



31 March 2016

Committee Secretary
Senate Economics References Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Dr Dermody

Re: Inquiry into penalties for white collar crime

The Financial Planning Association of Australia (FPA)¹ welcomes the opportunity to provide input to the inquiry into penalties for white collar crime. This inquiry provides the opportunity to make positive steps towards a stronger and fairer penalty regime to better protect consumers from the effects of white collar crime.

With respect to particular policy measures, the FPA strongly recommends that Government introduces measures which improve the accountability of individuals when they are providing professional services to consumers by encouraging and incentivising membership of professional associations.

We welcome the opportunity to discuss our submission with the Government. If you would like further information about our submission, please contact me on (02) 9220 4544 or email: ben.marshan@fpa.com.au.

Yours sincerely

Benjamin Marshan

Professional Standards and Advocacy Manager

¹ The Financial Planning Association (FPA) represents 12,000 members and affiliates of whom 9,000 are practicing financial planners and more than 5,500 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first “policy pillar” is to act in the public interest at all times.
- We banned commissions and conflicted remuneration on investments and superannuation for our members in 2009 – years ahead of FOFA.
- We have an independent conduct review panel, Chaired by Mark Vincent, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 24 member countries and the 150,000 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 17 Australian Universities for degrees in financial planning. All new members of the FPA are required to hold, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional bodies, eg CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board



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FPA Submission to the Senate Economics References Committee

DATE | 31 March 2016



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INTRODUCTION

While we note that the terms of reference are not specific to financial planning, this submission will use financial planning as a frame for managing the risks associated with white collar crime and demonstrating the benefits obtained by consumers through dealing with a member of a professional body. We will therefore focus primarily on how professional bodies are able to effectively set higher conduct standards for professionals and provided higher levels of professional accountability on members to more effectively protect consumers against white collar crimes.

The FPA believes that protection of consumers is significantly enhanced when individuals voluntarily become members of their professional association. Adherence to professional and ethical obligations delivers sound consumer protection benefits and improves the quality of services provided. A professional membership frameworks helps to set: entry, education and experience requirements for professional members; compliance, conduct, CPD and supervision requirements to improve professional conduct; and provides a complaints and discipline system to ensure professional accountability.

This, in turn helps increase consumer confidence and trust in the profession and drives consumer recognition of the value of receiving advice from a member of a professional association. Further, the powers and activity of professional bodies demonstrate the significant role professional bodies can play in the regulatory design, particularly in responding to consumer complaints and ensuring appropriate action is taken against inappropriate conduct of individual providers. This allows professional bodies to assist the government in setting regulatory and compliance frameworks, and generally at a higher level than those set by the law and regulators.

While using membership of the FPA to demonstrate the benefits of professional association membership as an example, the FPA absolutely acknowledges that financial advice and some financial planners have played a role in the consumer detriment resulting from previous product collapses created by fraudulent activities. However the banning of investment commissions, capping of insurance commissions and the introduction of the adviser 'best interest duty' under FoFA² have led to significant reform of the advice industry and improving the protection of all consumers who receive financial advice. The FPA would note that the FPA Code of Profession Practice (including a code of ethics) requiring members to act in their clients best interests was introduced in 2008, and the FPA Remuneration Policy which requires members to manage conflicts of interest was introduced in 2009, significantly earlier than the introduction of the FoFA reforms demonstrating the ability for professional associations to set best practice standards above those set by the law more easily.

As a further demonstration of the consumer protection afforded by membership of professional associations, the fact that since July 2009 of the 132 financial advisers banned by ASIC for breaches of the Corporations Act, 118 (or 89%) were not members of the FPA and therefore not subject to the additional regulatory oversight of our professional obligations. This clearly demonstrates the consumer protection benefits of adhering to professional standards³. Statistical under-representation when compared to the total financial

² Corporations Amendment (Future of Financial Advice) Act 2012 and Corporations Amendment (Further Future of Financial Advice Measures) Act 2012

³ ASIC bannings analysed against FPA membership data



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adviser population in ASIC enforcement activity is a proof point of the positive effect of professional obligations. It demonstrates the vital role professional bodies play in 'norming' good professional behaviour beyond legal minimum standards, and the necessity of such obligations for the protection of consumers.

Profession bodies also allow for the development of strong, external to the corporation reference points and anchors for good behaviour. Applying professional norms within a corporate community can make it more difficult for fraud and criminal misconduct to emerge within an organisation. The development of robust professional communities within organisations creates the will and community to: challenge poor individual behaviours of colleagues; question the abuse of corporate and bureaucratic power in dealings with consumers; and creates the safe space for individual professionals to speak the truth.

The FPA therefore recommends that the Committee consider what can be done by Government, regulators and industries to encourage more individuals to voluntarily take up professional association membership as a means of improving consumer protection and decreasing the incidences of white collar crime.

Compelling adoption of professional standards

There are strong reasons for encouraging the adoption of professional standards for individuals. Using financial planning as an example, in recent years numerous cases of poor financial advice and fraud have come to light, with some consumers making considerable losses and the reputation of the financial advice industry being damaged in the process.

For example, the collapse of Trio Capital resulted in consumers losing roughly \$176 million from their superannuation.⁴ While corporate collapses such as Trio Capital, Opes Prime, and Westpoint involved fraud, many consumers who invested in these products received personal financial advice. Professional, ethical and education standards serve to assist financial planners to identify appropriate financial strategies and investments suitable to each client's circumstances, goals and needs. This is a fundamental form of consumer protection and must be at the core of providing personal financial advice to clients.

The FPA's review of data collected since July 2009 on ASIC enforcement action concerning individuals in relation to financial advice, shows that FPA members represent significantly less than 5% of the overall ASIC enforcement action each year⁵. FPA members have also accounted for significantly smaller proportion of financial advisers banned by ASIC. The fact that 89% of financial advisers banned by ASIC were providers who are were members of the FPA and therefore not subject to the additional regulatory oversight of our professional obligations, clearly demonstrates the consumer protection benefits of professional standards⁶. While we note that not all ASIC bannings involve criminal misconduct⁷ (in fact only 2% of bannings involved misappropriation, theft or fraud), they are of a civil nature and demonstrate the general incidences of misconduct of those subject to professional standards and those who are not.

⁴ Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the collapse of Trio Capital, Final Report, 16 May 2012

⁵ Based on publicly available enforcement information released by ASIC

⁶ ASIC bannings analysed against FPA membership data

⁷ ASIC Report 476: ASIC enforcement outcomes: July to December 2015. <http://download.asic.gov.au/media/3799605/rep476-published-30-march-2016.pdf>



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Statistical under-representation when compared to the total financial adviser population in ASIC enforcement activity is a proof point of the positive effect of professional obligations. It demonstrates the vital role professional bodies play in 'norming' good professional behaviour beyond legal minimum standards, and the necessity of such obligations for the protection of consumers.

Further, professional bodies don't just assist individuals. Profession bodies allow for the development of strong, external to the corporation reference points and anchors for good behaviour. Applying professional norms within a corporate community can make it more difficult for fraud and criminal misconduct to emerge within an organisation. The development of robust professional communities within organisations creates the will and community to challenge poor individual behaviours of colleagues; question the abuse of corporate and bureaucratic power in dealings with consumers; and creates the safe space for individual professionals to speak the truth.

Cost of Professional Membership

There are some however who suggest that the cost burden of professional membership is not justified. Adherence to professional and ethical obligations and increased education standards, must not be viewed as a cost burden. Professional membership is an essential business investment as the cost of not taking action to improve standards will be far greater. The cost of not acting to change the status quo will be borne more heavily by consumers than the monetary investment white collar workers must make to lift the bar. It is extremely difficult for governments to stamp out fraud or corporate crime. However, as demonstrated by the positive outcomes achieved through voluntary membership of the FPA on banning actions by the regulator, being committed to raising standards helps to protect consumers from involvement in any future corporate collapses and fraudulent activities.

Encouraging white collar professionals to adhere to professional and ethical obligations will assist in delivering sound consumer protection benefits and improves the quality of services provided to consumers. This, in turn helps increase consumer confidence and trust in the relevant profession and drives consumer recognition of the value of obtaining professional advice and services. Encouraging membership of a professional body is a sound business investment and sound government policy. For individual practitioners, professional membership fees and education costs can be claimed from the business as a training and personal professional development expense or may be claimed as a tax deduction.

Recently, the financial services industry has demonstrated a desire to make this business investment with several of the largest financial planning groups, representing more than half of the financial planners and financial advisers in Australia, recently announcing a commitment to raise the education standards of their representatives⁸. This included membership of a particular professional body for some groups and the choice of industry associations for others. The government, regulators and industry should be congratulating these institutions for taking this step and recognising the benefits that having an accountable professional community within the corporation will have for corporate citizenship and consumer outcomes across their entire organisation.

⁸ http://fpa.com.au/wp-content/uploads/2015/09/2015_05_07_FPA-Response-to-PJC-discussion-paper_FINAL.pdf



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The FPA believes it is essential that individuals who advise consumers should operate under a professional code and a code of ethics in addition to legislation, and government should be encouraging for this across all white collar industries, particularly in financial services.

Supervision and Oversight of Members

In addition to the benefits of self-regulation, professions with a strong professional association benefit from complaints handling, investigations, and disciplinary actions provided by these bodies. A key aspect of consumer protection is the accountability of professional association members through compliance monitoring and complaints management. A vital element of this process is the ability to identify and track trends and systemic issues, and to modify regulatory requirements to ensure consumer protection is improved. Professional bodies play a key role in this regard.

As an example, in addition to acting on complaints from consumers, the FPA also has the power to initiate investigations of its own under its supervisory and oversight capacity. The FPA analyses information from its complaints procedures and compliance monitoring to identify and address issues affecting consumers and the quality of advice. This could range from planner education initiatives, to a review of the adequacy of professional obligations in extreme cases. Managing these arrangements in-house also provides for the efficient use of member information and market intelligence to screen new applicants and to maintain an effective member registry.

Public Complaints System and Investigations Handling

As a demonstration, the FPA has a formal complaints and investigation handling system codified in the FPA Disciplinary Regulations. The system works as a result of cooperation between the FPA's accountability team and Conduct Review Commission (CRC).

The accountability team is responsible for investigating complaints, gathering evidence, conducting preliminary investigations, inviting the member to assist and allowing the member every opportunity to give an explanation, and assisting complainants throughout the process. The aim is to deliver a recommendation to the Chair of the CRC as to whether FPA's Code of Professional Practice has been contravened and if the Chair should issue a breach notice.

The Conduct Review Commission (CRC), through its independent Chair, is responsible for reviewing the recommendation made to it by the FPA's accountability team, issuing a breach notice if satisfied that the evidence and legal arguments are sound, arranging and conducting hearings, and determining the most appropriate disciplinary action to take.

The FPA receives complaints by consumers regarding breaches made by FPA members. In the period from July to November 2015, there were 10 new investigations received and 13 investigations closed⁹. During this period, 1 member was expelled and 3 members were terminated. The FPA publishes quarterly Professional Standard reports on its complaints procedures, which includes the identification of any remedial tips for

⁹ http://fpa.com.au/wp-content/uploads/2016/02/FinPlanMag_Feb-2016_LR.pdf



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planners to help educate members in adhering to the Code obligations, and minimise the risk of breach reoccurrence for consumers.

Active Professional Disciplinary Panel

The CRC receives complaints from a number of sources including consumers, members and teams within the FPA. In 2014/15, 70% of complaints arose from consumers and 23% were from with FPA members or FPA teams¹⁰. Only 1 complaint during this period was to do with white collar crime¹¹. As can be seen in the diagram below, there has been a general downward trend in complaints made to the FPA which demonstrates the continuing and improving professionalism of FPA financial planner members.

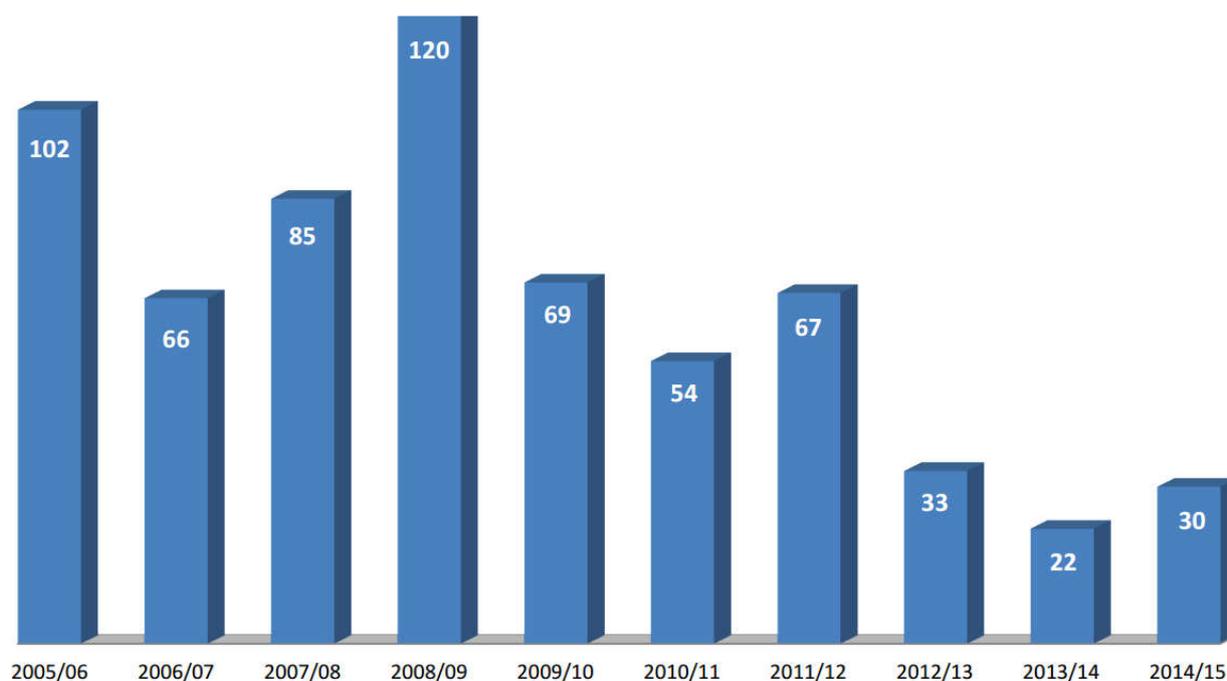


Figure: Trend in number of complaints made to the FPA each year from 1 July 2005 to 30 June 2015.¹²

There are a number of sanctions available for the CRC to enforce, depending on the extent of the breach and amount of Member cooperation. The most regular sanctions given by the CRC are admonitions, further education and supervised practice, and fines ranging from \$1,500 to \$20,000 per contravention¹³. Although expulsion and suspension are uncommon sanctions, as the CRC aims to promote ethical behaviour in the industry and reintegration into good standing, the CRC had 1 member expelled and 3 members were

¹⁰ FPA Annual Report 2014-15 p17. http://fpa.com.au/wp-content/uploads/2016/02/ProfStandards_Annual-Report-2015-FINAL.pdf

¹¹ FPA Annual Report 2014-15 p18. http://fpa.com.au/wp-content/uploads/2016/02/ProfStandards_Annual-Report-2015-FINAL.pdf

¹² FPA Annual Report 2014-15 p17. http://fpa.com.au/wp-content/uploads/2016/02/ProfStandards_Annual-Report-2015-FINAL.pdf

¹³ From Bad Practice to Good Practice and the FPA's Conduct Review Commission - Dimity Kingsford-Smith's article



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terminated over the July to November 2015 period¹⁴. Where the CRC believes that the individual can provide good evidence that their experience and expertise can contribute to the financial planning industry and there remains some scope that the individual will regain adherence to the professional obligations, the CRC will be more encouraged to designate further education as a sanction rather than expelling or suspending the individual.

Once a decision is made by the Panel, the decision can be appealed. The CRC has had only one appeal of its determinations to date, which was dismissed¹⁵, demonstrating that the decisions are fairly and accurately made and the sanctions provided are reasonable.

The powers and activity of the CRC demonstrate the significant role professional bodies can play in the regulatory design, particularly in responding to consumer complaints and ensuring appropriate action is taken against inappropriate conduct of individual providers.

In a similar way to ASIC, the FPA's Conduct Review Commission Disciplinary Panel may inform itself as it deems necessary and is not restricted to the rules of evidence. This enhances our ability to respond to consumer complaints and allows for flexible solutions to be implemented to enhance the protection of the public and the profession. While ASIC has the benefit of civil penalties, the FPA has a demonstrated capacity to act promptly to inappropriate behaviour that puts consumers at risk, with sufficient flexibility to achieve results.

For example, the following timeline in response to the collapse of Storm Financial, particularly in relation to the conduct of CEO, Emmanuel Cassimatis, demonstrates the FPA's ability to investigate and act on issues of poor conduct effecting consumers:

Date	Action
October 2008	Initial media article published concerns about practices within Storm Financial
6 November 2008	The FPA <u>initiated</u> a complaint against Storm Financial. The FPA was interested in allegations raised in a media article concerning the widespread use of a high risk gearing strategy and possible client exposure to margin calls in the then volatile market environment.
23 December 2008	FPA issued a Breach Notice to Storm Financial
20 January 2009	Under FPA procedures Storm Financial had until 20 January 2009 to respond to the charges.
12 January 2009	Storm Financial entered into voluntary administration
May 2009	The FPA received a consumer complaint against Mr Cassimatis
September 2009	FPA Breach Notice was issued

¹⁴ http://fpa.com.au/wp-content/uploads/2016/02/FinPlanMag_Feb-2016_LR.pdf

¹⁵ http://www.fpa.asn.au/media/FPA/FPA%20Standards/FPA_ProfessionalStandardsReport2012-FINAL.pdf - FPA Annual Report 2011-12 p20



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March / April 2010	CRC Hearing was held
October 2010	CRC Determination was issued – Cassimatis was expelled from the FPA
February 2011	Cassimatis Appeal was heard
July 2011	Appeal dismissed – expulsion confirmed

In comparison, ASIC's actions against Emmanuel Cassimatis are still ongoing¹⁶.

Publication of Disciplinary Decisions with Reasons

Under Part 10 of the FPA Disciplinary Regulations, the CRC is required to produce a statement of reasons for its determination regarding a breach. Part 13 allows the FPA to publish the outcome of the determination on the FPA's website¹⁷ and in the Financial Planning Magazine¹⁸. Publication can be following a special breach due to non-cooperation, following a Disciplinary Panel determination or following a summary dismissal. The Member's name is published in the case of expulsions and the name of the complainant withheld. This allows consumers the ability to easily review information about the professional they are consulting with to understand their professional standing.

The FPA also acts to incorporate the reasons for the determination into training and feedback to members. This ensures that recurrences of common breaches are significantly reduced, and members are made aware of areas in which they have to take extra care. Complaint procedures and the activity of the CRC is one strategy the FPA uses for reducing infringements of the Code of Professional Practice. In addition, the FPA uses training, continuing professional development (CPD) obligations, and improvements to the Code of Professional Practice itself, to continuously improve the professional conduct of individual members and enhance consumer protection.

Interactions with the regulator

The FPA has regularly attempted to work with ASIC on investigations of financial planners and financial advice businesses where the FPA has been informed of misconduct or a complaint has been made. ASIC will also ask the FPA to comply with an information notice which requires the FPA to provide information to ASIC. It has been our experience however that regulators are rarely prepared to provide information to professional associations where it has obtained information or is investigating an association member. As noted above, the FPA is able to take action against a financial planner more quickly than ASIC is able to, and this can enable faster outcomes to protect consumers. There would be significant benefits to consumers if the regulators and professional bodies would work together more closely to deal with misconduct, particularly in instances where the professional body is able to obtain an outcome more quickly than the regulator.

¹⁶ <http://storm.asic.gov.au/proceedings/cassimatis-civil-penalty-proceeding/>

¹⁷ <http://fpa.com.au/professionalism/professional-accountability/>

¹⁸ <http://fpa.com.au/about/financial-planning-magazine/>



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Recommendations

As shown, the Government can significantly improve consumer outcomes by advocating for the benefits of membership of professional bodies. This will have the benefit of significantly improving consumer protections against white collar crime. The Government can do this by: incentivising membership of professional bodies, such as enshrining professional titles and actively educating consumers on the importance of seeking out professional assistance rather than hoping they make the correct decision.

For financial planning in particular, the Government is in a position to significantly enhance and educate consumers on the importance of financial advice, and the critical role a national advice profession plays in the financial security of all Australians. By changing the language and messaging around financial advice to the community, the Government can better advocate the benefit of a professionally developed financial plan in all aspects of a consumer's life.

The Government should also consider the following ideas to better protect consumers: enshrining the terms financial planner and financial adviser to make it clearer who consumers can trust to get a financial plan; educating Australians on the importance of having a financial plan and the importance of the financial advice sector; and encouraging school leavers to consider financial planning as a career and working with the university sector to build bespoke financial planning degrees.

Further, the regulator should be directed to: actively cooperate with industry efforts to professionalise financial planning; and share information around misconduct and bad apples across emerging professional networks and across and within corporations to challenge members and professionals to continually strive for higher standards and self-regulate against unethical conduct.

Conclusion

As we have demonstrated the protection of consumers from fraud and criminal breaches of financial services laws is significantly enhanced when individuals choose to become members of their relevant professional association. Adherence to professional and ethical obligations delivers sound consumer protection benefits and improves the quality of services provided. The FPA therefore recommends that the Committee consider the benefits of the government encouraging membership of professional association as a means of improving consumer protection and decreasing the incidences of white collar crime.