

Quarterly Complaints

– January to March 2015 –

Disciplinary Activity Summary

In the March 2015 quarter, the FPA received nine new complaints, finalised nine investigations and has seven ongoing investigations. Of those ongoing investigations, one continuing matter had a further report to the FPA's Conduct Review Commission (CRC), resulting in a Notice of Disciplinary Hearing being issued to the member. Other activity includes the issuing of an Infringement Notice to a member and another matter being finalised by Summary Disposal.

A tale of two members

The FPA complaint process is not intended to be unnecessarily punitive. An important part of the process is for practitioners and the practising profession to learn not only from their own mistakes but also from those of others.

The following two case studies demonstrate how these learnings and other benefits can be achieved from the FPA complaint process when embraced by members.

Case 1: The worst of times

The FPA received a complaint against a CFP® practitioner member (the member) from another FPA member (the complainant). The essence of the complaint was that:

- the member had discussions with three clients of his financial planning business regarding the sale of founder units they held in an investment fund;
- the member sold the founder units to these clients at different unit prices;

COMPLAINTS AND DISCIPLINARY REPORT January to March 2015	
Investigations ongoing as at 31 December 2014	7
New investigations	9
Investigations closed	9
Investigations ongoing as at 31 March 2015	7
Members suspended	0
Members expelled (CRC)	0
Members Terminated (Constitution)	2
• Alan Kenyon	
• Shane Thompson	
Other Sanctions (CRC)	
Summary Disposal – fine, professional education and reprimand	1
Referred to Professional Designations Committee for Sanction	0

- the clients were not given the same information about the proposed sale;
- the clients were not fully aware of whose interests the member was representing – theirs as a private individual or theirs as their financial planner; and
- the clients, who may have been retail clients, did not receive a Statement of Advice in regards to the member's recommendation that they purchase the founder units.

The complaint raised prima facie concerns the member may have breached various enforceable elements of the FPA Code of Professional Practice (the Code).

The member was contacted by telephone, then invited to make a submission to the FPA about the complaint, its subject matter or both. Unfortunately, the member took an adversarial stance from an early stage. The FPA received a response from the member's legal representative, which advised, among other things, that the member:

- made no admissions in relation to the allegations;
- did not wish to expend time or money dealing with this investigation;
- resigned from the FPA; and
- would not enter into any further correspondence in this matter.

The FPA informed the member's legal representative that the FPA must not accept the resignation and advised the member had a duty to provide reasonable assistance to the FPA in connection with the complaint.

The member's legal representative reiterated the member's previous position and advised this would be the final correspondence in the matter.

FPA members are required to provide 'reasonable assistance' to the FPA in connection with any complaint and investigation. A member commits a 'special breach' by failing or refusing to provide reasonable assistance when requested to do so.

'Reasonable assistance' includes

the production of documents and the provision of information. What constitutes a reasonable excuse will depend on the circumstances of the individual case, and could include:

- a. that the member does not, in fact, have the documents or information sought by the FPA. Where applicable, the member should say who they think does, in fact, have the documents or information requested;
- b. a rule of law that provides an excuse for non-production of documents or information to a court.

The FPA would be amenable to an application for extension of time for provision of reasonable assistance if, for example, a member or an immediate family member of theirs was suffering from serious illness or because of other personal compassionate circumstances.

The purpose of the provision is not to be unreasonable, but to ensure that members reasonably co-operate with the FPA in the investigation and determination of any complaint made against them that they have breached their professional obligations. The consequences for not doing so are serious and may impact on the reputation of the member, the FPA and its members. It undermines the integrity of the disciplinary scheme when members choose not to comply with their obligations as a member of the FPA and a member of the financial planning profession.

A member who commits a 'special breach' without reasonable excuse may be fined by the CRC.

In this particular case, the CRC was of the view that the member's

and Discipline Report

decision to not participate in the investigation could not constitute a 'reasonable excuse' and that the member had shown disregard for his professional duty. The member was fined.

Where a member was subject to disciplinary proceedings and fails to pay a monetary penalty imposed by the relevant body (the CRC) within 42 days, their membership is automatically terminated with immediate effect and without any discretion by the FPA.

Case 2: The best of times

This matter concerned alleged breaches of FPA Rules of Professional Conduct (Pre-2009) by a CFP® practitioner member who was an employee representative of a corporate authorised representative of a licensee. The essence of the trustees' (of an SMSF) complaint was that the member's recommendations to them in 2006 and 2007 were unsuitable and that they did not understand the risks of accepting the member's recommendations.

The trustees complained to the FPA in 2012. Subsequently, the trustees received an undisclosed amount of compensation in a confidential settlement, independent of the FPA. This prevented the trustees from continuing with the FPA complaint; however, the FPA made a decision to become the complainant.

Following the FPA's investigation, the complaint was reported to the Chair of the CRC who directed the FPA to issue a 'Notice of Charge' to the member for alleged breaches of: Rule 110 (Develop a suitable financial strategy based on relevant information collected and analysed) and Rule 111 (Provide an explanation of investment risks in terms that the client is likely to understand).

The member accepted full professional accountability for the advice given. Importantly, the member fully co-operated during the entire FPA investigation, instead of attempting to rely upon the compensating of the clients and their unavailability as complainant. There was an acceptance of using this experience to grow understanding and to change conduct and processes personally as a financial planner and in the routines of the business.

The FPA acknowledged the member's explanation that a factor in these breaches was the strategy guidance provided by the member's employer at the time, which was heavily geared towards an over-exposure in property during 2006 and 2007.

As a result of the member's co-operation and responses, the FPA invited the member to discuss terms for a 'Summary Disposal' of the matter without the need for a CRC hearing.

Following discussions, the FPA reached agreement with the member, whereby the member acknowledged a breach of:

1. Rule 110, requiring members to develop a suitable financial strategy based on relevant information collected and analysed. The member's recommendations to the trustees in the SoA in 2006 and the SoAA in 2007 were unsuitable because:

- allocating 50 per cent of the portfolio in unlisted property trusts placed too high a proportion of the trustees' investment capital in a high risk, illiquid asset, particularly for retirees who were in pension phase; and
- allocating 25 per cent of the trustees' portfolio to unlisted property trusts managed by the one fund manager was unsuitable, as this failed to provide adequate diversification,

particularly in view of related party transactions referred to in the PDSs.

2. Rule 111, requiring members to provide an explanation of the investment risks in terms that the client is likely to understand, because:

- the investment strategy formulated by the member identified the main risk of unlisted property trusts as volatility to the unit price and failed to refer to other main risks, including liquidity risk;
- in verbally explaining his recommendations to the trustees in 2006 and 2007 to invest 50 per cent of their investment capital in unlisted property trusts, the member diluted the risk of illiquidity by placing too high an emphasis on the 'ability to offer periodic withdrawals' and insufficient emphasis on the disclosure in the PDSs that the recommended trusts' funds offered only limited withdrawals or had no withdrawal rights, and that investors may not be able to sell or redeem their capital promptly or at all, as there is no secondary market; and
- in verbally explaining his recommendations to the trustees in 2006 and 2007 to invest 50 per cent of their investment capital in unlisted property trusts, the member conveyed that 'low risk to capital' is one of the characteristics of unlisted property trusts. Low risk to capital is not a characteristic of unlisted property trusts.

One of the objects of the FPA Professional Accountability framework is to ensure that members engage with their professional obligations and understand, accept and learn from non-compliance with the Code. The Chair of the CRC was satisfied that this had occurred

in this instance. Factors that were considered by the FPA and member when agreeing to suitable sanctions included:

1. the member had engaged in a constructive and genuine manner with the FPA during the investigation process and demonstrated contrition;
2. the member had acknowledged breaches of professional obligations;
3. the absence of any sinister motivation;
4. the member's disciplinary record;
5. the length of time since the conduct; and
6. the trustees had been compensated.

Accordingly, the FPA reached agreement with the member on the following sanctions:

1. the member was reprimanded and fined \$1,500 for each breach;
2. the member was required to successfully complete CFP 1: the FPA Professionalism unit of the CFP® Certification Program (Semester 1 or 2, 2015); and
3. the member was required to complete the e-learning module for the FPA Code of Professional Practice (by 31 March 2015)

Conclusion

The (former) member subject of Case 1 is no longer a member of the FPA. Due to the member's non co-operation, no finding was possible in respect to the substance of the FPA complaint.

In contrast, the member subject of Case 2 remains a member of the FPA after demonstrating a desire and capacity to continue as a professional planner and member of the FPA. The member promptly satisfied sanctions one and three, and set out to satisfy sanction two.