FINANCIAL PLANNING ASSOCIATION OF AUSTRALIA

CONDUCT REVIEW COMMISSION

DISCIPLINARY PANEL

REGARDING:	SAM HENDERSON (Member ID331878)
DETERMINATIONS:	CRC 2018_1
PANEL:	Dale Boucher, Deputy Chair, Presiding Member
	Sandra Bowley CFP, Panel Member
	Michael Miller CFP, Panel Member
DATE OF DETERMINATIONS:	10 October 2018 (sanction)
DATE OF HEARING:	14 August 2018
PLACE:	Sydney
APPEARANCES:	Mr Nicholas Furlan for the FPA
	Mr Donald Mitchell, for Mr Henderson

SUMMARY OF DETERMINATIONS IN RESPECT OF SANCTIONS FOR BREACHES OF THE FPA CODE OF ETHICS, THE FPA PRACTICE STANDARDS AND FPA RULES OF PROFESSIONAL CONDUCT, AND OTHER MATTERS

- **The Panel is determining that none of the alleged breaches was a minor instance of unsatisfactory conduct.**

- **In respect of Breach 1 that Mr Henderson failed to be diligent, as alleged the Panel is determining that he be fined an amount of $8,000.00.**

- **Noting that Breaches 1, 2, 3, 5 and 7 are closely related, in respect of Breach 2 that by failing properly to consider and identify strategies which were appropriate to the Complainant's personal circumstances and objectives, in particular the Complainant's current course, Mr Henderson breached rule 4.2, as alleged. the Panel is determining that he be fined $2500.00.**

- **Noting that Breaches 1, 2, 5 and 7 are closely related, in respect of Breach 3 that - Mr Henderson failed to comply with Rule 4.5 in the manner described (herein) in respect of performance and costs, the Panel is determining that he be fined $2500.00.**

- **In respect of Breach 4 that he failed to comply with Rule 4.5, concerning providing advice to the Complainant about assisting her children the Panel is determining that Mr Henderson be fined $4000.00.**

- **Noting that Breaches 1, 2, 5 and 7 are closely related, in respect of Breach 5 that he failed to comply with Rule 4.7 re the MGIT product, the Panel is determining that Mr Henderson be fined $2500.00.**

- **Noting that Breaches 1, 2, 5 and 7 are closely related, in respect of Breach 7 that he failed to comply with Rule 4.11 as alleged re existing strategies, the Panel is determining that Mr Henderson be fined $2500.00.**

- **In respect of Breach 8 that he failed to comply with Code of Ethics Principle 1 in relation to putting the clients' interests first, and in failing to prioritise the client's interests, the Panel is determining that Mr Henderson be fined $20,000.00; but in respect of the breach in relation managing conflicts of interest contrary to Principle 3, no further sanction is being imposed on him.**

- **In respect of Breach 9 that Mr Henderson failed to comply with Practice Standard 7.3 of the Code concerning errors in calculations in the SOA, the Panel is determining that he be fined $4000.00.**

- **In respect of Breach 10 that he failed to comply with Code of Ethics Principle 5 overall as alleged, the Panel is determining that Mr Henderson is fined $4000.00.**

- **The Panel is making determinations in respect of Costs and out of pockets expenses of the FPA.**

DETERMINATIONS INCLUDING REASONS

What these Determinations are about

1. **These Determinations decide** the sanctions to be imposed following a disciplinary hearing which inquired into allegations that Sam Henderson, at relevant times a member of the Financial Planning Association of Australia (FPA), engaged in conduct in breach of the FPA's *Code of Professional Practice* ("*Code*"), including within the *Code* certain Principles of the *FPA Code of Ethics*, a Practice Standard and a number of *Rules of Professional Conduct*.

Background, in summary

2. On 3 November 2016, a client (the Complainant) approached Mr Henderson (the Member) of Henderson Maxwell seeking financial planning advice. On 14 December 2016, the Member provided a signed Statement of Advice (the SOA) to the Complainant which was headed 'Investment Tax and Financial Advice'. This was described as being "*Prepared for [*name deleted*] by Sam Henderson Authorised Representative of Henderson Maxwell Pty Ltd..*'.

3. It was common ground that the SOA contained a significant error. This was described as '*... an error as to the nature of the Complainant's SaSS superannuation account which mistake if not picked up (as it was) would have resulted in the Complainant suffering a loss of approximately $530,000'.*[1]

4. On 6 March 2017 the FPA received a complaint (the Complaint) from the Complainant against the Member and the company Henderson Maxwell Pty Ltd (trading as Henderson Maxwell) in relation to the SOA and associated issues. Henderson Maxwell was said to be the holder of Australian Financial Services Licence (AFSL) number 321972[2].

5. According to a subsequent report dated 13 October 2017 from the FPA Investigation Officer (IO) to the Conduct Review Commission (CRC), the Member was at the time of the Report and had at all material earlier times been CEO and Senior Financial Adviser of Henderson Maxwell. In this Report, the IO made 10 allegations against the Member of breaches of the Code (the Allegations) and on 17 November 2017, in a Notice of Disciplinary Proceedings, the Chair of the CRC directed that the FPA commence proceedings in relation to them.

6. Following a hearing on 14 August 2018, on 10 September 2018, this Disciplinary Panel made determinations that the Member had breached the Code in respect of nine (the Breaches) of the ten allegations that were made against him by IO.[3]

Overview of the breaches found

7. All of the Breaches arose from the giving of the SOA and from its contents, that is from a single course of conduct. Therefore, while it is necessary for the Panel to make a determination as to sanction in respect of each Breach, in the Panels view it would be an artificial exercise to take each of the breaches summarised below and impose a sanction on each as if they were to be seen in isolation. Each breach must be seen in its overall context. In this regard, the Panel has had regard to and has sought to give effect to the totality principle which Counsel for the Member contended should apply. That is, it must have regard to the appropriateness of the total or overall sanction once individual sanctions have been set (the totality principle) and make any necessary adjustments[4].

---

[1] Observations made by Counsel for the Member at the Breach hearing on 14 August
[2] See the IOs Report dated 13 October 2017 at page 4
[3] One allegation, number 6, of an alleged breach of Code of Ethics Principle 8 was not sustained
[4] Submission on behalf of the Member dated 28 September 2018, paragraph 8

8. While the FPA did not directly address or disagree with the point about the totality principle, it did acknowledge that there was some overlap between a number of the breaches

9. **In order to determine the appropriate sanctions, it is also important in the Panels view to have an overall perspective of the conduct that was found to be in breach. In summary,** the Member provided a signed SOA which recommended a number of courses of action but contained the significant error described above, as well as other mistakes. If acted upon the SOA would have resulted in a loss to the Complainant, as described above.

10. Seen in another way, the SOA was put forward recommending a course of action which had not been carefully checked and would have, but for detection of the error by Complainant and if acted upon, resulted in a very significant loss to the Complainant. This was not the only fault in the SOA.

11. In providing the SOA the Member failed to compare the Complainant's current course or provide adequate advice in terms of performance and costs; gave cursory advice and did not reasonably consider an existing product and did not reasonably evaluate it. The SOA also contained factual errors and failed to provide advice on the benefits, risks and costs of the recommended strategies. Overall in providing the SOA the Member did not act in a professional manner and demonstrate sound professional conduct.

12. Most significantly, the SOA did not prioritise the Complainants interests or manage evident conflicts of interest. The panel found this latter breach (Breach 8) of failing to prioritise the client's interest over the member's own to be the most concerning and the most deserving of a strong sanction. In many ways all of the conduct found to be in breach flowed from it. However, the panel recognises that as this allegation had been made in an alternative form has taken this into account in the sanction for Breach 8 which it is imposing being limited to the first aspect of putting the client's interest first.

13. Following the Determinations as to Breach, the Panel invited the Member and the FPA to make submissions in respect of sanctions. This was done in accordance with clause 113 of the Disciplinary Regulation 2016. A timetable for the making of submissions was later agreed between the parties, approved by the Panel and was broadly complied with.

FOUR GENERAL POINTS CONCERNING SANCTIONS

14. Before dealing with the sanctions, if any, which should be imposed, the Panel has considered it useful to deal with four general points. They were:

    - **A - What is the nature of the Code and what are the principles applicable to sanctions in this matter, including the submissions of the Parties in this regard?**

    - **B - Were any of the acknowledged breaches minor instances of unsatisfactory conduct** (minor instances) as that term is defined in the Disciplinary Regulation 2016? These were raised in a written submission prior to the hearing, again at the hearing and in submissions on sanction by Counsel for the Member, as well as by the FPA.

    - **C - What credit should be given to the actions of the Member to try to rectify the SOA and situation and is this a case where no sanctions should be imposed?**

    - **D - What arises in general terms from the above?**

A - The Code and principles applicable to sanctions in this matter

15. The Code contains three enforceable components, which formed the foundations for the allegations in this matter:
    - the Code of Ethics
    - Practice Standards
    - Rules of Professional Conduct.

16. As stated in its Introduction[5], the *Code* is a form of professional regulation and "is the key document detailing the obligations of FPA members in the financial planning profession." It is intended to operate alongside government regulation and also inform licensee compliance requirements. It is designed to reflect the perspectives of members, peers and other relevant professionals as to professional practice in financial planning.

17. The Code is part of a scheme of governance for the financial planning profession. In this context public protection is of high importance and is seen to be such by the FPA, including in the FPA constitution. In this regard, the FPA in its' submission, '(t)he *objects for which the FPA is established are reflected in Clause 1.1 of the FPA's Constitution. These objects include but are not limited to the following:*

> *a. act in the public interest so that clients of FPA members and prospective clients obtain fair and competent financial planning advice and to supress Malpractice;*
> *b. enhance public awareness of, and confidence in, the financial planning profession;*
> *c. promote and ensure compliance with high standards of professional and ethical conduct within the financial planning profession and by members of the FPA.*

The FPA submissions

18. The FPA noted that 'The Code goes towards upholding the objects identified above.' The FPA also noted that the purpose of the Code is to establish professional obligations for the conduct of members and to assist in meeting the objectives of the FPA. Members make individual commitments to adhere to the Code and to be held accountable by their peers and the public.

19. The FPA submission[6] was that the purposes of sanctions should be in line with the protective role of disciplinary action (for the public and the financial planning profession), rather than to punish the Member). In addition, the panel notes the FPA submissions that where breaches occur they must be treated seriously, in order to maintain the integrity of the Code. Furthermore, the overall purpose of the Code is to establish a protective jurisdiction, for the public interest and to protect members of the public from misconduct.

20. Counsel for the Member also noted that the role of the CRC is a protective one, agreed with relevant case law which had been cited by the FPA in this regard and noted that the CRC itself had recognised this previously.[7]

21. The disciplinary processes are also intended to ensure that members are held accountable for compliance with the Code, so that where breaches occur action is taken, other members are deterred from engaging in the same or similar conduct and members who have breached can work to rectify and improve their conduct.

22. The points made by the FPA as to the purposes of sanctions were as follows. That is sanctions should go towards:

    a. assisting the FPA member in understanding, correcting and rehabilitating the conduct which was found to be in breach of the Code;

---

[5] See the FPA publication 'the Pillars of our Profession', at page 2
[6] Submission of 24 September 2018
[7] Submission dated 28 September 2018 at paragraph 6

b. protecting the public, the profession and the peers of the FPA member;
c. maintaining the professional conduct standards and expectations of the profession and the FPA;

d. protecting the peers of the FPA member; and

e. deterring the FPA member and their peers from engaging in similar or other unsatisfactory conduct or misconduct.

23. The FPA submitted that (including on the general issue of sanctions) that the CRC should consider the following matters:

a. whether the Member's conduct was deliberate, negligent or reckless;

b. whether the conduct has occurred before;

c. whether the Member recognises his wrongdoing;

d. what steps the Member has taken to improve his skills and knowledge following the complaint;

e. what contributing factors may have played a role in the conduct in question;

f. whether there is a demonstrated pattern of behaviour;

g. the potential for or actual harm as a result of the conduct; and

h. whether the Member has acted to remediate any loss or harm caused by the conduct

24. The FPA submission[8] was made on the basis of the following factors:

a. the Member is no longer a member of the FPA and is not practising as a financial planner means the sanctions which can be imposed on the Member are limited;

b. there is a large number of Breaches of the Code by the Member;

c. the Breaches involve a significant degree of unprofessional conduct on the Member's part and numerous failures by the Member to uphold the professional expectations and standards under the Code;

d. the negligent and reckless conduct of the Member;

e. the degree of harm that would have occurred had the advice given by the Member been implemented;

f. the lack of extenuating circumstances surrounding the conduct;

g. in committing the Breaches, the Member has brought the reputation of the profession into disrepute;

h. that the Member pressed that the SOA was in a draft form (which the CRC found was not the case) which demonstrates a lack of good judgment on the Member's part

25. The FPA said that not all of these purposes can be served in this case, because the Member is no longer an FPA Member and has left the profession. (This was disputed in the Member's submissions, to which the Panel comes below). The submission from the FPA was that, in

[8] FPA Submission dated 24 September 2018 at paragraph 33

view of the circumstance that Mr Henderson is no longer a member and is only subject to its disciplinary processes because of the period that he was a member, there are effectively only two forms of sanction that are available to the Panel, (if any sanctions are to be imposed). These are fines and payment of the FPAs costs and expenses.

Submissions on behalf of the Member

26. Public protection was also seen as important in submissions made on behalf of the member.[9] **Counsel for the member, however, strongly disputed that the only practically available sanctions are fines, costs and expenses. In so doing Counsel characterised the FPA submissions (in summary) as:**
    - **having referred to the available sanctions;**
    - **claiming that certain of these can no longer apply because the Member is no longer practising;**
    - **while acknowledging that the Member has apologised, saying that only fines and costs are appropriate;**
    - **then making submissions on fines that should apply for each breach.**

27. The submission was to the effect that **it is not mandatory or appropriate that a sanction be imposed for every breach and that it was incorrect to eliminate those sanctions that are not available; instead the question should be what sanctions are appropriate in the circumstances.**[10]

28. Counsel for the member submitted that:

    'The starting point for consideration of an appropriate sanction is cl.88 of the FPA Disciplinary Regulation 2016 which relevantly provides:
    The hearing of Disciplinary Proceedings against a Member shall be conducted as far as possible as an inquiry into the Member's conduct consistent with the FPA's objects and for the purposes of determining: …
    b) where the Disciplinary Panel finds a Breach proven, determining whether the interests of the public, the financial planning profession, and the community lie with:
    i. assisting the Member to understand, correct and rehabilitate any conduct found to be in Breach;
    ii. sanctioning the Member for that conduct for the protection of the community or the profession; or
    iii. both i and ii.'

29. In summary, Counsel for the Member noted[11] that the CRC may impose any sanction set out in Schedule B of the Disciplinary Regulation 2016 as it considers appropriate for each breach proven. The role of the CRC is a protective one (of the public, the profession and the community). The imposition of sanction is discretionary, not mandatory. This means that the CRC is required to consider both whether any and if so what sanction should be imposed and must consider all the circumstances.

30. The CRC must also it was submitted have regard to the appropriateness of the total or overall sanction once individual sanctions have been set, i.e. the totality principle, and make any necessary adjustments and assess whether the breaches found constitute a course of conduct, in which case it is appropriate to impose a smaller penalty for each contravention.

31. The following matters were contended to be relevant to determining whether and if so what sanction is appropriate to each breach alleged and overall. The Member was not alleged or found to have acted dishonestly. It was submitted that while the FPA (without any particularity) describes his conduct as "reckless" in its submissions at [33(d)], recklessness (i.e. conscious indifference or wilful blindness) was not found by the CRC, nor did the facts as

[9] Submission on behalf of the Member at paragraph 5 and 6;
[10] See para 10 of submission dated 28 September 2018
[11] Ibid paragraphs 5 and 6

found amount to recklessness. The CRC found only that Mr Henderson acted with a lack of due diligence.

32. It was submitted that the Member caused new processes to be implemented to ensure the Complainant's experience would not be repeated[12]. The breaches did not cause the Complainant loss, although the Member acknowledged that they carried the potential for substantial loss.

33. While not put forward as excusing the Member's conduct, it was submitted that he had a number of things going on in his personal and professional life that are relevant and that they were addressed in a 6 November Response, as recognised by the FPA. The member also co-operated with the FPA in assisting with its investigation.

34. Furthermore, it was submitted that the Member acknowledged five breaches of the Code, although not all in precisely the form found. In addition, he did not request that the Complainant be made available for cross-examination in this proceeding, despite the FPA relying on parts of the Complainant's evidence that the Member disputed. (In its submission in reply of 2 October 2018, the FPA submitted that this is not a relevant factor, that the Member could have asked to cross examine the Complainant and did not do so. The panel accepts the FPA submission in this regard).

35. Further, the Member is no longer practising as a financial planner. The reason for this is important because it stems directly from the conduct the subject of this disciplinary proceeding. The submission on behalf of the Member then referred to his appearance at the Financial Services Royal Commission and the consequences that were said to flow from it, leading to the Member deciding to cease his practice, which was put in explanation of why he is no longer practising as a financial planner. (The Panel notes that it has not taken into account in its consideration in any adverse way the appearance of the Member at the Royal Commission, as it is not relevant to the conduct of the Member found to be in breach and for which the sanctions herein are being imposed, but it has noted the explanation given).

B - Minor instances of unsatisfactory conduct issue

36. The issue relates to the seven of the nine breaches, including those which were acknowledged in whole or in part. (The exception is in relation to breaches 8 and 10 where it was not contended that this was a minor instance). It is whether they would amount to or could appropriately be regarded as minor instances, as contended on behalf of the Member. This term is defined in clause 6 of the Disciplinary Regulation 2016 and if established it can lead to a lesser range of sanctions.

37. It is desirable to set out the wording of the definition or for the purposes of these Determinations. Under clause 6 of the DR

> *'**Minor Instance of Unsatisfactory Conduct** means a Breach that is appropriate to consider minor in nature, having regard to factors such as:*
>
> *a) the impact of the Breach;*
> *b) whether the Breach or its consequences were unintended;*
> *c) any acknowledgement by the Member of the Breach; or*
> *d) any remedial action taken by the Member.'*

38. This was raised for the Panel's consideration by Counsel for the Member in particular in the context of the hearing to determine whether there had been breaches of the Code. The Panel was urged to decide it at that stage but declined to do so. While a determination must now also be made in respect of each relevant breach, it is appropriate to decide it now, at least in terms of the relevant general considerations.

[12] As had been noted by the Member in a November 2017 response to the FPA

39. Counsel for the member submitted[13] that the defined term refers to "a Breach that is appropriate to consider minor in nature, having regard to factors 'such as' those listed in (a) to (d) of the definition. Those factors extend beyond the breach itself (indeed the only stated factor going to breach relates to intention) to its impact and contrition/remediation. This indicates that the circumstances of the breach itself is not the sole focus and that an unintentional breach that may not be regarded as minor viewed on its own may be regarded as "minor in nature" if (as in the present case) it does not give rise to loss and there is substantial contrition and remediation.

40. As noted above, there is a more limited range of sanctions available for this type of breach[14], apart from perhaps from whatever value may lie in the description of any conduct as being 'minor, or 'a minor instance'. However, it is also important to note the Panes view that just because a breach is not a minor instance does not mean that the fine which can be imposed must be greater than the maximum for such minor instances ($5000). All that is set is a maximum fine of $20,000 and a fine could be less than $5000).

41. In the Panels view, there are number of elements to the definition of minor instances but not all of these are fully evident from the wording of the definition. From the definition:

    - it must be *appropriate* to consider a breach minor in nature;
    - This requires, as stated, consideration or in other words judgment;
    - The word 'minor' has a number of meanings but most relevantly it means '*lesser, as in size, extent, or importance, or being the lesser of two*'[15]. (The Panel also noted the submissions of Counsel for the Member that the characterisation of and issue as minor does not mean that it is in fact minor.[16]);
    - Because of the two words, '*if any*' in the list of factors set out in the definition is not an exhaustive or complete list; this means in the Panels view that the underlying purpose of the Code must also be kept in mind in deciding on sanctions and in deciding on appropriateness; (this is a matter of common ground with parties);
    - The existence or satisfaction of these four criteria does not mean that just because they have been met conduct should be regarded as a minor instance in the defined sense; it must also be appropriate to consider conduct to be a minor instance;
    - The public interest in only those who are suitably qualified being allowed to practise, and in public protection and public confidence in the profession need to be maintained when considering conduct found to be in breach of the Code;
    - It is important, depending on the context and the severity of the conduct to deter others from repeating conduct of the kinds that the Member engaged in, and therefore to signal to this to others in the financial planning profession.

42. As distinct from the submissions made on behalf of the Member, the FPA, submitted that, due to overall severity of the Member's conduct, no Breach constitutes a "Minor Instance of Unsatisfactory Conduct" and therefore no Breach should be treated as such.

43. It is useful to recall the summary of the conduct found by the Panel to have breached the Code. That is: the SOA was put forward recommending a course of action which had not been carefully checked and would have, but for detection of the error by Complainant and if acted upon, resulted in a very significant loss to the Complainant. In providing the SOA the member failed to compare the Complainant's current course or provide adequate advice in terms of performance and costs; did not reasonably consider an existing product and did not reasonably evaluate it; it contained factual errors, failed to provide advice on the befits risks and costs of the recommended strategies; overall the Member did not act in a professional

---

[13] Submission dated 28 September 2018 at paragraph 23

[14] Schedule E to the FPA Disciplinary Regulation 2016 sets out the actions which may be taken where there is a minor instance of unsatisfactory conduct. Schedule B sets out sanctions and costs for breaches generally and includes additional possible sanctions of expulsion, supervised practice and other discipline.

[15] See Macquarie Dictionary, Revised Third Edition page 1217

[16] Submissin Dted 28 September at paragraph 23

manner and demonstrate sound professional conduct. Most significantly the member did not prioritise the Complainants interests or manage evident conflicts of interest.

44. **None of this conduct was minor. And no breach could be said to be an instance which was minor. Most significantly, it would not be appropriate, having regard to the public interest in signalling that similar conduct by any financial planner member would also be unacceptable to regard any of the breaches as an isolated instance. The conduct in relation to the 8 relevant breaches was not in the opinion of the panel minor instance of unsatisfactory conduct.**

45. **To summarise on this issue, the Panel notes that it determines that none of the breaches 1-5, 7 or 9 was a minor instance of unsatisfactory conduct.**

C - What credit should be given to the Member and is this a case for no sanctions to be imposed?

46. The FPA acknowledged, as does the Panel, that prior to the Disciplinary Proceedings and the Hearing, the Member acknowledged to a degree some of issues in relation to 5 of the Breaches and took immediate steps to rectify the conduct. The FPA acknowledged that the Member:
    a. provided a written apology to the Complainant;
    b. refunded the advice fees to the Complainant;
    c. offered to provide further advice to the Complainant without any charges;
    d. co-operated with the FPA in assisting with its investigation.

47. In addition, the panel accepts that the member did not act dishonestly. As recognised by the FPA (submissions at [22(a)-(c)]), the Panel also notes and has taken into account that the Member was not found to have acted recklessly. Although his conduct was lacking in diligence; that no loss was caused to the Complainant in fact, although there was potential for loss). And the panel accepts. the other matters put in mitigation on behalf of the member, save for that relating to cross examination of the Complainant.

48. The actions of the Member identified above have been be taken into consideration with respect to the sanctions to be imposed for the Breaches. However, for reasons which are set out below they do not negate the need for strong sanctions to be imposed.

D - General considerations from the above?

49. The sanctions that are provided for in respect of any breaches of the Code including its three elements are:

    - **Schedule B** to the FPA Disciplinary Regulation 2016 sets out sanctions and costs for breaches generally. In summary these include reprimand, apology, suspension from rights and privileges, remedial education, fines (which can be up to a maximum of $5000 for a minor instance) or up to $20,000 for other breaches, undertakings to rectify a matter or circumstance or provide a warranty as to future conduct, expulsion from membership, supervised practice or other discipline.
    - **Schedule E** sets the actions which may be taken where there is a **minor instance of unsatisfactory conduct**. In that instance, possible sanctions do not include expulsion, supervised practice and other discipline.

50. In the view of the Panel, we agree that it is not mandatory to impose a sanction in respect of every breach (but did not take the FPA to be contending otherwise and note that it also denies this). However, in general, and in relation to the Breaches the Panel is of the view that this is not a case for sanctions no to be imposed (with one exception relating to the second aspect of Breach 8 to which we will come).

51. As pointed out by the FPA and the Member's solicitor, the Member is no longer practising in the financial planning industry and has made this publicly known. The FPA informed the

Panel that it understands that the Member does not intend to return to the financial planning industry in any capacity. The FPA also has informed the Panel that it understands that the Member does not have any involvement with the business of Henderson Maxwell Pty Ltd.

52. The breaches were not minor, and it is not appropriate for the reasons we have set out above for them to be classified as minor instances. Breach 1 and Breaches 2, 3 5 and 7 displayed a lack of diligence. Overall the Members misconduct displayed a lack of professionalism, as found in Breach 10, which was acknowledged not to be a minor instance, nor was Breach 8.

53. In this case the Panel's view is that other sanctions are not appropriate, for the following reasons. While the Panel agrees that, a sanction of expulsion could in theory be imposed. In circumstances such as here where the Member is known publicly to no longer be practising as a Financial Planner, expulsion would not operate as any form of deterrent. It would invite other members who may breach to simply leave and would bring the profession into disrepute and invite derision and public disquiet of the Profession. Expulsion even if ordered as a signal would not sufficiently serve the public interest and the need for public protection, by clearly signalling the need for diligence by all financial planners as required by the Code, nor would it act as a sufficient deterrent. A reprimand would likewise be inappropriate.

54. An undertaking to rectify a matter (and the obvious ones being the refund of the payment of the fee to the Complainant and an offer to provide the services again at no cost have both already been done) would have no utility. A warranty as to future conduct would have no relevance as would any requirement for supervised practice or for example for further training.

55. An apology has already been given; and undertakings could not usefully be given by someone who is not a current financial planner, not would other steps, such as remedial education or training be of any point. There would be no purpose in imposing a sanction directed to rehabilitating the member in the financial planning profession because he has left it. The panel is therefore of the view that no other sanction, apart from fines, costs and expenses would be appropriate for any of the breaches.

56. However, it notes and accepts that the Member took substantial steps in remediation, which are described above and that his conduct was not dishonest;

57. For these reasons, the Panel is of the view that the sanctions that should be imposed, where this is otherwise appropriate, are fines, as well as to order the payment of costs and expenses of the FPA.

SANCTIONS FOR THE BREACHES

BREACH 1

58. **The first Breach was that the Member breached Principle 8 of the FPA Code of Ethics- Diligence. This breach related to the error in the SOA which if it had not been detected would have resulted in a loss to the Complainant in the vicinity of $530K. It was acknowledged by the Member, but in a limited manner**.

59. In explanation the member put the admitted error down to him failing to understand the nature of the Complainant's superannuation product. However, he also indicated that he should have checked himself, but left this to a paraplanner for whom he was responsible.

60. The Panel found among other things that the giving of this advice involved a mistake in research by the Member or by staff or paraplanners for whom the Member was responsible[17]. The failure by the Member was more than a failure of understanding, it was a failure to check. And the SOA was not a draft as contended by the Member.

[17] See e.g. the members letter to Mark Murphy of the FPA dated 12 May 2017 and the members acknowledgment of breach

61. The panel again notes that the acknowledgement as to Breach 1 was limited, in that it was said to arise from a failure of *understanding* on the part of the Member. However, as it noted in the breach Determination, the Panel was reasonably satisfied that there was material to the contrary which set out in the Allegation. It was information which was readily available to the Member and ought to have been known by him.

62. The FPA submitted on the question of breach that that the Member's significant failure to exercise diligence and due care in understanding the Complainant's superannuation benefit is a serious breach of Principle 8 of the Code. Had the Member been diligent and made reasonable enquiries it is likely that his error regarding the superannuation benefit would have been avoided, in the FPA's submission.

63. The FPA noted the serious failure by the Member to exercise due care and diligence in providing his professional services and the potential loss that could have been suffered by the Complainant. Therefore, in the FPA's submission, this was not a Minor Instance and that Breach 1 is serious in nature. A fine in respect of Breach 1 should be towards the upper limit of the maximum fine which can be imposed.

64. On behalf of the Member Breach 1 was acknowledged, although accepting that his acknowledgement did not extend as far as the breach found by the CRC (and therefore in the Panel's view was only acknowledged in a limited way). However, it was submitted that the use of the words "significant" and "serious" used by the FPA do not assist in the evaluation of whether a sanction is appropriate for this breach and, if so, what that sanction is. Counsel for the Member submitted that any breach of the Code is serious and significant.

65. The Panel was informed that the Member accepts that this breach carried the potential for a substantial loss but that this was not intentional or dishonest. It did not in fact cause a loss, had been acknowledged by the Member and he had taken substantial steps in remediation in apologising, refunding the advice fee, offering to provide further advice without fee and more generally in improving his processes.

66. It was submitted these matters had not been taken into account by the FPA. Further, that the Member accepts that this breach is, having regard in particular to the financial consequences had it not been detected, one that requires a sanction. However, it was submitted that the appropriate sanction is not a fine but a reprimand, which would appropriately serve the protective function by clearly marking the CRC's disapproval of the Members conduct.

67. It was also submitted on behalf of the Member that this breach is not one that would warrant the most severe sanction of expulsion in Schedule B of the Regulation. Yet his conduct had effectively led to that result (for reasons which were explained).

68. The primary submission on behalf of the Member was that Breach 1 should be held to be a Minor Instance. It was submitted that such a finding does not involve, as the FPA submits, a finding that the breach itself is minor. Further, the definition does not involve the CRC looking at whether there have been other breaches, contrary to the submission of the FPA that the fact that there have been other breaches means that no breach can be a Minor Instance of Unsatisfactory Conduct.

69. It was submitted that even if the CRC does not accept this, having regard to the factors referred to Breach 1 does not warrant a fine in excess of $5,000 and certainly not one toward the top of the range ($20,000) as sought by the FPA. The top of the range is reserved for breaches that involve or amount to dishonesty and a lack of contrition, remediation and acknowledgement. (And any fine should be subject to adjustment for the totality principle)

70. Other CRC decisions were referred to on behalf of the member. The panel has had regard to these submissions but believes that the circumstances of this case require that a fine be imposed

71. In arriving at the figure set out below [the Panel has had regard to the totality principle contended by Counsel for the Member and would apart from that principle have imposed a fine in the order of $10,000.

72. In relation to this Breach the Panel:

- Determines that it was not a minor instance.
- Believes as a general proposition that it is appropriate to have regard to the degree of seriousness and significance of a breach in determining the appropriate sanction and notes that there will always be degrees of seriousness and significance.
- Notes that here there was a significant failure to exercise diligence and due care, not only in understanding the Complainant's superannuation benefit; it and has found that this was more than a failure to understand, it was a failure to check, based on the Members own submissions. The failure was significant because of the potential impact of the Breach and this acknowledged lack of diligence by the Member.
- Is also of the view that the Member appears to lack full insight into his conduct because of his limited acknowledgment of the Breach (based on the proposition that it reflected just a failure of understanding) and his formal maintenance of the position in argument that the signed SOA was just a draft.
- He has accepted neither of these propositions, that the breach was more than a failure of understanding and it was not a draft.
- Regards this is a serious breach of Principle 8 of the Code
- Accepts that it is not a breach which by itself would justify expulsion,
- The factors put n behalf of the Member, as discussed above, have been taken into account in mitigation of the sanction which we determine below, taking it well below the maximum which applies of a fine of $20,000.
- Accepts that the totality principle submitted on behalf of the Member is relevant to this breach and to the related Breaches 2, 3 5 and 7; and on account of this, the Panel has reduced the sanction which it would otherwise have determined of a fine of about $10,000 to the figure which we determine below.
- Repeats, so far as necessary, the general considerations about the inappropriateness of other sanctions, apart from fines, costs and expenses.

73. **The Panel, having regard to these considerations, Determines that Mr Henderson is fined $8,000.00 in respect of Breach 1.**

BREACH 2

74. **Breach 2 – was that the Member breached Rule 4.2 of the Code**. In summary, it is that in selecting the recommended financial planning strategy for the Complainant that a self-managed superannuation (SMSF) account be established the Member failed to consider strategies relevant to the Complainant's current situation with SaSS Deferred that could reasonably meet her needs and objectives.

75. **In the Panels view**, it was not sufficient for compliance with this Conduct Rule that there be a recommendation as to a strategy without a reasonable "addressing' of the four factors set out in the rule and as particularised in relation to this allegation, or in other words of consideration of them. If there was no evaluation there could not be a consideration

76. The FPA submitted on the question of breach that given the fundamental importance of properly considering and identifying financial strategies which suit the personal circumstances and objectives of a client with respect to the provision of financial planning services and the Member's complete failure to do so in this matter, that the fine in respect of Breach 2 should be towards the upper limit of the maximum which can be imposed.

77. On behalf of the Member it was submitted that the FPA submission did not reflect the findings made by the CRC. It did not find that there was a complete failure – instead it noted that the statement of advice contained a recommendation that an SMSF be set up and found that the

breach comprised the failure to consider the Complainant's current circumstances and course. Further, the FPA's submission is in substance that Rule 4.2 is important therefore a breach of it warrants a fine toward the upper limit. (the Member) acknowledges that Rule 4.2 is important. All provisions of the Code are.

78. For the Member it was contended that It would defeat the purpose of requiring the FPA to set appropriate sanctions if all breaches required close to the maximum available penalty. This clarification was not meant to in any way detract from the CRC's findings of breach, merely to demonstrate that (together with the absence of dishonesty and loss and the presences of contrition, remorse and remediation) the breach does not warrant anywhere near the upper end of the available penalties.

79. It was noted on behalf of the Member that he accepts that the nature of the breach is such that a sanction is appropriate and made the same submissions about it as those made in respect of Breach 1 (described above).

80. The Panel

- Determines that it is not a minor instance of unsatisfactory conduct.
- Regards this is a serious breach of Rule 4.2 of the Code
- Notes that in the circumstances that the Member has left the industry, a reprimand would be pointless.
- Repeats, so far as necessary, the general considerations set out above about the inappropriateness of other sanctions, apart from fines, costs and expenses.
- Notes and accepts that the Member took substantial steps in remediation, which are described above and that his conduct was not dishonest; this is taken into account in mitigation of the sanction which we determine below, taking it well below the maximum which applies of a fine of $20,000.
- Notes that this breach is closely linked to breaches 1, 3, 5 and 7. Having regard to this linkage the sanction which should be imposed should reflect this fact and be reduced.
- Accepts that the totality principle submitted on behalf of the Member is relevant to this breach and to the related Breaches 1, 3 5 and 7; and on account of this, the Panel has reduced the sanction which it would otherwise have determined of a fine of about $3,000 to the figure which we determine below.

81. **For these reasons, the Panel Determines that the sanction imposed on Mr Henderson for failing properly to consider and identify strategies which were appropriate to the Complainant's personal circumstances and objectives, in particular the Complainant's current course, in Breach 2, is a fine of $2500.**

BREACH 3

82. **Breach 3 – was that the Member breached Rule 4.5 of the Code. In summary**, the allegation **was that there had been a failure to compare the performance and costs of the superannuation products recommended.**

83. Specific mention had been made in the allegation leading to this finding of breach to the Complainant's desire not have an SMSF, whereas the SOA had recommended one. **Further, that** the financial planning recommendations were unsuitable among other reasons because '*an alternative would not perform as well as her existing superannuation schemes on a net basis'* and, in effect, that the Member had not demonstrated '*that the Complainant would be in a better net position'*.[18]

84. **Breach 3 was** acknowledged as found by the CRC (but not as originally alleged by the FPA). In dealing with the sanction for the Breach which was found, it is appropriate to mention this aspect, even though it does not form part of the finding of breach, as this may assist others in

[18] See the Notice of Disciplinary Proceeding at Particular 3 iv.

understanding the Panels reasons. The Panel noted that prior to and at the hearing there was argument about the SMSF issue, to the point that either the Complainant's version or that of the Member should be preferred concerning her strongly expressed preference not to have an SMSF. However, it was also noted that, even on the Complainant's version of events she had said (even if facetiously) that 'if there was some secret financial planner's business about having an SMSF the Member could put it in the advice (and that she would read about it as an available option).[19]

85. An addition of written words by the complainant into the Executive Summary of the SOA had confirmed that the complainant would not be opposed to considering this option. Therefore, this aspect did not form part of the Breach for which a sanction is imposed. **noting, however, that the Panel was reasonably satisfied there was a breach in that** the SOA did not consider the recommended strategy in terms or performance and costs.

86. The FPA submitted on the question of breach that the comparison of financial products in respect of performance and costs is a fundamental part of financial planning services. Therefore, the Member's failure to do this with respect to the Complainant's superannuation arrangements was a significant breach of Rule 4.5 of the Code. As such, the FPA submitted that Breach 3 should not be treated as a Minor Instance of Unsatisfactory Conduct.

87. The FPA submitted that as the CRC did not find Breach 3 as alleged, but rather found that the breach occurred by reason of the Member's failure to compare the performance and costs of the superannuation products, the fine imposed in respect of this breach should be towards the lower end of the maximum limit which can be imposed by the CRC. However, the fine should be greater than $5,000.00 as it is not a Minor Instance.

88. On behalf of the Member it was submitted that he acknowledged Breach 3 as found by the CRC (just not as alleged by the FPA). He accepted that the nature of the breach is such that a sanction is appropriate and made the same submissions about it as in respect of Breach 1, although noting that the monetary amount of the fines imposed by other bodies in other circumstances is not relevant and no regard should be paid to the amounts of the fines referred to in the FPA's submissions. (The Panel notes that the FPA had referred to fines by the Australian Securities Exchange Disciplinary Tribunal. The Panel agree with the Submission of the member on this point and sees those fines as being of no relevance here).

89. On behalf of the Member it was put that consistent with the position taken by the FPA, if a fine is considered appropriate it should be less than any fine in respect of Breach 1.The FPA submitted that the appropriate sanction is a fine toward the lower end of the maximum limit which can be imposed but more than $5,000 "as it is not a Minor Instance.

90. For the member it was contended that even if the CRC rejects his submissions, a fine is not appropriate and that Breach 3 is a Minor Instance, and the FPA's submission was incorrect. The role of the CRC is to impose an appropriate sanction. Even if, contrary to his submission, the CRC considers a fine is appropriate, it can impose a fine of any amount up to $20,000. The fact that the limit for Minor Instances of Unsatisfactory Conduct is $5,000 does not dictate that a fine for a breach that does not satisfy that definition must be more than $5,000. As noted above, the Panel also agree with this latter aspect of this submission.

91. The panel:

- Determines that it is not a minor instance;
- Regards this is a serious breach of Rule 4.5 of the Code;
- Repeats, so far as necessary, the general considerations about the inappropriateness of other sanctions, apart from fines, costs and expenses.
- Notes and accepts that the Member took substantial steps in remediation, which are described above and that his conduct was not dishonest; this is taken into account in

[19] See the Complainant's statement dated 29 September 2017 at paragraph 45

mitigation of the sanction which we determine below, taking it well below the maximum which applies of a fine of $20,000.

- Notes that this breach is closely linked to breaches 1, 2, 5 and 7. Having regard to this linkage the sanction which should be imposed should reflect this fact and be reduced.
- Accepts that the totality principle submitted on behalf of the Member is relevant to this breach and to the related Breaches 1, 2, 5 and 7; and on account of this, the Panel has reduced the sanction which it would otherwise have determined of a fine of about $3,000 to the figure which we determine below.

92. **For these reasons, the Panel Determines that the sanction imposed on Mr Henderson for failing to compare the performance and costs of the superannuation products, is a fine of $2500**

BREACH 4

93. **BREACH 4 – was that the Member breached Rule 4.5 of the Code**. In summary, it related to the Complainant's objective to **purchase property with an AMP Bank loan and to assist her children** financially while attending to her own financial needs. Rule 4.5 requires any financial planning recommendation to be consistent with a number of things, including (but not limited to) the client's personal circumstances and risk (appetite), confirmed objectives, any reasonable assumptions and any suitable strategy identified.

94. **This allegation was acknowledged by the Member.** The Member acknowledged that *'in not giving more direct and conclusive advice about this, in (*the SOA, the Member*) didn't not meet the expectation that the Complainant had of him and thereby breached the Code'*[20]

95. **Counsel for the FPA submitted**[21] that the SOA contains no real advice at all in relation to property investment, other than a statement that the Complainant should consider this form of investment.

96. The FPA submitted on the question of breach that as this is the second instance where it was found that the Member breached Rule 4.5 that the Member has significantly failed to adhere to the requirement that financial planning recommendations be consistent with a client's personal objectives and circumstances. This meant that this is not a Minor Instance and the FPA submitted that it should not be treated as such.

97. The FPA submitted that an appropriate fine should be imposed in respect of Breach 4 that is at least $5,000.00, noting the overlap between Breach 3 and Breach 4 and that both Breaches involve a breach of Rule 4.5 of the Code.

98. **On behalf of the Member** it was submitted that Mr Henderson acknowledged the substance of breach 4. He accepts that the nature of the breach is such that a sanction is appropriate and made the same submissions about it as those made in respect of breach 1 (the sanction should be at the lower end) although noting that (consistent with the position taken by the FPA if a fine is considered appropriate it should be less than any fine in respect of Breach 1.

99. Counsel also repeated the submission (having regard to the submission made by FPA) that a fine could be less than $5000 even if not a minor instance.

100. The Panel:

- Determines that it is not a minor instance.
- Regards this is a serious breach of Rule 4.5 of the Code.
- Repeats, so far as necessary, the general considerations about the inappropriateness of other sanctions, apart from fines, costs and expenses.

---

[20] Transcript page 21, ff line 45

[21] Pre-hearing FPA submission at paragraph 23

- Notes and accepts that the Member took substantial steps in remediation, which are described above and that his conduct was not dishonest; this is taken into account in mitigation of the sanction which we determine below, taking it well below the maximum which applies of a fine of $20,000.
- Accepts that the totality principle submitted on behalf of the Member is relevant to this breach and on account of this, the Panel has reduced the sanction which it would otherwise have determined of a fine of about $6,000 to the figure which we determine below.

101. **Breach 4 - Having regard to these facts and findings and noting and taking into account his acknowledgments, the Panel Determines that the sanction imposed on Mr Henderson for failing to comply with Rule 4.5, concerning the Complainant assisting her children is a fine of $4000.00**

BREACH 5

102. **Breach 5 – was that the Member breached Rule 4.7 of the Code**. In summary, it concerned an allegation that he failed to evaluate an existing product the Complainant had or had invested in that reasonably addressed her circumstances identified, (that is the Complainant's interest in the **Macquarie Global Infrastructure Trust (MGIT)**), nor did he accept information from the Complainant about these products.

103. **The particulars** given in respect of the allegation included that it Is not apparent that that he considered or evaluated MGIT, except to say, '*That's not the type of product we recommend'*. Further, that '*it is not apparent from the Member's SOA that he considered or evaluated MGIT*'.

104. **A further expansion of the particulars** was that '*the Member made his recommendation in the absence of understanding any of the costs, risks or adverse consequences for the Complainant of disposing of her investment MGIT and instead investing in Henderson Maxwell Managed Accounts*'.

105. **The FPA submitted that** Rule 4.7 of the Code imposes an obligation on FPA members to *"identify and evaluate products or services, including any existing products and services held by the client"* which reasonably address the matters in the rule when making financial planning recommendations.14 The Member failed to do this when he failed to properly consider and evaluate the Complainant's interest in MGIT.

106. The FPA submitted that a fine should be imposed in respect of Breach 5. However, in the context of the overall conduct engaged in by the Member and bearing in mind the overlap between the Breaches the FPA was satisfied that the fine imposed in respect of Breach 5 should be towards the lower end of the maximum amount, but greater than $5,000.00

107. **On behalf of the Member** it was submitted that the Member accepts that the nature of Breach 5 is such that a sanction is appropriate and made the same submissions about it as those made in respect of Breach 1 although noting (consistent with the position taken by the FPA) if a fine is considered appropriate it should be less than any fine in respect of Breach 1.

108. He also repeated the submission contrary to that made by FPA in its submissions that a fine could be less than $5000 even if not a minor instance.

109. **The Panel:**

- Determines that it is not a minor instance.
- Regards this is a serious breach of Rule 4.7 of the Code.
- Repeats, so far as necessary, the general considerations set out above about the inappropriateness of other sanctions, apart from fines, costs and expenses.

- Notes and accepts that the Member took substantial steps in remediation, which are described above and that his conduct was not dishonest; this is taken into account in mitigation of the sanction which we determine below, taking it well below the maximum which applies of a fine of $20,000.
- Notes that this breach is closely linked to breaches 1, 2, 3 and 7. Having regard to this linkage, the sanction which should be imposed should reflect this fact and be reduced.
- Accepts that the totality principle submitted on behalf of the Member is relevant to this breach and to the related Breaches 1, 2, 3 and 7; and on account of this, the Panel has reduced the sanction which it would otherwise have determined of a fine of about $5,000 to the figure which we determine below.

110. **Breach 5 - Having regard to these facts and findings and noting and taking into account the acknowledgments by him, the Panel Determines that the sanction imposed on Mr Henderson for failing to comply with Rule 4.7, concerning the MGIT product is a fine of $2500.**

BREACH 7

111. **Breach 7 – was that the Member breached Rule 4.11 of the Code in failing** to provide information on the benefits and disadvantages, risks and costs of her existing strategies and products against the recommended strategies and products, or any reasonably suitable alternatives.

112. **The FPA submitted** on the question of breach that the FPA Code of Professional Practice requires an FPA member provide financial planning recommendations and information to a client which assists the client to understand the recommendations. The Member did not do this for the Complainant. Accordingly, the FPA submitted that the fine in respect of Breach 7 should be towards the upper limit of the maximum which can be imposed.

113. **On behalf of the Member** it was submitted that he accepts that the nature of breach 7 is such that a sanction is appropriate, and made the same submissions about it as those made in respect of breach 1

114. The Panel:

- Determines that it is not a minor instance.
- Regards this is a serious breach of Rule 4.11 of the Code.
- Repeats, so far as necessary, the general considerations set out above about the inappropriateness of other sanctions, apart from fines, costs and expenses.
- Notes and accepts that the Member took substantial steps in remediation, which are described above and that his conduct was not dishonest; this is taken into account in mitigation of the sanction which we determine below, taking it well below the maximum which applies of a fine of $20,000.
- Notes that this breach is closely linked to breaches 1, 2, 3 and 5. Having regard to this linkage, the sanction which should be imposed should reflect this fact and be reduced.
- Accepts that the totality principle submitted on behalf of the Member is relevant to this breach and to the related Breaches 1, 2, 3 and 5; and on account of this, the Panel has reduced the sanction which it would otherwise have determined of a fine of about $6,000 to the figure which we determine below.

115. **Breach – 7 Having regard to these facts and findings, we Determine that that the Member sanction imposed on Mr Henderson for failing to comply with Rule 4.11 as alleged re existing strategies is a fine of $2500.00.**

BREACH 8

116. **BREACH 8 – was that the Member breached Code of Ethics Principle 1, which requires the client's interests first; or, alternatively, that the Member breached Ethics Principle 3.**

117. **At the outset of the consideration of sanction on this matter, the Panel notes that it accepts the submission made on behalf of the member that** having regard to the fact that the allegations were put in the alternative, only one sanction may be imposed, not a sanction for each breach that was found.

118. Accordingly, while the panel remains of the view that there was a breach in respect of the conflict of interest aspect, no sanction is imposed for that breach. That said, the conflicts illustrate the failure of the Member to prioritise the Complainant's interests over his own. It is difficult to totally excise the conflicts aspect from the lack of putting the client's interests first breach.

119. In summary, the breach was that the Member did not place the clients' interests first or provide professional service objectively. It was also particularised that the Member did not provide professional services objectively, and did not exercise sound professional judgment; alternatively, that he did not act intellectually honestly and placed personal gain before the client's interests.

120. Further, the Member and related parties would have gained 'more substantially from his recommendations and his conduct than he would have otherwise and that these gains would have been in remuneration (fees) for ongoing services; and that there was also potential for further benefit from property services. To summarise the particulars in the allegation, leading to the finding of a breach, it was put that '*in all the circumstances it is contended that there is a strong and reasonable inference that the Member's conduct stemmed from a lack of objectivity or a conscious decision to place his own interests before those of the client.*'

121. **In his pre-hearing submission Counsel** for the FPA submitted that had the recommendations been implemented gains would have been made by entities in which the member had interests and that there were no recommendations in respect of the suitability of products of service in which he had no interest.[22] Notably, however, at the hearing Counsel for the FPA indicated that the FPA does <u>not</u> maintain an allegation that the Member acted dishonestly, that is, that he acted with an actual consciousness of wrongdoing.[23]

122. The effect of this concession was in the Panel's view to carve out one of significant, but not all of the, elements of the allegation and the panel made no finding that the member was dishonest.

123. As it noted in its decision on breach in respect of this matter, aspects of the SOA put this allegation into stark relief. For example, the Summary of Recommendations only mentioned entities associated with the Member, for investment products or vehicles. That there were associations between the various entities and the Member was not disputed, as a matter of fact.

124. The panel also notes again that this allegation depends on an inference being able to be drawn that the Member's conduct was as alleged and that this amounted to a breach of Code of Ethics Principle 1. Noting of course that all the other allegations are serious, this was indeed, as urged by Counsel for the Member, a serious allegation, because it included the element that the Member had not acted intellectually honestly. However, while the Panel was of the view that clear evidence would be needed of a lack of honesty for that aspect of the allegation to be sustained, there is more to consider than honesty, (taken alone).

---

[22] See Submission by Mr Furlan at paragraph 37

[23] Transcript at page 6

125. The Panel's view was that it is reasonable to expect that where a conflict both exists, and is material, that a member would provide a thorough explanation of why recommendations (in this case only to proceed with entities associate with the Member) are in the client's interest *despite the conflict*, as opposed to prioritising the client's interests first. A thorough explanation of why alternatives that are free of the conflict should have been but was not discussed or mentioned.

126. As has been found throughout the remainder of these reasons, there was no evidence whatsoever of sufficient – or any - consideration being given to any alternatives. The Panel again notes that there is a stark lack of evidence that the Member prioritised his client's interests or gave them any level of reasonable consideration.

127. **The findings** on material questions of fact and references to the evidence which the Panel made in respect of Breach 8 were that:

- Entities associated with the Member were featured in the recommendations in the SOA to set up an investment account, for the suggested rollover both for superannuation and investment purposes.
- No entities that were not associated with the Member were recommended, although this is not clear in respect of recommended property purchases.
- There is not clear and strong evidence that the Member acted dishonestly or with a lack of objectivity and he asserts the contrary.
- There was no evidence whatsoever of sufficient – or any - consideration being given to any alternatives, or about how the conflicts apparent in the advice in the SOA would be managed.

128. **The FPA submitted on the question of breach that** Principle 1 of the Code of Ethics requires an FPA member to place the client's interests first and Principle of the Code of Ethics requires an FPA member to provide professional services objectively. It was the FPA's view that these are important principles with respect to professional behaviour and maintaining public confidence in the financial planning profession.

129. Importantly, the SOA only referred to entities associated with the Member and no entities not associated with the Member were recommended. The CRC also stated *that "there was no evidence whatsoever of sufficient – or any – consideration being given to any alternatives, or about how the conflicts apparent in the advice in the SOA would be managed".*17

130. The FPA submitted that it is imperative in maintaining the integrity of the financial planning profession and protecting the interests of the public, that FPA members provide advice objectively and put the interests of clients first. FPA members should also avoid any real or material conflicts of interests. Accordingly, the FPA submitted that Breach 8 is a serious breach of the Code by the Member and that a fine should be imposed upon the Member which is towards the upper limit of the maximum amount.

131. Breach 8 is serious in nature and was denied by the Member at the hearing. However, on behalf of the Member it was submitted on the question of sanctions that he accepts that the nature of breach 8 is such that a sanction is appropriate and made the same submissions about it as those made in respect of breach 1, with the exception that he did not submit that this breach is a Minor Instance. It was accepted by the Member that the failure to manage conflicts takes this breach outside that description.

132. This breach was therefore a most serious one, of the Member failing to comply with Code of Ethics Principle 1 and is deserving of the maximum fine which is available. Imposing this fine will in the Panels view send a clear signal to planners generally that they must put their client's interest first and be as a strong deterrent to others. It also expresses the Panels strong disapproval of the member's conduct on this breach in particular.

133. The Panel:

- Notes that this breach stands in distinction from all the other beaches and should not itself be reduced as a matter of the overall balance in the sanctions.
- Determines that it is not a minor instance and notes that it was not contended to be such on behalf of the Member.
- Regards this is a serious breach of Code of Ethics Principle 1.
- Repeats, so far as necessary, the general considerations set out above about the inappropriateness of other sanctions, apart from fines, costs and expenses.
- Notes and accepts that the Member took substantial steps in remediation, which are described above and that his conduct was not dishonest; however, in view of the seriousness of this breach, this is not taken into account in mitigation of the sanction which we determine below, of the maximum which applies of a fine of $20,000.

134. **Breach 8 - Having regard to the foregoing, the Panel Determines that:**

- **the sanction on Mr Henderson for failing to comply with Principle 1 and to put the Complainant's interests first is a fine of $20,000; and**
- **No sanction is imposed in relation to the breach concerning not managing conflicts of interest, which were apparent in the recommendations in the SOA.**

BREACH 9

135. **BREACH 9 was that the Member breached Practice Standard 7.3 which requires members to present and promote their services fairly and honestly**. In summary, it was alleged that there were a number of issues identified with the Member's disclosure, namely with the SOA, the Financial Services Guide (FSG) and in respect of related party disclosures.

136. **The particulars given**, and which were found to constitute the breach in summary, were that:

- there was an incorrect calculation of ongoing fees and brokerage in the SOA which was calculated on (a lower) SASS balance, instead of one obtained on 7 November for a higher amount, meaning that the ongoing fee would increase;
- there was a failure alleged in respect of a personal account recommended to be established with an entity associated with the Member;
- there were failures to disclose in the FSGs, including as to establishment costs, ongoing accounting fees and the wrong version of the FSG was given to the client meaning that a number of conflicts which appear to have been material were also not disclosed; and
- there were failures in relation to related party disclosures.

137. **Allegation 9 had been acknowledged by the Member** (and had also been in his November 2017 response) that is, that he omitted to disclose or miscalculated certain fees and thereby breached practice standard 7.3. However, it was contended that this was not because of any lack of honesty but due to a failure to provide sufficient disclosure. The allegation concerning disclosure of relationships was disputed, Counsel noting that although the Member did have an interest in the company which ran the platform and would derive fees from a managed account, the interest was only in the order of one percent and was not considered to be material.

138. **The FPA submitted** on the question of breach that this Practice Standard imposes an obligation on the member to provide *"sufficient disclosure"* to consumers. The FPA submitted that Breach 9 is significant in that it is a serious breach of Practice Standard 7.3 to provide incorrect calculations and errors with respect to fees and costs and to fail to disclose in the FSG fees and costs. It is important that clients are fully informed as to the costs and fees associated with the recommendations provided.

139. The FPA submitted that given the serious nature of Breach 9 it should not be treated as a Minor Instance. The FPA further submitted that a fine should be imposed upon member which is towards the upper limit of the maximum amount.

140. **On behalf of the Member** it was submitted that the substance of breach 9 was acknowledged by the Member. He accepted that the nature of the breach is such that a sanction is appropriate and made the same submissions about it as those made in respect of breach 1.

141. The Panel:

- Determines that that this breach is not a minor instance.
- Regards this is a serious breach Practice Standard 7.3.
- Repeats, so far as necessary, the general considerations set out above about the inappropriateness of other sanctions, apart from fines, costs and expenses.
- Notes and accepts that the Member took substantial steps in remediation, which are described above and that his conduct was not dishonest; this is taken into account in mitigation of the sanction which we determine below, taking it well below the maximum which applies of a fine of $20,000.
- Accepts that the totality principle submitted on behalf of the Member is relevant to this breach; and on account of this, the Panel has reduced the sanction which it would otherwise have determined of a fine of about $5,000 to the figure which we determine below.

142. **Breach 9 – The Panel Determines that that the sanction imposed on Mr Henderson for failing to comply with Practice Standard 7.3 of the Code is a fine of $4000.00.**

BREACH 10

143. **Breach 10** – was in summary that, in breach of Code of Ethics Principle 5, overall the Member did not act in a professional manner or demonstrate sound professional conduct having regard to the rules regulations and professional requirements of the financial planning industry. It concerned mistakes made in the SOA.

144. **This Breach was based on the overall client experience** and particulars of all matters identified earlier where there was said to be a case to answer were repeated.

145. **Breach 10 was acknowledged by the Member** (and had been in his November response). That is, he acknowledged that his failure to pick up and correct errors in the SOA and the overall client experience comprised a breach of Principle 5 of the Code.

146. **The FPA submitted on the question of breach that this Practice Standard** goes towards protecting the interest of the public, as well as upholding the standards and expectations of the conduct of FPA members.

147. The FPA submitted that overall the Member engaged in unsatisfactory conduct having regard to the rules, regulations and professional requirements of the financial planning industry. The FPA also submitted that Breach 10 is serious in that breaches of Principle 5 can significantly damage the reputation of the financial planning profession and are not in the interest of the public. Breach 10 also reflects overall the numerous Breaches committed by the Member and the degree to which his conduct was unsatisfactory.

148. Therefore, the FPA submitted that Breach 10 should not be treated as a Minor Instance. The FPA further submitted a fine should be imposed upon member which is towards the upper limit of the maximum amount. In fact, the FPA submits that the highest fine should be imposed in respect of Breach 10 as it encapsulates the conduct as a whole.

149. (The panel did not agree with the FPA that this breach should attract the highest fine. In its view the failure to put the client's interests first (Breach 8) was the root cause of all the breaches, although the point may be a moot one and the lack of professionalism overall is concerning and deserving of a sanction).

150. **On behalf of the Member** it was submitted that the substance of breach 10 was acknowledged by him. It represents the culmination of the other breaches alleged. For that reason, in addition to the submissions made in respect of breach 1 which were repeated, with the exception of the submission that the breach is a Minor Instance. It was accepted by the Member that the culmination of the other breaches takes this breach outside that description, but a reprimand was submitted to be the only appropriate sanction.

151. The Panel:

- Determines that that this breach is not a minor instance and notes that it was not contended to be such on behalf of the member in submissions on sanctions.
- Regards this is a serious breach of Code of Ethics Principle 5.
- Repeats, so far as necessary, the general considerations set out above about the inappropriateness of other sanctions, apart from fines, costs and expenses, and in particular concerning a reprimand.
- Notes and accepts that the Member took substantial steps in remediation, which are described above and that his conduct was not dishonest; this is taken into account in mitigation of the sanction which we determine below, taking it below the maximum which applies of a fine of $20,000.
- Accepts that the totality principle submitted on behalf of the Member is relevant to this breach; and on account of this, the Panel has revised the sanction which it would otherwise have determined to the figure which we determine below.

152. **Breach 10 - Having regard to these facts and findings, we Determine that the sanction imposed on Mr Henderson for failing to comply with Code of Ethics Principle 5 overall as alleged is a fine of $4000.**

FPA'S COSTS AND EXPENSES

153. The Panel determines that the Member must pay within 21 days of notification of them or such further period as may be agreed between the parties, in any case not exceeding 120 days from the date of this Determination, the reasonable costs and expenses of the FPA of and incidental to the Investigation and Disciplinary Proceedings, including:

a) The FPA's Investigation expenses;
b) Transcription service expenses incurred in relation to the hearing;
c) Panel Members sitting and preparation fees; and
d) Panel Member travel expenses.

STATEMENT OF RIGHT TO REQUEST A REVIEW

154. **In accordance with Clause 110 of the FPA Disciplinary Regulation 2016 the Member is notified that:**

- **he has a right to request a review of these determinations pursuant to Part 14 of the Regulation (Applications for Review); and**
- **that the Prescribed Time for lodging a review request is 21 days from the date notice is received of any Breach imposed by the Disciplinary Panel, in this case by 31 October 2018.**

155. Such a request must be lodged with the FPA Investigating Officer at Level 4, 75 Castlereagh Street Sydney NSW 2000.

Signed

Dale Boucher	**Sandra Bowley CFP**	**Michael Miller CFP**
Deputy Chair	**Panel Member**	**Panel Member**
Presiding Member		

DATED

10 October 2018