

Complaints and Discipline Report

– 1 April 2016 to 30 June 2016 –

Disciplinary Activity Summary

In the April to June quarter, the FPA received nine new complaints, finalised 10 complaints and has three ongoing complaints. Of those ongoing complaints:

- a hearing is part heard before a Conduct Review Commission (CRC) disciplinary panel and has been adjourned until August;
- a Notice of Disciplinary Breach has been issued to a member and the FPA is awaiting the member's response (within 21 days); and
- one matter has been delayed due to the member's circumstances.

Conflicts of Interest – a professional approach

ASIC recently issued its report on its review of *culture, conduct and conflicts of interest in vertically integrated businesses in the funds management industry*¹ (The Report). The Report followed ASIC's review of the management of conflicts of interest in a number of diverse funds management businesses that may be characterised as vertically integrated.

The Report identified specific areas of improvement in order for licensees to meet their legal obligations and suggested future surveillance on culture, conduct

COMPLAINTS AND DISCIPLINARY REPORT	
1 April to 30 June 2016	
Complaints ongoing as at 1 April 2016	4
New complaints	9
Investigations closed	10
Investigations ongoing as at 30 June 2016	3
Members suspended	0
Members expelled (CRC)	0
Members terminated (Constitution) * Dean Williams	1
Other sanctions (CRC)	0
Referred to Professional Designations Committee for sanction	7

and conflicts of interest, not limited to those licensees that are vertically integrated or within the funds management industry. The Report is a useful tool for considering regulatory risk.

The FPA's own broader observations are generally consistent with those made by ASIC that while there appears to be some commitment to managing and avoiding conflicts of interest, there is still considerable ground to be made to meet legal obligations, let alone professional obligations.

At both a fundamental and a professional level, it's not possible to have appropriate conflict arrangements in place if you're not competent in identifying conflicts. According to the FPA Code of Professional Practice 2013² (the FPA Code), a member's professional duty to the client requires that the member identify the member's own and any third party conflicts with the interests of the client.

So, what is non-aligned? (A term which is so often propagated in various ways through the trade press, in consumer marketing and appears to be generally accepted industry terminology). There appears to be various interpretations, which in itself is problematic, but in any event it is reasonable to infer that there is an intention to convey an end message as to the absence of a product conflict(s).

Notwithstanding this, on a daily basis we observe instances where financial services parties who have a direct or third party product conflict(s), such as an in-house product or one or more of the functions ASIC rely upon in The Report to define a vertically integrated business, are referred to as non-aligned.

Turning to the FPA Code, there is a professional expectation that licensees, and their representatives, undertake fair

and honest communication to the public and that they provide sufficient disclosure to enable consumers to understand and appreciate any licensee and third party influences.

So, in a professional world, is it fair and honest for those with a product conflict(s) to represent themselves, or to be represented, as being non-aligned? Is the extent of the use of the term reflective of the general progress towards a professional culture? It's certainly food for thought.

Another question is whether it is possible to be totally conflict free in the absence of a direct or third party product conflict? For instance, there are those who assert that they are conflict free by virtue of strictly meeting obligations under the Corporations Act, so as to enable them to refer to the licensee being Independent. In some cases, there may also be additional steps, such as excluding asset based fees from their charging model.

Whilst avoiding product related conflicts and any other conflict of interest is not to be discouraged, we think there would be very limited, if any, circumstances where a financial services licensee, or their representative, could truly claim to be conflict free – certainly to the professional threshold.

Turning to Practice Standard 7.5 (Conflicts of Interest and Prioritisation) of the FPA Code, being able to correctly identify situations, arrangements,

relationships and associations that give rise to conflicts is an important professional skill and forms the foundation to responding to conflicts with professional integrity. How often do we hear, "We don't have any conflicts"!

Some of the more pertinent, non-product related conflict aspects of Practice Standard 7.5 include:

- Members need to be aware of their own interests, as well as personal biases, and how these may threaten the member's ability to provide professional services to clients objectively. Some of the more obvious self-interests arise in relation to remuneration from professional services. Some of these self-interest threats to the member's professional duty to the client arise when the member enters into a client relationship for the provision of the member's own services for reward. Examples include:

- When the member recommends services, including the member's professional services, or services be provided by associated third parties, from which the member of the associated third party will benefit commercially (regardless of whether or not there is a referral fee).
- When the member re-contracts with the client for services.
- Members who are not licensees may have obligations to their licensee and/or employer that can conflict with their duty to their client. Such as to generate revenue from time based fees for financial services. For example, a determination (2013_1) by the (FPA) Conduct Review Commission stated that:

The payment by the principal of a salary to the member has obvious potential to influence advice: even if it is a flat salary, there are both

legal and practical reasons why the member might put the interests of the employer before those of the client. Even if the member has no say in the quantum and conditions of the salary, the employed member is likely to follow the directions of the employer, and these may diverge from the interests of the client.

- The member's service offering (or that of their employer or licensee) may place limitations on the financial planning strategies, recommendations or services the member is able to advise on. Any such limitation might restrict a member from carrying out their professional duty to the client, requiring the member to decline or cease an engagement.

There are other areas of the FPA Code which interact with the above, such as Practice Standard 7.6 (Professional Service Charging and Renewal). Examples include:

- Cost suitability – Costs of services to the client should be suitable as measured by benefit (tangible and intangible) to the client.
- Suitability of services – Services should be suitable to the client (including, but not limited to, consideration of useability, usefulness, duration, benefit and complexity of these services).

Are your recommendations to your retail clients to acquire or continue a professional service supported by information articulating the reasons for those recommendations in terms of the particular client's circumstances, needs, goals and priorities?

All members should be familiar with and make all reasonable endeavours to embed the FPA Code in all of their professional activities. This should not only facilitate the requisite culture and

conduct that your clients and prospective clients are entitled to expect, but also reduce both professional and regulatory risk.

The FPA Professional Accountability team welcomes contact from members who seek information, clarification or guidance on applying the FPA Code.

Amendments to the FPA Disciplinary Regulation

The FPA's Disciplinary Regulation applies to members and the FPA, and describes the procedures and powers of the FPA in its handling of disciplinary activity, as well as describing the actions expected of members engaged in disciplinary activity with the FPA.

The Disciplinary Regulation is a foundational governance document for the FPA and underpins the authority for the FPA to act in accordance with its public interest obligations to respond to allegations of malpractice.

An effective Disciplinary Regulation is necessary for the effective operation of the CRC and our entire private tribunal system. The Disciplinary Regulation balances the interests of the member with the interests of the public and the profession to provide a complaints and disciplinary system that affords high standards of procedural fairness, is independent, efficient and cost effective.

At the June Board meeting, the Board approved FPA Disciplinary Regulation 2016 (effective 1 July 2016), amending FPA Disciplinary Regulation 2011.

The FPA conducted an operational review of the 2011 Disciplinary Regulation with the assistance of the Acting CRC Chair. The review identified a number of

technical amendments to the Disciplinary Regulation, with a view to improving the experience for members the subject of complaints and investigations, and other stakeholders. These amendments are intended to:

- lessen risk of processes becoming subject to legal challenge;
- simplify processes and remove unnecessary process duplication;
- bring earlier involvement of the CRC in the disciplinary process;
- improve member communication; and
- improve hearing phase management.

In keeping with the FPA's commitment to good governance principles, arrangements for CRC Chair appointments have also been amended to require that future appointments to the CRC Chair and Deputy will be made by the Board on advice from an independent committee to be appointed by the Board. This committee will comprise of a person of standing and independent of industry, as chair, the FPA Board Chair, and a consumer representative.

Disciplinary Regulation 2016 applies for any complaint made on or after 1 July 2016. You can download a copy of Disciplinary Regulation 2016 from the FPA website.

Footnotes

1. Report 474 – Culture, conduct and conflicts of interest in vertically integrated businesses in the funds management industry.
2. (FPA) Code of Professional Practice July 2013.