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## CONDUCT REVIEW COMMISSION (CRC) REFERENCE GUIDE FOR FPA MEMBERS

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## **Glossary**

Breach	Any conduct by an FPA Member which is in breach of the FPA's Constitution, Code of Ethics, Rules of Professional Conduct, Disciplinary Regulations or any other FPA Member policy or code.
Clause	A clause of the Disciplinary Regulations
Hearing	An inquisitorial hearing of a case against a financial planner before a Panel of the CRC
Member	A person who is classified to be a Member of the FPA, according to the FPA's Constitution, and Member and Affiliate Regulation 2017
Panel	A panel of 3 members of the CRC which presides over a hearing of the CRC, whether for disciplinary proceedings or reviews. The Panel is presided over by the CRC Chair or Deputy Chair
Disciplinary Proceedings	The complete set of actions required to arrange, prepare for and conduct a Hearing on the basis of a complaint made to the FPA

## **Purpose**

- 1.1 This reference guide is issued by the CRC primarily to assist FPA Members who are required to prepare for, and present at, hearings of the CRC, or an appeal against an earlier decision of the CRC. It also seeks to inform members of the public, who may have complained about the conduct of an FPA member, what they can expect to happen in respect of the handling of the complaint.
- 1.2 This document does not override or replace any of the requirements set out in the Disciplinary Regulations, and should be read in conjunction with the Regulations. In preparing for a hearing, Members should familiarise themselves with parts 7-15 of the Disciplinary Regulations, including the appended schedules.

## **Background to the CRC**

- 1.3 The CRC is an independent body put in place to ensure Members are held accountable to the FPA Code of Professional Practice and Code of Ethics. The

CRC plays a vital role in regulating the conduct of FPA Members and upholding the highest ethical standards within the financial planning profession.

- 1.4 In achieving this aim, the CRC performs the following functions:
  - 1.4.1 Determining whether disciplinary proceedings should commence against Members;
  - 1.4.2 Hearing and determining complaints against Members in respect of breaches; and
  - 1.4.3 Hearing and determining appeals.

### *Composition of the CRC*

- 1.5 Up to 15 members can be appointed to the CRC, including the **Chair** and **Deputy Chair**.
- 1.6 The roles of CRC Chair and Deputy Chair are typically held by legally trained professionals, but each position may also be held by a financial specialist or person of note.
- 1.7 The Disciplinary Regulations provide that the Deputy Chair is able to exercise the same powers as the Chair, so for the sake of clarity a reference in this document to the Chair of the CRC includes a reference to the Deputy Chair
- 1.8 Non-Chair CRC members are generally experienced financial planners (Certified Financial Planners with more than 10 years' experience), though relevant experts and members of the public may also be appointed. Current CRC members can be viewed on the FPA website, at <https://fpa.com.au/professionalism/conduct-review-commission>
- 1.9 CRC members are required to act at all times in accordance with the Constitution, Disciplinary Regulations and other rules and policies applicable to the CRC. Further, they must not adjudicate in any disciplinary proceedings where they have a potential or actual conflict of interest in the matter being considered by the CRC<sup>1</sup>.

## **Preliminary – Complaints about Members**

- 2.1 This section provides some background to the complaints process which precedes disciplinary proceedings.

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<sup>1</sup> 2019 Regulations, Part 16, clause 179

- 2.2 Complaints about Members are made in writing to the FPA. The CRC does not receive complaints about Members directly. Complaints can be made about Members by anyone, but typically will come from clients, be initiated by the FPA, or be made by fellow Members.
- 2.3 The CRC can, however, refer a matter to the FPA for investigation in some circumstances, including during a hearing where a matter needs more investigation to assist the Panel in making its decision<sup>2</sup>.
- 2.4 Every complaint received must be allocated to an Investigating Officer at the FPA.

### *Delayed complaints*

- 2.5 If the complaint is about conduct that occurred more than 3 years before the complaint was made, then a determination has to be made by the Chair as to whether:
  - 2.5.1 It is just and fair to deal with the complaint having regard to the delay and the reasons for the delay;
  - 2.5.2 The complaint involves an allegation of Malpractice; and
  - 2.5.3 It is in the public interest to deal with the complaint<sup>3</sup>.
- 2.6 If the Chair decides that it is appropriate to proceed with the complaint, then the investigation will progress, otherwise the complaint will not be dealt with. The Chair's decision on this point is final, and cannot be challenged.

### *Preliminary Enquiries*

- 2.7 Once the complaint is allocated, it must be subjected to Preliminary Enquiries by the Investigating Officer<sup>4</sup>. Preliminary Enquiries are the activities the FPA undertakes with the key purpose of determining whether the complaint concerns a Member, and whether the allegations involve a Breach of the Member's obligations<sup>5</sup>. The Investigating Officer can make any necessary enquiries into the subject matter of the complaint, and is not bound by the **rules of evidence**.

The **rules of evidence** are rules which constrain what evidence can be admitted and used during court proceedings. Courts are bound by the rules of evidence, largely due to the adversarial nature of proceedings, however it is common for tribunals to be exempt from the rules of evidence

<sup>2</sup> 2019 Regulations, Part 8, clause 92; see also paragraph 4.15

<sup>3</sup> 2019 Regulations, Part 2, clauses 11 to 14

<sup>4</sup> 2019 Regulations, Part 3, Section 3.1, clauses 25 to 28

<sup>5</sup> 2019 Regulations, Part 3, Section 1.4, clause 6 (definition of Preliminary Enquiries)

## Pre-Hearing

- 3.1 Once the Preliminary Enquiries have enabled the Investigating Officer to ascertain that the complaint involves a Member's conduct which could amount to a breach, the Investigating Officer will send a written notice of the investigation to the Member within 30 days. The notice will set out the complaints the Member needs to address, as well as other matters prescribed by clause 29.
- 3.2 If the investigation later extends beyond the issues mentioned in the notice to the Member, the Member must be told in writing of any new issues to answer, as well as their right to make further submissions on the new material.
- 3.3 After completing the investigation of the complaint, the Investigating Officer must then prepare a report for the Chair pursuant to clause 51. The report is a thorough analysis of the case against the Member, including full particulars of the alleged conduct, whether the Member has a case to answer for each allegation of a breach, any supporting material gathered in the investigation, as well as any allegations which the Investigating Officer did not consider could be pursued. This report is to be given to both the Chair, and to the Member at the same time.
- 3.4 Once the Member receives the report, they then have 21 days to write to the Chair of the CRC responding to the matters set out in the report (refer to Part 5 of the Regulations)<sup>6</sup>.

### *Commencement of Disciplinary Proceedings*

- 3.5 After considering the report and any response, the Chair will decide whether there is a case for the Member to answer. The Chair will write to the Member to notify them of the decision to commence disciplinary proceedings, or to **summarily dismiss or dispose of the complaint** if there is no case to answer.

**Summary disposal of the complaint (or proceedings)** means to bring to an end to part or all of the complaint or proceedings against the Member, on the basis that one or other of the parties has no chance of success if a hearing occurs. Summary procedures to dispose of a complaint or proceedings are found in Sections 6.2, 7.3 and 7.4 of the 2019 Regulations, and are discussed in more detail below. Note that summary disposal under Section 7.4 also involves the CRC making a finding that a minor instance of unsatisfactory conduct has occurred.

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<sup>6</sup> 2019 Regulations, Part 5, clause 52 – At the time the Investigating Officer provides a copy of the Part 5 report to the Member, the Member must also be invited to make a written submission to the Chair of the CRC within the Prescribed Time. According to Action 3 of Schedule C to the Regulations, the Member has 21 days from the date of receipt of the report to make submissions.

- 3.6 If the Member has a case to answer, the Chair will direct the FPA to commence proceedings by issuing a Notice of Disciplinary Proceedings against the Member<sup>7</sup>.

### *Directions hearings*

- 3.7 Once the disciplinary proceedings have commenced in accordance with the procedure explained above, one or more directions hearings may be held prior to the hearing. Although there is no formal requirement in the Regulations to hold a directions hearing, a directions hearing can be held if it is considered necessary or desirable. A Member may also wish to request that certain directions be made, and if so should approach the CRC Secretariat by contacting the Investigating Officer. The Chair will decide whether the directions sought should be made and may convene a hearing if necessary, or may simply make directions as appropriate.
- 3.8 A directions hearing is conducted by teleconference, with the main purpose of making arrangements about the ongoing conduct of the Disciplinary Proceedings. If a directions hearing is held, it is presided by the Chair, and attended by the Member and the Investigating Officer, or their representatives.
- 3.9 The Chair may make directions in respect of the proceedings without holding a hearing.
- 3.10 As set out in Schedule F of the 2019 Regulations, a directions hearing provides an opportunity to discuss and resolve a range of issues, including:
- 3.10.1 Whether the Member intends to submit any more information to the CRC, beyond the information already provided;
  - 3.10.2 Whether some or all of the Disciplinary Proceedings should be dismissed for some reason;
  - 3.10.3 Whether some or all of the Disciplinary Proceedings are suitable to be dealt with summarily;
  - 3.10.4 Whether any factual matters which are not in dispute between the Member and the FPA; and
  - 3.10.5 Whether there are any directions the Member wants the CRC to make.
- 3.11 At a directions hearing, parties should be ready to discuss timetables for the making of submissions, whether it is proposed to call witnesses, whether the Member wishes to be represented by a legal practitioner and the arrangements for hearing dates.

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<sup>7</sup> 2019 Regulations, Part 7, Section 7.1, clauses 57 to 64

3.12 Unless otherwise decided by the Chair, the directions hearing will not be recorded. A written summary of the directions determined will be notified to both parties, and directions may be issued by the Chair without a hearing at the Chair's discretion. Usually the Chair would ask the parties about their intentions before doing so.

### *Summary disposal of proceedings*

3.13 Once disciplinary proceedings are commenced the Investigating Officer may, with the Chair's consent, invite the Member to enter into '**without prejudice**' **discussions** to explore whether it may be possible to agree to a summary disposal of some or all of the case against the Member. If this option is open the Member is encouraged to explore the resolution of the matter by participating in this process, though 'disposal' at this stage of the proceedings will likely include a disciplinary outcome against the Member. The following matters should be kept in mind:

3.13.1 Any agreement to a summary disposal requires the consent of the Chair, including to ensure that any agreed penalty accords with the seriousness of the breach, per Clauses 40, 54 and 73.

3.13.2 Clause 75 sets out the bases upon which a matter can be summarily disposed of, including the substantiation of an alleged breach, dismissal of one or more alleged breach, or imposition of one or more sanctions against the Member.

3.13.3 Part 13 deals with publication of the outcome of a complaint, including where the Member has been sanctioned (Clause 127) or where a complaint has been summarily dismissed for non-cooperation by the Member or another party (Clause 124). Under the 2019 Regulations it is not possible for the FPA to agree not to publish a Member's name when a breach of the Code has been found.

A '**without prejudice**' **discussion** is a voluntary conversation between the Member and the FPA about the complaint against the Member, and the future of the proceedings, which does not change either party's rights or position in relation to the complaint.

### *Disclosure and other procedural hearing requirements*

3.14 Unless otherwise determined at a directions hearing, copies of all reports, submissions and supporting materials relied on by one party are to be disclosed to the other party prior to the hearing. This ensures that no party will be taken by surprise at the hearing by the production of documentation, or the calling of a witness not disclosed to the Panel or the other party prior to the hearing.

- 3.15 Prior to the hearing, the Member is not to contact the Chair or other Panel members, unless the Chair directs otherwise during a directions hearing. All contact is to be channelled through the Investigating Officer who will pass all requests to the Chair via the CRC Secretariat.
- 3.16 Members' attention is drawn to the procedural time limits set out in Schedule C to the Regulations. For the purpose of calculating time limits, calendar days including weekends and public holidays are included. It is expected that all parties will abide by the set time limits. There is no provision in the Regulations permitting the times to be extended, but a Member can make a request in writing to the Chair. The Chair will subsequently make a written direction to confirm or decline the request.

## The Hearing

- 4.1 The hearing of a case against a Member is held in accordance with the process described in Part 8 of the Regulations. The Panel is directed by clause 97 to:
- 4.1.1 conduct the proceeding expeditiously and with as little formality as possible;
  - 4.1.2 apply the principles of procedural fairness; and
  - 4.1.3 inform itself on any matter, by any manner it sees fit, without being bound by the rules of evidence.
- 4.2 The Regulations also require the hearing to be conducted 'as far as possible as an inquiry into the Member's conduct'. Accordingly, the hearing is not run in the manner of an adversarial court-based hearing, with formalised procedures for giving evidence or adherence to civil court procedure. Nonetheless, both parties are given the opportunity to present their case about the Member's conduct.
- 4.3 The Member, and any representative, is required to be physically present at the hearing, unless the hearing is done by way of written submissions (also known as a hearing 'on the papers'). If present at the hearing, the Member may make oral submissions to the Panel.
- 4.4 Should the Member not be present at the hearing, the hearing can still proceed, namely on an **ex parte** basis<sup>8</sup>. A determination may therefore be made in the Member's absence should they not appear.

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<sup>8</sup> 2019 Regulations, Part 8, clause 91

In Australian law, an **ex parte** hearing is generally one which proceeds in the absence of a party to the proceedings. If a hearing proceeds ex parte, the decision-maker can make an order without hearing from the absent party.

- 4.5 It should be noted that disciplinary Panel proceedings are not open to the public and the permission of the Chair is required if a Member wishes any other person to be present. It is expected that a Member would make any such request at a directions hearing. The proceedings are also to be recorded, whether in writing, or electronically.

### *Witnesses*

- 4.6 Witnesses can be called by either party, subject to obtaining consent from the Panel. While it is not expressly provided for in the Regulations, the Panel would, as a matter of procedural fairness, permit the Member to ask questions of any witness called by the FPA or the Panel. Any witness called by the Member should be advised that he/she will also be open to be questioned by the FPA representative and/or the Panel.
- 4.7 Any questioning of a witness will be limited to furthering of the Panel's enquiry into the alleged breach or breaches, and is not to be undertaken in an adversarial manner. Under no circumstances will the Panel permit a Member or a witness who gives oral evidence to be intimidated by unfair or aggressive questioning. The Panel itself is empowered to ask questions of the Member and witnesses in fulfilling its inquisitorial functions.

### *Legal representation*

- 4.8 Unless the Panel otherwise decides, a Member is not permitted to be legally represented at a disciplinary hearing (clause 84). There is nothing to prevent a Member from obtaining legal advice prior to the hearing and, provided the request is made at a directions hearing prior to the panel hearing, a Member may expect permission to have a legal representative accompany him/her at a hearing to provide advice. Legal assistance may also be had to prepare any written submission the CRC may request.
- 4.9 However, given the nature of the proceeding as providing a peer review of conduct in an administrative/inquisitorial setting, a legal representative would ordinarily not be permitted to ask questions of witnesses or otherwise make oral submissions to the Panel, unless the Panel so decides. Clause 85 provides the

Presiding Member with a discretion to vary or revoke any determination or direction concerning legal representation.

### *Member's conduct at the hearing*

- 4.10 Members should be fully aware of the requirements of Clause 93. This Regulation requires that Members and their representatives:
- 4.10.1 Conduct themselves with due professionalism before the Panel; and
  - 4.10.2 Afford Panel members, witnesses and FPA staff every courtesy.
- 4.11 Generally, Members are also expected to act in accordance with the Code of Professional Practice, Member and Affiliate Regulation 2017, and other applicable practice standards, at all times during the disciplinary proceedings, including at the hearing.
- 4.12 A Member may also commit a Special Breach (clauses 99 and 100) should they fail to comply with any procedural or other requirement of the Regulations, or fails to comply with a direction given to them. A fine may be imposed for a Special Breach.

### *Panel Determination*

- 4.13 The Panel is required to make a determination in respect of each alleged breach in the complaint as to whether the breach is proven, or dismissed. A statement of reasons also needs to be prepared. The determination is made according to the 'reasonable satisfaction' of the Panel. Under this standard of proof, which can be taken to be similar to the standard of 'the balance of probabilities', a determination that a breach occurred confirms that it is more likely than not that the conduct complained of was committed by the Member.
- 4.14 If the Member is found to have committed a breach, then the determination of the Panel has immediate effect.
- 4.15 If, prior to making a Determination, the Panel decides that further investigation needs to be undertaken then directions as to how that is to occur will be issued.
- 4.16 The Regulations require the FPA to notify the Member of the Panel's decision, either when the Panel delivers an oral determination in the Member's presence, or otherwise in writing by serving notice to the Member in accordance with Part 15 of the Regulations. The notice must also advise the Member of the prescribed time in which to lodge a review request.

## Sanctions

- 5.1 After the hearing, if the Panel decides that a breach has been established it must then consider what Sanction to impose. If it has been determined that multiple breaches occurred, then a sanction can be imposed for each breach. Schedule B of the Disciplinary Regulations 2019 sets out the Sanctions which may be imposed. The available Sanctions are diverse, and allow the Panel to impose an outcome commensurate with the Member's conduct, and to protect the public, which is a key, underlying purpose of the FPA Code.
- 5.2 The following two steps will be undertaken:
- 5.2.1 prior to imposing any Sanction, the Panel will provide the Member with an opportunity to make a submission. That opportunity would, unless otherwise determined by the Panel, ordinarily be fulfilled by the making of a written submission; and
  - 5.2.2 once a Sanction has been decided it will be notified to the Member.

### *Publication of determination*

- 5.3 Members should note that once the Panel has notified the Member of a finding that a breach or breaches has been determined then the FPA must publish details of the Determination. Clause 126 sets out the minimum content requirements of the publication. The Panel has no authority to delay publication pending any request for a review of the finding.
- 5.4 Clause 127 sets out the publication requirements to be undertaken by the FPA in respect of the imposition of Sanction(s). The Panel has no authority to stay publication pending any request for review of the Sanction(s) imposed under the 2016 Regulations, but under the 2019 Regulations publication should not occur until after any review proceedings have been concluded.

## Applications for Review

- 6.1 Members have the right to seek a review of an adverse Determination made against them, or a review of the appropriateness of any Sanction imposed. A review is activated by the Member making a written request to the Investigating Officer.
- 6.2 The attention of Members is drawn to the following requirements for the request:

- 6.2.1 Under clause 133, a review request **must** be made within the Prescribed Time. Item 7 of schedule C prescribes that an appeal application must be made 21 days from the time that the notice of any breach Determination or Sanction imposed by the Disciplinary Panel is received by the Member. The timeframe is strictly enforced, as noted at paragraph 3.16 above.
- 6.2.3 Under clause 135, a review fee calculated in accordance with clause 136 **must** be paid to the FPA at the time a review request is lodged. There is no power to extend the time in which the fee is to be paid and failure to comply in the nominated time will result in the review application not being considered. Some portion of the review fee may be refunded if the review is not pursued, if there is a remainder after the deductions noted in clause 138.
- 6.2.4 Under clause 139, the grounds for review and the relief sought must be set out in the request. The Regulations do not limit the grounds which can be submitted. It is anticipated that the grounds should set out all of the issues upon which review is sought. Members' attention is drawn to clause 140 which provides that, subject to successfully **seeking leave** of the appeal Panel, no new or amended ground for review, or relief not included in the request for review, can be applied for at the hearing. It would be expected that if there is some change to the grounds or the relief sought, application would be lodged with the appeal Panel and the FPA at least 14 days in advance of the hearing in order to avoid the hearing being **adjourned**.
- 6.2.5 The provisions of Schedule H need to be met in advance of the review application hearing. The appeal Panel Chair will direct the time frame in which compliance is to be undertaken.

To '**seek leave**' is to obtain the permission of the Panel to do something. If the Panel grants leave, then the Member is given the freedom to do the thing they seek to do.

If a hearing is **adjourned**, it is rescheduled for a future date. If the hearing is adjourned while it is running, the hearing will resume from the point at which it is adjourned.

- 6.3 Clause 128 sets out the publication requirements to be undertaken by the FPA in respect of a review determination.
- 6.4 Generally, the appeal hearing is subject to the same procedural requirements as a disciplinary hearing. Accordingly, a hearing time for the review will be set down, the Member can seek leave to appear through a representative, and the hearing is conducted according to the same principles as apply to a disciplinary Panel.

- 6.5 One key difference is that a review hearing may be sought by the Member **de novo**<sup>9</sup>, because new material not before the disciplinary Panel is now available. In such cases, the appeal Panel has to consider the material that was before the disciplinary Panel, and also the new material.

A case heard on a **de novo basis** is essentially dealt with afresh or anew. If an Appeal Panel hears a review about a determination on a de novo basis, the case is considered as if the earlier decision had not been made. The Appeal Panel hears the complaint again, using the previously available evidence, as well as the new evidence. Similarly, an appeal de novo against a sanction will consider the sanction afresh, and the Appeal Panel will then make a new decision about the sanction that should apply (or may simply reaffirm the decision already made).

The original determination about the conduct may not change. Note that even if a review is heard by the Appeal Panel on a de novo basis, in accordance with clause 163 a determination of the Appeal Panel is final, and no further right of review or appeal is available to the Member.

- 6.6 Once an appeal Panel makes a determination it is final, and no further right of review or appeal is available to the Member under the Regulations.

## Costs

- 7.1 The Regulations allow disciplinary and appeal Panels to make costs determinations.
- 7.2 As part of its determination as to breach or sanction, the disciplinary Panel is also able to make a determination that the Member is to pay the FPA's costs and expenses incurred in the investigation and disciplinary proceedings<sup>10</sup>.
- 7.3 The appeal Panel can make a determination confirming or varying the earlier costs determination made by the disciplinary Panel, and is also empowered to direct the Member to pay the costs of the review. It can direct, as appropriate, for an amount of the review fee to be returned to the Member<sup>11</sup>.

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<sup>9</sup> 2019 Regulations, Part 14, clause 134.

<sup>10</sup> 2019 Regulations, Part 10, clause 106

<sup>11</sup> 2019 Regulations, Part 14, clause 159