

FINANCIAL PLANNING ASSOCIATION OF AUSTRALIA (FPA)

CONDUCT REVIEW COMMISSION (CRC)

DISCIPLINARY PANEL

GUIDANCE NOTE – No 2/2019

PRELIMINARY ENQUIRIES

UNDER THE FPA DISCIPLINARY REGULATION 2019

Purpose – to provide guidance about the scope of the authority of an Investigating Officer to decide that a Complaint made to the FPA should not be investigated at the stage of Preliminary Enquiries

1. This Guidance Note seeks to guide FPA Investigating Officers (IO's) on the extent of any discretion they may have **not** to investigate a Complaint made to the FPA about conduct of its Members, during or following Preliminary Enquiries (PE's).
2. Under clause 25 of the FPA Disciplinary Regulation 2019 (the DR) each Complaint must be subjected to PEs. PEs are defined by clause 6 to be the activities of the FPA on receipt of a Complaint which are undertaken for the purposes of ascertaining whether there has been a possible breach (that is, of the FPA Code of Professional Conduct (the Code)).
3. Clause 26 provides that the purpose of PEs is to investigate whether:
 - a) a Complaint alleges conduct of a Member; and
 - b) any alleged conduct is capable of amounting to a Breach.
4. Clause 27 provides in part that where any alleged conduct is after preliminary enquiries capable of amounting to a Breach, the conduct must be investigated.

Nature of this Guidance Note – it is not binding, but it seeks to assist

5. Prior to the making of the DR 2019, it was possible for an IO to come to an agreement with a Member for the summary dismissal of a Complaint, or to decide that conduct was a Minor Instance of Unsatisfactory Conduct or to refer it to the CRC for determination. The IO no longer has those powers. All of those decisions require decisions by the Chair of the CRC, following a recommendation by the IO (see clause 40, which sets out various possible reasons why an investigation should be finalised).
6. There may be many occasions, after a Complaint has been made, and even before an investigation is commenced, when it would not be appropriate to investigate, or the IO will not be able to undertake an investigation.
Examples could include, but are not limited to:
 - where the Complaint made is unintelligible;
 - the Complaint may allege some form of misbehaviour by a person but there is no apparent breach of the FPA Code; and
 - the complaint is against a person or entity who or which is not a member of the FPA and was not a member at any relevant time.
7. In instances such as those outlined in the preceding paragraph, and provided the complaint is not made in respect conduct which occurred 3 years or more before it was made, it is not necessary for the IO to refer the matter to the CRC Chair or to make a recommendation. Subject to appropriate record keeping, including compliance with clause 21 which requires a Disciplinary Register of all Complaints to be maintained by the FPA, and keeping a record of

the actions taken and a brief note of the reasons for not investigating, the IO may simply take no further action with those complaints. Notification of the complainant should also be undertaken.

8. Where a complaint is made over three years after the conduct complained of is alleged to have occurred, clause 12 of the DRs will apply. In those instances, the IO will need to consider whether each of the three tests in clause 12 for continuing to investigate old Complaints, can be met. These are that a determination has first to be made that it would be just and fair to deal with the Complaint, it must involve an allegation of malpractice and it must be in the public interest to deal with the Complaint.
9. Such a determination must be made by the Chair of the CRC. Accordingly, in instances of complaint being made more than three years after the alleged conduct occurred, the IO should always liaise with Chair of the CRC about what course to take, including as to whether the three tests in clause 12 of the DRs could possibly be met.

Dale Boucher

CRC Chair
30 July 2019