirmative answer was misleading. Given the confusion the complainants felt and Daniel's omission to fully explain, her oral assurance simply resolved the confusion caused when the complainants' read the documents, in favour of the erroneous belief that they were not making new borrowings.

7.7 As noted above, the complainants signed a number of Loan Authorisation letters. They signed a total of six letters, authorising an overall amount of $441,000 in loan increases. Each of the documents was titled 'Margin Loan No. 2106716 (Mr F and Mrs F)'.

7.8 The breach notice alleges misrepresentation only in relation to the first of the SOAAs that were signed. Consequently there is no need to make a finding as to whether Daniel's misrepresentation persisted or whether over time, the complainants did come to understand that they were increasing their borrowings. We do not make a finding on the question of what the complainant's' understanding of this matter was by the time they were signing the later margin loan authorities.

7.9 After very considerable deliberation, and acknowledging that the evidence is not clear cut, the Panel has concluded that Daniel's conduct did mislead the complainants in relation to the first SOAA. The combination of the newness and complexity of the recommendations, the length of the documentation and the apparent urgency that it be signed, and in the absence of any explanation, we think the complainants relied on Daniel's representation 'as a plank in a storm' of confusion. They relied on Daniel's answer in large part because she failed to explain any of the salient features of the transaction to them, including that extension of borrowing was at its heart.

FPA Rules of Professional Conduct 108 – the Failure to Collect Sufficient Information Allegation

7.10 The evidence was uncontroverted, that Daniels did not make any attempt to collect further information from the complainants prior to making financial recommendations to them in relation to any of the series of SOAAs. The SOAAs were sent in the post. In relation to the first in August 2007, there was a short phone conversation between Mrs F and Daniels. That was about whether any further borrowings were to be made, and on Daniels' side insistence that the complainants sign and return the SOAA without delay. The complainants and Daniels met in January 2008, but again the evidence was that the meeting did not involve the collection of new information for the formulation of additional investing recommendations. The weight of evidence is that the January 2008 SOAA had been sent to the complainants by post earlier, and that the meeting was to review their financial position generally, and entirely parallel to the business of signing up that further SOAA.

7.11 The complainants' evidence was that Daniels never contacted them at all in relation to all but the first SOAA. As we have found, all the SOAAs came in the post. The complainants signed the SOAAs and accompanying margin loan extension authorities, and Mrs F returned them by hand to the Storm Financial office reception, but never to Daniels personally. In short, Daniels never even attempted to make the irreducible minimum of enquiries required of FPA Rule 108. She never attempted to ensure that before making the recommendations she had 'sufficient information to ensure appropriate advice can be given'.

7.12 At the hearing, the complainants indicated that their retirement goals did not change from the time they originally sought advice in April 2007, as "*it had only been really about six months or so since we had initialled the last pages of the statement of advice...Everything was very much the same, and I don't remember having a conversation with her about it*" (Transcript, Page 23).

7.13 We do not think this in any way exonerates Daniels. As we have argued in Section VI above dealing with the relevant law, clients may not know whether things that have changed are relevant to their financial circumstances, and would cause their adviser to revise a recommendation. It is not appropriate professionally, nor effective legally, to rely on placing the responsibility on the client to give notice of changing facts. Statements to this effect in the SOAAs were simply ineffective to lift from Daniels' shoulders the obligation to gather sufficient information from the complainants to make a suitable recommendation.

Although it does not alter our reasoning or conclusion on this breach, it is also worth pointing out one other matter in passing. Daniels may have failed to make enquiries and collect sufficient information under FPA Rule 108, because the recommendations to extend the complainants' margin loan were not just additional or supplemental. There is a respectable argument that the quantum of the new margin money was significant enough that the investment made by the complainant's was proceeding on a different basis to that advised in the initial SOA. That would have required more than the irreducible minimum of information collection that we have found Daniels entirely failed to undertake.

FPA Ethics & Rules 110 – the Failure to Provide a Suitable Financial Strategy Allegation

7.14 We made two legal points above which are cardinal to the determination of this allegation. The first point is that under FPA Rule 110 the adviser must match the plan and its implementation to the client's needs, not the client to the strategy and products. Secondly, even where there is a recent fully analysed SOA and the investment recommendation is additional to that SOA, there will still need to be an irreducible minimum of analysis, to see if the additional recommendation is suitable. The evidence shows that Daniels failed to discharge her suitability obligation in both of these dimensions.

The complainants evidence is clear that they did not want to borrow more money. They had selected what they had been led to believe was a relatively low risk option in their early discussions with their other Storm Financial adviser, Mr S, in the process of developing their initial SOA. This position was reiterated in Mrs F's phone conversation with Daniels, when she asked in August 2007 for reassurances that no more borrowings would be involved. Given this position, the recommendations that Daniels made to the complainant's could never have been suitable.

Even if Mrs F had not stipulated that they did not want to borrow more, Daniels would still have been in breach of the requirement to make a suitable recommendation. There is no evidence that Daniels made any attempt to assess suitability – especially as she was recommending a strategy which increased risk. It increased borrowings, and the strategy increased the concentration of the complainants' investments in one product.

FPA Ethics & Rules 111 – the Failure to Provide an Explanation of Risk Allegation

7.15 The evidence is clear and uncontroverted, that Daniels made no attempt whatever, to explain the risk of the recommendations she made, to the complainants. The general risk explanation in the original SOA referred back to in each subsequent SOAA, was totally insufficient to discharge this obligation. Further, no attempt at explanation was made 'in terms that the [complainants] could understand." The rule was clearly breached.

FPA Ethics & Rules 6 – the Bringing Discredit to the Profession Allegation

7.16 Finally, did Ms Daniel's behaviour discredit the financial planning profession? Ms Daniel asserts that at all times she acted with the highest integrity and honest intentions, however provides no evidence or details. Her response is mere assertion.

7.17 The calibre of the departures from acceptable financial planning practice in this case is gross. There was not even an attempt to seek information from the complainants before advising them. There was flagrant disregard of the suitability requirement – not once, but on multiple occasions. There was not even an attempt to spell out the risks the complainants were being recommended to take on, and no attempt whatever to explain them in a fashion that met the complainants ' financial capability or experience. We have found that a serious misrepresentation was made – mostly to disguise the true nature of the risks that the complainants were being asked to assume.

7.18 We find that established standards for financial planning advice in recommending geared investments to clients in transition to retirement were thoroughly departed from, underlining further that Ms Daniel's was not decent commercial behaviour. The CRC concludes that Ms Daniel's behaviour is a gross departure from the FPA Rules of Professional Conduct and Code of Ethics and well established professional standards of the type that could bring discredit on the financial planning profession.

VIII. FINAL STATEMENT OF DETERMINATION

For these reasons the CRC finds the following breach of FPA Rules of Professional Conduct:

(a) Rule 101 but only that Ms Daniel's actions were misleading;

(b) Rule 108 that Ms Daniel did not collect sufficient information to ensure appropriate advice can be given;

(c) Rule 110 that Ms Daniel failed to develop a suitable financial strategy or plan for the client;

(d) Rule 111 that Ms Daniel did not provide an explanation into the investment risks involved.

(e) Given these breaches, there has been a breach of FPA Code of Ethics No. 6 which has led to the discredit of the financial planning profession.

IX. SANCTIONS

9.1 Since the CRC has found breaches of the FPA Conduct and Code of Ethics, it is authorised to impose sanctions. Those sanctions are available by force of paragraph 3.5.1 of the FPA Constitution and paragraphs 1.2 (definition of sanctions), 9.9 and Schedule B of the Disciplinary Regulations adopted by the FPA Board on 17 July 2007 (revised 4 June 2010).

9.2 On delivering the next to last version of these reasons to the parties, the CRC invited submissions in writing from the FPA and the member on the determination and sanctions that it was minded to impose. It has received no submissions from either party, on the substance of the determination or on sanctions.

9.3 The CRC imposes the following sanctions on the member:

(a) That Daniel pay the costs of these proceedings in the amount of $1,989.68 to be paid within 30 days of the date of the final determination;

(b) That Daniel be expelled from the Financial Planning Association;

(c) That having regard to the gross nature of the breaches of the FPA Rules of Professional Conduct and Code of Ethics found by the panel, that Daniel be disciplined by the publication of her name, the fact of her expulsion and the publication of these findings in full (being breaches proven, sanctions imposed and reasons for decision) by the Financial Planning Association.