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**FPA Disciplinary  
Regulation Review  
2018**

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# Financial Planning Association

## Disciplinary Regulation Review

### Executive Summary

A number of transitional changes will be needed to the FPA Disciplinary Regulation (2016) (**DRs**) if it is to become a suitable foundation for the Compliance Scheme required for the purposes of sections 921 E and 921 H of the *Corporations Act 2001*. Those sections require that financial advisers comply with a code of Ethics and be covered by such a scheme from 1 January 2020.

There are other reasons of principle why changes to the DRs are desirable. These have been identified by the Financial Planning Association Disciplinary Regulation Review (the **Review**). Inferences to be drawn from the proceedings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the **Royal Commission**), before the Hon Kenneth Hayne AC QC also lend strong support to the need for changes, as do the requirements of the Corporations Act.

**In summary, the recommended changes include those which are set out below.**

- Ensuring that public interest ‘calls’, including the need for public protection, receive more prominence and are made by the Chair of the Conduct Review Commission (**CRC**), not by employees of the FPA.
- Removing the ability of the FPA and FPA Members who may be in breach of a conduct rule to agree not to publicise the name of the member where a breach is established, subject to usual safeguards as to appeals processes.
- Separating the processes of investigation (to be carried out by the Investigating Officer (**IO**)) and determinations of breach and sanction (to be made by the CRC – not FPA employees) to the extent that this has been possible.
- Ensuring that determinations as to which misconduct constitutes a breach or a sanction (in cases of summary dismissal or for minor instances of unsatisfactory conduct) are made by the CRC or its Chair, while ensuring that the concepts of both are retained.
- Encouraging the FPA Board, the Professional Standards and Conduct Committee and the CRC panel to establish guidelines as to what constitutes grounds for summary dismissal or a minor instance of unsatisfactory conduct, as well as general guidelines on the appropriate sanctions for various types of misconduct.
- Directing that the *requirement* for a Directions Hearing to be held before a disciplinary matter can be listed be removed. The CRC should simply be able to list a matter, after appropriate consultations. A Directions Hearing could be held if thought desirable by the CRC or if a party needed to seek directions from the CRC.

- Providing the CRC with its own secretariat and resources;
- Better resourcing of the Investigating Officer function, and if necessary and appropriate, the Head of Professionalism (HP) function. This improved resourcing would include but not be limited to greater numbers of qualified staff as well as technology and other resources
- Appointing further Deputy Chairs for the CRC. The adoption of these recommendations and the prospect of other non-member financial advisers also being covered under an FPA Compliance Scheme will have significant resource implications. It is likely that additional Deputy Chairs will be needed.

The Review has not considered what detailed changes will need to be made to the FPA Code of Professional Conduct or its three elements, but such changes are likely to be needed because the FPA's own Code cannot be inconsistent with the Financial Standards and Ethics Authority (FASEA) Code. It may be possible to devise some simple workaround changes to the FPA Code to address this problem, but that remains to be explored, as does the possibility of improving the FASEA Code.

A revised set of the Disciplinary Regulations is submitted for consideration. The revised regulation should be capable of use until the FASEA Code and the associated Compliance Scheme it requires commences, but a new regulation will be needed for that time. Work should commence on this as soon as possible.

# **Review of the FPA Disciplinary Regulation (2016) against the broader FPA disciplinary framework including the FPA Code of Professional Practice (2013); the FPA Constitution (2011) and the FPA Member and Affiliate Regulation (2017).**

## **Introduction**

- 1. This report addresses Terms of Reference (TORs) for the FPA Disciplinary Regulation Review** which were issued on 5 June 2018. It does so in five parts:  
  
**A – Observations on preliminary issues** with the Disciplinary Regulation 2016 (the DRs), one of which is also to be seen with the Code of Professional Practice;  
  
**B – Implications of implementation of the FASEA Code and ASIC’s Consultation Paper (CP 300);**  
  
**C - Issues raised at the Royal Commission** into Misconduct in the Banking, Superannuation and Financial Services Industry (the RC);  
  
**D - Observations on each of the elements of the Terms of Reference;** and  
  
**E – Recommendations and next steps,** if the recommendations of the Review are accepted.
- 2. The first three of these topics are related,** in that they raise common issues and concerns which are directly relevant to the DRs. They therefore set the scene for the changes which the Review will recommend.
- 3. A revised draft of the DRs for the first stage until 31 December 2019 is attached in mark- up format.**

## PART A – OBSERVATIONS ON PRELIMINARY ISSUES

1. **The DRs are a good basic framework** -The overall scheme of the DRs has been in operation for several years and the DRs have undergone at least three changes since their inception. It is to be expected that any in disciplinary framework, rules such as the DRs will need changing from time to time. The DRs are also functioning as a good, basic framework for a disciplinary scheme for a professional association. The Review has not discerned any reason why they should not continue as such, provided the changes recommended herein and, in the draft, revised DRs are made, especially to correct some basic issues.
2. **But there are limitations and changes are desirable** - It is important to note that the DRs do not provide for compensation and are intended to provide a framework for the disciplinary scheme for FPA Members. However, while the DRs provide an appropriate basis for the future, including as a strong foundation for the compliance scheme that the FASEA Code will require, it is desirable that changes are made, for several reasons, identified by the Review.
3. **Inherent problems** - The DRs contain a number of interesting features and inherent problems.
  - **The CRC is not in control of all breach and sanction decisions** - the CRC is established pursuant to the Constitution and Part 16 of the DRs to determine whether there have been breaches of the FPA Code, and to impose sanctions. However, it is possible at present for both those things to happen without any reference to the CRC and for matters which are assessed to be minor. This comes about because DR section 3.6 (Minor instances of Unsatisfactory Conduct) provides in clause 41 for infringement notices to be issued for such minor instances. This stage does not require (but does not prevent) CRC consideration (see clause 45) and this process is not carried out under the purview of the CRC. As will be noted below, keeping this power in the IO would be inconsistent with the FASEA Code and CP 300.
  - **Transparency issues for the CRC** - It is also quite likely that the matters might be concluded and kept confidential and the CRC may never know of it. This offends principles of transparency.
  - **Transparency issues for the public too** - The fact that a member has breached the Code can be blinded from publication. For this reason, the public also may never know that there has been compliance issue with a financial planner/member.
  - **Skewed decisions about the public interest?** - The reason for this possibility is that a decision can be made that the balance of interests between the member being

rehabilitated and the public knowing whether there has been a breach has been seen, on many occasions, to lie with the former, that is, not publicising<sup>1</sup>.

- **Role conflicts** - Public interest decisions may be made, no doubt always in good faith by the individuals concerned. However, there is an inherent conflict between the role of the Head of Professionalism (**HP**) in this respect as a servant of the Association and the interests of the general public and in transparency of the process overall.
- **Possibly errant Members taking control and delay issues** - The opportunity that exists for summary disposal of a matter, means that a Member can seek to negotiate for confidentiality, under clause 54 or section 7.3 of the DRs. The Chair of the CRC needs to be involved only to the extent that a complaint or investigation is not finalised. This process for resolving matters provides opportunity for delay and possibly for inappropriate compromise.
- **Process cluttered and delayed by directions hearings**- Holding a Disciplinary Panel hearing at present must be preceded by a Directions Hearing. While it may often be convenient for a Directions Hearing to be held, this too can cause delay. Directions hearings should have as their primary purpose, the orderly disposal of allegations brought to the CRC and should not be a tool for filibuster or argument by members, exacerbated, for example, by the unavailability of particular lawyers on either side.
- **A relatively small number of complaints end up in the CRC**. This may be because of the role of the IO and the classification of various matters under the Summary Disposal or Minor Instance of Unsatisfactory Conduct umbrella; because the FPA scheme does not offer compensation, or for other reasons.
- **Duplication and overlap** - IO reports exhibit a noticeable trend to make what appear to be all possible allegations against a member, perhaps in some cases to the extent of overlap and duplication. It is not always necessary or appropriate to issue allegations of breach in respect of every conceivable breach.

4. **Identification of the public interest and of the need for public protection should be given high prominence in the Code**. The Code of Professional Conduct (comprising the Code of Ethics, Practice Standards and Rules of Professional Conduct) (the FPA Code) sets the scene in some ways for the DRs. But the Code does not articulate, from the outset, the importance of public protection in the professional regulatory framework for financial planners. Although this may be an assumption, it is not stated.

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<sup>1</sup> (From figures supplied by the FPA to the Review): in the 10-year period to the end of 2017, 108 matters were summarily dismissed by the IO and 50 by the CRC (and therefore not published). Fourteen percent (14%) were not dismissed and were the subject of adverse findings by the CRC. 21 cases were not summarily dismissed but were treated as minor instances of unsatisfactory conduct (and therefore not published). An important qualification to these figures is in the last paragraph of this Part in relation to auto-terminations of memberships, of which there were also about 76 in the 10-year period.

5. **This should flow on to the DRs, where there are issues.** This then is reflected in some significant ways in the way the DRs are structured. For example, explicit consideration of public protection, or the public interest, is not required in deciding whether conduct might be classified as a Minor Instance of Unsatisfactory Conduct, by the definition of that term. Other issues exist with how and who makes public interest calls, placing FPA employees in a difficult position.
6. **There appear to be some mismatches, probably caused by decisions over time.** The Constitution of the FPA clearly articulates that the second object for which the FPA is established (after ‘*representing the interests of FP’s in their relations with governments, regulators the community and other professional associations*’) is to:

***“act in the public interest so that clients of members and prospective clients can obtain competent financial planning advice and to suppress Malpractice”***.<sup>2</sup>

7. **This is also evident because the FPA Executive recognises the importance of public protection.** It is clear that that the leadership in the Executive of the FPA recognises that the public interest or public protection is of primary importance. This is also evident from the proceedings of the RC, at which that the ultimate purpose of the FPA disciplinary process to protect members of the public was recognised.<sup>3</sup>
8. **Editorial changes should be possible.** The Review Terms of Reference (**TORs**) require that the Review be conducted by reference to the broader disciplinary framework, including the Code, the FPA Constitution and the Member and Affiliate Regulation (MAR). It may be possible to make suitable but a relatively small number of changes to address this.
9. **These could be, for example, in the early parts of the Code.** In the introductory section to the document “the Pillars of Our Profession” (in which the Code is set out), a description of how the Code is intended ‘to operate alongside government regulation and inform licensee compliance requirements’ is provided. A diagram is then set out, outlining three sources of regulatory obligations. These ‘are intended to inform licensee obligations’, being:
  - professional obligations;
  - government requirements; and
  - business requirements.

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<sup>2</sup> See clause 1.1 (a) ND (B) of the FPA Constitution; the expression ‘suppress malpractice’ is perhaps an unfortunate use of language.

<sup>3</sup> See page 1180 of the hearing of the Royal Commission [etc] on 26 April 2014 at lines 16 - 30

10. No mention is made in the above-mentioned section of the public interest or public protection. The impression that can be gained is that the above three sets of requirements are to be balanced, when that should not be the case, if and when there is a public protection issue.
11. An important qualification to the above remarks and the figures supplied as to outcomes by the IO and CRC is that there is also a process known as auto termination of a person's membership of the FPA. This can happen pursuant to clause 16 of the Member and Affiliate Regulation of the FPA. There have been 76 instances of auto-termination in the previous 10-year period. An example of which might trigger an auto-termination is a ruling by ASIC.

## **PART B – IMPLICATIONS OF IMPLEMENTATION OF THE FASEA CODE AND ASIC'S CONSULTATION PAPER (CP 300)**

1. **Many of the solutions to issues with the DRs coincide with requirements for the administration of the Financial Adviser Standards and Ethics Authority (FASEA) code and with those of ASIC.** Under amendments to the Corporations Act made in 2017, and as is well known to the FPA, financial advisers will have to comply with a single uniform Code of Ethics and be covered by a compliance scheme from 1 January 2020. Brief mention of this is made in the summary at the beginning of this Report.
2. ASIC has issued Consultation Paper (CP) 300 for the purposes of giving effect to these reforms. While it should be noted that CP 300 is what it says it is, (that is, a consultation paper) and the requirements that it sets out are not yet fixed, those requirements relate to the FASEA Code not to the FPA DRs. They should nevertheless be regarded, with the relevant Corporations Act provisions to which they seek to give effect, as setting the framework for the FPA Compliance scheme. The FPA's own Code cannot be inconsistent with the FASEA Code.<sup>4</sup>
3. Therefore, in considering the DRs, the approach has been taken of trying to ensure that the DRs and the FPA scheme overall will not be incompatible with any of the ASIC CP 300 or FASEA Code requirements. The aim should be, it is suggested, to have the DRs scheme operate largely as it has been with necessary amendments, but also to become the vehicle for the FASEA Code compliance scheme. (Additional changes to the DRs may be needed once implementation arrangements have been settled and questions of coverage resolved).
4. In considering the DRs, in broad terms, the assumption has been made that the CRC would equate to and be transformed into being a Governing Body as described in CP 300. The

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<sup>4</sup> See paragraph 53 of CP 300

function of the IO and HP would, in effect, jointly take on the role of the Monitoring Body. **A note of caution is necessary here**, because CP 300 and ASIC appear to use the term 'Governing Body' interchangeably to mean not only the body which would govern the overall compliance scheme called for in CP 300 (and the Corporations Act 2001) but also as the body which would make decisions as to breaches of both Codes. These may not be the same.

5. Usually *in this, Report* Governing Body should be taken to mean the body which equates with or is the CRC. (A colloquial description of the CRC would be that it is the internal 'judiciary' for the FPA, although in no sense is it a court nor are its members judges). The Review is aware that there could be different arrangements for these roles, which could be put to ASIC. CP 300 contemplates this.
6. To recognise that there are desirable changes to the DRs that should be made in the short term, albeit with a view to the implementation of CP 300, changes to the DRs will need to be made in two stages:
  - amendments to the DRs to bring them up to date, until the FASEA Code starts in full on 1 January 2020; it is desirable that these changes reflect as much as possible some of the fundamental tenets of part CP 300; and
  - longer term changes to apply from that date to enable the FPA DRs to be used as the basis for a FASEA Code and FPA compliance/discipline administration scheme<sup>5</sup>.
7. The following is a list of particular CP 300 requirements (or of implications from CP 300), which will have implications for the DRs. The amendments for these should be made as soon as possible:
  - **Not every complaint needs to be investigated** as currently required by DR 25. Instead a phase of "Preliminary Enquiries" can be introduced, to test whether there has been a "possible failure to comply with the Code"<sup>6</sup>. These matters should be assessed and finalised within 28 days, because that is the timetable for initial assessment of complaints under CP 300;<sup>7</sup>
  - **However**, where a complaint has been made, it should be appropriately addressed to the extent possible, where the conduct falls short of being capable of being a possible breach of the Code. Doing this is not only a matter of good public relations for the FPA but should also serve to improve the standing of the financial planning profession. This observation is made in the knowledge that complaints can be made to the Financial Ombudsman Service (FOS) or in future to AFCA.

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<sup>5</sup> See Part 7.6, Division 8B – Compliance Schemes, of the Corporations Act 2001

<sup>6</sup> See CP 300, Table 3 page 41 and paragraph 122

<sup>7</sup> SEE CP 300 Table 6, page 80

- **Failure to comply** with the Code, including holding hearings and imposing sanctions – will be a **Governing body responsibility, which cannot be delegated**<sup>8</sup>;
- **The IO will not be able to determine that a matter is a minor instance** of unsatisfactory conduct for the FASEA Code; this needs to be a CRC function if it is to be retained;
- **There will be no option not to publish the outcome of a disciplinary matter, where a breach has been found** because there is no provision in CP 300 or otherwise for confidentiality or “blinding” of a member’s name in that circumstance; and the public interest lies in the name being reported on the FPA’s Disciplinary Complaints Register, on the FPA website, in *Money & Life*; and to ASIC, as required.
- **Public interest “calls”** which at present can be made by the HP under clauses 23 and 13 of the DR and by the IO under DR 40(k) should be made by the Chair of the CRC given the inherent conflict between the role of the HP and IO acting in the interests of the FPA as well as the broader public interest.
- **Directions Hearings not a necessary step** - it is not necessary to require that a Directions Hearing be held as a precursor to listing a matter for hearing before the CRC;
- **But Directions Hearings may be convenient** and should be allowed for, but with the approval of the CRC Chair or presiding member, and if appropriate, on the application of a party;
- **Hearings should be able to be listed by the Chair** (after due enquiries as to convenience and the like);
- **The CRC should be able to issue Procedural Rules**, to govern such matters as applications for Directions Hearings, adjournments or other matters and the timing thereof.

## **PART C – ISSUES RAISED AT THE ROYAL COMMISSION**

1. In May 2018, the FPA was required through its CEO to appear before the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the **Royal Commission**), before the Hon Kenneth Hayne AC QC.
2. The following list of issues arising from the Royal Commission, with the FPA (and therefore DRs), has been compiled with the assistance of FPA staff. Considering each criticism in turn, the Review has noted, where possible, how the recommendations in this report should assist to address the issue or concern of the Royal Commission.

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<sup>8</sup> Ibid, Table 2 page 22

**(a) Matters taking too long to resolve**

- One of the main ways in which delays will be dealt with is to **introduce a new step of preliminary enquiries** aimed at filtering out complaints lacking in substance or where there is no breach of the Code. Not all complaints need be investigated, but complaints which are not should investigated at least be subjected to appropriate complaint handling practices<sup>9</sup>.
- The FPA could **consider introducing a more robust complaint handling practices** should it desire to do so; while this is not explicitly called for by CP 300, it is a matter of good sense to do this, including when complaints have been 'processed' through the CRC.
- **Removing the need for a Directions Hearing** to be held first (while still permitting such hearings) should also enable hearings to be listed sooner.
- **Removing the option for a member's name to be blinded** or for the FPA to agree to be restrained in publishing a member's name, only where the member has been found to be in breach<sup>10</sup>, will mean that allegations of breach can be brought on for hearing sooner.

**(b) Lack of resources leads to delays**

- It is the case that the FPA's resources are limited and the probability is that **additional resources will be needed** for the FASEA Code Compliance role, if conferred on the FPA or an entity associated with it; and will be required by ASIC.
- **The resources for the IO** will need to be enhanced; indeed, this is of primary importance in making the FPA scheme work effectively. It is likely that investigations may be more difficult because the ability of the IO to offer confidentiality in return for acknowledgment of a breach will be removed.
- **Additional resources** should also be provided to give **the CRC** its own Secretariat, avoiding conflict for the IO in having to support the CRC.

**(c) Need to wait for agreed terms before summary disposal agreed upon**

- This Review will recommend that the discretion to **not publish a member's name**, even if they may be in breach of the Code, **will be removed**. As noted above, this will mean that Members will no longer have the option of negotiating with the CRC to keep their name confidential.
- It will also be recommended that there be **time limits on summary disposal**, which if not met, will mean that a matter can be referred to a full CRC Disciplinary Panel for decision as to sanction and breach much more quickly.

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<sup>9</sup> Australian Standard AS ISO 10002 available from Standards Australia or SAI Global

<sup>10</sup> See Clause 75 e) of the DRs

**(d) CEO speaking directly to a complainant about disciplinary matters.**

- **Separate roles-** Under the FASEA Code and CP 300 requirements, the roles of the investigator and CRC on the one hand and of the FPA as an Association on the other will need to be separate. Apart from this observation, no further comment is made about the criticism, as good complaint handling practices will require some level of contact periodically with complainants.

**(e) More concerned with membership base than rigorous disciplinary system**

- There may be scope for such a criticism to be made, although it does appear that the FPA has been motivated at all times by a desire to behave appropriately.
- Perhaps the reason why this could be thought is that there has been an ability in the IO to reach decisions not to publish a member's name even if there has been a breach: that is, in cases of summary dismissal or where a breach is classified as a minor instance of unsatisfactory conduct, leading to non-publication of the name. This may have been done on occasions by giving more weight to members' interests than the public interest, in line with the current DRs. No criticism of staff is to be implied from these observations.
- This Review will recommend that both of those forms of disposal of a complaint (summary dismissal and minor instances of unsatisfactory conduct) be kept, but their use should be subject to approval by the Chair of the CRC or the CRC itself in appropriate cases; and publication, if there has been a breach, will always follow. This is consistent with CP 300.

**(f) IO's report damning, did not advocate for summary disposal, had a case to answer – CRC still tried to negotiate outcome with a particular member**

- It is not appropriate to comment on this particular case and criticism but the observations above are relevant.

**(g) Lack of information provided to a complainant**

- It is not appropriate to comment on this particular case and criticism but the observations above are relevant, including the possibility of the FPA enhancing its complaint handling practices, by reference to the relevant Australian Standard AS ISO 10002.

**(h) Delay in dealing with a complaint**

- Under FASEA and CP 300, initial complaint assessment will need to be dealt with in 28 days and there will be (described by ASIC as "soft") time expectations for investigations, depending on the complexity of the matter.

**(i) Why wasn't information provided to [a complainant] on a confidential basis?**

- It is not appropriate to comment on this particular case and criticism but the observations above are relevant, including the desirability of the FPA enhancing its complaint handling practices.

**(j) Why wasn't the [complainant] allowed to give evidence at hearing?**

- It is not appropriate to comment on this particular case and criticism, but FPA disciplinary hearings are intended to proceed on the papers. Where necessary a complainant can be called in person. A complainant's perspective can be very adequately conveyed in most instances on the papers and an issue would be about the time needed to call them as a witness and therefore the cost including of complying with procedural fairness requirements. However, if the Corporations Act were to require this, that could be accommodated, subject to these points.

**(k) Only six people been found not fit to practice and expelled from membership.**

- This is correct from a historical perspective. The reforms recommended by this Review may lead to more expulsions in future.

**(l) Being expelled is the most serious sanction at FPA's disposal.**

- This is arguably correct, but the consequences of expulsion will in future be much more significant because financial advisers will need to be covered by a Compliance Scheme.
- There are also a number of other flow-on consequences that might flow from a sanction, and not just from expulsion, for example in relation to Professional indemnity insurance, and employment.
- Financial advisers will have to be covered by a compliance scheme in future and being expelled may have also flow on effects for their AFSL.

**(m) Even if a member is expelled from organisation they can still practice as a financial advisor.**

- There are also a number of other consequences that might flow from a sanction, and not just from expulsion in relation to Professional indemnity insurance, and employment.
- Financial advisers will have to be covered by a compliance scheme in future and being expelled may have flow on effects.

3. It is understood that the Royal Commission will issue an interim report in September 2018 that may recommend additional regulatory requirements be implemented. This will require close study.

## PART D - OBSERVATIONS ON EACH OF THE ELEMENTS OF THE TERMS OF REFERENCE

4. **Methodology:** The following review has been carried out by analysing the terms of the DR, speaking to as many people as possible (a list and summaries of the main points made by interviewees, where appropriate is at **Attachment B**) and with regard being had to the terms of ASICs Consultation Paper (CP) 300.

### *a. The role of the Investigating Officer*

5. **The key points are:**

- **Regulation 25 of the DR unnecessarily requires each complaint to be investigated.** This creates administrative cost and delay.
- **There is a misalignment of functions between the CRC and the IO**, in that the IO has too much scope to determine matters as being minor. **This is inconsistent with ASICs CP300.**
- **In principle, the IO and CRC functions should be separate**, with the IO investigating and the CRC determining the outcomes (breach and sanction) of misconduct allegations.<sup>11</sup>
- **There should be a basic two-part separation of complaints**, in common with other disciplinary systems (e.g. for the TPB's Code of Professional Practice; that for the legal profession; and with CP 300), into:
  - those which are misconceived etc, and it is not possible to discern a failure to comply with the Code, or there is a very minor service issue, which should only be subject to preliminary enquiries (and perhaps to complaint handling practices);
  - those which indicate a possible failure to comply with the Code (including those that might be classified as sanctions) but might be delegated to the Chair of the CRC or a full Disciplinary panel.
- **The IO performs an essential role in the Disciplinary scheme** and the role should be strengthened and given better support - suggestions about that are made below.
- **FPA Investigators should have or should undertake appropriate investigation training** and be given the appropriate tools.
- **Appropriate complaint handling practices are absent**, and consideration should be given to the DR or FPA practices being amended to include these.<sup>12</sup>

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<sup>11</sup> See e.g. paragraph 63 of CP 300 – the ultimate responsibility for determining code failures must only lie with the governing body (i.e. the CRC).

<sup>12</sup> By way of contrast, for the legal profession and while complainants are not a party to disciplinary proceedings, they are involved and kept informed throughout the preliminary assessment and investigation of a complaint. In the event that it is proposed to determine a complaint under section 299 of the Legal Profession Uniform Law (LPUL) by ordering a reprimand, caution or other summary outcome rather than initiating disciplinary proceedings, there is a duty to provide a

- **The IO needs to maintain appropriate statistics and data** and to build a capacity for regular reports to ASIC.<sup>13</sup>
  - **Consideration should be given to entering into appropriate MOU's** with ASIC and other regulatory, enforcement and compliance schemes in relation to exchanges of information. This should facilitate FPA investigations.
6. Under the DR's specific roles for the IO include those that are listed below (numbers refer to the relevant DR number). Where a role is questionable it is set out in italics and a brief reason for that view is described below:
- Investigate complaints allocated to them (10; see also 22);
  - Acknowledge receipt of complaints (22)
  - Receive notices withdrawing as complainant (23);
  - Investigate all complaints and whether conduct is capable of being a breach (25 & 26)
  - Require further information etc from complainants (28)
  - Notify Member of complaint and investigation (29)
  - Advise Member of extended investigation (30)
  - (Investigatory powers and submissions from members – 34 – 39)
  - ***Summary dismissal powers of IO – (40)***
  - ***Decide alleged breaches may be Minor Instances of Unsatisfactory Conduct and issue Infringement Notices (41); and***
  - ***Seek Members consent to courses of action if infringement notice issued (42)***
7. The last three of these are inconsistent with CP 300. That is because the powers to determine breach and a sanction can only be exercised by the Governing Body for the FASEA Code Compliance scheme. At present all of the above powers can be exercised by the IO without any overview by the CRC *necessarily* occurring, although DRs clauses 44 and 45 require reporting and *enable* the IO to recommend that allegations should be regarded as Minor Instances of Unsatisfactory Conduct. etc. Hence these settings do not enable CRC oversight.
8. **There is thus a misalignment of functions between the CRC and the IO:** under the DR it is possible for conduct to be inappropriately categorised by the IO as a minor instance of unsatisfactory conduct. As noted already, this has the result that instances where there might

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complainant with details of the proposed determination and an opportunity to make submissions. There is also a statutory duty, in considering whether or how to exercise any applicable discretions when dealing with a complaint (including the conduct of any investigation), to act in a fair manner, having regard to the respective interests of the complainant and the respondent lawyer and to the public interest. In dealing with consumer complaints (as opposed to disciplinary matters) there is a statutory duty to resolve the matter as speedily and informally as is possible. This often involves extensive consultation with both a complainant and the practitioner. The most common types of consumer complaint received are cost disputes, delay and claimed liens for non-payment of costs.

<sup>13</sup> SEE CP 300 Table 8 Section E and p85

be a public protection issue, but it is mistakenly thought that the balance should lie in not naming an individual FP, that the members name is 'blinded'. The outcome is that the public will not know that the financial adviser may have had conduct "issues".

- Of a random sample carried out for the Review of 10 cases categorised as minor, 50 per cent were probably wrongly treated as minor, and did not reach the CRC.
9. This situation comes about because under the DR's the FPA may invite a Member to enter into without prejudice discussions after a breach notice has been issued. These discussions are conducted with a view to summary disposal of the disciplinary action against the member by agreement. This possibility has in the past been overtly publicised by the FPA, using the following language:

***“Significant benefits can flow from the Members cooperation and acknowledgment of wrongdoing. For example, it may be unnecessary to name the Member in publication of the disciplinary outcome where restoration of the member, professional good standing on the protection of the public can be achieved by anonymised reporting.....”*** (Emphasis added).<sup>14</sup>

10. Section 3.5 of the DR provides for summary dismissal of certain complaints. A number of grounds are set out in clause 40. Under clause 51, it is only:
- after investigating; and
  - to the extent a complaint has not been finalised;

that a report must be prepared to the Chair of the CRC.

11. Part 6 of the DRs provides for determinations by the CRC Chair and permits dismissal of part or all of a complaint, as well as the commencement of disciplinary proceedings pursuant to Part 7. Clause 57 appears to further set the tone. It provides that, "To the extent a Complaint or Investigation is not dismissed or disposed of under Section 6.2 (summary Disposal by the [CRC], [ the Chair is to direct the commencement of Disciplinary Proceedings]."
12. **Observations on balancing members interests and the public interest:** The reasons for the above settings in the Code and DR's can well be imagined. They will include the efficient disposal of complaints, cost considerations, reputational issues for the FPA overall, and for members. However, the question might be asked whether the public interest, or more particularly the interests of members of the public and of clients of FP members generally are being best served? The positive benefits of publicity and 'sunlight' do not appear to be given

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<sup>14</sup> 2014/15 Report on Professional Standards, page 22, under the heading Provision for Summary Disposal

sufficient weight. Importantly also, it seems that the values of independence of the CRC and of the effectiveness of the overall discipline process are compromised by these settings.

13. The current settings also do not adequately distinguish investigatory and disciplinary functions. The outcome of conduct investigations should always be a matter for the CRC. While these are the opinions of the Review anyway, the fact, as indicated, is that CP 300 and the requirements of the *Corporations Act* require such separation.
14. **Resources available to the IO** – the Review has observed that while the FPA professionalism team works hard, they are using inadequate computer systems for investigations. These systems have evolved but are not at all comparable to disciplinary investigation systems and resources available for example to the legal profession in NSW and Victoria or the Tax Practitioners Board. This issue requires considered attention.
15. After enquiries made of staff, the Review would agree with the assessment that the following resources be provided for the IO and HP functions:
  - **Web based software** (such as modified iMIS or another suitable products) where complaints can be logged, monitored and tracked on a Members profile.
  - **Online complaint form** to then flow into the software. Obviously, complainants would still be able to submit complaints by email, post or phone.
  - **Portal for complainants and members** to submit documents in support of their case.
  - **Triage process** and built in tools/checklists to assist in the preliminary queries when a complaint is received by the FPA.
  - **Ability to capture general enquiries**, that may not be complaints, but are of a nature that could lead to a complaint in the future (e.g. where a client has a grievance but is not willing to provide the member's name without knowing the details of the disciplinary process).
  - **Capability for the Professional Standards area to report on the details of a complaint** (status, type of complaint, age of the case, time taken between each complaint milestone, final outcome, fines & penalties applied, recording FPA costs related to the CRC).
  - **Ability for Document Management**, archiving, and referencing documents to aid in the production of CRC Reports and exhibits. A more sophisticated document management system would also assist in being able to respond e.g. to ASIC notices, court or Royal Commission notices or Parliamentary enquiries
  - **Ability to record and track other actions** that the Team perform (Automatic Terminations, Suspension of Membership, Notifiable Events, due diligence and background checks, reference checking, etc.
  - **Ability for letter and email templates** to be integrated into the system.

- **Ability for the CRC Chair & Deputy Chair, or future CRC secretary**, to view certain information relating to the complaint (i.e. a separate CRC login).
- **Ability for the team to record events** such as ASIC bannings and media alerts that are received from time to time
- **Up to date document and papers management**, so that for example CRC papers are properly managed and paginated.
- **Investigators should be appropriately trained<sup>15</sup> and undertake CPD in their field.**

16. In support, if this were needed, of capabilities such as the above to be provided, the Review notes that section 921 K(4) of the Corporations Act 2001 provides that ASIC may approve a compliance scheme if it is satisfied that, (for the purposes of the FASEA Code and approval of a compliance scheme):

*“(a) compliance with the Code of Ethics will be appropriately monitored and enforced under the scheme; and*

*(b) the monitoring body has sufficient resources and expertise to appropriately monitor and enforce compliance with the Code of Ethics under the scheme”(emphasis added).*

## ***b. the role of the Head of Professionalism (HP)***

1. **The key points are:**

- **The HP performs an essential operational role** in the FPA disciplinary system, by providing an expert view on technical issues relating to the practice of financial planning; this should be of assistance to the IO although it does depend on who holds the role of IO who is assisting the IO;
- **The role of HP is very important to the FPA in other respects**, (which are outside the TORs) such as in relation to CPD, member education and setting of standards;
- **CP 300 provides that Monitoring Bodies cannot have conflicting roles** within the entity which is the Monitoring Body<sup>16</sup>. What this means will need to be explored with ASIC, but it could mean that both the Monitoring Body and the FPA will need expertise of the kind provided by the HP and may both not be able to refer matters to him or her;
- **The role of the HP has too much undefined ambit**, having regard to the impending requirements of CP300. There are, for example, judgment calls required under

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<sup>15</sup> Certificate III and IV and Diploma courses are available through a number of organisations

<sup>16</sup> See CP 300 paragraph 71ff at page 26

clause 12(c) about whether it is in the public interest to deal with a complaint; and **public interest calls should be a CRC function**, given also the separation of roles discussed above in relation to the IO.

2. Under the DR's, the HP is to perform the functions listed below. Where a role is questionable it is set out in italics and a brief reason for that view is described below:

- authorise complaints when made to be made or continued (9b);
- ***make determinations dismissing complaints under clauses 12) and (13)***; - this is inconsistent with the requirement that determinations as to breach be made by the Governing Body/CRC;
- authorise complaints to continue as FPA complaints where a complainant has withdrawn (DR, cl. 24)
- Can direct IO to withhold information (DR, cl. 29) to the Member (DR, cl. 30) and may later direct IO to provide such information

***c. The role of the Conduct Review Commission (CRC) and instances when the CRC should be involved in a complaint matter***

3. The key points are set out below.

- **The CRC has had an essential but limited role in the last 10 years** in that relatively few matters go to the CRC.<sup>17</sup> **In part been this has due to the structure of the DRs** which enable conduct issues to be classified as minor instances of unsatisfactory conduct or summary disposal matters. In some instances, the CRC might never know of these classifications. **It is also due to conduct issues not coming to the attention of the FPA**, such as those for example that FOS and ASIC may be aware of with licensee conduct as the professional association of its individual members.<sup>18</sup>
- **The CRC or any successor body will need to be a separate entity or independent of the FPA** to meet CP 300 requirements (albeit under its aegis) as the "Governing Body".
- **More matters are likely to go to the CRC**, or its successor if the recommendations relating to limiting the authority of the IO to determine minor instances (etc) are

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<sup>17</sup> Over 10 years 14% of matters were the subject of adverse findings by the CRC, or in 30 cases of 205.

<sup>18</sup> It is understood that FOS see about 1200 complaints per annum relating to investment disputes, about half of which may relate to individual member conduct; of these the full gamut of alleged misconduct may be involved ranging from but not limited to fee for no service; unauthorised transitions, failure to manage conflicts of interest

accepted. **This is likely to have resourcing implications for the CRC**; in particular additional deputies and members are likely to be needed, noting probable increased workloads and possible ASIC requirements for geographic representation<sup>19</sup>; other administrative staff will be needed, especially if the CRC takes on the FASEA Code role for other entities/financial planners.

- **The CRC lacks but should have at least a dedicated secretariat** and staff member or members whose role is to service the needs of the CRC; this support function should not be an add-on to the IO's or the HP's functions, as it is at present (creating inappropriate role conflict).<sup>20</sup>
- **The CRC will need to build a cadre of members** all of whom are familiar with the jurisdiction; this bespeaks a leadership role for the Chair in the allocation of matters, induction and professional development, as necessary.
- **There should also be a diversity of membership with consumer representation** being added<sup>21</sup>, to better ensure robust decision making and avoid perceptions of bias towards the financial adviser profession.
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- **The CRC role is unnecessarily 'clogged' by** the structure of the DR, which provides for **directions hearings** as a required step. A simpler system under which, aside from matters where no beach can be reasonably suspected, (and aside from Notifiable Events happening, as defined in Schedule D to the DR and regulations 15 & 16 and clause 16.1 of the Constitution), matters would be sent directly to the CRC for setting a hearing date (where needed), as soon as an allegation has been made by the IO and has been properly particularised with supporting evidence, in a brief.
- The system is cumbersome to administer for FPA staff.

4. **A more fully effective system of oversight of alleged breaches of the CPP and the FASEA Code should be able to be created by the amendments to the DRs proposed by this Review.** The point that the CRC does not see all instances of conduct has been noted above.

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<sup>19</sup> See for e.g. paragraph 88 ff of CP 300

<sup>20</sup> Under CP 300 staff carrying out monitoring and enforcement activities must not have other conflicting roles within the entity acting as the Governing Body: see CP 300 e.g. at p75

<sup>21</sup> CP 300 at paragraph 69 (b) requires that Governing bodies have a minimum of three members with an independent chair and an equal balance industry and consumer representative experience.

**d. Publication provisions as outlined in Part 13; and**

**e. The issue of member confidentiality**

1. **The key points are:**

- Publication should follow the event and **the IO and CRC functions should be separate, with the IO investigating and the CRC determining the outcomes of misconduct allegations, even for minor breaches.** How can there be a credible disciplinary system when a key element of it lacks transparency?
  - The **non-publication provisions of the DRs** referred to above in regulation 75(e) and sections 3.5 and 3.6 **need to be removed**; among other reasons, **in the interests of transparency**; they also create the circumstances for delay and filibustering by members and their lawyers; and they exacerbate the prospect of reputational and integrity risks for the FPA.
  - The **CRC lacks control about the use of this tool**, which should be corrected.
  - The principle should be that **publication ‘goes with the territory’**, where a breach has been proven and appeal processes have been exhausted.
  - The publication provisions in Part 13 should not be seen in isolation from the provisions of regulation 75 e) which enables the FPA to be restrained from publishing the outcome of disciplinary proceedings; or from cases under Sections 3.5 and 3.6 of the DR, where the IO can summarily dismiss a complaint or classify it as a minor instance (etc), without any publication requirement.
2. **Could there be a spent breaches or record expungement system?** - These earlier regulations and the power of the IO to determine something will not be published when it involves a breach of the Code should be changed, as indicated above. A question does arise, however, as to whether and for how long a member’s name should be on the FPA Disciplinary Register. It may be possible for minor breaches to reach a situation where after a period of time, the members name and their breach might be “expunged”, much in the same way that certain criminal convictions can be treated that way.<sup>22</sup>
3. It is not sensible to develop such a scheme at this time. Any arrangements would require ASIC input, detailed study of the Corporations Act and ASIC’s own practices, as well as input from and consistency with other compliance schemes. The focus would initially be on a

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<sup>22</sup> See e.g. *the Criminal Records Act 1991 (NSW)*

scheme directed to proven breaches of the FASEA Code and any arrangements for the FPA Code would need to be compatible.

4. **FPA Conduct Committee and CRC Panel engagement** - a useful exercise would be to engage members of the Committee and Panel to reach agreement in general terms on what conduct breaches should usually be regarded as minor or be suitable for summary dismissal. This could be done, for example, at the time of an FPA Annual Conference and there may be other aspects on which the views and input from that group would be useful (e.g. sanctions policy). Such an event may also assist to build a sense of collegiality among the discipline arm of the Governing Body for the FASEA scheme.

***f. the powers of the Investigating Officer to decide on Summary Dismissal***

5. **The key points are:**

- **These powers should be removed from the direct authority of the IO**, although they may be able to be returned for the truly more minor matters, under delegation to the CRC to the Chair (or by a rule to that effect), on the recommendation of the IO.
- **The CRC itself should decide in all of the circumstances** in which there can be summary disposal, because only the CRC or Governing Body for the purposes of FASEA and CP 300 will be able to do this.
- **Under CP 300 the governing body must be the entity to make the final determination as to whether a covered Financial Adviser (FA) has failed to comply** with the FASEA Code.<sup>23</sup>

6. The suggestion for Conduct Committee or CRC Panel involvement in advancing how and when there should be summary disposal is apposite here. Care will always need to be exercised not to fetter the jurisdiction of a Disciplinary Panel in particular matters but to mitigate risk.

***g. the powers of the Investigating Officer to classify an alleged breach of the Disciplinary Regulation to be a Minor Instance of Unsatisfactory Conduct;***

7. **The key points are:**

- **The definition in cl. 6 of the DR and associated power in cl. 41 of the DR to dismiss a complaint as such is problematic** on a number of grounds and should be changed;

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<sup>23</sup> See e.g. page 77 of CP 300

- The assessment process should be done under CRC oversight and there should be a triaging system, (the TPB deals with a similar issue but ‘manages out’ less significant matters using a risk analysis tool; the legal profession adopts a similar approach with what it calls consumer complaints).
- **Complaint handling techniques/practices?** - Both the TPB and the legal profession in NSW and Victoria employ complaint handling techniques which have not been observed to be formally present at the FPA. However, this Review recognises that these may be used by IO staff in dealing with complainants as a matter of practice and necessity. It is recommended that such should be formally adopted, even having regard to the fact that the FPA scheme is disciplinary and not compensatory in its intent.
- **Criteria to assist in eliminating minor matters?** - it may be possible in time to develop a set of these (**provided the always that the tripwire test, that it cannot be established that there has been a possible breach of the Code may have been established, is met**); and the CRC panel might also usefully be engaged on this question.
- **The outcomes of a finding of misconduct should be a matter for the CRC overall** including if there is to be some sort of summary disposal

***h. the report by the Investigating Officer to CRC Chair following an investigation;***

**8. The key points are:**

- **Some of the CRC investigatory reports** (in the experience of the current CRC Chair) typically seem to ‘**throw the book**’ at the member under investigation), in that it appears in some reports that every possible allegation might be made. This is often unnecessary and **good practice would probably be to select the most serious allegation that can be made and proved with, if necessary, a sample set of other allegations to reflect the whole of the conduct** alleged being made.
- Some reports have been excellent.
- Learning how to finesse and properly particularise allegations by reference to the available evidence and the Code breaches alleged are core skills that investigators should have.

*i. the process and option for Summary Disposal;*

9. The key points are:

- **It will not be possible in future to retain a summary disposal power without CRC endorsement of the breach and sanction involved.** But provision for summary disposal should in the opinion of the Review still be retained, because there will be minor cases where it is desirable.
- The Review recognises that **much of the incentive for financial advisers to agree to summary disposal will be negated by removal of the option** for their name not to be mentioned, where there has been a breach.
- **It may also be more difficult to establish or prove certain breaches**, because part of the corresponding bargain, an admission of culpability by the member may be less likely where no member confidentiality can be delivered by the FPA in return. (This difficulty may be able to be addressed by the enhanced capacity for the IO recommended in this Report).
- In addition, the Monitoring Body under the CP 300 and FASEA Code administration requirements will have statutory investigative powers under the Corporations Act.<sup>24</sup>
- **Admissions** of culpability by a member that they have engaged in conduct which may be in breach of either the FASEA Code or the FPA Code **should in principle attract some consideration from the CRC as to the possibility of a reduced sanction**, depending on when the admission is made and the circumstances overall.
- **It will be desirable that the less serious breaches of conduct rules be able to be disposed of by the CRC as soon as possible**, so that adequate time and resources can be applied to the more complex or serious cases.
- Without detracting from any of the earlier points, it will also be important to ensure the IO has room to move, subject to overall CRC supervision in dealing with members under investigation.

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<sup>24</sup> Sections 921L (4) and 921M (3) of the Corporations Act 2001 confer strong investigative powers for the FASEA Code. These powers may or may not be able to be used for the concurrent investigation of an FPA Code breach, but that will be a matter to be explored in future.

***j. determinations, comments and views of the CRC Chairs (current and former) and Commission Panel members (current and former)***

10. As requested by the FPA, three former CRC Chairs, as well as a number of other people have been consulted in the course of this Review. Some of the key points they made are set out in **Attachment B**.
11. On Wednesday 24 July the Review briefed members of the FPA Board Conduct Committee on progress with the Review and on the issues and solutions being considered.
12. Subsequently the Chair of the Committee, David Sharpe was consulted in person and Mr Sharpe's suggestions have been considered and adopted in the attached draft.

**k. the views and findings of the Royal Commission into Misconduct into the Banking, Superannuation and Financial Services Industry.**

13. (The Key points arising from the RC to date have been noted, with observations from the Review in PART C above.)

**PART E - NEXT STEPS AND RECOMMENDATIONS**

14. The Review has had regard to the overall thinking of the FPA Board and Executive concerning implementation of the FASEA Code and CP 300. However, as a disclaimer, it has not considered the particular corporate structures, tax arrangements employment arrangements, resources or other matters that should be advised. How FPA members will become bound to any revised FPA Code requirements has also not been considered. (Presumably this will come about because financial advisers will need to be covered by a compliance scheme as a matter of law, and subscription to or adoption of a Code will be a matter of contract).
15. The focus of the Review is on what changes are needed to bring the DR's up to date and for them to become the basis for the framework for the FASEA/CP 300 Compliance Scheme, as required by the *Corporations Act 2001*. Prior to that happening, those structures will need to be identified with more precision, desirably with endorsement from ASIC of some kind. The DR's may need to be remade if they are to be the Disciplinary Rules of a new entity
16. Most importantly, this is not a review of the FPA Code, but such a review will be needed, because it cannot be inconsistent with the FASEA Code<sup>25</sup>. The Review has seen work done within the FPA comparing the FASEA and FPA Codes and also the TPB Code and the FASEA Code. It may be that this will be a more straightforward exercise than it appears at first sight, but it would involve at least study of the Corporations Act, the FASEA Code itself

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<sup>25</sup> See Paragraph 53 of CP 300

and the three elements of the FPA Code (i.e. the Code of Ethics, FPA Practice Standards and the Rules of Professional Conduct). At the very least a provision will be needed to state that in the event of an inconsistency with the FASEA Code, the FASEA Code prevails.<sup>26</sup>

## **E. RECOMMENDATIONS AND NEXT STEPS**

### **17. The Review makes the following recommendations:**

- (a) public interest 'calls', including recognising the need for public protection, should receive more prominence and be made by the Chair of the Conduct Review Commission, not by staff;
- (b) the ability of the FPA and Members who may be in breach of a conduct rule to agree not to publicise the name of the member where a breach is established, should be removed, subject to the usual safeguards as to appeals processes;
- (c) There should be a separation of the processes of investigation (which should be for the Investigation Officer) and of breach and sanction, which should be for the CRC, not staff, to the limited extent that this has been possible;
- (d) The requirement that all complaints be investigated should be replaced by a requirement that all complaints be subjected to preliminary enquiries, to ascertain whether there has been a possible breach of the Code and if there has been such a possible breach the matter should then be investigated;
- (e) Appropriate complaint handling practices should be considered for adoption by the IO and by the CRC, by reference to the relevant Australian Standard AS ISO 10002;
- (f) Decisions as to breach and sanction, in cases of summary dismissal or for minor instances of unsatisfactory conduct should be made by the CRC or its Chair, but the concepts should be retained;
- (g) The FPA Board or its Conduct Committee and the CRC panel might usefully be engaged on agreeing to some guidelines as to what constitutes grounds for summary dismissal or a minor instance of unsatisfactory conduct as well as general guidelines on the appropriate sanctions for various types of misconduct.
- (h) The requirement for a Directions Hearing to be held before a disciplinary matter can be listed should be removed. The CRC should simply be able to list a matter, after appropriate consultations; but a Directions Hearing could be held if thought desirable by the CRC or if a party needed to seek directions from the CRC.
- (i) The CRC should have its own secretariat and resources.
- (j) The Investigation Officer function and, as necessary and appropriate, the Head of Professionalism (HP) function should be much better resourced, both as to numbers of staff, technology and other resources.

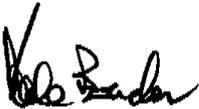
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<sup>26</sup> *ibid*

- (k) Consideration should be given to entering into appropriate MOUs with ASIC and other regulatory, investigation and compliance bodies to facilitate FPA preliminary enquiries and investigations, using clause 19 of the DRs.
- (l) Additional Deputy Chairs be appointed as necessary.

**18. It is also recommended that**

- (a) the FPA Board notes and endorses this report as a basis for preparing for implementation of the FASEA Code and the relevant Corporations Act obligations associated with it;
- (b) agrees that a set of interim changes be made to the FPA Disciplinary Regulation 2016, to apply until otherwise determined; and
- (c) for that purpose, the Board endorses the **Attached** marked up version of the Disciplinary Regulation 2019 as the basis for those changes.



Dale Boucher

Deputy Chair

FPA Conduct Review Commission

6 September 2018

## ATTACHMENT A – Terms of Reference

**Document to be reviewed:** FPA Disciplinary Regulation (2016) against the broader FPA disciplinary framework including the FPA Code of Professional Practice (2013); the FPA Constitution (2011), the FPA Member and Affiliate Regulation (2017)

**Review due date:** The final review report including recommended changes to the Disciplinary Regulation (2016), together with any other necessary or desirable changes to the FPA Code of Professional Practice, needs to be completed by **Friday 7th September 2018**

**Assistance:** You will be assisted in your review by the FPA Professional Standards Lawyer, Sarah Kavanagh.

**Board Approval:** A new Disciplinary Regulation will be submitted to Board for approval on 11th October 2018.

**Date Review to Commence:** June 2018 2 **Scope of Works / Terms of Reference**

Review the FPA Disciplinary Regulation (2016) against the broader FPA disciplinary framework including the FPA Code of Professional Practice (2013); the FPA Constitution (2011) and the FPA Member and Affiliate Regulation (2017).

**Particular regard will be paid to** the complaints handling and disciplinary processes of the FPA.

**Recommendations** to enhance and improve the Disciplinary Regulation (2016) will be made so that it aligns with appropriate professional standards.

**1. The review should consider the following:**

- a. the role of the Investigating Officer;
- b. the role of the Head of Professionalism;
- c. the role of the Conduct Review Commission (**CRC**) and instances when the CRC should be involved in a complaint matter;
- d. publication provisions as outlined in Part 13;
- e. issue of member confidentiality;
- f. the powers of the Investigating Officer to decide on Summary Dismissal;
- g. the powers of the Investigating Officer to classify an alleged breach of the Disciplinary Regulation to be a Minor Instance of Unsatisfactory Conduct;
- h. the report by the Investigating Officer to CRC Chair following an investigation;
- i. the process and option for Summary Disposal;

j. determinations, comments and views of the CRC Chairs (current and former) and Commission Panel members (current and former).;

k. the views and findings of the Royal Commission into Misconduct into the Banking, Superannuation and Financial Services Industry.

2. The review should consider the operation of the Disciplinary Regulation (2016) alongside the:

a. FPA Code of Professional Practice (2013);

b. FPA Constitution (2011); and

c. FPA Member and Affiliate Regulations (2017).

3. The review should consider the role of the FPA in information sharing with the following entities:

a. Other professional bodies

b. Licensees

c. External Dispute Resolution Schemes

d. ASIC; and e. TPB.

## **ATTACHMENT B – Summary of some of the main points made by interviewees**

**Mark Vincent** told me he was Chair for about 18 months prior to the Current Chair, Mr McDonald. He made the points set out below.

- members under review would resign, rather than engage with the process which was seen as too legalistic (this has since been rectified by Clause 13 of the FPA Constitution, effectively continuing membership of someone who has purported to resign until the conclusion of current disciplinary proceedings)
- he had noted the problem of multiple or too many allegations being made and had tried to narrow the issues to the essential by getting the right people involved.
- he managed a very difficult matter, the first where a solicitor was involved, by a series of directions hearings (the recommendations of this Review will not preclude that happening but will not require such Hearings as a precursor to listing a matter.
- There should be a power in the CRC to obtain its own evidence or direct that such be obtained.
- A discipline system has to be primarily educative and backward looking but also needs to be protective of the public, first and foremost.
- There is a need for a systems-based approach or better systems and data.
- The CRC is beholden to the IO and the success of the whole discipline process hinges to a large degree on the equality and resources of the investigation and resources available.
- Mr Vincent created a system of headnotes to describe the outcomes of a CRC process (much like law cases).
- Publication is a very useful tool, the only other sanction of note being expulsion.

**Dr June Smith** was Chair only for about 12 months until May 2015, when she moved to the Financial Ombudsman Service (FOS). However, she was the head of Policy at the FPA prior to that for 6 years. She made the points set out below.

- FOS receives about 1200 complaints each year concerning investment disputes, of which about half relate to the conduct of advisers. The latter cover the full gamut of possible misconduct issues. FOS (of course) provides for compensation.

- Under the law at present large firms are the primary resolvers of disputes but are not good at referring matters to professional bodies.
- The 'old' FOS rules contemplated an MOU with the FPA (presumably relating to conduct referrals) but none is in existence: she asked why not?
- The CRC process was open to question as to how independent it was of the FPA; independence is needed.
- The composition of the CRC is important and consumer representation is needed; diversity of membership leads to better decision making.
- Transparency is key and is needed as to the outcomes of CRC matters.
- Members of the Panel were underutilised and are a resource who could be used more.
- The CRC has to be resourced to deliver justice fairly and quickly.

**Professor Dimity Kingsford-Smith** was Chair of the CRC for about four years, from 2009 - 2014. She made the points set out below.

- She inherited a system where the Chair previously (none of the above persons) would make decisions and not give reasons. That was highly undesirable.
- She was Chair at the time of the Storm Financial matters came to the CRC. Many were complex.
- In some cases, it was clear that evidence was not going to be available and time should not be spent on such matters.
- Preparing reason was she found a very time-consuming task and in some matters went to 70 - 80 pages.
- If a member could be remediated there were she thought occasions for summary dismissal or for treatment as a minor instance; Prof Kingsford Smith acknowledged however the need for public protection.

The Review has also spoken to **a number of other people**, including:

- John Bacon – the former Investigations manager; Mr Bacon gave valuable insights and indicated that he would not be in any way resistant to the function of the IO being 'wound back'. He also strongly made the point that the IO and any compliance audit functions should not be combined because this compromises both. Additional

resources are needed for the IO function. And the writing is on the wall about the need for change and the direction of change (as outlined above).

- John McKenzie, the NSW Legal Services Commissioner who gave valuable information about the legal profession complaints handling and investigation process. And
- Current staff, whose valuable assistance has helped the Review significantly.
- ASIC in conjunction with the FPA Chair and CEO, in relation to the possible option for the FPA to operate a Compliance Scheme.