

# Complaints and Discipline Report

– July to November 2015 –

The FPA is committed to informing members and the community of the trends and outcomes of complaints and disciplinary action in the financial planning profession. It is important for members and the community to be confident that the profession takes a strong position on the protection of the reputation of financial planners by responding to breaches of its professional expectations.

As well as communicating the activities of professional accountability, our goal is to assist members in appreciating the types of complaints received, to encourage members to consider their own practices, and to provide guidance for complaint protection.

## Disciplinary Activity Summary

In the 5 months from July 2015 until November 2015, the FPA received 10 new complaints, finalised 13 investigations and has five ongoing investigations. Of those ongoing investigations, a new hearing date is to be set for a Disciplinary Hearing after the initial hearing date of 30 November 2015 was vacated. The Conduct Review Commission (CRC) issued Determination CRC 2015\_1 on 31 July 2015 – a summary of which follows in the Case Study and a full copy of which can be found on the FPA website. The CRC also agreed with the FPA in another case that a particular Member had no case to answer and that

COMPLAINTS AND DISCIPLINE REPORT	
July to November 2015	
Investigations ongoing as at 30 June 2015	8
New investigations	10
Investigations closed	13
Investigations ongoing as at 30 November 2015	5
Members suspended	0
Members expelled (CRC)	1
Members Terminated (Constitution)	3
Other Sanctions (CRC)	0
Referred to Professional Designations Committee for Sanction	0

the disciplinary investigation be dismissed.

## Determination CRC 2015\_1 (Conflicts of Interest)

### Background:

In June 2014, the FPA became aware that practitioner Member Mr. Robert Tomasello's authorisation had been revoked by his Licensee because he had borrowed money from a client. The FPA wrote to Mr. Tomasello seeking further information and a copy of the loan agreement.

The FPA subsequently initiated a complaint against Mr. Tomasello to investigate its concerns that in September 2010 Mr. Tomasello, on behalf of his former financial planning business, iAdvise Financial Services Pty Limited ("iAdvise") had entered a private loan agreement to borrow \$990k from a client so that Mr. Tomasello could build a house.

The complaint also alleged exacerbating factors:

- Mr. Tomasello was now unable to repay the loan;
- Mr. Tomasello's business – which was to provide security – had been placed into administration and then wound up; and
- Mr. Tomasello had prepared the loan agreement and to his understanding the client did not obtain legal advice before entering the agreement.

Mr. Tomasello sought to resign from the FPA. The FPA advised Mr. Tomasello (correctly) that the FPA could not accept his resignation since his conduct was the subject of a current investigation, and that he remained bound by the Constitution and any regulations.

Mr Tomasello did not respond to questions asked of him once the FPA initiated the complaint, did not respond at all to the Notice of

Disciplinary Breach and did not attend the Disciplinary Hearing.

### Full Matter:

In 2008 Mr. Tomasello and his wife sold their Sydney home, intending to build a new house nearby. The Tomasellos' had invested some \$500,000 via a mortgage broker pending the funds being needed for the development. In December 2009 the broker advised the funds had been lost. By early 2010 the Tomasellos' new house was at the lock-up stage but incomplete in fit-out.

Also, the income being received from the financial planning business had dropped significantly. According to Mr. Tomasello, he and his wife were faced with selling the house in the state it was or borrowing to complete it; however, they were unsuccessful in their attempts to borrow from their bank or brokers.

Mr. Tomasello had an elderly client who had over \$2M in investment funds, much of which was held in a trust. The client relationship had commenced in 2007. Mr. Tomasello says the two beneficiaries had powers of attorney in respect of the elderly client, who by this time was aged 78 and in deteriorating health.

In circumstances that Mr. Tomasello did not clearly remember, he discussed his financial difficulties with the attorneys. At that stage the elderly client had entered a nursing home.

Mr. Tomasello drew up a loan agreement, which he left with the attorneys, but as far as he knew they did not discuss it with an accountant or solicitor. The attorneys advised they had discussed things with the elderly client, who was prepared to loan the funds.

The loan agreement was executed with the named parties to the loan being the trust and iAdvise, with Mr. Tomasello stated to be “acting as the agent of iAdvise”. Elsewhere Mr. Tomasello has said he was the borrower.

*The loan agreement included terms that:*

- each amount advanced was to be repaid 36 months after the date of advancement;
- the interest rate was 6%;
- interest in respect of an advance was payable upon the repayment of an advance;
- the loan was secured against iAdvise.

The loan did not provide for interest to be compounded.

Loan funds were drawn down as invoices were received from the builder. According to the Schedule, the first repayment would have been due in September 2013. The elderly client died in November 2012.

On 20 December 2012, iAdvise resolved that it be wound up in liquidation. The report to creditors by the liquidator did not list any loan to iAdvise amongst its liabilities. There was no evidence available as to whether the deteriorating state of affairs of iAdvise had been communicated to the elderly client, his attorneys, or his estate.

There was neither payment of interest nor repayment of capital when the repayments became due. Various negotiations to sell the house were unsuccessful

and eventually it was sold by way of mortgagee sale in 2014. Sometime after the mortgagee sale, Mr. Tomasello says he repaid approximately \$380,000 of the loan, but now had no assets.

Whether there was a loan from a client in breach of Rule 7.35 of the Code

*Rule 7.35 states:*

A Member must not borrow money from a client.

This Rule does not apply when:

- (a) the client is a member of the Member’s immediate family; or
- (b) the client is an institution in the business of lending money and the borrowing is unrelated to the professional services performed by the Member.

The Panel considers the purpose of Rule 7.35, as one of the three Rules by which a member is not to borrow from, lend to, or commingle assets with a client, is to avoid conflicts of interest arising.

Conflicts between the member’s interests and those of the client will arise whether or not a loan is personally in the name of the member, or directly made by a member or an entity in which the member has an interest.

The Panel agreed with the FPA’s submissions that the overwhelming evidence was that the funds were for the personal use of Mr. Tomasello and that Rule 7.35 is not limited in its application to situations where a loan is in a member’s own name. Were it otherwise, the purpose of the Rule would be undermined. The Panel found that Mr. Tomasello borrowed the money from his client.

*Whether there was a breach of Ethics Principle 1 – Client First*

*The FPA submitted that:* Ethics Principle 1 goes to the heart of the trusted adviser/client relationship and that it highlights

that the member’s primary professional obligation is to the client.

- the personal gain or advantage of Mr. Tomasello was not only in obtaining and use of the loan proceeds; but also that the loan was on better terms than would have been obtained elsewhere. The FPA pointed to the low interest rate compared to the RBA indicative rates of the time, given the risk of the investment.

- Mr. Tomasello had not acted honestly within the meaning of Ethics Principle 1, in that he had not been forthcoming to the clients as to what an appropriate rate of interest would have been given the underlying risks of the investment.

By Ethics Principle 1 the duty of a planner is to maintain the primacy of the client’s interests. The operative part of Ethics Principle 1 is the phrase “Placing the client’s interests first”. Implicit in this Principle is the recognition that conflicts of interest may occur. At the most general level it provides a means of assessing how to approach a potential conflict of interest, and deal with one that has occurred.

If a planner is not honest, or favours their own interests, the “client first” principle is breached. However, a failure to keep the client’s interests foremost can occur even when the planner is honest and not placing their own interests ahead of those of the client.

Any circumstance where the client’s affairs and those of the planner are not kept separate will raise the spectre of a breach of Ethics Principle 1. In this regard Ethics Principle 1 is backed up by Rules 7.34 to 7.36 requiring client assets to be kept separate.

Mr. Tomasello not only failed to keep separate the two sets of affairs, he actively pursued financial support from his client.

It was not an arms-length transaction. The Panel found that Mr. Tomasello failed to prioritise his client’s interests and placed his own personal gain an advantage ahead of that of his client. The Panel found the breach of Ethics Principle 1 proven.

The Panel was not prepared to find that Mr. Tomasello had failed to act honestly; rather, the evidence showed an inability to make appropriate judgments, and an unawareness of the appropriate moral compass to be held by a member of the FPA.

*Failure to provide reasonable assistance:*

The Panel also found that Mr. Tomasello had failed to provide reasonable assistance to the FPA, as alleged. Reasonable assistance has been addressed in detail in other recent Complaints & Discipline Reports.

## Sanctions:

The FPA submitted that the evidence demonstrated Mr. Tomasello had no appreciation or understanding of the minimal ethical requirements to be a financial planner and for the protection of the public it was appropriate to sanction Mr. Tomasello by expulsion from the FPA.

The Panel found that for the protection of the community and the profession expulsion was the appropriate sanction.

## Member Guidance on Conflicts of Interest:

The Practice Standards of the FPA Code, particularly PS 7.4 Professional Judgment, and PS 7.5 Conflicts of Interest and Prioritisation, provide extensive commentary and guidance on how to prioritise the client’s interests, and how to identify, avoid and manage conflicts of interest.