

**FINANCIAL PLANNING ASSOCIATION OF AUSTRALIA  
CONDUCT REVIEW COMMISSION DISCIPLINARY PANEL**

**DETERMINATION AND REASONS FOR DECISION**

**Member: Emmanuel Cassimatis**

**Panel Members: Dr June Smith, Chair  
Mr Michael Perkins, Member  
Mr James Cotis, Member**

**Date of Hearing: 22 March 2010 and 27 April 2010**

**Date of Final**

**Determination: 20 October 2010**

**Parties' Representatives:**

**Mr Ivan Middleton (FPA)**

**Mr Daniel Levy (Greenfields Financial Services Lawyers)**

## **DETERMINATION AND REASONS FOR DECISION**

### **1. Summary of Determination and Reasons**

- 1.1 The Conduct Review Commission Disciplinary Panel ("the Panel") has prepared this Statement of Reasons to record the result of its findings and its decision in this matter in accordance with Clause 9.10 of the Disciplinary Regulations 2007 of the Financial Planning Association of Australia Ltd ("FPA") ("the Regulations").
- 1.2 In reaching this determination the Panel has had the benefit of and has considered additional submissions from the member and the FPA about its draft reasons for decision.
- 1.3 The Panel has determined that the member Emmanuel Cassimatis has committed numerous offences against the provisions of the FPA Code of Ethics and Rules of Professional Conduct.
- 1.4 These offences relate to breaches of Rule 101, Rule 110 and the Ethics Principle of Professionalism in the provision of professional and business activities and in his conduct as a member of the FPA.
- 1.5 The Panel is not satisfied that the member has committed an offence pursuant to clause 3.3(f) of the Constitution or Rule 127 of the FPA Rules of Professional Conduct.
- 1.6 A statement of this determination is outlined in Part 15 of these reasons for decision and the sanctions are set out in Part 16.

### **2. The Complaint**

- 2.1 This matter concerns the hearing of charges against the member brought by the FPA in its disciplinary capacity under its Constitution and the Regulations. The matter concerns a complaint received by the FPA's investigations officer, Mr Ivan Middleton from the complainant, Mr W. It was referred to the Conduct Review Commission ("CRC") on the motion of the FPA.
- 2.2 The complaint alleges that Mr Cassimatis (the member), who was at all material times an authorised representative of the Storm Financial Pty Limited ("Storm") and a member of the FPA, has breached numerous provisions of the FPA Constitution, the FPA Code of Ethics and Rules of Professional Conduct in the provision of professional and business services to Mr and Mrs W.
- 2.3 In a submission to the Panel of 14 September 2010, Greenfields Financial Services Lawyers asserted that Mr Cassimatis did not admit that he was a member of the FPA under the terms of its Constitution. The Panel is surprised at this submission given it is inconsistent with another assertion in the same letter that Mr Cassimatis had been a member in good standing of the FPA for 16 years (see page 8), but has considered the matter. The FPA records of membership provided to the Panel as Exhibit 3 confirm that Mr Cassimatis was a general individual member of the FPA at the time the complaint was lodged in this matter with subs paid to 30 June 2009. The Panel is therefore satisfied that Mr Cassimatis has been an ongoing member of the FPA since 22 February 1994.
- 2.4 In January 2009, the FPA received details of a complaint against the member from the Complainant.

- 2.5 Between March 2009 and August 2009, the FPA Investigations Officer interviewed Mr W and assisted him in the development of a statement of complaint, which formed part of the formal complaint document outlined in Annexure A to the FPA's Notice of Breach, issued on 3 September 2009.
- 2.6 On 23 September 2009, Mr Cassimatis responded to the Breach Notice in writing.
- 2.7 On or about 1 October 2009, the FPA received from the Receiver appointed to Storm, a CD containing the client file documents of Mr W. The CD contained three additional documents that had not been previously supplied by the Complainants, including a Client Fact Finder. The FPA exchanged these three additional documents with the member.
- 2.8 After these further investigations and correspondence between the FPA and Mr Cassimatis, the FPA responded to the member's submissions of 23 September 2009, on 20 October 2009. This letter documented the determination of the CRC that the member continued to have a case to answer in relation to six of the breach allegations identified in the Breach Notice. It further clarified the FPA's stated position on each of these six charges and advised the member that one charge had been withdrawn.
- 2.9 There was some contention at the end of the first day's hearing in this matter as to whether or not the FPA had received a complaint from the Ws, which was formally constituted under the Regulations. Mr Middleton confirmed that the complaint was constituted by Annexure A to the FPA's Breach Notice, which included a record of interview that he had had with Mr W (see paragraph 30 of the transcript of 22 March 2010. That record is documented from paragraphs 3 to 37 of Annexure and was authenticated by Mr W at the hearing (see paragraph 10 on page 18, first transcript).
- 2.10 The Regulations, under which the Panel operates, define a complaint as:
- an expression of dissatisfaction or grievance made to the FPA by a complainant in relation to the conduct of a member, or where a response or resolution is explicitly or implicitly expected, but does not include any commercial dispute.*
- 2.11 The Regulations do not define a complaint as being a complaint made in writing. Complaints may be made by way of a complaints form under clause 2.1 of the Regulations, but this does not appear to be compulsory. Clause 2.1 does require the complainant to state clearly and in detail the grounds for their complaint. A complaint must also be accompanied by sufficient information to enable the FPA to consider the nature of the complaint and make determinations in relation to it.
- 2.12 The Panel is satisfied that Mr W's record of interview, as documented in paragraphs 3 to 37 of Annexure A, was sufficient to constitute a complaint under the Regulations. Further, the Panel is satisfied that this document met the requirements of clause 2.1 of the Regulations and was provided to the member by the FPA. In addition, the accuracy of the record of interview was confirmed by Mr W during his evidence before the Panel on 22 March 2010.
- 2.13 Further, the Panel is satisfied that the FPA initiated its own investigation concerning the member's conduct in relation to the distribution of a letter of 8 October 2008 that ultimately resulted in Charge number 3 being brought before this Panel. Again, the Panel is satisfied that the member received adequate notice of the FPA's complaint against him in this regard.

### The Case to Answer

- 2.14 The CRC appointed a Panel of its members to hear and determine the case against the member.
- 2.15 The case to answer was outlined in a series of charges raised in the Breach Notice of 3 September 2009 from the FPA to Mr Cassimatis. These matters were clarified in the FPA letter of 20 October 2009, which confirmed that whilst the member still had a case to answer on six breach charges, the charge related to breach number 4 (Rule 108 of the Rules of Professional Conduct) was withdrawn. Accordingly, it was not heard by the Panel.
- 2.16 In summary, the six charges before this Panel were that Mr Cassimatis:
- (a) **Charge 1** - breached Rule 101 of the FPA Rules of Professional Conduct in that in the conduct of professional and business activities, the member engaged in an act or omission of a misleading, deceptive, dishonest or fraudulent nature.
  - (b) **Charge 2** - breached Rule 110 of the FPA Rules of Professional Conduct in that in preparing written or oral recommendations to the Ws, the member did not develop a suitable financial strategy or plan based on the relevant information collected and analysed.
  - (c) **Charge 3** - breached Rule 110 of the FPA Rules of Professional Conduct in that the member sent a letter dated 8 October 2008 to a number of Storm clients, including the Ws, and in preparing the written recommendations contained in that letter did not develop a suitable financial strategy or plan for those clients, based on the relevant information collected and analysed.
  - (d) **Charge 4** - withdrawn
  - (e) **Charge 5** - breached clause 3.3(f) of the FPA Constitution in that the member failed to supply material or further information or assist the Chief Executive Officer of the FPA, or other person, with respect to an FPA Compliance Review or investigation, whether of the member or otherwise.
  - (f) **Charge 6** - breached Rule 127 of the FPA Rules of Professional Conduct in that the member failed to co-operate with the FPA in all aspects of an investigation or compliance review, as authorised pursuant to the Constitution and Regulations of the FPA.
  - (g) **Charge 7** - breached Ethics Principle No. 6 of the FPA Code of Ethics, namely Professionalism, in that the member's conduct, in breaching the other Rules of Professional Conduct, has led to discredit to the financial planning profession.

### 3. The Particulars of Each Charge

- 3.1 The details of each charge alleged against the member and the grounds on which the charge was based, were provided in writing to the member pursuant to the Breach Notice dated 3 September 2009, which was issued under clause 7.2(b) of the FPA Disciplinary Regulations.
- 3.2 After considering the member's position in relation to the Breach Notice and the documents on which he intended to rely in his defence, the FPA clarified its position, in its letter to the member on 20 October 2009.

3.3 The details of each charge follows.

### **Charge number 1**

3.4 In relation to charge number 1, Rule 101 of the Rules of Professional Conduct states that in the conduct of professional and business activities a member shall not engage in any act or omission of a misleading, deceptive, dishonest or fraudulent nature.

3.5 The grounds on which this charge was based were that Mr Cassimatis had engaged in acts of a misleading, deceptive, dishonest, or fraudulent nature in that he had represented to the Ws that returns on the Australian share market had averaged 13% per annum over the five year period to 2008. The particulars relied on were that:

- (a) In fact, as demonstrated in the cash flow worksheet accompanying the Statements of Advice provided to the Ws, the relevant period was at least 15 years. It may likely have been longer, since at the end of 15 years from 2008 the Ws will be 75 and 73 years respectively and may live longer.
- (b) Cassimatis made the representation knowing that the 10 to 20 year return on the share market was not 13% per annum but closer to 8% per annum after tax. On this basis the cash flow worksheets themselves demonstrated that the entire strategy was unsustainable and based on misleading representations.

3.6 In its letter of 20 October 2009 notifying the member that he still had a case to answer in relation to this charge, the FPA asserted that Mr Cassimatis' failure to quote the after tax rate of total return to the Ws was, in the circumstances misleading. Further, it was alleged that PowerPoint slide 15 (Annexure "D" of Mr Cassimatis letter of 23 September 2009) indicated that the return on the Australian All Ordinaries from 30 June 2007 to 15 February 2008 was in fact -15.39% compound. The FPA argued that this was not drawn to the Ws attention during the meeting conducted with Mr Cassimatis on 29 April 2008, when Mr Cassimatis emphasised that the average returns were 13% per annum. The FPA alleged that this was further evidence of misleading conduct by Mr Cassimatis.

### **Charge number 2**

3.7 In relation to charge number 2, Rule 110 of the Rules of Professional Conduct provides that in preparing oral or written recommendations, the member shall develop a suitable financial strategy or plan for the client based on the relevant information collected and analysed.

3.8 The particulars of charge number 2 alleged in the Breach Notice were that the member developed an inappropriate strategy for the Ws which required them to take on significant borrowings through loans secured on their real estate, to cash in their superannuation entitlements and investment properties and to invest everything in units in Storm Financial Indexed Funds, in circumstances where they were aged 60 and 58 years respectively and had ceased all forms of work. The FPA alleged that this advice was given during a meeting with the Ws on 29 April 2008. The Breach Notice further alleged that the oral advice given on that day was then reduced to Statements of Advice received by the Ws on 30 May 2008, 10 June 2008 and 28 July 2008 respectively.

3.9 The Breach Notice alleged the financial planning strategy recommended by the member to the Ws was unsuitable because:

- (a) It required the Ws to pay large amounts of interest when they had ceased all forms of work and their only material source of income was to be derived from distributions made from the new Storm Indexed Fund investments. These funds were invested in

the share market with significant exposure to the volatile and high risk resources and technology sectors.

- (b) It was implicit in the strategy, as evidenced by the cash flow worksheet annexed to the Statements of Advice provided to the Ws, that the strategy advised on 29 April 2008 was designed for a 15 year period. The FPA alleged that by then the Ws would be 75 and 73 years respectively, their capital would be reduced to a very modest figure compared to their initial capital and they may well live much longer than the period anticipated in the cash flow;
  - (c) Mr Cassimatis provided advice in person to the Ws on or about 29 April 2008 that the likely rate of return on funds invested in the share market was 13% per annum and that this return would supply sufficient funds to pay the interest on the margin loans, as well as provide an income to the Ws of \$110,000 per annum for living costs over the 15 year period in the worksheets. Cassimatis provided this advice knowing that the period in the worksheets (and of the Ws retirement) was 15 years at least and that the 10 to 20 year expected rates of return on the share market was not 13% but closer to 8% per annum after tax. On this basis the FPA alleged that the cash flow worksheets demonstrated that the entire strategy was unsuitable and based on misleading representations;
  - (d) It exposed the Ws to calls on their margin loans and to the selling down of their indexed investments. It also exposed them to default on their home loans if the distributions from the indexed funds did not supply amounts sufficient to pay the interest on these loans. Further, it exposed them to these liabilities at a time in their lives in which they had no possibility of replacing assets or capital if lost through this exposure;
  - (e) It required them to pay large amounts of interest and fees in circumstances where they were retired and could not expect to earn income which could support or justify this level of transaction costs; and
  - (f) The degree to which the strategy was said to be unsuitable was allegedly demonstrated by the fact that the Ws' desired annual income was \$60,000 per annum and this could have been obtained through an allocated pension strategy, without the risks associated with a significant gearing strategy and the consumption of their capital within 15 years, if not before.
- 3.10 In its letter of 20 October 2009, the FPA continued to assert that Mr Cassimatis gave oral advice to the Ws at the meeting on 29 April 2008 and that his role in the meeting was to persuade the Ws to accept "the Storm model" and invest in the strategy. The FPA alleged that during the course of that meeting, Mr Cassimatis entered the personal information of the Ws into a computer program, leading them to assume that he was providing them with advice relevant to their circumstances.
- 3.11 The FPA alleged that the Ws relied on, and subsequently agreed to participate in the strategy, based on the advice given by Mr Cassimatis. The FPA argued that this advice therefore should have been suitable to their needs, objectives and circumstances.
- 3.12 The FPA continued to maintain in that letter, that the advice given was unsuitable and was likely to lead to a reduction in the Ws capital during the 15 year investment period (between 2008 and 2024). This was based on the FPA's assertions that:
- (a) the advice anticipated that the Ws would pay amounts of interest every year that approached double their living expenses and that accordingly the Ws would be left

with the modest amount of \$371,826 as the final return, after investing for 15 years at high risk;

- (b) expenses incurred in the years 2008 to 2013 before accumulated investment growth was available to pay interest, would mean the capital of the Ws was likely to be reduced;
  - (c) volatility in distributions meant that the Ws may not be able to pay their very large interest bill from distributions income and would have to dip into capital contributed by them;
  - (d) volatility in the value of the indexed funds meant there would be insufficient funds available from the sale of the indexed funds on maturity to repay the borrowed corpus of the home and margin loans, without using capital in order to do so;
  - (e) the financial advice did not provide for payment of capital gains tax that may be due from the sale of assets or investments; and
  - (f) the fees charged for the services provided to the Ws were inappropriately high and cut into the capital the Ws had to invest. This made the strategy advised by Mr Cassimatis (of which high fees were a component) unsuitable.
- 3.13 The FPA alleged that Mr Cassimatis had provided no evidence that the Ws really understood the risks that the strategy would deplete their capital.
- 3.14 The FPA additionally alleged that the advice was unsuitable because of representations made by Mr Cassimatis that a 13% total return rate could be expected on the strategy and that living expenses of \$110,000 could also be expected, which did not eventuate.
- 3.15 The FPA further asserted that the member had failed to present well analysed alternative strategies to the Ws, such as an allocated pension.

### **Charge number 3**

- 3.16 The FPA alleged an additional breach of Rule 110 of the Rules of Professional Conduct against the member.
- 3.17 It was alleged that the member signed and sent a letter dated 8 October 2008 to the Ws, being a form of letter sent to other Storm clients, which breached Rule 110 as it did address the Ws actual circumstances when it advised them to switch their units in the indexed funds to cash.
- 3.18 The particulars of this charge alleged in the Breach Notice were that:
- (a) The letter assumed the Ws' portfolio of units had or would receive a margin call. Mr Dowie (a fellow adviser to Cassimatis) called the Ws not long after they received the letter telling them to ignore it, as their portfolio was not subject to a margin call;
  - (b) The letter contained instructions that recipients should retain switched assets in cash rather than paying down margin loans, ignoring the fact that the Ws had no other source of income to pay the interest on their loans and the fees involved in the sale of the units;
  - (c) There was no advice on the percentage of the Ws' portfolio of units that might be switched and no analysis of whether other alternative strategies might be adopted as more suitable to their circumstances

- 3.19 In its letter of 20 October 2009, the FPA further asserted that failure to mention the repayment of interest on borrowed funds when making the switching recommendation was an omission and further evidence of the unsuitability of the recommendation that the Ws convert to cash.

#### **Charge number 4**

Withdrawn

#### **Charge number 5**

- 3.20 In relation to charge number 5, Clause 3.3(f) of the FPA Constitution states that a member commits an offence under the Constitution where the member fails to supply material or further information or assist the Chief Executive Officer or other person, with respect to a compliance review or investigation (including any disciplinary investigation), whether of the member or otherwise.
- 3.21 The particulars of this charge alleged in the Breach Notice were that Mr Cassimatis failed to assist the FPA's investigations manager, Mr Ivan Middleton (being an appointed person pursuant to the Constitution for this purpose), in an investigation he was conducting, by not responding to a letter from Mr Middleton dated 6 November 2008.

#### **Charge number 6**

- 3.22 In relation to charge number 6, Rule 127 of the Rules of Professional Conduct states that a member must cooperate with the FPA in all aspects of any investigation or compliance review as authorised pursuant to the Constitution and Regulations of the FPA.
- 3.23 The particulars of that charge alleged in the Breach Notice were the same as those made in support of the alleged breach of clause 3.3(f) of the Constitution.

#### **Charge number 7**

- 3.24 In relation to charge number 7, the ethical principle described in the FPA Code of Ethics titled "Professionalism" states that members shall ensure their conduct does not bring discredit to the Financial Planning profession.
- 3.25 In prosecuting this charge, the FPA repeated all of the particulars it had alleged against the member in prosecuting charges 1, 2, 3, 5 and 6.
- 4.25 In its letter of 20 October 2009, the FPA clarified that allegations of unsuitable investment advice given to the Ws, accompanied by an allegation of misleading and deceptive conduct, meant that Mr Cassimatis continued to have a case to answer about whether his conduct had brought discredit to the profession in that it "*destroyed confidence in the reputation of the financial planning profession, in the eyes of a reasonable member of the investing public.*"

### **4. The Subsequent Exchange of Correspondence Between the Parties**

- 4.1 In a letter dated 3 February 2010 Greenfields Financial Services Lawyers ("Greenfields"), requested that the FPA reconsider its decision to decline Cassimatis' request for an adjournment of the hearing set down originally for 12 February 2010. In that letter Greenfields argued that the FPA's refusal to grant an extension of time prejudiced their client's right to a fair hearing, including the right to respond to allegations first made against him after the Breach Notice was served.



- 4.2 Greenfields further argued that some of the allegations made by the FPA in the Breach Notice lacked sufficient particulars of the acts or omissions on which Mr Cassimatis was to be judged. Further, it argued that the nature of allegations against Mr Cassimatis had changed since the issuing of the Breach Notice on 3 September 2009 and that a number of those new allegations were unsupported. For example, Greenfields asserted that the FPA had not provided any explanation as to how it calculated the 8% after tax returns on Australian shares referred to in paragraph 3 on page 1 of the FPA's Response of 20 October 2009.
- 4.3 The FPA responded to the Greenfield's letter on 5 February 2010. The FPA advised that the Chair of the CRC had agreed to the extension of time requested and adjourned the hearing to 10 March 2010, subject to the availability of Mr W and other panel members. The adjournment was also subject to the condition that if Mr Cassimatis was made the subject of a cost order by the Panel, that the costs of the FPA vacating the 12 February 2010 hearing date of \$2,000 was to be included.
- 4.4 In its response, the FPA also reaffirmed its reliance on Annexure "A" to the Breach Notice, which it argued provided a full statement of the facts upon which the FPA would rely in prosecuting the charges against the member. The FPA denied that any new allegations had been raised by it since the Breach Notice of 3 September 2009, but that even if additional breaches had been alleged in the FPA's response of 20 October 2009, Mr Cassimatis had had sufficient time to respond to them.
- 4.5 The FPA further invited Mr Cassimatis to provide additional submissions demonstrating that he had not made misleading or deceptive statements to the Ws concerning the average per annum returns on the Australian share market and that his representations to the Ws were made on reasonable grounds.
- 4.6 On 9 February 2010 Greenfields agreed to the adjournment of the Panel proceedings until 10 March 2010 on the conditions detailed in the FPA letter of 5 February 2010.
- 4.7 On 11 February 2010 Greenfields wrote an additional letter to the FPA outlining its understanding of the particulars of the breaches before the Panel.
- 4.8 The FPA responded to the letter on 15 February 2010. That letter confirmed that:
- (a) The hearing would take place on 10 March 2010.
  - (b) A further Breach Notice would not be issued.
  - (c) The letter of 20 October 2009 documented a determination by the CRC Chair that the member continued to have a case to answer and contained further facts on which the FPA would rely or statements of position in relation to documents provided to it after the release of the Breach Notice.
  - (d) The Ws would be present to give evidence, to take and answer questions from the CRC Panel during the hearing; and
  - (e) the CRC would accept further written submissions from the member should he so desire.
- 4.9 In an exchange of further correspondence in February 2010 and March 2010, the FPA and Greenfields agreed that:

- (a) Mrs Julie Cassimatis may attend the hearing on 10 March 2010 to assist the member in his defence of the charges in an administrative capacity only and without the right to address the Panel directly.
  - (b) Mr Cassimatis would not be calling any witnesses at the hearing.
- 4.10 During this time Greenfields made additional submissions that the Panel Chair, Prof. Kingsford-Smith should disqualify herself from hearing the matter on the basis of published materials that Greenfields alleged created a perception of bias. This bias is denied by the FPA and Prof. Kingsford-Smith. However, so as to facilitate a hearing being convened, on 4 March 2010 the FPA wrote to all parties advising that Dr June Smith had been substituted as Chair of the Panel and that the hearing was now scheduled for 22 March 2010.
  - 4.11 On 3 March 2010 Greenfields provided additional written submissions and annexure on behalf of Mr Cassimatis.
  - 4.12 In a further submission of that day, Greenfields outlined the numerous factual inconsistencies it argued existed between the different sources of evidence relied on by the FPA in support of its case. This correspondence and the attached documentation formed part of the evidence before this Panel.
  - 4.13 These issues were again canvassed by Mr Cassimatis in his submissions before the Panel, where he argued the FPA had failed to sufficiently and clearly particularise the conduct it alleged he had engaged in, in its prosecution of the charges brought against him.
  - 4.14 The Panel has considered these submissions on procedural fairness made by the member. The Panel has formed the view that both Greenfields and Mr Cassimatis understood the nature of the charges they were defending and that both the details of the charges made and the grounds on which they were based were articulated sufficiently in the Notice of Breach of 3 September 2009.
  - 4.15 The Panel does not share the view that the letter of 20 October 2009 formed part of the Breach Notice. It is satisfied however that the letter clarified the FPA's position and articulated the reasons behind the CRC Chair's determination that the member continued to have a case to answer on each of the remaining six breaches. Accordingly, it is the Panel's view that the letter of 20 October 2009 forms part of the case Mr Cassimatis has to answer. The Panel has noted that Greenfields provided a substantive response to the matters outlined in the letter of 20 October 2009 in its submissions of 3 March 2010 and that ample opportunity had been accorded to the member to provide submissions and documentation related to both documents.
  - 4.16 The Panel therefore is of the view that procedural fairness has been accorded to the member in this regard.

## **5. The Panel Proceedings**

- 5.1 A hearing of this matter was convened on 22 March 2010 in accordance with the Regulations and the FPA Constitution. The FPA was represented by Mr Ivan Middleton, FPA Investigations Manager and Mr John Bacon, FPA Compliance Manager, who both appeared in person before the hearing. Mr and Mrs W appeared before the Panel by phone conference. Mr Cassimatis also appeared by phone conference from Townsville, after having made a decision not to attend the hearing in person due to personal reasons. He was accompanied by Mrs Julie Cassimatis. Mr Daniel Levy of Greenfields attended the hearing by phone from Melbourne.

- 5.2 The Panel received further submissions from the FPA on the afternoon of 18 March 2010. On Friday 19 March 2010, a final submission was received from Greenfields on Mr Cassimatis' behalf. The parties confirmed at that time that there were no further written submissions on which they intended to rely.
- 5.3 The Panel is satisfied that documentation relied upon by each party in relation to the charges brought was exchanged. Consequently it is the opinion of the Panel that the parties were given adequate notice of their respective positions and the evidence upon which they would rely. The Panel further determined that Mr Bacon, Mr Levy and Mrs Cassimatis would not present evidence or submissions in the hearing, unless requested to do so by the Panel.
- 5.4 The Regulations outline the matters to be taken into account by the Panel in its deliberations. Clause 9.5 of the Regulations states that the Panel must make its determinations on the basis of material before it and on the balance of probabilities. Further, decisions of the Panel shall be by simple majority.
- 5.5 In terms of how the proceedings were conducted, clause 9.6 of the Regulations outline that the Panel was bound to follow the rules of procedural fairness, but was not bound by the Rules of Evidence. The Panel may also inform itself on any matter before it as it saw fit.
- 5.6 The CRC generally and the Panel have no powers of compulsion in relation to the evidence placed before it in disciplinary proceedings. It relies on the co-operation and adherence to the Regulations of FPA members in this regard and the willingness of consumers to put their version of events before it. It is fortunate that members make evidence available in compliance with the rules of FPA membership in the majority of cases, however, the absence of powers of compulsion and the fact that evidence is not given on oath and is not the subject of contempt powers, mean that the rules of evidence adopted in Court do not apply. The Panel however can rely on evidence that it considers comes from any reasonably probative source.
- 5.7 As indicated previously, the standard of proof that the Panel must observe in making its determinations is on the balance of probabilities. The CRC is not an adversarial tribunal, but is inquisitorial in its processes. Accordingly, the Panel admitted all available and probative information relevant to the charges before it. It also considered all submissions of the member and the FPA in reaching its final determination. In addition, the Panel asked a series of questions of the witnesses and representatives of the parties throughout the course of proceedings, so as to inform itself directly about matters it believed were relevant its deliberations.
- 5.8 During the course of these proceedings, numerous communications took place between the parties as to their ability to hear the evidence presented before the Panel and at all times the parties indicated their willingness to continue with the proceedings.
- 5.9 At the conclusion of evidence on 22 March 2010, the matter was adjourned to 27 April 2010 to hear further evidence from the FPA and Mr Cassimatis. Mr and Mrs W were excused from further attendance. The FPA and Mr Cassimatis were given the opportunity to make further written submissions to the Panel following access to the transcript of the first day's proceedings.
- 5.10 The Panel also encouraged Mr Cassimatis to appear in person on 27 April 2010 so as to facilitate the exchange of evidence and submissions between the parties and to ensure Mr Cassimatis was fully engaged in the proceedings.
- 5.11 On 26 April 2010 the Panel was advised by Greenfields that Mr Cassimatis would not be in attendance at the hearing but would again conduct his defence by telephone conference from

Townsville. The Panel notes that further submissions had been received from both parties in the interim period.

- 5.12 The hearing was reconvened on Tuesday, 27 April 2010. As a preliminary matter the Panel noted its view that whilst the transcript of the first day's proceedings contained some minor grammatical and spelling errors, these errors did not detract from the substantive meaning or interpretation of the transcript and provided a salient and full view of the evidence that had been presented before the Panel on 22 March 2010. Both parties agreed with this conclusion.
- 5.13 Despite the conducting of the hearing by phone conference on both days, the Panel believes that all parties had the opportunity to actively and openly engage in the process and provide all relevant evidence to the Panel. The transcripts further confirm the Panel's view that no party suffered any prejudice as a result of the proceedings having been conducted in this way.

## **6. The Ws Complaint**

- 6.1 The Ws made the following allegations against the member in the complaint documents and during their evidence to the Panel.
- 6.2 On 31 October 2006, Mr W then aged 59 and his wife, Mrs W aged 57 years, attended a group information session conducted by Storm financial adviser, Mr Ash Dowie. This followed an introduction to the financial services firm by their son who worked at Storm as a junior financial planner. Mr Dowie was an authorised representative of Storm, but not a member of the FPA.
- 6.3 By November 2007 Mr and Mrs W had just retired from all forms of work and were considering their financial options.
- 6.4 On 22 November 2007 Mr and Mrs W attended a one on one meeting with Mr Dowie. Mr Dowie interviewed Mr and Mrs W regarding their financial circumstances, goals and objectives. At this meeting the Ws provided information concerning their financial circumstances, current expenditure of \$25,000 per annum, their ideal income in retirement of between \$50,000 to \$60,000 per annum, their desire to have the same exposure to risk that they had with their existing investments and their belief that they had an investment timeframe of 10 to 15 years, based on their life expectancy.
- 6.5 The information before the Panel suggests that at this time the Ws had net assets of approximately \$2,700,000 comprised of three investment houses (\$1,050,000), a family home (\$700,000), combined superannuation (\$900,000), shares (\$50,000) and cash of \$70,000. Their liabilities totalled \$353,575, represented by three mortgages on their investment properties. This meant they had a debt equivalent to 12% to 13% debt of their total asset base.
- 6.6 In the first or second week of February 2008 Mr and Mrs W attended another Storm information session, presented by Mr Cassimatis. The session was conducted over an approximate two hour period and about 100 to 150 people attended. Mr Cassimatis was the sole speaker and he discussed an investment model whereby clients utilised a gearing strategy to purchase Storm Badged Indexed Funds. The aim of the strategy as described in that meeting was to accumulate capital and fund retirement by drawing down on a buffer account. Mr Cassimatis also allegedly explained that gains in the share market over the longer term were better than any property or other asset class, thus making the strategy more attractive.
- 6.7 Throughout the meeting, the Ws alleged that Mr Cassimatis continually used words to the effect that "Storm had never had a margin call and never lost a client" and "if you want to live the dream, then you can, through margin lending. This is what people who have money do to

make more money.” The Ws allege that these words provided comfort to them that this strategy, provided through Mr Cassimatis and Storm, was a safe retirement investment option for them.

- 6.8 Shortly after this meeting, Mr Dowie contacted Mr W and enquired about the Ws interest in this strategy. At this point, Mr W agreed to meet with Mr Dowie to discuss their financial options. That meeting took place on 13 February 2008 and Mr Dowie outlined the investment model in general and possible variations and provided some initial cash flow viability information. Mr W was unable to recall when asked by the Panel whether Mr Dowie discussed his attitude to risk or completed a risk tolerance assessment.
- 6.9 Between March and April 2008, Mr and Mrs W had a number of other meetings with Mr Dowie, but was not convinced that the strategy was suitable to them. Their concerns included the level of fees paid to Storm, the high returns needed for the strategy to be effective and the investment security of the strategy. Mr W therefore requested a meeting with Mr Cassimatis to discuss these issues, which was arranged via video conference.
- 6.10 Prior to the meeting with Mr Cassimatis, Mr W made handwritten notes of the issues that he wanted to address at the meeting, as outlined above. These notes were annexed to Annexure “A” of the FPA’s Breach Notice as Exhibit 6. The notes also included reference to whether the Ws would be better off under the Storm model, whether the Storm model lacked the diversity of their existing investments, whether they could obtain growth over 10 years, not 15 to 20 years and why there was no growth expected for the first two years, how secure Commonwealth Margin Lending was as a lender and who owned the share investments once purchased.
- 6.11 The Panel has formed the view that the issues outlined in this document that Mr W wished to discuss in the meeting with Mr Cassimatis related specifically to the Ws personal circumstances and to whether the general investment strategy being proposed, was suitable for them.
- 6.12 The Ws claim that on 29 April 2008, they, their son and Mr Dowie, met with Mr Cassimatis by video phone conference. Mr Cassimatis presented to the Ws:
  - (a) The concept of using debt to build wealth;
  - (b) An investment strategy which involved the sale or conversion of the Ws’ existing assets to cash and the borrowing of further funds through a series of loans, so the Ws could purchase a number of Storm Badged Index Funds. These Funds were designed to track the makeup and performance of Australian Indices and Accumulated indices in the technological, industrial and resource sectors; and
  - (c) The returns that could be expected if the proposed strategy was utilised.
- 6.13 The Ws alleged there was also some minor discussion regarding the benefits of selling one of the Ws investment properties to add to the amount they could invest in the strategy and the cashflow implications that may arise as a result of that sale.
- 6.14 The Ws submitted that at one point in the meeting Mr Cassimatis discussed the returns they could expect if they adopted the strategy. There was a conversation where Mr Cassimatis asked what a great return per annum on the share market might be? Mr W allegedly answered “about 10%”. Mr Cassimatis is alleged to have replied “How about 13%? The average returns for the Australian share market for the past five years have been 13%. The returns have been volatile, but 13% is the average. This historical data is all we have to predict future returns.”

- 6.15 The Ws claimed that about this time in the meeting, Mr Cassimatis accessed a computer programme and entered the Ws' personal financial information into it. The Ws allege that there was then a conversation where Mr Cassimatis asked them how much income they wanted for their living expenses per year. Mr W replied "About \$50K to \$60K would be great". Mr Cassimatis then completed some calculations and is alleged to have said words to the effect "It is sustainable for you to live off \$110K per annum using this strategy". The Ws submitted that Mr Cassimatis' confidence in the strategy and the use of their data, persuaded them that they would earn this amount of income per annum should they adopt the investment strategy.
- 6.16 Mr W, in particular, argued in his evidence before the Panel, that he became prepared to take short term risks in the share market as he was convinced by Mr Cassimatis during the meeting that the long term returns of the share market investments would fund his lifestyle and any interest repayments on the loans that he would need to secure, so as to participate in the strategy.
- 6.17 The Ws claimed they and Mr Cassimatis discussed Storm's fees for financial advice during the meeting. Mr W enquired as to why the fees were so high (\$196,086 payable upfront). It is alleged that Mr Cassimatis replied with words to the effect "Go to another planner for comparison. We have never lost a client." Again, the Ws submitted that they relied on Mr Cassimatis' comments in this regard and his confidence in the success of the strategy, which alleviated their concerns about the level of fees to be paid.
- 6.18 A file note of the matters discussed in this meeting which is dated 29 April 2008 and the implications of that file note are considered later in this decision.
- 6.19 At some point between 29 April 2008 and 16 May 2008, the Ws maintained that Mr Dowie asked Mr W whether they could live off \$85K per annum in retirement rather than the \$110K initially forecast by Mr Cassimatis. Given they had originally stated that their desired retirement income was \$60K per annum, the Ws were again reassured that the investment strategy could deliver a comfortable income in their retirement.
- 6.20 On or about 19 May 2008, the Ws received a Statement of Advice (Exhibit 8 to Annexure "A" of the FPA Breach Notice). The Statement of Advice recommended, amongst other things, that the Ws:
- (a) withdraw \$900K in superannuation from their existing funds;
  - (b) sell investment properties and other assets;
  - (c) obtain an equity loan of \$878,500 (secured on the family home and investment properties); and
  - (d) obtain a margin loan of \$1.15M;
  - (e) use the proceeds of the sale or conversion to cash of their existing assets and borrowings to:
    - (i) purchase \$2.3 million of various Storm Badged Index Funds in the technology, resources and industrial sectors;
    - (ii) put \$366,000 into reserves to fund living expenses and loan repayments; and
    - (iii) pay \$196,086 in advice fees to Storm Financial, payable upfront.

- 6.21 The Ws believed that this Statement of Advice reiterated and implemented the primary advice they thought they had received from the member in their meeting of 29 April 2008 and that following the strategy would guarantee them \$85,000 per annum in retirement income. The Ws believed the cash flow statements in the Statement of Advice reflected the member's advice to them, had been prepared to estimate the recommended revenues and expenses associated with the strategy and had been tested under unfavourable conditions, thus ensuring the viability of the plan. Comments made within the Statement of Advice reassured them that that their selected time horizon would allow them to ride out whatever volatility the market presented and still allow a profit to be generated (see page 80 of the Statement of Advice).
- 6.22 In their deliberations as to whether to accept the recommendations made to them, the Ws also considered an allocated pension strategy. Mr W had calculated that they would receive about \$80K per annum from a superannuation rollover into this strategy and from net return income on their three investment properties. Mr W then compared the model recommended by the member and Mr Dowie to the allocated pension strategy. Mr W alleged that in making this comparison he did not appreciate that the Storm strategy had a higher risk due to its higher debt structure and more volatile assets.
- 6.23 Shortly after receiving the Statement of Advice, the Ws informed Mr Dowie that they would proceed with the recommended Storm investment strategy. However, as the Lender only approved a \$640K equity loan (instead of the \$878,500 originally recommended), the strategy was implemented using that lesser amount and reducing the index fund purchase to \$2.11M (instead of the \$2.3M originally recommended).
- 6.24 The Ws then received two more Statements of Advice, which amended their cash flow situation to take into account the changed lending circumstances. These Statements of Advice were exhibited to the FPA Breach Notice of 3 September 2009 as Exhibits 9 and 10.
- 6.25 On or about 8 October 2008, Mr Cassimatis signed and sent a letter to the Ws recommending they take urgent action with their portfolio. Shortly after this letter was sent, Mr Dowie telephoned the Ws and informed them to disregard the letter as it was not relevant to their circumstances, given the Ws had not received a margin call. This letter was exhibited to the FPA Breach Notice as Exhibit 13. This letter is also discussed in more detail later in these reasons for decision.
- 6.26 On 16 December 2008, the relevant Lender sold down half of the Ws' Storm Index Funds. By mid January 2009, the Ws had sought advice from another financial planner who advised them to sell down their entire Storm Index Fund portfolio. This was achieved over the following months. At the time the portfolio was worth \$1.55M. The Ws paid margin loans down from \$1.15M to \$190K, leaving an amount of \$130K in the margin loan buffer account.
- 6.27 As of January 2009 therefore when the Ws sold their Storm portfolio, their financial situation was as follows:
- (a) Net assets of \$1.229M;
  - (b) Net liabilities of \$1.151M.
- 6.28 The evidence before the Panel is that the Ws therefore lost \$1.47 million in net assets within a seven month period from June 2008 to January 2009. They also went from a situation where they had approximately \$2.7 million in assets and a 12%-13% debt to asset ratio, to one where they had \$1.229 million in assets and debts of \$1.15 million, almost equivalent to the value of their assets. In addition they had paid \$196,000 in fees for this advice received from Storm Financial. Mr W provided the FPA with a chronology of the investments recommended by Storm, which was attached to the FPA Breach Notice as Exhibit 14.

## **7. Additional Evidence Before the Panel: Charge No. 1**

- 7.1 In its submissions to the Panel, the FPA relied on Annexure “A” to the Breach Notice of 3 September 2009, which contained relevant documentation and the complainant’s version of events, on which the FPA relied in its prosecution of all six charges.
- 7.2 In relation to the first charge and the FPA’s allegation that Mr Cassimatis made misleading and deceptive statements to the Ws related to the share market return for a five year period, the FPA alleged that there were two elements to this breach:
- (a) That Mr Cassimatis had represented to Mr and Mrs W a share market return for a five year period, when he should have quoted the returns for a period of at least 15 years, as this was more relevant to the investment strategy being proposed to the Ws due to their respective ages; and
  - (b) Mr Cassimatis represented that the return on Australian shares over a ten to twenty year period was 13%, failing to take into account after tax returns and when the figure was closer to 8%.
- 7.3 It was alleged by the FPA that the conversation concerning the 13% per annum return created an expectation in Mr & Mrs W that about 13% was the average annual return for investment in the share market and that rate of return (of 13% per annum) could be expected by the Ws should they engage in the Storm Financial Planning strategy.
- 7.4 In its letter to the member of 5 February 2010, the FPA referred to the AMP Financial Planning 2009 Investment Toolkit which calculated return figures to 31 December 2008 for the annualised asset class returns for Australian Shares in the All Ordinaries Accumulation Index (before tax) at 6.3% for 5 years and 7.6% for 15 years.
- 7.5 The FPA asserted that the Ws did not understand the amount of volatility or appreciate the impact of downward volatility of the market on the strategy recommended by Mr Cassimatis. It was the FPA’s contention that this amplified the misleading conduct related to the 13% statement made by Mr Cassimatis because he did not fully explain the potential sum of volatility on returns or the impact of the downside of volatility (page 6 of the second transcript).
- 7.6 In further support of this allegation, the FPA relied on its Breach Notice; evidence outlined in the Annexure A document and the FPA’s letter of 20 October 2009. Further, it referred the Panel to Exhibit 19 of the Folder of Exhibits and also tab 12 of the Folder of Correspondence.
- 7.7 In its written submissions of 3 March 2010, Greenfields argued, amongst other things that:
- (a) the investment horizon specified by the Ws in their confidential personal profile dated 22 November 2007 specified 5 to 7 years. Accordingly, it was appropriate to disclose the average return for the previous 5 years;
  - (b) the statements made by Mr Cassimatis had to be considered in the context of other disclosures made to the Ws, including in the Statement of Advice, where returns for between five to fifty five year periods were disclosed;
  - (c) the return on Australian Shares over 10 to 20 years was 13% and that this was supported by material published by ASIC, FPA and IFSA downloaded by Greenfields on 2 February 2010;



- (d) neither the law or industry practice required the quotation of after tax returns in these circumstances. In this regard it again relied on the material published by ASIC, FPA and IFSA, downloaded by Greenfields on 2 February 2010, which it maintained did not quote returns net of fees, charges or taxes; and
- (e) the alleged conduct did not constitute “misleading conduct” as it was not conduct which led the Ws into error or gave cause for them to err. This was because the Ws were fully informed of historical long term average returns for Australian Shares at 13% and the period on which that return was based, namely 5 years.

7.8 Mr Cassimatis’ relied on this written submission to support the view that the average return was 13%. Yet he then went on to contend before the Panel, that the Ws may have mixed up his comment about a 13% return with the long term return in the markets as opposed to a mere five year return. This comment seems to contradict the submissions made on his behalf by Greenfields.

7.9 In relation to the risks that he understood were associated with the margin loan and gearing strategy in particular, it was Mr W’s evidence at paragraphs 5 - 10 on page 67 of the first transcript dated 22 March 2010, that the risks were what he had read in the paper, where:

*“if you took out a margin loan, the loan needed to be returning 10% in order for you to be able to pay the interest on a margin loan which was, at the time around 8 or 9%, as well as obviously some sort of a profit on the investment. So when Mr Cassimatis said it was guaranteed at 13% over the last five years, I thought well, it’s more than 10% and the risks we didn’t think, therefore, were all that great. We had no thought whatsoever that, you know, this asset lending simply meant that Okay if you default we’ve got your house, You put it up for security. Naïve maybe but that’s the way it went.”*

## **8. Additional Evidence Before the Panel: Charge No. 2**

8.1 In relation to its prosecution of charge number 2, the FPA relied on Exhibit 5 to Annexure “A”; being a document provided by Storm to Mr W dated 11 January 2008. This document related to the Agenda and the points discussed at the meeting between the Ws and Mr Dowie on 22 November 2007. It also contained information concerning the assets and liabilities of the Ws and their objectives for their retirement. Mr Middleton described as significant, a statement within that memorandum that:

*“Their expenses are approximately \$53,000 per annum, and they believe they can live comfortably off approximately \$60,000 per annum”.*

The FPA asserted that this statement was significant because it set the financial goals and objectives of the Ws in seeking advice from Storm.

8.2 The document also outlines some recommendations made by Mr Dowie to the Ws, such as that Mr W invest \$770,000 held in superannuation funds and \$560,000 in equity from the primary residence into Storm Index Fund, but that Mrs W’ superannuation not be contributed to the strategy until she turned 60 years. Further, the Ws were advised to take out a margin loan of \$1.1 million against this investment up to a loan to value ratio of 60%.

8.3 The FPA then turned to Exhibit No. 20, a confidential financial profile of the Ws dated 23 November 2007. The FPA directed the Panel to page 23 of that document under the heading “Purpose and Needs”, which again reiterated that the Ws had a goal to live on between \$50,000 and \$60,000 per annum throughout their retirement.

- 8.4 The FPA asserted that page 24 of that document contained a risk volatility statement which represented the only analysis undertaken of the clients' risk tolerance and demonstrated that the clients were conservative or moderately conservative investors. It was the FPA's contention that the complainants were in or nearing retirement, had approximately \$1.7 million that could be dedicated to a low to medium risk financial strategy in keeping with their risk profile and that this could achieve their financial goal of having \$50,000 to \$60,000 income per annum.
- 8.5 The FPA further contended that when Mr W informed Mr Cassimatis of his financial goals during the meeting on 29 April 2008 and Mr Cassimatis utilised their financial information for the computer program analysis, Mr Cassimatis gave financial advice to the Ws. The FPA's submission was that after completing the calculations and showing a graph that demonstrated the potential earnings that the Ws could attain from the strategy, Mr Cassimatis said words to the effect: *"It is sustainable for you to live off \$110,000 per annum using this strategy"*. It was the FPA's submission that this constituted a recommendation by Mr Cassimatis which the Ws relied on in turn, when determining whether or not to accept the advice given and invest in the Storm Index Fund Strategy.
- 8.6 The FPA's case is that the meeting on 29 April 2008 went for over 3 hours and included a number of topics discussed between the Ws and Mr Cassimatis. These are documented in a Storm file note dated 29 April 2009 and include:
- the zero default risk of Storm Investments;
  - that Storm invested in a hugely diversified asset base;
  - the clients' maximum capacity;
  - the clients' own personal situation; and
  - who owns the asset

It was the FPA's contention that this constituted clear documentary evidence that Mr Cassimatis had reviewed the Ws' personal situation, their risk tolerance, goals and objectives, during the meeting on 29 April 2008 and had made recommendations to them about a financial strategy they could adopt in order to meet those goals.

- 8.7 The file note of 29 April 2008 was prepared by Mr Dowie and was annexed as Exhibit 7 to Annexure "A" of the FPA's Breach Notice of 3 September 2009. The file note confirms that the meeting was conducted over a three hour period. It outlines some 12 topics discussed by Mr Cassimatis at the meeting including those listed above. It also documented discussion of more general topics including that debt must be managed correctly, that the Storm process was a journey, economic investments in Enterprise Australia and that financial planning was about managing the risks.
- 8.8 On page 24 of the transcript of proceedings of 22 March 2010, the member maintained that during the meeting with the Ws, he was simply manipulating Mr Dowie's figures and giving a general outline of the Storm model, not a specific outline as to what would be recommended to the Ws. It was Mr Cassimatis' contention that he undertook a viability test in order to explain the process, not the specifics and he insisted in his evidence that he was simply using examples to outline a general process. He explained the use of the Ws own data, which he claimed Mr Dowie had inserted into the computer program, as making the whole process more understandable. He insisted that he made no recommendations on that day to the Ws.

- 8.9 In his evidence before the Panel, Mr W asserted that both he and his wife attended the meeting on that day primarily to have Mr Cassimatis give them advice on their position. Mr W stated that he and his wife were vacillating and needed reassurance and clarification of how their situation would work, together with an explanation of the model being proposed and

*“Who better than the CEO of Storm Financial to do that?”*

- 8.10 It was Mr W’s evidence that it was very clear in his mind and in the mind of his wife that the information they were given and the presentation that they watched during the meeting was particularly pertinent to their case.

*“If it was modelling it was our model. We believed that if Mr Cassimatis manipulated the data, it was our data. No, that is not sustainable. Look, the graphs dropped in a way at this point. Let’s re-evaluate. And so from \$130,000 to \$150,000 per annum it came down to a sustainable as the graph was continuous, was straight, had no kinks in it, and that \$110,000 he said: there you are, that is sustainable for you”.*

- 8.11 This evidence was verified by Mrs W.

- 8.12 It was Mr W’s evidence that the Ws left that meeting with no doubt in their minds that the modelling undertaken by Mr Cassimatis meant that they, if they agreed to the Storm’s strategy, would receive \$110,000 per annum in income.

- 8.13 Mr W further explained that they went to see Mr Cassimatis, in his words, seeking the highest possible advice:

*“We went there seeking clarification, and the CEO of Storm, whom we had great respect for at that particular time - and we wanted his opinion in our situation, and we got it (page 25)”.*

- 8.14 On page 26 of the transcript, Mr W outlined his understanding that the purpose of the meeting was for Mr Dowie to use Mr Cassimatis in teleconference to add weight to their situation. That is: to the proposal that they invest in the Storm strategy. It was Mr W’s assertion that perhaps the Ws appeared to Mr Dowie to be a tough nut to crack and that the CEO of Storm may be able to get their investment over the line. He also believed that Mr Dowie wanted the Ws to see Mr Cassimatis using the modelling software and he expressed that it was very impressive.

- 8.15 Mr W further confirmed that he went to the meeting seeking information about why the Storm’s fees were so high, about the security of the investments that may be made and how that would relate to the returns that were being proposed. The Panel noted that these points coincide with the list of items Mr W made before he went to the meeting and which was in evidence.

*“So we were looking for our future, and I suppose, in a nut shell, we needed clarification and understanding at the highest level that our investment with Storm would be safe and we would have an assured income, well, for the long term and that was, in our estimation, 15 years (page 26).”*

- 8.16 Mr W gave evidence that it was during an early conversation with Mr Dowie that Mr Dowie offered to arrange a teleconference with Mr Cassimatis, to which the Ws agreed.

- 8.17 As indicated on page 27 of the transcript, Mr W gave further evidence that Mr Cassimatis used the word “sustainable” a number of times during the meeting and that the Ws believed him when he said that \$110,000 per annum of income was a sustainable outcome for them on

the model being demonstrated to them. They believed that the model being presented applied to their circumstances and that it was going to be their future.

- 8.18 Mr Cassimatis gave evidence (page 28 of the transcript of 22 March 2010) that Mr W had in fact requested the meeting and that the member's role would simply be to answer questions and re-explain the terms of the Storm model to the Ws. It was Mr Cassimatis' contention that he made it clear to the Ws that he was not giving financial advice to them or making any recommendations in that meeting.
- 8.19 Mr Cassimatis further asserted that Mr W was a very careful and methodical person and that it took over two years for the Ws to make their decision to invest and sign the Statement of Advice. He believed this was consistent with Mr W's personality and inconsistent with the notion that the Ws would have made a decision based on the one meeting that they held with Mr Cassimatis.
- 8.20 The Panel is entitled to use its discretion to give the probative weight it considers appropriate to the evidence and to the submissions of the witnesses that appeared before it. In the Panel's view, it was the evidence of Mrs W on these points that was compelling. It was Mrs W's evidence before the Panel that she believed the purpose of the meeting was to look at the Ws situation and to assure them that the Storm model was appropriate to them and that they were not being led astray by anything that Mr Dowie was saying.
- 8.21 In her opinion, the meeting's purpose was to confirm, through the use of their data, what Mr Dowie said: *"So that we could move on with our investment"*. On page 29 of the transcript she gave evidence that she believed that the presentation given by Mr Cassimatis was designed to develop their investment plan and help them decide what to do. She also asserted that she believed that comments made by Mr Cassimatis throughout the meeting were clearly and specifically aimed at the Ws situation, including that:

*"Teachers and pilots are the hardest to convince to do this model" (Mr W was a school teacher).*

and

*"What is it with women and their houses?" (when Mrs W commented that she did not want their home included in the strategy).*

- 8.22 Mr Cassimatis alleged that he had no recollection of the family home being mentioned to be excluded from the strategy. He maintained that it was the Ws action in selling their investments at a particular point in time, together with the actions of the Commonwealth Bank of Australia and its forced sell-out of the Indexed Funds which led to their losses.
- 8.23 Mrs W maintained that it was not until that meeting that the Ws decided to move forward with the strategy. In her opinion, but for the input of Mr Cassimatis they probably would not have proceeded with the recommended strategy.
- 8.24 In relation to the suitability of advice issues, Mrs W gave evidence that:

*"One of the things that sold us on joining Storm was that they had never lost a client, that they monitored daily people's portfolios, that there was personal attention to portfolios and that we were not at any risk. Now that was from Mr Cassimatis; that's what he said: .... I take Mr Cassimatis' point about it being impossible to look at everyone's case individually in those circumstances, but that was one of the deals that we signed up for and you know, I think that we were hugely let down in that regard."*  
(Page 65 of the first transcript)

- 8.25 When asked by the Panel about the services that she was expecting to receive from Storm over and above the investment recommendations and financial education, Mrs W replied:

*“I was expecting that - Mr Cassimatis had said we’ve never lost a client. I expected that - I trusted that would never happen and I expected to be kept fully briefed and informed on our portfolio.”* (Page 65 of the first transcript)

- 8.26 It was Mr W’s evidence that they had sought the advice of a licensed financial adviser and acted in accordance with the advice given. He argued that they were both retired and had no income and tried to keep some of their assets out of the investments, such as the family home and one investment property, but it was a:

*“Put everything in strategy, all of our super, all of our lifetime of work, 40 years of work had been a nest egg of superannuation - you know how much - our property and our shares. Our precarious position, the falling market was not explained to us.”* (Page 66 of the first transcript)

- 8.27 The FPA further contended that at the time Mr Cassimatis met with the Ws, he was aware that the Ws were a couple in their late 50’s and about to retire and that their financial goal was to retire on \$50,000 to \$60,000 per annum. It was also reasonable to conclude that Mr Cassimatis was aware of the Ws financial circumstances and the tolerance to risk assessment which had been undertaken by Mr Dowie.

- 8.28 The FPA attempted to demonstrate a link between the meeting of 29 April 2008 and the Statement of Advice of 16 May 2008, including the short time frames between the meeting and the document being delivered. The FPA argued that Mr Cassimatis made oral recommendations at the meeting of 28 April 2008 and that those recommendations were subsequently mirrored in the Statements of Advice and in the cash flow analysis and diagrams put before the Panel.

- 8.29 It was the FPA’s assertion that there was a clear link between the cash flow analysis for \$110,000 in draw downs discussed at the meeting and the cash flow analysis within the Statements of Advice received by the Ws. This was despite the fact that by the delivery of the Statements of Advice, the Ws had already agreed for the drawings to fall to \$85,000.

- 8.30 The FPA’s evidence on this point appeared confusing at times. Mr Middleton attempted (page 12 of the second transcript) to argue that even though the cash flow tables in the Statement of Advice were more conservative (\$85,000 per annum income), than the actual recommendations made by Mr Cassimatis in the meeting of 29 April 2008, they were still linked to his recommendation that cash flows be set at an income rate of \$110,000.

- 8.31 In his defence, Mr Cassimatis relied on the file note made by Mr Dowie of 29 April 2008 as suggesting that the recommendations contained in the Statements of Advice were not linked to the meeting outcomes. This was because after the meeting the Ws wanted their cash flow scenario to be re-done following the sale of their properties and the conversion of their combined superannuation funds. It was Mr Cassimatis’ assertion that he was not privy to these conversations or the recommendations that flowed from them.

- 8.32 It was the FPA’s contention that:

- (a) the recommendation to invest in the Storm Index Funds through a significant gearing strategy that also required the Ws to commit their existing financial assets was a high risk strategy involving high debt in a volatile asset class and that this was at odds with the Ws tolerance to risk and their goals and objectives. (Page 7 of the second transcript);

- (b) the gearing strategy was also not feasible based on the higher volatility of the index funds which was likely to cause at some stage in the future high unsustainable loan to value ratios, which would trigger forced selling and significant loss of capital; and
  - (c) the strategy was particularly unsuitable when an alternative strategy, such as the allocated pension strategy that the Ws were considering, would have met the clients' needs and objectives with less risk.
- 8.33 The FPA relied on a portrait document headed Analysis of Appendix B, Cash Flow Diagrams, Statement of Advice dated 16 May 2008, Volatility Impact on Short Term LBR and Equity in Strategy (page 19 of the second transcript). It was the FPA's contention that the object of this table was to demonstrate the impact of the downside volatility on the Ws' loan to value ratio and the net equity in the strategy.
- 8.34 The FPA submitted that the cash flow document did not take into account an increase in the loan to value ratio (LVR) over the period of the loan, to the point where there was a real possibility that at some stage in the future the LVR would well and truly exceed 80%, at which time the margin lender would be forced to sell the Indexed Funds, resulting in a significant capital loss to the client.
- 8.35 The member submitted in his evidence that:
- (a) the table reflected a cash flow viability test which used parameters that were quite negative and therefore any conclusions drawn would have been significantly on the downside;
  - (b) the cash flow document had already therefore been stressed, reflected a negative situation and that to take those numbers and further stress it to demonstrate a negative impact, as the FPA had done in support of its case, was unnecessary;
  - (c) the Ws understood the advice they had been given by Storm;
  - (d) the Ws were getting advice from other advisers regarding allocated pensions but that they simply did not want to adopt that approach. In his opinion they were given all information by Storm to make an informed decision, and that they made their choice on all of the facts. He maintained that:
 

*"I would have started much, much higher in the range giving numbers and alerting the Ws as to what it would take to achieve those numbers, even down to quite high numbers. And as I went down through the numbers we got to a point where I would have said, as I say in most cases, that from this point on this is sustainable on the parameters that are available here that we are using."*
- 8.36 In its written submissions, these arguments were reiterated by Greenfields, which also argued that:
- (a) the evidence did not support the view that Mr Cassimatis had made a recommendation during the course of the meeting with the Ws, as that term is used in the Corporations Act 2001 ("the Act") and as required by Rule 110;
  - (b) the Ws only received factual information or recommendations during the meeting that did not constitute 'advice' under Regulation 7.1.33A of the Act, as the recommendations related to the allocation of a person's funds among investments across one or more asset classes;

- (c) Mr Cassimatis made no statements during the meeting on which the Ws could rely on the basis that no potential investor was permitted to invest in any Storm product until the investor had received a Statement of Advice; and
- (d) If Mr Cassimatis provided a statement of opinion to the Ws during the course of the meeting, this did not fall within Rule 110 which required that a recommendation must have been made.

- 8.37 Mr Cassimatis explained to the Panel how Storm determined whether its investment strategy suited particular clients (page 31 of the second transcript). He gave evidence that Storm advisers were aware that clients had to be fully informed of the type of investment model and the approach that Storm took. Mr Cassimatis gave evidence that he tried to impress on Storm advisers that it took time to ensure that clients were so informed.
- 8.38 Secondly, Mr Cassimatis advised the Panel that the Storm model was for people who desired to continue increasing their wealth. It was not simply for the advisers to take a custodial approach on their wealth. "We generally also asked clients or potential clients to shop around". He believed the Ws fulfilled both elements.
- 8.39 He insisted that there were clients that Storm declined to assist, because "we thought, or Compliance Committee thought, wasn't ... and I believed that the Ws had done - fulfilled both of those." The evidence before the Panel was that one in four potential clients who entered the Storm process, proceeded to invest in its investment model.
- 8.40 It was Mr Cassimatis' evidence that within the Storm hierarchy, the decision as to whether or not a client should or should not proceed further in the process was primarily the adviser's. In addition, their mentor and senior planner had an oversight role. The mentor's senior planner for Mr Dowie was Brian Roy. Throughout his evidence Mr Cassimatis maintained that he was not the adviser to the Ws, rather Mr Dowie was.
- 8.41 Mr Cassimatis maintained that he did not work with either adviser on a regular basis. He gave evidence that he was used from time to time to assist in explaining cash flow models to clients, to present investor updates or assist in training. He denied that he played an active role in the information session that clients generally took part in the early stages of their interaction with Storm.
- 8.42 On page 33 of the second transcript Mr Cassimatis explained his role in the meeting on 28 April 2008 in particular as follows:

*"That ... in particular Mr W had a more questioning mind and accordingly I think Ash didn't feel as confident in explaining broadly the Storm model before he moved on. So that's - I was simply called in to give those clarifications. And I think it was mentioned that the Ws may have had some questions they wanted to ask."*

- 8.43 It was the view of the Panel that the Storm investment strategy, as documented in the 111 page Statement of Advice given to the Ws, contained a number of goals. One goal was to increase the size of the capital base of the client. The second goal was to concentrate on improving the quality of the asset base. To achieve both goals, in the Ws case, the broad strategy required the conversion of the existing asset portfolio held by the clients to cash, the addition of further funds obtained through gearing and then to invest all funds in Storm Badged Index Funds. Once the clients had agreed to pursue the strategy, it was then tailored further to meet the recommended loan to value ratio required, the amount to be borrowed, the debt ratio to be held and the income level required to make repayments on the loans and living expenses.

- 8.44 Mr Cassimatis' gave evidence that he believed this description was an over simplistic view of the model (page 36 of the second transcript). He argued that, for example, whether or not the entire existing asset base of a client was used in the strategy, depended on what the client wanted to do. He gave evidence that some clients did not want their primary residence included in the strategy and some did not want to borrow funds. Indeed, the Panel heard evidence from Mr W that of 14,500 clients associated with Storm; approximately 3,000 were involved in a gearing strategy (page 37 of the second transcript).
- 8.45 Mr Cassimatis conceded however that the Statement of Advice gave the Panel a clear understanding of the financial planning strategy that Mr and Mrs W were to adopt and that it outlined the advantages, disadvantages and risks of the strategy to them (page 37 of the second transcript).
- 8.46 The Panel was interested in the diversification strategy within the investment portfolio that had been recommended to the Ws. In particular, the Panel questioned Mr Cassimatis on how a couple who were considered overweight in property and other investments found themselves in a highly geared strategy that saw them with almost 100% exposure to the equity market, albeit through a number of indexed funds and significant additional risk when compared to their tolerance to risk and previous portfolio. Mr Cassimatis responded that he would not have been considering diversity issues during his meeting with the Ws in April 2008, but would have merely outlined how the cash flow worked.
- 8.47 The Panel asked additional questions of Mr Cassimatis about the development of the Storm model and the Storm Badged Indexed Funds strategy. He responded that:
- "We are talking about history. The only answer I can give to that is I don't know, without further thought and talking to them and asking them well, what happened here, how did we end up in this position, I don't know".* (Page 39 of the second transcript).
- 8.48 The member subsequently advised that he had devised the index fund strategy 30 years previously because it gave maximum diversification into that asset class, the costs were lower and because there was no proof in his opinion that other managed funds consistently outperformed the indices. He denied that he had played a significant role in the development of the strategy and maintained that it was just an evolution. He further contended that the strategy was only used when it was suitable for the client and that they self selected:
- "I mean, they - it - you know, people were given information; one in four did it"* (page 40 of the second transcript)
- 8.49 Mr Cassimatis was asked to explain what he meant by the term "self selection" and he said:
- "Things were presented to people and one in four proceeded".*
- 8.50 He maintained however that the evidence before the Panel did not support the view that his role in the meeting of 29 April 2008 was to make sure the Ws moved through the process so that they became part of the "one in four" referred to.
- 8.51 When asked by the Panel to explain his role in the meeting, Mr Cassimatis advised that he didn't have anything to do with the process from A-Z, other than at a point when someone required an explanation about something and he was called in. He insisted that that is what had happened in the Ws case. His role was simply to explain in broad terms how all of the parameters meshed together worked. For example:



*“Maybe in the Ws case, you know, we’d like this or that or something else. It was giving options as to the buttons one could push to get various outcomes.”*

- 8.52 Mr Cassimatis denied that an important element of his meeting with the Ws was in discussing the risk return options that were available to them. He insisted that that was for the adviser to determine. He had commented:

*“Simply on the use of the debt, you know, the effect of - the use of debt, why indexing; that type of stuff, and then numbers to show how things moved in various directions.”*(Page 42 of the second transcript)

- 8.53 The Panel asked Mr Cassimatis, given his significant experience as an adviser, how he had addressed and managed the perceptions and expectations that the Ws may have had of his role in the meeting, including any reliance they may have placed on comments he may have made. Mr Cassimatis was asked to explain the kinds of comments he would have made during the meeting to clarify his role and to manage their expectations that they were receiving advice individually tailored to their circumstances.

- 8.54 Mr Cassimatis dismissed this idea at first by indicating that he had not spoken to the Ws before the meeting, he couldn’t understand how they held the view that he was such an important person, how they could reasonably expect that the CEO of a company would advise them individually or why people would rely on comments that he made given it was an education session, simply assisting them to understand the cash flow. (Page 43 of the second transcript).

- 8.55 On page 48 of the second transcript Mr Cassimatis reiterated that it was clearly not a reasonable expectation for Mr W to have had that the CEO of Storm would have given individual advice to him.

- 8.56 Mr Cassimatis defended the Storm investment model by claiming that the model was not unique to Storm, that many financial planning firms used gearing strategies as a common strategy in financial planning, that the FPA had known about the model for over a decade, had conducted audits and had made various visits to Storm, as had the Regulator, but nobody had advised that it was an unsuitable or inappropriate strategy for clients up to the point of the Storm collapse.

- 8.57 This point was reiterated by Greenfields in their written submissions. They also argued that the FPA had been well aware of and approved the Storm model over a number of years and had not raised concerns.

- 8.58 Mr Cassimatis further argued that the only reason the Ws lost money on the strategy was because another adviser had told them to redeem half their money and Colonial unlawfully sold them out of half of their investment (page 49 of the second transcript).

- 8.59 In closing his submissions for the FPA on this charge, Mr Middleton argued that the meeting of 29 April 2008 was crucial because this was a meeting that convinced the Ws to accept the Storm strategy. He argued this was the role that Mr Cassimatis was expected to play and the reason why he attended the meeting. Mr Middleton maintained that:

*“It was from the head of Storm and they wanted his opinion, and they valued his opinion, and they got his opinion.”*

- 8.60 Mr Cassimatis provided evidence that he had given specific general advice warnings to the Ws at the meeting, which he both read to the Ws and provided by PowerPoint presentation. Mr Cassimatis gave evidence that the warning stated:

*“The information contained in this presentation is for general information only and is not specific to your needs. Accordingly, it should not be acted upon without reference to your personal information and adviser.”*

- 8.61 He insisted that he had provided this warning to the Ws several times throughout the meeting by reading it out and showing it to them on the screen at conference. He submitted that Mr Dowie could confirm this assertion and had made a statement to this effect. He clarified that the general advice warning formed part of the PowerPoint presentation delivered to the Ws during the meeting.
- 8.62 When asked by the Panel whether or not he would provide a copy of a statement from Mr Dowie confirming that he had used general advice warnings as indicated, Mr Cassimatis advised that he was hoping to keep it for “*the appeal*” (page 57 of the second transcript).
- 8.63 The Panel notes that Mr Cassimatis had provided a copy Power Point slide with his response to the Notice of Breaches (slide 6 in Appendix D). That slide contains the wording outlined by Mr Cassimatis in his statement above. However, it seems to be only one of two slides provided to the Panel of what seems to have been a 16 slide presentation and there is no verifying evidence that it formed part of the presentation given to the Ws.
- 8.64 The Panel sought clarification from Mr Cassimatis as to whether he sought to rely on the general advice warning, the full PowerPoint presentation presented to the Ws and the statement from Mr Dowie confirming that the general advice warnings had been read to the Ws during the course of the meeting. It was at that stage that it became clear that Mr Cassimatis did not have a signed statement from Mr Dowie, but rather a tape recording of a conversation which did not identify the parties involved. The Panel provided Mr Cassimatis with the opportunity to present further evidence before it on these matters, an opportunity he declined both at the hearing and subsequently in a letter from Greenfields.
- 8.65 During the course of the proceedings on the second day, Mr Cassimatis drew the Panel’s attention to the document dated 21 April 2010 from Greenfields and in particular the third last paragraph at point 1.8 and page 42 lines 7-8. In these paragraphs the evidence that Mr W gave before the Panel on the first day of hearings is discussed. Mr Cassimatis contended that Mr W had been equivocal in his evidence about the Statement of Advice and that the evidence that he had given that he had not seen the Statement of Advice prior to being asked to sign it, was incorrect at best and misleading at worst.
- 8.66 Mr Cassimatis also argued (page 48 of the second transcript) that Mr W’s view of all the evidence was flawed and that by implication the member’s evidence should be preferred by the Panel.
- 8.67 On this point, there were some occasions through the hearing when Mr W made assertions which the Panel is satisfied could not be substantiated. For example, that he had not been given the opportunity to read documentation prior to signing and that he and Mrs W had not signed the margin loan or equity loan application forms.
- 8.68 However, on matters related to the meeting with Mr Cassimatis and the W’s expectations and deliberations as a result, Mr W’s evidence was often confirmed by Mrs W. The Panel is entitled to determine the probative weight it gives to the evidence of each witness that appeared before it. The Panel found Mrs W to be an honest and reliable witness. Given that assessment, in those circumstances, where there was inconsistency between the evidence of the member and Mrs W, the Panel has preferred the evidence of Mrs W.

- 8.69 In any event, the Panel does not believe that the evidence it heard from Mr W related to the loan documentation or the signing of the Statement of Advice was relevant to the charges heard and it has not been taken into account.

## **9. Additional Evidence Before the Panel: Charge No. 3**

- 9.1 The letter dated 8 October 2008 and sent by Mr Cassimatis to numerous Storm clients, was the subject of the breach allegations in charge number 3 and was appended to Annexure A of the FPA's documents as Exhibit 15.

- 9.2 The FPA asserted that the letter was sent to somewhere between 3,000 to 4,000 clients in total (page 52 of the transcript of 22 March 2010).

- 9.3 There was some contention between the parties as to whether or not the fact that the letter had been sent to numerous clients, in addition to the Ws, formed part of the breach allegations originally raised in the FPA's Notice of Breach to Mr Cassimatis. The Panel accepted that the allegations in the Breach Notice, for the purposes of both Breach No. 3 and Breach No. 7, raised the issue of the number of clients to whom the letter had been sent. This allowed the Panel to consider the number of clients to whom the letter had been sent in its deliberations.

- 9.4 The FPA alleged that the letter of 8 October 2008 was unprofessional and that both the content and delivery breached Rule 110, in that whilst it purported to provide personal advice to each client individually, the letter:

- (a) was generic in nature and sent to numerous Storm clients simultaneously;
- (b) did not deal with any client's individual circumstances despite recommendations made within the letter related to the sale of investments held; and
- (c) was not in a format that represented a Statement of Additional Advice, even though it provided personal financial advice pursuant to the Act.

- 9.5 The FPA argued (page 54 of the transcript of 22 March 2010) that the letter contained a number of phrases that were inappropriate and created confusion for the client as to which of the recommended actions they should take, including:

- (a) *"Accordingly, we now find that it may be necessary to recommend that you switch up to 100% of your portfolio to cash"*. The FPA alleged the use of the word "may" created confusion as to whether the recommendation was appropriate for the client.
- (b) *"Action 2: For those who prepaid interest ..."* The FPA alleged that this phrase demonstrated that the member was uncertain as to whether or not the particular client who received the letter had prepaid interest in the strategy. Despite this, the letter later provided advice to switch the prepaid interest to a variable option, without considering the extent of the breaking costs for the individual client.
- (c) Under the heading Action 1 (paragraph 5), the member recommended a switch out of equities (share and share indexes) to cash and to increase the client buffer account as follows:  
  
*"We propose that you increase your buffer by switching part of your portfolio up to 100%, out of equities and into cash."*
- (d) The member further stated that *"it is strongly advised that these funds are not to be used to pay down debt"*. The FPA contended that the most appropriate advice would

have been to recommend the client pay down margin lending debt and so reduce high interest payments, rather than increase the buffer account. The FPA asserted that if the adviser was of the opinion that the market would improve, then the client could have accessed equity and debt from the margin lending account to fund the purchase of share and share indexes.

- (e) A proposal that the clients sign a document that gave Storm the authority to implement any recommendation outlined in the letter that it considered was appropriate for the client, despite the letter outlining a number of different options, depending on whether the client had prepaid interest or had additional security.
- 9.6 The FPA contended that as the letter made no mention of the client's critical financial circumstances, such as the loan to value ratio on their margin loan, their ability to repay current losses and their risk appetite to continue in the stock market, Mr Cassimatis had not demonstrated that he was providing advice that considered the client's personal circumstances as required by Rule 110.
  - 9.7 Furthermore, the FPA submitted the letter was in breach of Rule 110 in that it failed to discuss any costs to be borne by the client as a result of Storm's redemption strategy (such as breaking costs, brokerage commissions) or to discuss any fees to be received by Storm in converting the redemption proceeds to the client buffer account.
  - 9.8 It was Mr Cassimatis' contention that Storm lost money from recommending the conversion to cash as this meant it would forgo ongoing trails from the Storm Index Funds of 0.22% trail plus royalty. That is: the letter recommended a transfer of funds from an account that allowed Storm to receive trail commission and royalties, into an account that was receiving none (page 57 of the transcript of 22 March 2010).
  - 9.9 Mr Cassimatis maintained that given the redemptions came out of accounts that received commission and went into accounts that received no commission, that no disclosure of fees and commission was required in the letter.
  - 9.10 The FPA admitted on page 59 of the transcript that the Breach Notice might be deficient in that it did not disclose that the failure to disclose fees and commissions formed part of the particulars attached to Breach No. 3 and therefore part of the allegations pertaining to Breach No.7. The Panel has therefore formed the view that the failure to disclose fees does not form part of the charge against the member.
  - 9.11 In addition, Mr Cassimatis argued that the Ws were never in danger of a margin call and that Mr Dowie rang the Ws prior to them reading the letter and advised them to disregard its contents as it did not apply to them. The Ws therefore did not act on the recommendations made so did not rely on it and therefore by inference it could not be in breach of Rule 110.
  - 9.12 In defending his actions in both drafting and forwarding the letter of 8 October 2008 to numerous clients including the Ws, Mr Cassimatis maintained in his evidence before the Panel that it was sent as a result of circumstances that were quite unique in the financial market (page 61 of the transcript). He stated that the letter was drafted when he began to see difficulties in the data that they were receiving from suppliers, including the Commonwealth Bank of Australia. It was his contention that the speed of events prohibited a situation where an investigation of each and every client's personal circumstances could be undertaken, prior to seeking permission to take action. He maintained, as did Greenfields in its written submissions, that the letter was a mechanism for alerting people of significant events in the market whilst analysis was being undertaken of their individual circumstances. It was then followed up by further advice from their adviser to ensure that appropriate action was taken.

- 9.13 In his response to the Breach Notice of 23 September 2009, Mr Cassimatis took a different view. In that response on page 4, Mr Cassimatis asserted that the letter “certainly addressed the circumstances of Mr W”, that it “clearly outlined the strategy reasons for the advice”, that there was “clear advice on which investments should have been switched and in what order” and that:

*“if there were technical errors such as the heading on the document I believe the situation warranted that the essence of the advice should go out notwithstanding this technical error”.*

- 9.14 When asked how it was that the Ws were sent a copy of a letter that was not relevant to their circumstances, Mr Cassimatis responded that the alternative would have been to do nothing and that, in his opinion, would have been unprofessional.

- 9.15 The letter on page 3 advised the clients to:

*“Sign an acknowledgment at the end of the duplicate copy and the attached documentation to accept our recommendation. This will give us the authority to implement the recommendation for you. The duplicate letter and document should then be returned to this office for processing in the reply paid envelope.”*

- 9.16 The advice therefore was that if clients had prepaid interest on their loans, they were to sign off on action number 2 and if they hadn’t prepaid interest then the recommendation was that they sign off on action number 1.

- 9.17 The Panel asked the member how clients, including the Ws, were expected to know they had the opportunity to consult their adviser before acting on the contents of the letter, when the letter did not advise them of this right but asked them sign an authority allowing Storm to implement the recommendations made within it. Mr Cassimatis replied that for a very large percentage of clients, the advice contained in the letter was correct and the exceptions were taken care of by the advisers, individually, who ensured that clients did not act on the letters.

- 9.18 The Ws in their evidence confirmed that they were overseas at the time the letter was sent out by Storm, that they received information from Ash Dowie that the letter did not apply to them before they had read it and accordingly they did not act on it.

## **10. Additional Evidence Before the Panel: Charges No. 5 and 6**

- 10.1 In relation to the charges concerning the non-assistance of Mr Cassimatis with an FPA investigation, the FPA submitted that the facts on which it relied were outlined in Appendix A. The FPA relied on a letter of 6 November 2008 addressed to Storm Financial and a letter of the same date addressed to Mr Cassimatis personally. Those letters were different in content and contained different headings. The letter of 6 November 2008 was exhibited to the FPA Breach Notice as Exhibit 16.

- 10.2 The FPA alleged that on 6 November 2008, the FPA Investigations Manager, Ivan Middleton wrote to Mr Cassimatis, requesting additional information about the circumstances of the client letter of 8 October 2008 within 21 days.

- 10.3 It was common ground between the parties that on 18 November 2008, Julie Cassimatis sent an email to Ivan Middleton enquiring as to the status of the letter to Mr Cassimatis, given Storm had received another letter from Mr John Bacon of the FPA, which seemed, in her opinion, to ask similar questions.

- 10.4 Shortly afterwards, Ivan Middleton contacted Mrs Cassimatis' secretary, Jodie Geissman, to confirm that it was suitable for both Mr Cassimatis and Storm Financial Group to provide the one response to both FPA letters.
- 10.5 The FPA alleged that on 2 December 2008, Ivan Middleton telephoned Mrs Cassimatis to enquire as to the progress of the response. It is alleged that Mrs Cassimatis stated that she would require an extension of time in order to do so, which was granted until 15 December 2008.
- 10.6 The FPA alleges that no response was ever received from Mr Cassimatis or Storm on his behalf, to the letter of 6 November 2008.
- 10.7 In his defence Mr Cassimatis outlined that around this time there had been a number of emails between Storm and Mr John Bacon and that he had passed his letter from Mr Middleton on to staff to handle. He believed that Storm then asked the FPA if both letters could be addressed as one. That was agreed to so "I simply assumed that Storm would respond. I asked Compliance to answer the questions and draft a response which they did."
- 10.8 Mr Cassimatis maintained that most of the questions in the questionnaire sent by Mr Bacon with his letter and the letter to Mr Cassimatis from Ivan Middleton were somewhat different but in essence identical, in that they asked questions about the suitability of advice given to clients in the 8 October 2008 letter, how many letters had been sent out to clients, how many clients had received letters, the criteria for receipt of the letters etc. He believed that those questions were answered in the response provided by Storm to the FPA, to the best of Storm's ability at the time.
- 10.9 Mr Cassimatis asserted that given the similar nature of the questions being asked by Mr Bacon and Mr Middleton, that he and others assumed that all questions had been answered in the response provided to the FPA by Storm and that therefore he had co-operated with the FPA's investigation. He maintained that responses to these letters had to be seen in a context of the business pressures he was facing at the time and that:

*"I simply assumed it was all done".*

- 10.10 Mr Cassimatis' submitted that the FPA did not contact him for another six months and had not followed up on his alleged failure to respond, leading him to believe that there was nothing more that he had to do.
- 10.11 Mrs Cassimatis was asked by the Panel about her recollections of the receipt of the letters and her communications with the FPA and its staff concerning how they would be responded to.
- 10.12 Mrs Cassimatis gave evidence that both letters had been received and at some point in time they had sought an extension of time to respond because of the circumstances in which they found themselves at the time. It was her opinion that the questions John Bacon asked in his letter were extensive and overlapped with the questions that Ivan Middleton had asked of Mr Cassimatis earlier. Given they were having great difficulty getting the information together, FPA was asked whether or not one response would suffice to both letters. Mrs Cassimatis gave evidence that she questioned the FPA about the fact that different letters had been received from different departments causing confusion and that she:

*"Didn't get an answer to clarify that so, you know, my assumption was, you know, it's all ok to - this is from recollection anyway ..."*

- 10.13 Mrs Cassimatis maintained that there were only 12 working days between the date on which the extension of time for response to the FPA letters expired and the actual closing down of

Storm. Her evidence was that during this time, the Cassimatis' spend numerous days in Brisbane in Court trying to stop people closing the business down. Her evidence was that Storm collapsed on 9 January 2009 and that by then she believed they had responded to the FPA requests for information. She maintained that no-one at the FPA had followed up on the correspondence or suggested that additional information was required until the Breach Notice was issued. Her evidence was that had the FPA followed up and asked for further information then they would have provided additional responses.

- 10.14 It was Mrs Cassimatis' evidence that they had spent a great deal of time and effort answering each of the questions asked by John Bacon in his letter and that:

*"We were trying very hard to be co-operative in amongst everything else that was going on. But the fact that we did get that letter to FPA is evidence, I think, that we weren't being non-co-operative."*

- 10.15 In its submissions, Greenfields argued that there had been no refusal by Mr Cassimatis to cooperate with an FPA investigation and that FPA should have followed up by phone or email if it believed the response was deficient.
- 10.16 Further, Greenfields argued that it was inappropriate of the FPA to charge the member with a breach of Clause 3.3f of the Constitution and Rule 127, as it amounted to making the same allegation twice for what was ostensibly the same conduct.
- 10.17 Mr Middleton conceded on page 52 of the second transcript that he understood that only one response was to be completed by Storm to the two separate requests it had received from the FPA. He insisted however that there was a difference between his understanding of the responses to be received to the two separate letters and that portrayed by Mr and Mrs Cassimatis. He argued that Mr Bacon was concerned with the margin lending aspects of advice to the client data base and that he was investigating the circumstances surrounding the client letter of 8 October 2008.
- 10.18 Mr Middleton conceded that he had not followed up Mr Cassimatis or Storm to seek any additional responses to the two letters and that:

*"Essentially, after the administration in early 2009, the urgency for a response to the two letters had obviously lessened."*

- 10.19 Mr Bacon gave evidence that from the FPA's point of view there were two or possibly three lines of inquiry related to Storm at the time. Mr Middleton's letter of 6 November 2008 was addressed to both Storm and Mr Cassimatis. His own enquiry related more to the FPA's compliance review powers under its Constitution and stemmed from the FPA's concern to determine the extent of the potential fallout from the Storm collapse. He gave evidence that that his enquiry ultimately resulted in a Breach Notice issued to the principal member on or about 23 December 2008, which was abandoned because Storm ultimately went into administration and therefore its membership under the FPA Constitution was automatically terminated.

## **11. Additional Evidence Before the Panel: Charge No. 7**

- 11.1 The FPA submitted in its evidence that Mr Cassimatis had engaged in conduct that brought discredit to the Financial Planning Profession. It relied on the evidence it had presented on the other five charges before the Panel in support of this submission.
- 11.2 In particular, the FPA asserted that prior to the provision of the advice by Mr Cassimatis, the complainants held assets of approximately \$2.7million (or \$1.7million without the family

home) to service their retirement needs. Within a seven month period they had suffered significant losses as a result of the advice given by Mr Cassimatis and significantly increased their debts. These losses have already been outlined in paragraph 7.28 of this Determination.

- 11.3 As Mrs W maintained in her evidence, at the time they “went to a professional” they had approximately \$2.5 million dollars in assets and \$320,520 in liabilities.

*“We have lost all our super, we have a debt of 1.2 million dollars, we will lose our investments in real estate, we have health issues as a result of all of this and how could a financial plan put someone in a position such as ours, that could destroy us in six months. And we were only with Storm for six months.”*

- 11.4 The Panel also notes that the Ws paid \$196,086 in upfront fees to Storm for the privilege of that advice.
- 11.5 The FPA further alleged that the letter of 8 October 2008 demonstrated a breach of the Code of Ethics Principle number 6 in that it was unprofessional to request of any client that they give authority to undertake particular actions on their behalf, whilst providing advice that was unsuitable and that may not be consistent with their personal circumstances.
- 11.6 The FPA contended that the member had brought the profession into disrepute by sending such a letter to so many clients.
- 11.7 Mr Cassimatis also relied on the submissions he had made during the course of the proceedings in defence of his claim that he had not breached this particular rule.

## **12. Relevant Legal Issues and Rules**

- 12.1 The Panel has considered a number of legal issues in its deliberations.
- 12.2 The first issue concerns whether or not the member was in an advisory relationship with the Ws and engaged in conduct in the provision of professional and business activities, which breached the FPA Code of Ethics and Rules of Professional Conduct.
- 12.3 In our opinion the FPA Code of Ethics and Rules of Professional Conduct are not restricted in their operation by reference to whether or not a member is providing personal financial advice on a financial product, as defined by the Act.
- 12.4 The Panel is of the view that financial planning and the professional and business activities associated with it is far wider in its application than a mere recommendation made on a financial product. For example, it may include advice and recommendations on estate and business planning, lending, debt management and reduction, cash flow and income strategies and numerous other strategies that fall outside the specific definition of a financial product recommendation in the Act.
- 12.5 In determining whether or not the member was in an advisory relationship with the Ws, or whether or not the member has engaged in unprofessional conduct, a wider application is therefore both necessary and warranted. We believe this view is supported by the wording of the Rules themselves.
- 12.6 In this regard, the Panel is also cognisant of the preamble to Regulation 1 of 1997 and its recognition of the applicability of the FPA’s professional standards to its membership.
- 12.7 In that preamble, the FPA has stated that the reliance of the public and the business community on sound financial planning and advice imposes on financial planning



professionals an obligation to maintain high standards of technical competence, fair dealing and integrity.

- 12.8 In this way, these professional standards reflect the commitment of the FPA and its members to the public, to meet a high standard of professional conduct in all aspects of their financial planning businesses, in the provision of financial planning services, in their professional activities and in their relationship with other stakeholders such as clients, the media, peers, their employer and colleagues. This is a corner stone of a profession. That it will abide by standards far higher than minimum legal standards in the services it provides to the community.
- 12.9 The Panel further notes that Regulation 1 of 1997 predates the Financial Services Reform Act by six years. Accordingly, there can be no clear expectation that the Act is the primary and only focus when interpreting the application of the Rules to a member's conduct, although whether a member has failed to meet even the minimum legal standard under the Act is a matter the Panel may take into account when determining whether a breach of the FPA Rules of Professional Conduct occurred.
- 12.10 Accordingly, there are numerous reasons why the FPA professional regulatory framework should not be confined to an examination of the strict legal obligations owed by a member in the provision of financial product advice to clients under the Act.
- 12.11 Given this, the Panel can see no justification to impose a limited interpretation as to the types of activities or conduct that are captured by the operation of the Rules or that would limit the operation of the Rules to merely financial product advice, as defined in the Act.
- 12.12 The Panel believes that this conclusion is in line with the approach taken by Finkelstein J. in *Deakin Financial Services v Financial Industry Complaint Service Limited* (2006) FCA, where the interpretation of the rules of a private financial industry dispute resolving body was at issue. In that case the Federal Court gave the FICS rules their ordinary (and wider) meaning than those given to similar terms in the Act. CRC Panels have adopted this approach in previous determinations and this Panel sees no reason to depart from this reasoning in this case.
- 12.13 In addition, the Panel is of the opinion that it is not required to find that Mr Cassimatis gave advice on a financial product as defined in that Act, for the Panel to determine that an advisory relationship existed between the member and the Ws. Advice in the context of the FPA Regulations should be given its ordinary meaning. For this purpose, the Panel used the following definition for advice, namely:  
  
*Guidance or recommendations as to an appropriate course of action, generally given by someone regarded as knowledgeable or authoritative (Collins Compact Dictionary).*
- 12.14 Having said this, as previously mentioned evidence which suggests that a breach of the Act has also occurred should and has been taken into account by the Panel in reaching its view as to whether the member's conduct has met the requisite standard required by the FPA Code of Ethics and Rules of Professional Conduct.
- 12.15 Mr Cassimatis argued strenuously throughout his evidence that he was not the adviser to the Ws, was not in an advisory relationship with the Ws and that his role in the meeting of 28 April 2008 was to confined to providing the Ws with general information concerning cash flow models and the Storm Investment strategy.

- 12.16 This raises the question of how and when in the general law and pursuant to the FPA Code of Ethics and Rules of Professional Conduct in particular, an advisory relationship is created and/or an exception or limitation to that relationship is created.
- 12.17 The Panel has formed the view from the evidence before it that a professional relationship existed between the Ws and Mr Cassimatis.
- 12.18 The Panel has drawn this conclusion on the evidence before it. Further, the Panel finds that professional responsibilities, obligations and accountabilities flowed from this relationship.
- 12.19 The Panel is also satisfied that Mr Cassimatis knew, or a reasonably prudent adviser in his position would have known, that his role at the meeting on 29 April 2008 went far beyond education and information and was designed to, and had the effect of, influencing the Ws to invest in the Storm Indexed Fund strategy. As indicated in paragraphs 9.23 to 9.25, the evidence given by the Ws was that but for the input of Mr Cassimatis at the meeting on 29 April 2008, they probably would not have proceeded with the investment.
- 12.20 The Panel accepts the evidence of the Ws that they believed they were receiving advice in the meeting from Mr Cassimatis that was individually tailored to their circumstances. Their evidence that they believed that Mr Cassimatis was the leading and most senior adviser within Storm as its CEO, that they relied heavily on his advice that the Storm model would be sustainable to their circumstances and would allow them to draw well above their expected income levels per annum should they proceed with the model, is also accepted.
- 12.21 That conclusion is supported by the letter Mr Cassimatis sent to between 3000 to 4000 clients, including the Ws, on or around 8 October 2008. The Panel finds he was the lead adviser within the Storm Group and represented himself in that way to Storm clients.
- 12.22 The Panel has concluded on the evidence that Mr Cassimatis was an integral part of the Storm advisory process as its CEO and most senior adviser and was brought into the meeting to ensure that the Ws were influenced to invest in the Storm Index Funds and became one of the one in four clients to adopt the model as their own.
- 12.23 The Panel accepts the view put to it that Mr Cassimatis' role was to "get them over the line". The Panel expressly rejects Mr Cassimatis evidence that it was unreasonable of the Ws to conclude that he was doing no more than giving them generic factual advice on the generation of cash flow models.
- 12.24 The Panel believes it was disingenuous of the member to maintain he performed a perfunctory role only. In our opinion, Mr Cassimatis' assertion that despite his experience, seniority and status within Storm and Townsville at the time, his role in the client meeting was to merely perform a task that could have been performed by a para-planner or allied professional, is not supported by the evidence.
- 12.25 Mr Cassimatis made attempts during the proceedings to assert that he had given the Ws warnings throughout the meeting, both in writing and orally, that any advice given by him was general advice only. The Panel is satisfied on the balance of the evidence before it that the power point presentation contained a general advice disclaimer warning on a slide. In relation to whether oral warnings were also given, Mr Cassimatis' submissions to this effect were inconsistent with his failure to question the Ws about the oral warnings he gave during the proceedings or offer these warnings as evidence of the steps he took to manage the Ws' expectations, when expressly asked by the Panel to do so.
- 12.26 The Panel also points to the file notes of the meeting taken by Ash Dowie in this regard. Those notes do not refer to any warnings given and instead highlight the personalisation of

matters discussed during the meeting to the Ws circumstances and the advice given by Mr Cassimatis.

- 12.27 The Panel finds that even if oral general advice disclaimers were made by Mr Cassimatis during the meeting, these disclaimers needed to be clear to the Ws in terms they could understand, as required by ASIC Regulatory Guide 175.39. The evidence is that the Ws believed they were receiving advice specific to their circumstances. Their belief is reasonable having regard to Mr Cassimatis' conduct during the meeting and the personalisation of the issues discussed with the Ws that went to their specific circumstances. The Panel is firmly of the view that in those circumstances a financial planner cannot hide behind a general advice disclaimer, even if expressed to the client, in circumstances where personal advice was in fact given.
- 12.28 It may have been effective for Mr Cassimatis to limit the relationship within that meeting by his conduct, words or deed. However, when Mr Cassimatis was pressed on whether or not, given his experience as a financial adviser, he had taken steps to limit or manage the clients' expectations and their reliance on any advice given in the meeting, he made no mention of the warnings but rather maintained that he was not the adviser and it was unreasonable for the Ws to have concluded that he had an advisory role.
- 12.29 For these reasons the Panel has concluded that even if an oral general advice warning was given, it was insufficient in the circumstances to limit the advisory relationship that existed between Cassimatis and the Ws and the nature of the advice provided.
- 12.30 The Panel is of the view that the FPA Rules of Professional Conduct do not require that only one financial planner gives the advice to a client, for an advisory relationship to exist. Rather, the Panel accepts that most financial planning advice to a client is usually undertaken by a team of advisers and allied professionals within a financial planning business, such as was the case at Storm.
- 12.31 Rule 110 states that in preparing oral or written recommendations to clients, a member shall develop a suitable financial strategy or plan for the client based on the relevant information collected and analysis given.
- 12.32 Whilst Rule 110 speaks of an adviser making a recommendation, either oral or in writing, the FPA Code of Ethics and Rules of Professional Conduct do not clarify what a recommendation is and when it is made.
- 12.33 The Panel has applied Justice Finkelstein's approach in *Deakin Financial Services v Financial Industry Complaint Service Limited* (2006) FCA in this regard and given the word "recommendation" its ordinary meaning as applied in the Oxford Dictionary. The dictionary defines the verb "to recommend" as to:

*"Put forward (advice) with approval as being suitable for a purpose or role. Advice as a course of action."*
- 12.34 The derived noun "recommendation" would have a corresponding meaning. The Panel does not accept that the FPA Code of Ethics and Rules of Professional Conduct is restricted to the highly technical meaning given to the word "recommendation" in section 766B of the Corporations Act. This is particularly so given these professional standards were adopted by the FPA in 1997, some six years before the Financial Services Reform amendments were introduced.
- 12.35 Therefore, the Panel concludes that a recommendation is made for the purposes of Rule 110 of the FPA Code of Ethics and Rules of Professional Conduct, when a financial adviser puts

forward advice as being suitable for the client's financial planning purposes. Advice has previously been defined in this determination at paragraph 13.13.

- 12.36 The FPA's Ethical Principle 6 on Professionalism states that members shall ensure their conduct does not bring discredit to the financial planning profession.
- 12.37 The Panel attributes its ordinary meaning to the word "*discredit*", as found in the Macquarie Dictionary: meaning to "*injure a reputation or esteem or to destroy confidence in*". In our opinion, there is overlap in this definition with the word *disrepute*.
- 12.38 In prior determinations, the CRC has concluded that for an FPA's member's conduct to discredit the profession of financial planning, a member's conduct would require some moral deficiency or to be grossly inappropriate. This Panel adopted this meaning for the purposes of these proceedings.
- 12.39 The Panel's decision on whether or not the member has breached this Principle will be discussed in the next section of these reasons for decision.

### **13. Outcomes and Reasons**

- 13.1 The Panel has reviewed the evidence and submissions put before it by all parties. The Panel's conclusions on the evidence are now outlined.
- 13.2 In preparing its findings in this matter, the Panel has been cognisant of the reliance that the public and the business community place on sound financial planning practice, the reputation of the financial planning profession and the obligations that members of the FPA owe to the community and to other members of the profession to protect the public from conduct that does not meet the requisite professional standard.

#### **Did an advisory relationship exist?**

- 13.3 Given that one of the main objectives of the FPA's Rules of Professional Conduct is to protect the public, Mr and Mrs W are entitled to that protection, unless it can be clearly shown that Mr Cassimatis was not in an advisory relationship with them and was not engaged in professional activities at the time of his meeting with the Ws on 29 April 2008 or when he signed and sent the letter of 8 October 2008.
- 13.4 It is the Panel's opinion that an advisory relationship existed between Mr Cassimatis and the Ws for reasons already outlined in this decision. The Panel is not satisfied that Mr Cassimatis made a clear and unqualified written or oral statement to the Ws that his role in the meeting was not an advisory one and has concluded that he took no effective steps to exclude himself from an advisory relationship with the Ws. The Panel has further concluded that Mr Cassimatis was acting in an advisory capacity when he made recommendations to the Ws about their investments in the letter of 8 October 2008.
- 13.5 The Panel further finds that the conduct which formed the basis of the charges brought against Mr Cassimatis, was conduct that was associated with the professional and business activities of a member and therefore is of a type contemplated by the FPA Code of Ethics and Rules of Professional Conduct.

#### **Charge No. 1**

- 13.6 In relation to charge number 1 and the alleged breach of Rule 101 of the Rules of Professional Conduct, the Panel must decide whether or not in the conduct of professional and business activities, Mr Cassimatis engaged in any act or omission of a misleading, deceptive, dishonest

or fraudulent nature. It is for the FPA to satisfy the Panel on the balance of probabilities that the charge is made out. There is no allegation by the FPA that the representations made by Mr Cassimatis concerning the share market rates of return were dishonest or fraudulent in nature.

- 13.7 The Panel has already concluded that Mr Cassimatis was engaged in professional activities in the provision of advice to the Ws during the meeting on 29 April 2008. The issue now is whether he engaged in misleading or deceptive conduct envisaged by Rule 101.
- 13.8 The Panel has relied on previous determinations of the CRC and Australian case law on misleading and deceptive conduct in formulating its view of the test it must apply to this matter. Incorrect advice or opinions given by financial advisers have previously been held to be misleading or deceptive, particularly in circumstances where the person did not exercise adequate care and skill in making the representation.
- 13.9 Whether or not the conduct was misleading or deceptive is a question of fact for the Panel to determine in the context of the evidence of the conduct and the surrounding facts and circumstances.
- 13.10 In contrast with the prohibitions on such conduct in the Trade Practices Act and in the Australian Securities and Investments Act, the Panel, following previous CRC decisions, has formed the view that Rule 101 does not prohibit conduct that is “likely to mislead or deceive”. However, the prohibition on misleading and deceptive conduct has broad application.
- 13.11 Conduct or representations in this context will only be misleading or deceptive if they induce error. It follows therefore that conduct which has caused confusion or uncertainty in the minds of the Ws will not, on its own, be enough to amount to misleading conduct under Rule 101. Yet it is appropriate to review the Ws’ response to the conduct. This requires the Panel to consider what each party knew about the other. The overall impression created by the representation or conduct is key.
- 13.12 The Panel has also formed the view that a breach of Rule 101 is not confined to conduct which is intentional, but that a member acting honestly may nonetheless engage in misleading conduct.
- 13.13 When considering if conduct is misleading and deceptive, the Panel needs to consider the evidence objectively and consider what the average person would have done in response to the representations made. Further, disclaimers will not negate a misleading or deceptive message.
- 13.14 It is possible for factually true statements to be misleading if the associated circumstances contribute to error or misconception. Further, a misrepresentation made in one part of a document, or the oral and documentary record of a transaction as a whole, may still mislead, even if corrected in another part, but where it is unlikely that the average client would look or make the connection back to the original misstatement. These are all matters that are relevant to the circumstances of the matter before this Panel.
- 13.15 Predictions as to the rate of return in the financial markets that it is alleged Mr Cassimatis made are fertile ground for misleading conduct, unless reasonably based and properly explained. This is very relevant to this complaint.
- 13.16 The Panel finds on the evidence before it that in the course of the meeting on 29 April 2008, the member made a representation to the effect that:

*“The average returns for the Australian share market for the past five years have been 13%. The returns have been volatile, but 13% is the average. This historical data is all we have to predict future returns.”(see Annexure A at page 16, first transcript of 22 March 2010 at paragraphs 7.35, 18.10 and 26.17.)*

- 13.17 When asked by the Panel to explain his understanding of the Mr Cassimatis’ representations in relation to the market return, Mr W gave evidence that on two occasions, Mr Cassimatis asked him what he believed the share market was doing or would do at that time, in terms of return on investment. He said about 10%. Mr W’s evidence, which is accepted on this point, was that Mr Cassimatis then said no, its doing 13% and that’s average:

*“So when Mr Cassimatis said it was guaranteed at 13% over the last five years I thought, well, its more than the 10% that the market would need to return in order to pay the interest on a margin loan which was at the time around 8-9% as well as obviously make some sort of profit on the investment.” (see paragraphs 15 on page 26 and paragraph 5 on page 67, first transcript 22 March 2010)*

- 13.18 The representations made to the Ws about consistency of returns over the previous five year period were not only conveyed in the meeting of 29 April 2008, but also in the financial modelling and graphs generated to illustrate the likely result of the proposed investment program. The representations have to be seen in this context. That is: that the representations were made in circumstances where they formed part of the advice about the likely outcomes of the proposed Storm Index Fund strategy. The rates were misleading in that they not only represented historical returns in the share market, but also stability in the return projections also provided in relation to the Index Fund strategy.
- 13.19 The Panel is satisfied that the representation made by Mr Cassimatis when viewed in the context of the whole of the circumstances in which the representation was made. As we have already explained there is no requirement that Mr Cassimatis intended the statement to mislead. It is sufficient that that the Ws relied on the statements in making their investment decisions which induced error.
- 13.20 The Panel has formed the view therefore that the representations about the rates of return cannot be taken in isolation from the commensurate discussions about the proposed investment strategy. The Panel finds that the representations were made in an attempt to present the proposed strategy in the best possible light so as to influence the Ws to invest in the Storm Index Funds. Further, the representations served to reiterate the safety of the model, the lack of risk associated with it and the relative ease with which the Ws could earn suitable retirement income from it, well above the income that could be earned from an alternative strategy, such as the allocated pension model that the Ws were considering. In this way the representation made led the Ws to a false sense of security about the benefits of the strategy and belief that they could expect returns commensurate with the 13% historical returns on average should they adopt the recommendations.
- 13.21 The assumptions made about the returns and the time periods associated with the representations made also fed into the Ws’ understanding of the affordability of the strategy. When coupled with other statements made during the meeting, it also led to the Ws drawing certain conclusions about the nature of the risks associated with the strategy and the safety and appropriateness of the strategy to their circumstances.
- 13.22 The fact that returns over longer periods of time were disclosed in the Statement of Advice does not detract, in the Panel’s view, from the misleading nature of the representation made in the meeting. Indeed, to provide predicted returns for the share market for a period of up to 55 years, as disclosed in the Statement of Advice, seems irrelevant to the Ws circumstances and was not information, which in our view, would assist them in their decision making.

- 13.23 The Panel notes that Greenfields relied on material from ASIC, FPA and IFSA in argument that Mr Cassimatis' representations were made on reasonable grounds. The documents it provided to the Panel were all downloaded on 2 February 2010, well after Mr Cassimatis made the representations to the Ws in 2008. The Panel was provided with no information as to what Mr Cassimatis actually based his assessment on at the time he made the representations, nor why he used a five year term when the likely investment window for the Ws was 15 years. In any event, factually true material can still be misleading depending on the context in which it was made.
- 13.24 In terms of the tables provided on annualised returns, it is the Panel's view that these tables do not add weight to the evidence either way. The tables demonstrate that the 13% return, being 8% income and 5% growth, is on the high side. Based on the modelling contained within the Statement of Advice, the return rate assumptions were 8.5% capital growth and 4% dividends, equalling a 12.5% total return, certainly in our view at the very upper end of the scale. The projections estimate a 4% dividend on \$2,300,000 of the portfolio, which equals \$92,000 per annum. The dividend figure increases each year as the 8.5% annual capital growth is added to the original amount of \$2,300,000. From July 2011 the cash reserves and cash flow are also supported by the accumulated capital growth of 8.5% per annum. The Panel finds that these projections are in keeping with the representation made by Mr Cassimatis during the meeting. If the accumulated capital growth of 8.50% per annum is removed from the modelling a very different picture of returns and sustainability would emerge.
- 13.25 The Panel finds on the balance of probabilities that the Ws were influenced by the representation made by Mr Cassimatis during the course of the meeting on 29 April 2008 and accepted his representation. They believed it meant that the historical rate of return represented to them would also be the indicative market rates of return should they invest in the Storm Indexed Funds. Further the representations caused the Ws to infer these returns were sustainable and would lead to a greater financial benefit to them than if they chose the allocated pension strategy that they were also considering. The representations thus induced errors which led to the Ws deciding to invest in the Storm Indexed Funds. The Panel has concluded that in the whole of the circumstances a reasonable person in the Ws position would have reached the same conclusions.
- 13.26 The Panel is satisfied therefore that on the balance of probabilities the FPA has satisfied the onus of proof in relation to this charge and the charge is made out.

## **Charge No. 2**

- 13.27 It is the opinion of this Panel that Mr Cassimatis made oral recommendations to the Ws at the meeting on 29 April 2008, as part of a financial planning process in which the Ws were engaged. The member did so as an integral and key part of a Storm advisory team that provided services to the Ws.
- 13.28 Therefore Mr Cassimatis had a professional obligation to ensure that he complied with the Rule 110 of the FPA Code of Ethics and Rules of Professional conduct in the provision of this advice to the Ws and to have prepared those recommendations based on a suitable financial strategy or plan formulated on the basis of relevant information collected and analysed.
- 13.29 It is the Panel's view that Mr Cassimatis and Ws were engaged in an advisory process at the meeting on 28 April 2008 and the personalisation of the data during this meeting and the role Mr Cassimatis played in influencing the Ws to engage in the Storm investment strategy, were material to the Ws' decision to proceed with the investments.
- 13.30 The Panel does not accept the arguments made by Mr Cassimatis that his role within the meeting was merely to provide information, assist in educating the Ws on the Storm model

and/or to undertake cash flow analysis. Further, as previously discussed, the Panel is not satisfied that he adequately disclaimed that he was providing advice within the meeting.

- 13.31 The Panel has concluded that Mr Cassimatis' role within the meeting was broader than claimed by him for a number of reasons. First, the length of the meeting held with the Ws and the fact they only they attended supports the view that it was not simply an information session and sets it apart from other Storm information sessions they had attended previously. Secondly, the file note created by Ash Dowie on 29 April 2008 specifically identified that the Ws' personal circumstances were discussed during the meeting, in addition to their financial details, the risks of the Storm model, Storm's fees and their capacity to repay the loans associated with the strategy.
- 13.32 This must be seen in the context of the reassurances given during the meeting that there was zero default risk, that Storm invested in a much diversified asset base and that an income level of \$110,000 per annum was sustainable for the Ws if the model was adopted. Thirdly, this file note corresponds to the matters that Mr W gave evidence he had wanted to discuss at the meeting, as outlined in his file note created before the meeting. This included matters related to the personal circumstances of the Ws and the suitability of the Storm strategy to them. Fourthly, Mrs W gave evidence, which the Panel accepts and which has been previously outlined in this determination, about the purpose of the meeting as she saw it, why she and Mr W wanted to see Mr Cassimatis, comments made during the meeting by Mr Cassimatis about the Ws personal circumstances and the decisions the Ws made following the meeting about engaging in the Storm investment strategy. All of this evidence supports the conclusion reached by the Panel.
- 13.33 The Panel is also of the view that Mr Cassimatis' role in this meeting would have been a role that he would have played on many occasions and with many Storm clients. This view was formed as a result of Mr Cassimatis' own evidence (at paragraphs 25 on page 28 and paragraph 30 on page 35 of the first transcript dated 22 March 2010) where he described his role in the meeting as something he had done many times and that statements made in the meeting were "and as I have always done it, any meeting of that nature is simply to go through the generalities of the Storm process, the use of debt, etc. and if we can get hold of some of the peoples details then we plug it in and we manipulate the data" (see paragraph 30 on page 35).
- 13.34 Indeed, Mr Cassimatis gave evidence that he counselled Storm advisers that it took time to ensure that clients were fully informed of the type of investment model and the approach Storm took. Taken with the evidence that he signed and sent the letter of 8 October 2008 to between 3000 to 4000 Storm clients, the Panel is satisfied that a more appropriate reflection of his role within Storm was as the most senior financial adviser within the Group.
- 13.35 Greenfields submitted that the length of the meeting at three hours is inconsistent with the existence of an advisory relationship between Mr Cassimatis and the Ws. The Panel's view is that the meeting's length seems inconsistent with the time it would take to engage in the activities Mr Cassimatis asserts were the subject of the meeting. However, rather than just its length, it is the purpose of the meeting, the matters discussed by the parties during the meeting, the fact that it was a tipping point in the decision of the Ws to engage in the Storm strategy and the critical advisory role Mr Cassimatis played in the meeting as evidenced by Mr Dowie's file note, that demonstrate to the Panel that an advisory relationship existed.
- 13.36 In addition, it is the letter of 8 October 2008 that the Panel believes leads to the conclusion that even Mr Cassimatis believed he was in an advisory relationship with the Ws. There is no other credible explanation before us for why he would sign and send a letter which gives them advice about their investment portfolio.



- 13.37 The Panel has concluded that Mr Cassimatis made numerous oral recommendations in the meeting of 29 April 2008 to the Ws and in doing so failed to develop a suitable financial strategy or plan for the clients, which was based on their personal circumstances. The first recommendation was that the Ws divest themselves of specific assets held by them. Secondly, that they engage in a gearing strategy and then reinvest both the cash accumulated from the divested assets and from the gearing strategy, into the Storm Index Funds. Thirdly, that the Ws could achieve a particular income level if they engaged in the strategy. In support of these recommendations, according to the Storm file note of 29 April 2008, the Ws were advised in the meeting by Mr Cassimatis that an investment in the Storm Index Funds had zero default risk.
- 13.38 The Panel accepts that the file note of 11 January 2008 discloses that some of the recommendations made by Mr Cassimatis had already been discussed by the Ws with Mr Dowie. However, whether or not these recommendations had also been made previously by Mr Dowie is immaterial to the Panel's findings. Indeed, the very purpose of the meeting on 29 April 2008 seems to have been to ensure that the Ws received advice from a source they trusted and to ensure the Ws were amongst the one in four clients who proceeded to invest in the Storm investment model.
- 13.39 It is clear from the file note of 29 April 2008 that following the meeting, cash flow scenarios based on the sale of investment properties were to be re-done, that an interim move into the Storm model was to be adopted pending the sale of the Clay Street property and that an additional loan of \$525,000 was to be organised. The Panel is satisfied that these matters constitute steps that could only have been taken if the Ws personal circumstances, goals and objectives were discussed in the meeting with Mr Cassimatis.
- 13.40 It is the Panel's opinion that even if following the meeting, there remained questions to be asked about what amount was to be invested in the strategy, the specific assets to be divested, the loan to value ratio to be adopted and how that would all be achieved, this does not detract from the fact that oral recommendations were made at the meeting as part of the financial planning process that were intended to influence Mr. and Mrs. W to conclude that the investment strategy proposed was suitable for their circumstances. These recommendations were focussed on the strategic issues of the suitability of the Storm strategy to the Ws circumstances.
- 13.41 In preparing and making these oral recommendations, Mr Cassimatis had a duty to exercise reasonable care and skill in the provision of advice and ought to have known that reliance was being placed on his skill and judgment. He also had an obligation to develop or contribute to the development of a suitable financial strategy or plan based on relevant information collected and analysed. The Panel finds that this did not occur. In our expert opinion the investment strategy recommended to the Ws was unsuitable and in fact inappropriate to their circumstances. We base this opinion of the evidence before us that the strategy required the Ws to significantly gear without adequate explanation for why the amount of borrowings was necessary or the switching risk implicit in the strategy. Further, the Panel finds that the recommendations were not in keeping with their tolerance to risk, reduced the diversity within their investment portfolio and significantly exposed them to not only loss of their capital should the indexes not perform, but also if there was a significant downturn in the financial markets.
- 13.42 The Panel finds that the member failed to ensure a suitable financial strategy was developed for the Ws that was consistent with the member's minimum legal obligations under section 945A of the Act or his professional obligations under Rule 110. It expressly accepts the FPA's submission that the strategy was particularly unsuitable when an alternative strategy, such as the allocated pension strategy that the Ws were considering, would have met the clients' needs and objectives with less risk.

- 13.43 In addition, the strategy discussed on 29 April 2008 clearly envisaged that the Ws would divest themselves of existing assets including their superannuation, borrow funds through a margin loan and mortgage and use the combined funds to replace these assets with investment in the Storm Badged Index Funds. To this extent it is the Panel's expert view that the advice given on that day may fail to meet the replacement product obligations of section 947D of the Act and is therefore in further breach of Rule 110. Strategic commitment to the Storm model was the precursor to the investment and loan strategy inherent in the Storm model. It was at this point that the switching risk from their existing investments should have been explained to the Ws, in addition to the risk amplification of borrowing to fund the strategy. In our expert view another advisory failure occurred at this point.
- 13.44 Pursuant to Section 947D of the Act, the member had an obligation when recommending the replacement of one product (in this instance superannuation products and other investments) with another (namely the in-house badged Storm Indexed Funds) to advise on and compare the costs, fees, benefits and disadvantages of the switch (see ASIC enforceable undertaking against AMPFP, 27 July 2006 at page 15 and ASIC enforceable undertaking against First Capital Financial Planning Pty Ltd, 11 May 2007 at page 4). This did not occur in this instance.
- 13.45 Greenfields has submitted that the Panel cannot make a finding in relation to section 947D as the FPA did not provide due notice to the member that it formed part of the charges against him. It is the Panel's view that it may inform itself on any matter that it sees fit and may draw conclusions within its combined expertise based on the material before it that go to the issues it must address. Replacement product advice includes a recommendation, whether explicit or implicit, to cease to hold (or to reduce contributions to) an existing financial product and replace with a new financial product. Whilst the switching issue does not form part of the specific allegations raised by the FPA in relation to Rule 110, whether or not the member appropriately applied his section 947D obligations is a matter that the Panel has and should consider when determining whether the recommended strategy was suitable under Rule 110 and whether or not the member met his professional obligations under that Rule and charge number 7. The Act expresses a minimum standard of conduct that is expected of FPA members and so any breach of the Act in the provision of advice to a client goes directly to whether there has been a breach under Rule 110 and Ethics Principle 6. The file note of Ash Dowie says that the Ws personal circumstances were discussed during the meeting. A prudent financial planner should have included reference to the switching risk during this meeting. Mr Cassimatis has failed to meet this standard.
- 13.46 Given the Ws had little opportunity to add more funds to the investment strategy if it failed to perform, as they were both retired, it appears to the Panel that the failure to adequately advise the Ws on the costs, benefits and risks of the switching recommendations amounts to a breach of Rule 110. Further, the Panel finds that the failure to diversify the new asset portfolio and its heavy reliance on the performance of the index funds and the significant gearing strategy, contributed significantly to the complainant's losses in this instance.
- 13.47 The Panel is very concerned that a significant component of the investment strategy was that the Ws divest themselves of existing assets and reinvest using both their own money and borrowed funds into what were ostensibly in-house Storm Badged Index Funds. The Panel has formed the view on the evidence that the inherent conflicts of interest associated with such a model were not actively or appropriately resolved by Mr Cassimatis in his role as a senior adviser at Storm. Whilst this matter has not formed part of the Panel's decision in relation to Rule 110, it is a matter the Panel has taken it into account when considering the overall context of Mr Cassimatis' conduct as it relates to charge number 7 and bringing the profession into disrepute, which it is entitled to do.

13.48 Indeed, the Panel was never given an explanation by the member for why the complainants were advised to borrow so significantly or invest such large sums in order to engage in the strategy. In the Panel's view, the degree of change between their existing portfolio and their new investment strategy, and the associated increase in risk that entailed, without a reasonable basis for why that degree of change was suitable to the Ws and why it was necessary to meet their original objective to earn between \$50,000 to \$60,000 per year, was staggering. In the Panel's expert opinion, the lack of sufficient impact analysis of the strategy on the current risk position of the Ws contributed to the provision of inappropriate financial advice to the Ws.

13.49 The evidence before the Panel is that the Ws asset allocation pre Storm was outlined in paragraph 7.5 of this determination, namely:

a)	3 investment houses	\$1,050,000.00	43%
b)	Family Home	\$ 700,000.00	29%
c)	Superannuation	\$ 900,000.00	37%
d)	Shares	\$ 50,000.00	2%
e)	Cash	\$ 70,000.00	3%
TOTAL ASSETS		\$2,700,000.00	
DEBT		\$ 353,575.	

13.50 The asset allocation associated with the recommended Storm strategy comprised:

- (a) withdraw \$900K in superannuation from their existing funds;
- (b) sell investment properties and other assets;
- (c) obtain an equity loan of \$878,500 (secured on the family home and investment properties); and
- (d) obtain a margin loan of \$1.15M;
- (e) use the proceeds of the sale or conversion to cash of their existing assets and borrowings to:
  - (i) purchase \$2.3 million of various Storm Badged Index Funds in the technology, resources and industrial sectors;
  - (ii) put \$366,000 into reserves to fund living expenses and loan repayments; and
- (f) pay \$196,086 in advice fees to Storm Financial, payable upfront..

13.51 The evidence before the Panel is that the Ws then lost \$1.47 million in net assets within a seven month period from June 2008 to January 2009. They also went from a situation where they had approximately \$2.7 million in assets and a 12%-13% debt to asset ratio, to one where they had \$1.229 million in assets and loan debts of \$1.15 million, almost equivalent to the value of their assets and approximately \$796,000 more in debt than their original position. In addition they had paid \$196,086 in fees for the advice received from Storm Financial.

13.52 The Panel finds that on any objective analysis, the Ws financial circumstances was significantly and adversely affected as a result of the inappropriate advice they received to

divest themselves of their existing assets and invest in the Storm Index Funds via the gearing strategy. To add insult to injury they paid \$196,086 in fees upfront which has not been refunded despite the fact that the advisory relationship was terminated well before the anticipated time advisory frames covered by the fees.

- 13.53 Greenfields has submitted on behalf of the member that the Ws incurred losses due to actions of an unassociated third party, the Commonwealth Bank and due to steps the Ws took to exit the market contrary to the advice they had been given and accepted (see page 10 of its letter of 14 September 2010). The Panel rejects those submissions. In our expert opinion and based on the evidence before us, but for the advice to invest in the gearing and Storm Index strategy with its significant risks and which was unsuitable to their circumstances and the achievement of their objectives, the Ws would not have been exposed to the losses they ultimately suffered.
- 13.54 The Panel questioned Mr Cassimatis on how a couple who were considered by Storm to be overweight in property and cash, found themselves in a highly geared strategy that saw them with a significant exposure to the equity market via the indexed funds. Mr Cassimatis responded that he would not have been considering asset diversification issues during his meeting with the Ws in April 2008, but would have merely outlined how the cash flow worked. The Panel finds that this evidence highlights another flaw in the financial advisory process adopted by in this instance and amounts to a substantial abrogation of Mr Cassimatis' professional obligations to the Ws.
- 13.55 Whilst the Panel disagrees with the FPA's assertion that the Statement of Advice replicated all the recommendations made at the meeting of 29 April 2008, this is not necessary for the requirements of Rule 110 to be met. In any event the Panel find there was also a clear link between the meeting on 29 April 2008 (as evidenced by the contents of Mr W's file note, and Mr Dowie's file note) and the Statements of Advice. The Panel concludes that the recommendations made by Mr Cassimatis in the meeting were ultimately described in the Statement of Advice. The Panel also finds that the recommendations made in the Statements of Advice are indicative of those matters discussed at the April meeting.
- 13.56 Whether or not the Statements of Advice were prepared by another adviser does not in the Panel's view, detract from our findings concerning Mr Cassimatis' conduct within the meeting and that the recommendations made by the member at the meeting are reflected in the Statements of Advice.
- 13.57 The Statement of Advice document articulates that the primary objectives within the Storm model were a journey towards capitalism and being able to deliver significant change to lifestyle and financial circumstances of its clients. The Panel has considered this mantra in conjunction with evidence from Mr Cassimatis that potential clients of Storm were expected to go on the journey through a process of self selection before committing to the Storm investment strategy. The Panel has concluded that both expectations led to an advisory model within Storm and utilised by Mr Cassimatis, that did not tailor financial advice to the Ws' circumstances, needs and objectives in accordance with section 945A of the Act and FPA Rule 110. It also fell well short of the professional standards expected of an FPA member.
- 13.58 In reaching these conclusions the Panel makes no findings about the Ws own behaviour and its contribution to the losses suffered by them. The Panel has focussed on the environment created by the member in the provision of advice to the Ws which in our opinion contributed to the Ws not being in a position to make informed decisions about their investments.
- 13.59 To this extent, the Panel accepts the evidence given by the Ws that they went to the meeting to get advice from the person they saw as the senior adviser and Chief Executive Officer of Storm. They believed in and trusted him when he said that the investment strategy he

proposed was viable and that they would receive a healthy investment income per annum on which to live if they followed the advice. They also believed him when he told them that Storm had never lost a client in doing so. The Panel finds that he ought to have known that the Ws relied on or were likely to rely on the representations made to them in this regard. It was apparent to the member that the Ws had not agreed to the strategy up to that point and would be influenced favourably towards it by the advice that was being given by him, given his seniority, status and experience. It is also the degree in the change in conduct of the Ws before and after the meeting with Cassimatis that gives rise to the grave doubts the Panel has about the inherent professionalism of the exchange between the adviser and the clients.

- 13.60 In addition, the advice given by Mr Cassimatis at the meeting and in the letter of 8 October 2008 was couched in terms which encouraged reliance and for which the member should be held responsible. In those circumstances another reasonable inference can be drawn that the member should have known that the Ws would rely, or were likely to rely, on that advice.
- 13.61 Further, the Panel accepts that Mr Cassimatis made representations to the Ws that they would receive significant asset management if they invested in the Storm Badged Index Funds and reaffirmed their belief that they were engaging in high level growth with low risk because of the momentum in the share market. Mr Cassimatis' reasoning that market momentum was an appropriate risk minimization technique for investors in the Ws situation is not one that would be expected of a reasonably prudent financial adviser.
- 13.62 In the Panel's view, a senior adviser of Mr Cassimatis' status and experience owed a professional duty to the Ws, given their circumstances and risk profile, to also propose an alternative lower risk investment strategy, which also failed to occur. This is based on our view that a financial planner, acting in the client's interests, would advise on an alternative strategy.
- 13.63 For all of these reasons the Panel finds that the charge is upheld and that the member breached Rule 110 in the provision of advice to the Ws.
- 13.64 Our conclusions and findings in relation to this charge are consistent with the following paragraphs from the Queensland District Court in *Evans & Ors v Brannelly & Ors* 2008 QDC 269 per McGill DCJ at page 20 of 96:

*"Whether or not there has been some detailed consideration of the whole financial position of a person, if a financial adviser purporting to act as a financial adviser says to a person in substance 'you should invest in x' that adviser is giving advice to that person and it is advice about the suitability of that investment for that person".*

*"However, where such advice is given in circumstances where there is nothing said to suggest that a general suitability of X as an investment is inapplicable to the particular person addressed and where the investment adviser knows that that person is contemplating making that investment, in my opinion that is in substance also advice that 'you should invest in X'"*

*"In the present case the defendants had and held themselves out as having skill and competence as financial and investment advisers and were in their correspondence and oral statements to the plaintiff inviting the plaintiff to act on the basis of the information and advice provided and intending to induce the plaintiff to act on that information, by investing in ....They had an interest in such an investment being made, because as admitted the second defendant received a payment from the third defendant as a consequence of the investment."*

### Breach No. 3

- 13.65 In terms of the letter of 8 October 2008, the Panel has concluded that Mr Cassimatis engaged in unprofessional behaviour in breach of Rule 110 when making the recommendations he made within that letter.
- 13.66 In the Panel's expert opinion the letter makes switch recommendations to the Ws to pursue one of two preferred strategies, subject to whether they had or had not pre paid interest. It further advised that in some instances both of the strategies may have to be pursued.
- 13.67 An additional recommendation made in the letter was that the clients were to authorise Storm to take action on their behalf and switch up to 100% of their investments to cash. The letter requests that the acknowledgement attached to the letter be signed and returned to Storm "NOW" as a matter of urgency. The authorisation confirmed that the clients accepted the recommendations made in the letter and authorised Storm to instruct the relevant Margin Lender/Fund Manager to take the necessary action to achieve the recommendations on their behalf.
- 13.68 The Panel has concluded that the recommendations were made without due consideration of the Ws personal circumstances and objectives and without an appropriate analysis of how the advice did or did not apply to them. The letter clearly asks the clients to act on the advice even when it is not clear which of the alternate recommendations the clients should adopt and in circumstances where, had the clients returned the authorisation, they would have been exposed to a conversion of a significant portion of their assets to cash, at Storm's discretion, whether they were or were not in margin call and whether or not this was necessary or suitable to their circumstances.
- 13.69 The Panel finds that the letter amounted to a request for Storm to act on its own discretion in relation to the clients' investments, in an attempt to manage what it saw as a crisis across its client database, without the need to comply with the legal or professional restrictions that might normally apply to personal advice to an individual client. The Panel is satisfied that this shows a lack of care and professional consideration on the part of the member.
- 13.70 The material before the Panel in relation to this charge also indicates that the letter may breach the minimum legal requirements expected pursuant to sections 945A and 947D of the Act. Further, in our expert view, the letter should have been properly constituted as a Statement of Advice given the significance of the recommendations made and the impact of those recommendations on the clients' existing strategy.
- 13.71 The Panel has therefore concluded that the requirements of Rule 110 have not been met by Mr Cassimatis in the preparation of those recommendations to the clients and the financial strategy outlined in the letter.
- 13.72 In this regard the Panel also relies on many of the statements made by it under heading 13 in relation to the obligations financial planners must meet in the provision of financial advice to clients.
- 13.73 The Panel accepts that the Ws did not act on the letter to their detriment. However, in our opinion, neither element is required for a breach of Rule 110 to be made out.
- 13.74 The Panel has some sympathy for Mr Cassimatis' position that he was attempting to respond to and alert a significant number of clients to some significant and life changing events at the one time. The Panel accepts the letter was an attempt to respond to an extraordinary situation. In that way, the Panel accepts that Mr Cassimatis' may have been doing the wrong thing for the right reasons.

- 13.75 However, the Panel is not satisfied that enough care was taken with the process adopted by Mr Cassimatis in this regard. The Panel has formed the view that the letter could have alerted clients to the difficulties they faced and advised them to contact their adviser immediately for further discussions, without the need to outline specific recommendations and require the signed authority be returned. Further, there does not appear to have been any care taken to ensure that clients to whom the contents did not apply, such as the Ws, did not receive the letter. For example, the letters could have been pre-vetted by Storm advisers to ensure that letters were only sent to clients directly affected. In addition, the letter did not have to actively encourage the clients to sign an authorisation to act in circumstances that may have been against their interests.
- 13.76 The Panel has concluded that this demonstrates a significant lack of professional care and attention by Mr Cassimatis in the performance of his professional tasks. We are of the view that an adviser with his experience and seniority should have more appropriately managed the provision of financial advice to clients, including the Ws, in these circumstances.

### **Charges No. 5 and 6**

- 13.77 The letter of the FPA of 6 November 2008 addressed to Mr Cassimatis, asked him to respond to five questions related to the circumstances surrounding the distribution of the letter of 8 October 2008 to numerous clients.
- 13.78 The email of 11 December 2008 that Mr Bacon sent to Storm, asked Storm to respond to a series of questions that were different to the questions raised in the letter of 6 November 2008. The Panel is satisfied that the letters requested different information from Mr Cassimatis and Storm and were concerned with different matters.
- 13.79 Having drawn this conclusion, the Panel is not satisfied that the evidence supports the allegation made by the FPA that Mr Cassimatis has failed to cooperate with an FPA investigation under clause 3.3f of the Constitution or Rule 127 of the FPA Rules of Professional Conduct.
- 13.80 To prove the member breached clause 3.3(f) of the FPA Constitution, the FPA must demonstrate to the Panel's satisfaction and on the balance of probabilities, that the member failed to supply material or further information or assist the Chief Executive Officer of the FPA or other person with respect to an FPA Compliance Review or investigation, whether of the member or otherwise.
- 13.81 To prove the member breached Rule 127 of the FPA Rules of Professional Conduct, the FPA must demonstrate that the member failed to co-operate with the FPA in all aspects of an investigation or compliance review, as authorised pursuant to the Constitution and Regulations of the FPA.
- 13.82 The Panel accepts that the FPA had agreed with Mrs Cassimatis that only one response was required to both letters. In the absence of any follow up from the FPA after the provision of the significant response document from Storm, which Mr Cassimatis believed addressed the issues in both letters, we believe it is unreasonable of the FPA to assert that Mr Cassimatis failed to cooperate with its investigation or provide material to it.
- 13.83 Having said that, the Panel has formed the view that it was unprofessional of Mr Cassimatis to not consider the differences between the letters from Mr Middleton and Mr Bacon and to ensure that he met his professional obligations to the FPA by supervising more fully and adequately a specific response to the FPA's queries about the letter of 8 October 2008.

### Charge No. 7

- 13.84 In relation to charge number 7, the ethical principle described in the FPA Code of Ethics titled “Professionalism” states that members shall ensure their conduct does not bring discredit to the financial planning profession.
- 13.85 In prosecuting this charge, the FPA relied on and repeated all of the particulars it had alleged against the member in prosecuting charges 1, 2, 3, 5 and 6 and the submissions made during the course of the proceedings.
- 14.63 In its letter of 20 October 2009, the FPA clarified that allegations of unsuitable investment advice given to the Ws, accompanied by an allegation of misleading and deceptive conduct, meant that Mr Cassimatis continued to have a case to answer about whether his conduct had brought discredit to the profession in that it “*destroyed confidence in the reputation of the financial planning profession, in the eyes of a reasonable member of the investing public.*”
- 13.64 In his defence, Mr Cassimatis similarly relied on and repeated all of the submissions made on his behalf during the course of the proceedings.
- 13.65 The Panel has attributed to the word “*discredit*” its ordinary meaning as found in the Macquarie Dictionary: meaning to “*injure a reputation or esteem or to destroy confidence in*”.
- 13.66 In prior determinations, the CRC has concluded that for an FPA’s member’s conduct to discredit the profession of financial planning, a member’s conduct would require some moral deficiency or to be grossly inappropriate. This Panel adopts this meaning for the purposes of these proceedings.
- 13.67 The Panel has determined that the representations made by Mr Cassimatis during the meeting on 28 April 2008 about market returns and his use of the five year period, were misleading and in breach of Rule 101. Further, the Panel has formed the view that the representations gave an exaggerated and misleading view of the sustainability of the investment strategy being outlined over the longer term and its ability to fund both the gearing strategy and the Ws’ income requirements. In addition, the representations served to reiterate the safety of the model, the lack of risk associated with it and the relative ease with which the Ws could earn suitable retirement income from it, well above the related income that could be used from an alternative strategy such as the allocated pension model that the Ws were considering.
- 13.68 The Panel has concluded that the Ws relied on those misleading statements and pursued the investment strategy, believing it offered a greater rate of return than the allocated pension strategy.
- 13.69 It is the opinion of this Panel that Mr Cassimatis made oral recommendations to the Ws at the meeting on 28 April 2008, as part of a financial planning process in which the Ws were engaged and as part of the development of a suitable financial strategy or plan for them. The member did so as an integral part of a Storm advisory team that provided services to the Ws.
- 13.70 Therefore, Mr Cassimatis had professional obligations to ensure that he complied with the FPA Code of Ethics and Rules of Professional Conduct in the provision of advice to the Ws, which the Panel has concluded that he has failed to meet.
- 13.71 His denial that he gave advice to the Ws and his portrayal of his role within the meeting, his status within Storm and his broader community and his role in the development of the Storm investment strategy seemed disingenuous and amounted to a purported abrogation of his professional responsibilities, in the view of the Panel.



- 13.72 The Panel concludes that all of these matters contribute to a finding that Mr Cassimatis' conduct in this matter has brought discredit to the profession.
- 13.73 The Panel has also been asked to consider whether or not Mr Cassimatis' conduct in distributing the letter of 8 October 2008 to the Ws and to numerous other clients, breached the Code of Ethics Principle 6 Professionalism and in particular brought discredit to the financial planning profession.
- 13.74 The Panel accepts that Mr Cassimatis' conduct in sending the letter was made in extenuating circumstances at a time when it may have been very difficult to examine each individual's circumstances before the letter was sent. However, this does not excuse the member from having to follow his legal and professional obligations. Indeed, the need for him to do so is probably heightened.
- 13.75 The Panel is satisfied that the letter was seriously lacking in numerous professional qualities that stakeholders would expect of a prudent financial planner. In this sense, his conduct fell well short of the reasonable standard of performance that the public and his clients were entitled to expect. It provided the same financial advisory recommendations to between 3000 to 4000 Storm clients, without reference to their personal circumstances and asking clients to consent to courses of action that were not always relevant to their circumstances. In our opinion, the advice also breached the minimum legal standards expected under the Act as previously outlined. The obligation to provide advice in writing exists to ensure consumers are able to make informed decisions about important financial matters. In this instance the member wrongly considered it unnecessary to comply with the strict procedures required of a financial planner. The Panel finds this was an abrogation of his professional responsibilities.
- 13.76 It seems to the Panel that it was sheer luck that the Ws did not receive a copy of the letter and/or that Mr Dowie rang them prior to their reading it, to explain that it did not affect them. A failure by Mr Cassimatis to introduce a mechanism into the process, whereby the letters were reviewed by Storm advisers prior to the letters being sent to ensure the contents were relevant to the clients to whom the letter was sent, seems a significant oversight to the Panel. Alternatively, in the Panel's view, Mr Cassimatis could have drafted the letter such that it advised clients to immediately contact their adviser to discuss the implications to them of the matters raised in the letter, rather than providing them with financial advice that may or may not have been relevant to their circumstances, which he did not do.
- 13.77 The Panel has concluded that the member's conduct as outlined in the evidence was morally deficient in his dealings with the Ws and grossly inappropriate for a member of his seniority and experience, for the reasons already outlined in these reasons for decision. In our opinion, on any objective measure, it cannot be said that a reasonably prudent financial planner in Mr Cassimatis' position would have believed that the Ws position would be improved by adopting the financial strategies proposed to them in the meeting of 29 April 2008 or the letter of 8 October 2008.
- 13.78 The Panel accepts that ordinary members of the investing public would consider the conduct of Mr Cassimatis brought discredit to the financial planning profession in that it was likely to *injure the reputation or esteem of the profession or to destroy confidence in the profession*. Indeed, we believe that such individuals may well consider Mr Cassimatis' conduct in inducing the Ws to invest in a financial strategy that was entirely unsuitable to meet their needs, objectives and circumstances as being unprofessional and not in keeping with appropriate commercial behaviour.
- 13.79 Both strategies further required significant switching advice which seems to have been completely ignored in both the meeting, the Statement of Advice and the letter of 8 October 2008.

- 13.80 It is the Panel's considered view that Mr Cassimatis' role in the meeting of 29 April 2008 and the representations made by him on that day were intended to influence the clients to accept the financial strategy as their own and 'self select' to become part of the one in four potential clients who engaged in the Storm model. The Panel believes that this approach is entirely inconsistent with the broader professional obligations of a member of the FPA to act in the client's interests above their own.
- 13.81 Further, the Panel has concluded that the distribution of a letter to 3000 to 4000 clients which sought their authority to act on recommendations that may not have been appropriate to their circumstances also meets this test.
- 13.82 In making its determination on this offence, the Panel must consider all of the breach allegations made against the member and the findings it has reached to date. When seen in its entirety, the Panel believes that there has been a breach of the professionalism principle in that the member has not ensured that his conduct, in either the provision of advice to the Ws or the delivery of the letter of 8 October 2008, did not bring discredit to the financial planning profession. The Panel concludes that the conduct identified during the course of these proceedings was likely to "*injure a reputation or esteem or to destroy confidence in the financial planning profession*" in the eyes of the investing public.
- 13.83 Accordingly the Panel concludes that Mr Cassimatis' behaviour and conduct as outlined in these reasons for decision is of the type likely to bring discredit to the financial planning profession.
- 13.84 The Panel has informed itself directly of the member's conduct in these proceedings and is entitled to draw conclusions from those observations and information. The Panel had its own experience of the priority Mr Cassimatis gave to his professional obligations to the FPA and to the profession during the course of the proceedings. The Panel reached the view that Mr Cassimatis does not hold his membership with the FPA in high regard. This was evident in his responses to some of the questions posed by the Panel and the fact that he openly asserted that he was withholding some documents from the Panel pending an appeal.
- 13.85 The Panel is also cognisant in its deliberations of the significant losses suffered by the Ws on their investments in such a short time frame and the upfront payment of \$196,086 in fees to Storm for the financial advice provided, which the Panel understands has not been refunded. The level of these fees is in our opinion completely unjustified, particularly in circumstances where the Ws exited the investment strategy within a seven months period.
- 13.86 Accordingly, the Panel determines that the offence is made out and charge 7 is upheld.

#### **14. Statement of Determination**

- 14.1 For the reasons outlined in this decision the Panel finds on the balance of probabilities that:
- (a) In relation to the charge that Mr Cassimatis has breached Rule 101 of the Rules of Professional Conduct, the offence is made out.
  - (b) In relation to the charge that Mr Cassimatis has breached Rule 110 of the FPA Rules of Professional Conduct in the provision of recommendations made to the Ws, the offence is made out.
  - (c) In relation to the charge that Mr Cassimatis has breached Rule 110 of the FPA Rules of Professional Conduct in the delivery of the letter of 8 October 2008, the offence is made out.

- (d) In relation to the charge that Mr Cassimatis failed to cooperate with an FPA investigation and provide relevant documents, the offence is not made out; and
- (e) In relation to the charge that Mr Cassimatis has failed to conduct himself in accordance with Ethics Principles No. 6 of Professionalism, the offence is made out.

## 15. Sanctions

- 15.1 Since the Panel has found that offences have been committed against the FPA's Code of Ethics and Rules of Professional Conduct, it is authorised to impose sanctions on the member pursuant to paragraph 1.2 (definition of sanctions), paragraph 9.9 and Schedule B of the Disciplinary Regulations adopted by the FPA Board on 17 July 2007.
- 15.2 Disciplinary proceedings and the sanctions imposed against members for breaches of professional standards have a number of objectives. The chief purpose of disciplinary proceedings is to protect the community. This protective aim has been repeatedly recognised and endorsed in the case law (See Dal Pont, G. 2010, *Lawyers Professional Responsibility*, Law Book Co., 4<sup>th</sup> ed., [23.10]).
- 15.3 This purpose must be considered when determining the ultimate sanction imposed and the factors that inform that sanction.
- 15.4 In addition, disciplinary orders may be punitive as well as protective. The objective of disciplinary proceedings may serve as a specific deterrent to the member and a general deterrent to other members at large not to engage in misconduct. Meeting this objective depends on sanctions having a punitive effect [*Quinn v Law Institute of Victoria Ltd* [2007] VSCA 122 per Maxwell J at p. 30].
- 15.5 In imposing sanctions on the member, the Panel believes it also has an obligation to uphold the objects of the FPA Constitution to act in the public interest, so that clients and prospective clients of members may have confidence that they will receive fair and competent financial planning advice according to high professional standards from an FPA member. The other object is to suppress Malpractice, namely behaviour that is in contravention of the Code of Professional Practice or that is likely to cause harm to clients.
- 15.6 In addition, the Panel is bound to assist the FPA to achieve its Constitutional objective to regulate the professional conduct of members with the aim of meeting the high professional and ethical standards that is expected of members by the public and other key stakeholder groups.
- 15.7 In assessing the sanctions to be imposed on the member, the Panel has considered a number of factors including the nature of the breaches made out against the member, the significant losses incurred by the Ws and the harm done to them, the fact that they paid \$196,000 in fees for the advice which have not been reimbursed, the degree of seriousness of the contraventions of the FPA Code of Ethics and Rules of Professional Conduct, the level of incompetence and irresponsibility of the member in his conduct, his lack of contrition and failure to accept responsibility for wrongdoing, his failure to meet the requisite standards required by the law and his professional obligations, and the likelihood that the member may engage in similar activities again. The Panel has also considered the likely harm caused to the public's confidence in the profession of financial planning as a result of the members conduct.
- 15.8 The Panel has also considered the likelihood that the member could rehabilitate and meet the requisite standard going forward if subjected to a rigorous professional development and supervision program. However, Mr Cassimatis seems unwilling to accept any responsibility for his conduct. In the circumstances the Panel doubts whether he would modify his

behaviour even if required to attend such programs or undertake a period of supervised practice. We remain concerned about the likely harm that may be caused to the profession's reputation with the public at large as a result of the member's conduct if strong sanctions are not imposed.

- 15.9 Having regard to the Panel's findings in this matter, the Panel concludes that in determining the sanctions to be imposed in this matter, the member's previously good record and the loss of professional reputation that he may suffer as a result of the sanctions are outweighed by the other considerations mentioned in the preceding paragraphs.
- 15.10 After giving due consideration to the parties submissions, the Panel imposes a fine of \$20,000 on the member, comprised as follows:
  - (a) That the member pay a fine of \$1,000.00 in relation to the offence against Rule 101 of the Rules of Professional Conduct.
  - (b) That the member pay a fine of \$10,000.00 in relation to the offence against Rule 110 of the FPA Rules of Professional Conduct in the provision of recommendations made to the Ws.
  - (c) That the member pay a fine of \$3,000.00 in relation to the offence against Rule 110 of the FPA Rules of Professional Conduct in the delivery of the letter of 8 October 2008.
  - (d) That the member pay a fine of \$6,000.00 in relation to the offence against Ethics Principles No. 6 of Professionalism.
- 15.11 The Panel further determines that the member should be expelled from the membership of the FPA. The Panel finds that the member's conduct in its entirety amounts to misconduct, being conduct which involves a substantial or consistent failure to reach or maintain a reasonable standard of professional conduct, competence and diligence, that would be expected of a member of the FPA in all the circumstances.
- 15.12 The Panel is unequivocally of the view that expulsion from the membership of the FPA is warranted in all of the circumstances and as a result of the findings and conclusions it has outlined in this determination. As has been identified on a number of occasions in this determination, the Panel has found that the member has repudiated the professional standards held by FPA members by his conduct both before and during the hearings. In our view, such repudiation supports the Panel's decision to expel the member.
- 15.13 The Panel is satisfied that amongst other things, the member's conduct was egregious given his seniority and experience and given the leadership role he held within Storm and in disavowing his professional relationship with the Ws during the proceedings. His senior advisory role in signing and sending the letter of 8 October 2009 further evidenced a lack of self awareness of the professional conduct obligations of members of the FPA and his role as a senior adviser within Storm Financial.
- 15.14 The Panel notes that this expulsion will not prevent Mr Cassimatis from practising financial planning, but it will mean he cannot hold himself out to the public as a member of this professional body.
- 15.15 In relation to the matter of costs, the Panel determines that the member is to pay the reasonable costs of the Panel proceedings on 22 March 2010 and 27 April 2010 in the sum of \$12,855.21, as notified by the FPA.

- 15.16 The member must also pay the costs of the FPA vacating the hearing date on 12 February 2010, in the sum of \$2,000.
- 15.17 The Panel further determines that the member's name and the nature of the offences found against the member and sanctions imposed may be published by the FPA pursuant to Schedule B of the List of Sanctions in the FPA Disciplinary Regulations.
- 15.18 It is the Panel's determination that publication is warranted so that the objective of general deterrence to other members engaging in such conduct is met. Publication should assist in promoting compliance with the FPA's professional standards by other members. Publication also meets the FPA's objective to act in the public interest and will reassure the public and other stakeholders that the FPA is appropriately regulating the professional conduct of its members and that they may have confidence in the profession to provide quality advice outcomes to Australian consumers.
- 15.19 The Panel also recognises that it is the view of the FPA Board and the CRC that the public interest and the maintenance of public confidence in the profession is best served by the publication of all CRC Panel determinations.