FINANCIAL PLANNING ASSOCIATION

CONDUCT REVIEW COMMISSION

DETERMINATION
AND REASONS FOR DECISION

Gus Christopher Dalle Cort

PANEL MEMBERS: ***Professor Dimity Kingsford Smith (Chair)***
Ms Sandra Bowley
Mr Christopher Benson

DATE OF HEARING: 2 July 2010

DATE OF FINAL DETERMINATION: 28 January 2011

PARTIES' REPRESENTATIVES: ***Mr Ivan Middleton (FPA)***
Mr Dalle Cort did not attend or appear

DETERMINATION
AND REASONS FOR DECISION

I. SUMMARY OF DETERMINATION AND REASONS

The CRC finds that the member Gus Christopher Dalle Cort made investment recommendations to Mr and Mrs D that contained misrepresentations, that were unsuitable and failed adequately to explain the risks involved in those recommendations. The CRC Panel also finds that Dalle Cort acted so as to bring discredit to the financial planning profession. The Panel finds all of these breaches occurred at the highest level of disregard of the interests of Mr and Mrs D. The final determination is set out at the end of these reasons in part VIII and the sanctions the Panel is minded to impose, in part IX.

II. THE COMPLAINT

2.1 This is a complaint by the Financial Planning Association (FPA) in its disciplinary capacity under its Constitution and Disciplinary Regulations. The complaint is referred to the Conduct Review Commission (CRC) on the motion of the FPA's Investigations Officer, as a result of a complaint received by him from a client of Gus Christopher Dalle Cort (Dalle Cort) a member of the FPA. The complainants Mr and Mrs D complained that they received defective financial advice from Dalle Cort. Dalle Cort was at the time an authorized representative of Storm Financial Pty Ltd (Storm Financial) a principal member of the FPA, the holder of an Australian Financial Services License and now in liquidation.

2.2 After investigation and correspondence between the FPA and Dalle Cort it was alleged that Dalle Cort had a case to answer under the FPA's Code of Ethics and Rules of Conduct (FPA Ethics and Rules). The case to answer alleged breaches of the Ethics and Rules as follows:

By Dalle Cort

2.3 1 In breach of Rule of Conduct 101 Dalle Cort engaged in deceptive and misleading conduct, including dishonesty, in that he misrepresented to Mr and Mrs D:

(a) That their investments were safe because Storm Financial had 'a mechanism for informing their clients and to sell down the portfolio to avoid margin calls'; and

(b) Storm Financial 'has insurance for it [a high risk margined investment strategy]'; and assured Mr and Mrs D that these features made their investment relatively safe; That by omission cash flow worksheets in the statement of advice of 19 April 2004 show no explanation of how cash reserves in large deficit are to be funded, nor of the implicit fact that increases in the margin lending at the heart of the strategy recommended to Mr and Mrs D were to be used to fund those reserves from which Mr and Mrs D living expenses were to be paid.

2. In breach of FPA Ethics and Rules 110 Dalle Cort failed to develop any suitable financial strategy or plan for the complainants before making his recommendation that they invest. In particular:

(a) Mr and Mrs D were advised to adopt a geared investment strategy at the heart of which were large margined loans and large loans on their residence, even though they were retired and had ceased all employment;

(b) by a letter dated 8 October 2008 Mr and Mrs D were advised to convert their interests in Storm Financial badged index funds (purchased mostly with borrowed funds), to cash with no investigation or explanation of how this recommendation was suitable.

3. In breach of FPA Ethics and Rules 111 Dalle Cort failed to provide any explanation of the nature of the investment risks involved in this margined loan investment strategy in terms that Mr and Mrs D were likely to understand.

4. Repeating all the breaches alleged above, the FPA also asserted that Dalle Cort had breached FPA Ethics and Rules 6, which requires members to ensure their conduct does not bring discredit to the professional financial planning.

2.4 The CRC held a hearing of these allegations on 2 July 2010. At the hearing the CRC took submissions and evidence from the FPA through its investigation officer. The FPA presented evidence in a folder of exhibits numbered 1 to 20 (FPA exhibits). Mr and Mrs D gave evidence by a statement and personally by telephone link.

2.5 Dalle Cort did not appear either himself or by a representative at the hearing. He corresponded by email and letter with the FPA investigation officer from mid-2009 up until the date of the hearing setting out his arguments and facts in his possession. This correspondence is referred to by date where appropriate in these reasons. Further, when the 'next to last' version of the determination was prepared it was forwarded to both parties for them to make final submissions. Both Dalle Cort and the FPA made written submissions at this final stage which the Panel also took into account in finalising this determination.

2.6.1 There is a typed transcript of the entirety of the hearing conducted on 2 July 2010 which is also referred to in these reasons by relevant page numbers.

III. BACKGROUND TO THE COMPLAINT

3.1 Dalle Cort is a General Member of the FPA. Dalle Cort was an authorised representative of Storm Financial from February 2004 to 12 January 2009. On 12 January 2009, Storm Financial entered into voluntary administration. Prior to becoming an authorised representative of Storm Financial Dalle Cort was a representative of MLC Limited. It was as customers of MLC Limited that Mr and Mrs D first had dealings with Dalle Cort. In 2002 when they were planning retirement he advised them to acquire an allocated pension, which they did. When Mr and Mrs D visited Dalle Cort just before he joined Storm Financial he told them he was moving and invited them to follow him as customers to the new licensee. He made it attractive by saying that at Storm Financial he would be able to do more for them in relation to retirement income than he could at MLC. He reminded Mr and Mrs D of the limits of their allocated pension – that it would 'run out' after 15 years or so. He invited them to attend Storm Financial's seminars in the newly opened Cairns office and hear about the Storm Financial investment methods.

3.2 In early 2004, Mr and Mrs D, 67 years and 66 years respectively, both were retired and living in Cairns on a combined income of $45,000 per annum from the following sources:

- Centrelink (both) - $6,624
- MLC Allocated Pension (both) - $27,000 ($345,000 redeemable)
- Overseas Pension (both) - $11,193

Mr and Mrs D had also just sold their residential home and had $180,000 in surplus cash to invest. Mr and Mrs D had the short-term financial goals of going on a holiday, renovating their existing house and providing a gift to a relative. They estimate these goals to cost $50,000.

3.3 In March 2004, Mr and Mrs D attended two Storm seminars. Mr and Mrs D say both seminars were presented by Dalle Cort. The seminars were about 3 to 6 hours in length and discussed the following:

- Margin lending as a debt strategy to purchase share investments,
- The workings of the share market, and
- Details of the Storm Financial Index Funds.

3.4 At both seminars Dalle Cort commented on the safety buffers of the Storm Financial margin lending strategy. Mr and Mrs D say that Dalle Corte said words to the effect, *"There are LVR safety buffers in place so that if the buffers are approached in a market downturn, Storm would advise their clients*

on strategies on how to cope with possible margin calls. This would require a partial sell down of the portfolio in order to meet the margin call."
At all of the meetings, Mr and Mrs D say Dalle Cort also stated words to the following effect, *"If this strategy goes bad, we have insurance to cover it and we will return you to your original investment status."*

3.5 At one of the meetings, Mr D recalls that Dalle Cort said words to the effect, *"Allocated pensions will slowly erode your principal. If you live to 90, you won't have any money."* So Mr and Mrs D concern increased that the principal of their allocated pension would significantly decay and they could fund less than 20 years of retirement.

3.6 Throughout February and March 2004 Mr and Mrs D met with Dalle Cort (once or twice) and provided their personal financial information and documentation. They explained that their financial circumstances were as follows:

Assets		**Liabilities**	
Cash	$187,000	Loans	Nil
Shares	Nil	Expected Holidays and Gifts	$48,000
MLC Allocated Pension		$346,000	
Family Home		$350,000	
Total	$883,000	Total	$48,000
Net Assets		**$835,000**	

Mr and Mrs D agreed to have Dalle Cort prepare a Statement of Advice ("**SOA**"). As a result of these discussions Dalle Cort completed a Confidential Financial Profile document which outlined Mr and Mrs D financial circumstances and risk tolerances. **(Exhibit 3)**

3.7 In April 2004, Dalle Cort spoke to Mr and Mrs D to arrange a meeting to discuss the SOA. Mr and Mrs D were about to holiday in Brisbane and so Dalle Cort referred them to Storm Financial advisor Stuart Drummond in Brisbane. It is said by Mr and Mrs D (and disputed by Dalle Cort) that Dalle Cort provided Mr and Mrs D with a copy of their SOA **(Exhibit 4)**. In late April 2004, in Brisbane, Mr and Mrs D saw Stuart Drummond. The meeting lasted 2 hours and Stuart Drummond explained aspects of the SOA. In May 2004, back in Cairns Mr and Mrs D say they decided to accept the advice and signed every page of the SOA. The document is dated 19 April 2004 in parts, and 20 April 2004 in other parts (these are printed dates). The signatures and dates on the signing page suggest the document was signed on 7 May 2004. Mr and Mrs D requested implementation. Dalle Cort argues Stuart Drummond, not he, gave Mr and Mrs D their final advice on the actual SOA they signed.

3.8 In the SOA Mr and Mrs D signed Dalle Cort recommended an investment strategy which involved the borrowing of funds to invest along with Mr and Mrs D own capital as follows:

- Borrowing $260,000 (via a margin lending facility);
- Redeeming their MLC allocated pension ($345,000);

- Adding cash on hand ($125,000); and using these funds to
- Purchase $600,000 of Storm Financial badged index funds managed by Colonial First State (CFS) and Macquarie Bank;
- Pay $31,000 in advisors fees to Storm Financial.

3.9 About December 2004, Mr and Mrs D received a telephone call from Storm Financial to advise them that they are ready for the next investment step according to the strategy set out in the SOA. This process of making further investments or taking additional investment steps occurred when the market value of a customer's portfolio had risen, and the ratio of their margin borrowing to the value of their investment (their LVR) had fallen. This freed up additional value in the investment. Shortly afterwards, Mr and Mrs D met with Dalle Cort in Storm Financial's Cairns office. Dalle Cort provided Mr and Mrs D with their Statement of Additional Advice ("**SOAA**") **(Exhibit 5)** and introduced them to Ms Bernadine Frawley who spoke via video conference from the main Storm Financial office in Townsville. At this meeting, Dalle Cort and Ms Frawley presented the SOAA. At one point in the meeting, Ms Frawley said words to the effect, "*Your LVR is down, your portfolio is up. You are in a position to build."*

3.10 The SOAA, page 3, discusses further recommendations of the margin lending strategy. This particular recommendation involved Mr and Mrs D:

- Borrowing a further $200,000 (via a margin lending facility);
- Borrowing $210,000 from the ANZ Bank (secured against their residential home);
- Purchasing $340,000 of Storm Financial badged index funds; and
- Paying $25,360 in advisor fees to Storm Financial.

Mr and Mrs D accepted the advice and requested Dalle Cort to implement the transactions. Thereafter Mr and Mrs D entered a number of further investment transactions following further SOAAs provided by Dalle Cort, and following the Storm Financial investing strategy involving borrowing further funds to invest in Storm Financial badged index funds managed by CFS and Macquarie Bank.

3.11 In April 2008, Mr and Mrs D received another SOAA **(Exhibit 7)**. They had discussions with Mr Dalle Corte and there followed a recommendation, again to borrow and to invest in index funds. As before Dalle Corte requested Mr and Mrs D to sign and return the SOAA, which they did. As at April 2008, Mr and Mrs D's financial position was as follows:

Assets		Liabilities	
Cash Reserves	$59,000	Loan (Margin Loan)	$1,760,000
Shares (index Funds)	$2,412,000	Loan (equity loan secured on house)	$252,000

Family Home $420,000			
Total	2,891,000	Total	$2,012,000
Net Assets		**$879,000**	

3.12 On about 8 October 2008, Mr and Mrs D received a letter from Storm advising that they sell 50% of their portfolio of Storm Financial index funds. **(Exhibit 8).** The letter was accompanied by an acknowledgement form to complete the request. Mr and Mrs D signed acknowledgement form and returned it to Storm Financial. On about 9 or 10 October 2008, Mr and Mrs D received a letter from Dalle Corte. **(Exhibit 9).** The letter recommended that they redeem $800,000 of their index funds to add security to their margin loan, and suggests that they sign the letter and return in order for the recommendation to be implemented. Mr and Mrs D signed this letter and returned it to Storm Financial's office. On Sunday 12 October 2008, Mr and Mrs D received a call from Ms Simone Woodbridge, a Storm Financial administration officer. Ms Woodbridge sounded panicked and said words to the effect,
"You have to close 100% of your Storm Index funds and convert to cash. You need to change the 8 October 2008 letter to 100% and sign and fax it in right now."
Mr and Mrs D made the amendments and faxed the document back to Storm Financial's offices. **(Exhibit 8)**

3.13 On or about 6 November 2008, Mr and Mrs D received a letter from CFS setting out the details of the sale of their index funds. The letter states that CFS withdrew 75% of their portfolio on 31 October 2008 (being $1,309,085), although Mr and Mrs D request was to withdraw 100% of their portfolio on 12 October 2008 **(Exhibit 10).** The proceeds of these sales were not used to pay down Mr and Mrs D margin and home loans. Instead they had been deposited into a CBA cash account that could be transferred quickly to purchasing back into Storm Financial index funds, as had been advised by the principal of Storm Financial Emmanuel Cassimatis, in his letter to Mr and Mrs D of 8th October 2008.

3.14 About mid November 2008, Mr and Mrs D had a telephone conversation with Ms Woodbridge. They informed Ms Woodbridge that there were insufficient funds in their Macquarie Cash Management Account to cover the December 2008 interest repayment for the margin loan and the home loan. The interest repayments were $13,000. Ms Woodbridge, on behalf of Storm Financial, then offered to pay that interest payment for the month by way of a loan to Mr and Mrs D from Storm Financial. Mr and Mrs D later noticed in their Macquarie Cash Management Account a deposit of $13,000 on 11 December 2008, which they assumed had come from Storm Financial.

3.15 Throughout November 2008, Mr and Mrs D were regularly reviewing the activity on their index fund accounts via the internet. They printed a number of snapshots of their Internet accounts throughout this period. **(Exhibit 11).** The documents demonstrate that the remaining 25% of their portfolio with CFS was cashed on 20 November 2008, and was valued at about $377,000, and was deposited into Mr and Mrs D margin loan account. Mr and Mrs D have not

received a statement from CFS regarding these transactions. The last CFS statement that Mr and Mrs D received was for March 2008. **(Exhibit 12).**

3.16 On 8 December 2008, Mr and Mrs D received a letter from Colonial Margin Lending **(Exhibit 13).** The letter states that their account is in deficit by $105,000.

3.17 Around 15 December 2008, Dalle Cort arranged for a number of Storm Financial customers to meet him as a group. At this meeting Dalle Corte said words to the effect:

"Some of you will end up losing your house and some of you will never be able to re- enter the market again. The Commonwealth Bank is to blame for this and Storm will take them to court over this."

At this meeting Dalle Cort provided his final SOAA to Mr and Mrs D **(Exhibit 14).** The advice is to transfer the funds realised from the sale of their index funds ($1,309,085) to repay most of the remaining margin loan. The SOAA also states that Mr and Mrs D have a margin loan of $1,414,237 and a security value of $1,309,084, therefore negative equity of approximately $105,000. Therefore, on the sale of their Storm Financial index funds Mr and Mrs D were left with debts of $255,000 (home loan) and $105,000 (margin loan). As a result they have sold their residential house (sale price $420,000) **(Exhibit 15)**, and paid down these debts. As a result of repaying these loans, Mr and Mrs D currently have $60,000 in their bank account, are renting a residential unit and source their income from Centrelink pensions and Mr D's overseas pension. Their current asset mix is the following:

Assets		Liabilities	
Cash	$60,000	Loan (Margin Loan)	Nil
Shares (index Funds)	Nil	Loan (equity loan secured on house)	Nil
Combined allocated pension		Nil	
Family Home		Nil	
Total	60,000	Total	Nil
Net Assets		**$60,000**	

3.18 In summary, Mr and Mrs D have lost $775,000 in net assets (835,000-$60,000) in the 4 years from April 2004 to January 2009, and paid $107,000 in fees. Throughout the 4 ½ years of being provided advice by Dalle Cort, Mr and Mrs D used funds from the investment strategy to travel overseas. In total Mr and Mrs D travelled overseas 4 times and had major dental work carried out in this period. Mr and Mrs D generally spent more money than before adopting the Storm Financial investment strategy, due to the advice of Dalle Cort. Mr and Mrs D estimate that their overall expenses were about $72,000 pa annum in the 4 ½ years with Storm Financial. Therefore, Mr and Mrs D personal expenses over and above those they had before becoming customers of Storm Financial ($45,000 pa) were about $27,000 per annum in each of the 4 ½ years.

3.19 Mr and Mrs D margin loan and index fund statements to evidence the transactions discussed above are at **(Exhibit 16).**

IV THE FPA'S POSITION

FPA Ethics & Rules 101 - the Misleading and Deceptive Conduct Allegation

4.1 The FPA alleges that Dalle Cort made misleading representations to Mr and Mrs D

(a) That their investments were safe because Storm Financial had 'a mechanism for informing their clients and to sell down the portfolio to avoid margin calls'; and
(b) Storm Financial 'has insurance for it [a high risk margined investment strategy]';
and assured Mr and Mrs D that these features made their investment relatively safe; and
(c) The FPA also asserts that Dalle Cort misled Mr and Mrs D by omitting to tell them that the investment strategy was only feasible if borrowings continued to be made. That by omission cash flow worksheets in the statement of advice of 19 April 2004 show no explanation of how cash reserves in large deficit are to be funded, nor of the implicit fact that increases in the margin lending at the heart of the strategy recommended to Mr and Mrs D were to be used to fund those reserves from which Mr and Mrs D' living expenses were to be paid.

Mr and Mrs D gave evidence that statements to the effect of paragraphs (a) and (b) above, were made to them, both in the Storm Financial educational seminars they attended, and in one to one meetings with Dalle Cort (Transcript pp 22-23). Mr D said that in one-to-one conversations in relation to these assurances: *"We discussed that all the time"* (Transcript p

24). *'"We have strategies for that. We have insurance." That went over and over like a broken record.'* (Transcript p 34).

4.2 The allegation in paragraph (c) is made by the FPA relying on the Statements of Advicegiven to Mr and Mrs D, particularly the Statement of Additional Advice (SOAA) dated 10 April 2008 and the cash flow tables dated 15 April 2008, that are attached to the SOAA (Exhibit 7). Each of the original SOA (Exhibit 4) and the several SOAAs given to Mr and Mrs D by Dalle Cort contained these cash flow tables, containing virtually identical financial entries (though the exact numbers rose with each version) supporting an overall identical strategy following through from the first SOA in April 2004. In each of the initial SOA and subsequent SOAAs revised versions of the cash flow tables appeared. The cash flow tables are made part of the advice, by cross reference in the body of the initial SOA dated about 19 April 2004, which SOA is referred back to in the opening paragraphs of every subsequent SOAA.

The FPA alleges that Dalle Cort misled Mr and Mrs D by failing to explain that the cash reserve figures which are an integral part of the recommendation given to Mr and Mrs D, would quickly grow to be a very large debit amount. That deficit, would require continual increase in Mr and Mrs D's indebtedness to banks, secured either on their holdings of Storm index funds, or their home, or both. As just mentioned all subsequent SOAAs entered by Mr and Mrs D were cross referenced back to the original SOA of 19 April 2004. But even here search for an explanation of the need for continual advances from banks is fruitless. The cash flow charts are in Appendix 4 and there is discussion and some assumptions identified in pages 36-39 ofthe main body of the SOA. But in neither place is there an explanation of the fact that the cash reserves will only be possible if further support from banks is forthcoming.

In evidence the FPA took the cash flow charts in the SOAA dated 15 April 2008 as an example. The FPA argued that in July 2008 Mr and Mrs D had cash reserves of $83,520. In July 2009 this figure is -80,371 and by July 2020 when the cash flow charts end the cash reserves figure is –$2,508,853. It is from this cash reserves figure that the interest on Mr and Mrs D loans is to be met, and their living expenses. It is true that the cash flow charts also show that by July 2020 the unrealised accumulated growth in Mr and Mrs D' investments was predicted to have climbed to $3,083, 853. The FPA alleges that Dalle Cort failed to explain to Mr and Mrs D that they would have to rely on further advances from the banks, that the value of the unrealised accumulated growth in Mr and Mrs D' assets was volatile, and may end up being much less on realisation than the amount of their accumulated deficit in cash reserves. In the event the investments realised less than the loans funding the deficit in cash reserves, they would have to sell the underlying asset on which the loans to fund the cash reserves were secured. That asset was their home.

4.3 T he FPA argues that there is no place in the initial SOA where this is explained, and no place in any of the subsequent SOAAs where it is explained. The FPA argues that the long-term *fact* of the growing deficit in cash reserves was never explained to Mr and Mrs D in writing or orally. Instead it was buried in complex cash flow charts at the end of the SOA and SOAAs. The FPA argues the long term *effect* of the growing deficit in cash reserves was never explained to Mr and Mrs D. The FPA also argues that the long term *risk* of the increasing deficit in the cash reserves was never explained. And when Mr and Mrs D asked about the possibility of losses from what they could understand of the strategy, they were continually reassured by the statements the FPA alleges were made by Dalle Cort, in paragraph (a) and paragraph (b) above. This omission to explain the fact and significance of the growing deficit in cash reserves and that it could only be sustained by banks continuing to make further advances, the FPA argues was a misrepresentation.

4.4 The FPA asserts that Mr and Mrs D relied on Dalle Cort's statements in deciding to become clients of Storm Financial and to accept the recommendations made to them in the various SOAs that they received.

FPA Ethics & Rules 110 – the Failure to Provide a Suitable Financial Strategy Allegation

4.5 The FPA alleges that in breach of FPA Ethics and Rules 110 Dalle Cort failed to develop any suitable financial strategy or plan for the complainants before making his recommendation that they invest. In particular the FPA alleges that Mr and Mrs D were advised to adopt a geared investment strategy at the heart of which were large margined borrowings and large borrowings secured on their residence, even though they were retired and had ceased all employment. This recommendation was mostly made in the SOA of 19 April 2004 and was reinvigorated by incorporation by reference in a series of subsequent SOAAs up until 2008. The FPA also alleges by a letter dated 8 October 2008 Mr and Mrs D were advised by Dalle Cort to convert their interests in Storm Financial badged index funds (purchased mostly with borrowed funds) to cash, with no investigation or explanation of how this recommendation was suitable.

4.6 At the hearing the FPA argued that Mr and Mrs D had chosen a level of risk for their financial plan that was not matched by the advice they were given (Transcript p 6-7). In the Confidential Client Profile (Exhibit 3 p 14) Mr and Mrs D selected a level of risk that declared 'I am prepared to accept volatility if in the medium to long term the investment growth is higher and the risks over *that term* are minimal or eliminated.' On the same page they chose a 5-7 year time horizon – it was one which matched their risk level. The FPA argued that the leveraged investment strategy which Mr and Mrs D were advised to adopt, was much higher in risk than the level they chose. The FPA argued further that the level of risk chosen, was just one manifestation of the general allegation that Mr and Mrs D were given investment advice that was unsuitable. It was unsuitable because they did not want the level of risk that the strategy imposed. Their choice of risk level and the constant requests for reassurance (discussed in relation to the misleading conduct allegation) were also evidence that they did not welcome a risky strategy.

4.7 The FPA also argued that the strategy Dalle Cort advised was unsuitable because Mr and Mrs D investing purposes were much more modest than to require such a complex high risk strategy. In the Confidential Client Profile the only investment goal based on information obtained from Mr and Mrs D, is that they need $40,000 per annum to meet living expenses (Exhibit 3 p12). The remainder of the investment goals in the document are 'boiler-plate' generalities inserted by Storm Financial that are not derived from Mr and Mrs D or their circumstances. The strategy advised produced funds for living on that were closer to $70,000 than $40,000, and Mr and Mrs D were encouraged to live at that level of expense during the time they were clients of Storm Financial. The aspect Mr and Mrs D were not expressly advised of, and which the FPA alleges they were misled about, was that these funds for additional living expenses were to be sourced from further borrowings. The FPA argues that these borrowings, especially given they were to fund income over and above the amount the clients needed to live, were unsuitable for a couple both retired and with no income independent of their investments. Further, the advice was unsuitable because it involved investing borrowed

funds in index funds which could go up and down. The risk of losing the capital of the borrowed funds and losing the asset on which it was secured (their home) and other savings, when being retired made it impossible for Mr and Mrs D to replace that capital, had very serious consequences for their financial welfare.

4.8 In relation to the letters sent by Storm Financial to Mr and Mrs D on 8 October 2008 (Exhibits 8 & 9) the FPA says that both were unsuitable advice. Exhibit 9 was signed by Dalle Cort, but adopts the general strategy of the letter of the same date signed by Emmanual Cassimatis (Exhibit 8). Both letters advised Mr and Mrs D to sell down their portfolio of index funds, and hold the cash against the margin loans they had, with a view to the cash borrowed funds being reinvested. Nothing was said about how funds for paying interest on the borrowed funds was to be found or how living expenses were to be funded. Further, no reinvestigation was done of Mr and Mrs D investment purposes prior to giving the advice in these letters, nor any up-date of their personal circumstances. For all these reasons the FPA says that this advice was unsuitable.

FPA Ethics & Rules 111 – the Failure to Provide an Explanation of Risk Allegation

4.9 The FPA alleges that Dalle Cort failed to provide an adequate explanation of the risks involved in the strategy and recommendations he made to Mr and Mrs D. The material in the SOA was extremely general as to the risks being run in a margined strategy, especially one secured on Mr and Mrs D' home. It is true that the SOA did provide a comparison between the margined strategy recommended, and the allocated pension strategy. But this was exclusively a comparison of the financial returns, and did not comment in detail on the risks involved in either strategy. The discussion of risk that was included in the SOA was very general: taxation risk, market risk, inflation risk, risk of the failure to sufficiently diversify and so on. There was no place in the entire SOA where the risks involved in the margined strategy recommended to Mr and Mrs D, were explained in terms of the *specific risks which if they were realised would effect the financial future of Mr and Mrs D*: there was just no such content in the SOA at all. The FPA argues that it is only risk disclosure of this character which could satisfy the requirement of FPA Rules and Ethics 111, and where that risk is explained in terms Mr and Mrs D could understand. In fact, as is obvious from paragraphs above, the FPA's allegation is that far from explaining risk in a way Mr and Mrs D could understand, Dalle Cort misrepresented the nature and effect of the risks involved. Except for the trip to see Stuart Drummond in Brisbane there is no where in the evidence where Dalle Cort asserts that proper explanations were made orally either.

FPA Ethics & Rules 6 – the Bringing Discredit to the Profession Allegation

4.10 The FPA is of the view that as a result of the conduct alleged in the paragraphs above, Dalle Cort has bought the profession of financial planning into discredit.

V THE MEMBER'S POSITION

5.1 As has already been stated Dalle Cort neither attended nor appeared at the hearing. Thefollowing account of Dalle Cort's position is therefore taken from the letter of response to the FPA's breach notice written by Dalle Cort to the FPA dated 27 January 2010 **(Exhibit 20).** Where Dalle Cort's refutations of the allegations in the breach notice appear in other correspondence with the FPA, that is referred to by date.Dalle Cort raised the following points in his defence.

Lack of Access to Liquidator's Files Response

5.2 In his letter to the FPA of 27 January 2010 (Exhibit 20) Dalle Cort assets that he has no file notes of his conversations with Mr and Mrs D, and the advice given to them. This he says, given the time that has passed, makes it impossible to recall a lot of the detail associated with Mr and Mrs D account. Further, Dalle Cort asserts in further correspondence just before the hearing (email to FPA from Dalle Cort 23 June 2010; letters Dalle Cort to FPA 20 and 30 June 2010) that he has attempted to obtain the file in Mr and Mrs D case form the liquidator of Storm Financial without success.

5.3 The FPA had in fact succeeded in obtaining some documents from Mr and Mrs D' file from the liquidator. All the documents relied on by the FPA in making allegations against Dalle Cort were provided to him in a folder with the FPA's Breach Notice in this matter. So Dalle Cort was furnished, right from the start of these proceedings, with all the documents that the FPA used in making its case.

5.4 Though he does not say so as such, the implication of Dalle Cort's raising this matter seems to be that Dalle Cort has been prejudiced in being able to defend himself against the FPA's allegations by the absence of the file from the liquidator. Accompanying this there seems also to be an inference that the FPA should do something in response to the fact that Dalle Cort cannot get Mr and Mrs D file. Exactly what the FPA should do (short of dropping the case) and why it should do anything, is not spelled out. Since this is a legal question we deal with this further in Part VI below.

The Lack of Opportunity to Attend in Person Response

5.5 In the same correspondence just before the hearing (email to FPA from Dalle Cort 23 June 2010; letter Dalle Cort to FPA 20 June 2010) Dalle Cort argued that for personal and financial reasons, he was unable to attend the hearing of the matter in Sydney in person. He requested the hearing be held by telephone hook-up. The CRC declined to approve this request. Despite having nearly a month's notice of the hearing date, Dalle Cort did not attend in person, nor did he appear by a representative. The hearing went ahead after a telephone call on the morning of 2 July 2010, confirmed that Dalle Cort would not be attending. In his final written response to the 'next to final' draft of the determination, Dalle Cort asserted again that the proceedings should

have been conducted by phone. There were no further facts and no new arguments added at this point and so the CRC did not change its earlier conclusion. This response too, is dealt with further in Part IV below.

The Bias Response

5.4 In his letter to the FPA of 20 June 2010, Dalle Cort requested that the CRC panel chair, Professor Kingsford Smith, be disqualified from the panel for bias. The bias allegation was made alleging that bias was evident from articles published by Professor Kingsford Smith in academic journals, which discussed aspects of the work of Storm Financial as evident from the website of the Commonwealth Parliamentary Inquiry into Financial Services. The request was not agreed to (see FPA letters to Dalle Cort of 21 and 25 June 2010), and Professor Kingsford Smith did chair the CRC on the day of the hearing. Before proceeding, having explained the reasons for Dalle Cort's bias objection, Professor Kingsford Smith asked the other members of the panel, and the complainants, if they had any objection to proceeding – they did not (Transcript p 3). In his final written response to the 'next to final' draft of the determination, Dalle Cort asserted again that the chair of the CRC was biased and should not preside. There were no further facts and no new arguments added at this point and so the CRC did not change its earlier conclusion. The legal aspects of the bias allegation are set out in detail in Part IV.

Leading Witnesses

5.5 In his final written response to the 'next to final' draft of the determination, Dalle Cort raised the argument that the transcript of the hearing disclosed that the chair of the CRC had 'led witnesses'. Mostly as the FPA points out in its 'next to final draft submission', Dalle Cort asserts this 'leading' occurs when the chair asks Mr and Mrs D for clarification of their responses to questions, when they answered 'Mmmm'. The chair on a number of occasions asked whether they meant 'yes' or 'no' or she paraphrased an answer in the affirmative, that was inferred from the tone and context of the 'Mmmm' response. These interventions by the chair were required for clarification so as to create an unambiguous transcript. Dalle Cort argues that the chair was putting words into Mr and Mrs D' mouths. As a result of this, he argues, the FPA has not proved its case on a number of issues because it cannot rely on Mr and Mrs D evidence.

'Leading a witness' is really a problem in fully blown adversarial proceedings, where counsel leads their own witness, or tries to trick a witness into saying something by this device in cross-examination. That is not relevant in inquisitorial proceedings such as the CRC conducts. There it is the panel that is trying to get at the truth, and asking the questions. The CRC is explicitly freed from the usual rules of evidence by its rules, and the interventions by the chair were designed to clarify Mr and Mrs D' answers for the transcript and nothing else.

FPA Ethics & Rules 101 - the Misleading and Deceptive Conduct Allegation

5.6 Dalle Cort does not deny that Mr and Mrs D were long-standing clients of his, and that he encouraged them to attend Storm Financial educational workshops. He says 'I encouraged many clients [from MLC] to attend educational workshops that were part of what Storm Financial provided to its clients and others.' (Exhibit 20).

5.7 Dalle Cort does however deny that he conducted the seminars which Mr and Mrs D attended at Storm Financial. It was there that Dalle Cort is alleged to have made the representations about 'other strategies' and 'insurance' for risks that Mr and Mrs D might encounter in adopting recommendations by Dalle Cort. Their evidence is that they attended these seminars at Storm Financial's office in Cairns in early 2004, and that Dalle Cort made the representations then, and at subsequent one-on-one meetings. Dalle Cort denies that he made the representations at the educational seminars, (Exhibit 20). However, he does not deny that he made the representations otherwise, for he states 'However I would have stated these points at sometime to Mr and Mrs D, as I believed them to be true.' (Exhibit 20).

5.8 To the extent that Dalle Cort has responded to the allegations of misleading representations by omission derived from the negative cash reserve figures in the cash flow statements, he says three things. Firstly, he says that he cannot remember, and that he has had no access to files on Mr and Mrs D held by the liquidator of Storm Financial.(Exhibit 20). We deal with this argument further in Part VI of this determination dealing with legal issues and in Part VII. Secondly, he makes a general denial of any intentional conduct that would mislead. (Exhibit 20). Again we deal with this matter further in Part VI of this determination dealing with legal issues and in Part VII. Thirdly, he says that he did not advise Mr and Mrs D at the point of them accepting the statement of advice in April/May 2004. This advice he says, was given by Stuart Drummond in the Storm Financial office when Mr and Mrs D were visiting Brisbane during April 2004.

5.9 To be particular, Dalle Cort not only says that the advice on the first SOA Mr and Mrs D entered was given by Drummond, but that he completed the Confidential Financial Profile (or 'fact find') as well. In his letter to the FPA of 27 January 2010 (Exhibit 20) he says: 'The number of fact finders were put together for Mr and Mrs D and as they were discussing objects with Sturt Drummond in Brisbane another one was put together to match their profile. The fact finder provided was completed by Stuart Drummond of our Brisbane office who I regard as very competent advisors form my dealings. The statement made that I provided Mr and Mrs D with their original advice is incorrect. As indicated in the initial Statement of Advice Stuart Drummond of our Brisbane Office signed off on the advice presented as Mr and Mrs D were holidaying in Brisbane.' Some of the statements in this paragraph were contradicted by Mr and Mrs D in evidence at the hearing, and some are confirmed either by Mr and Mrs D evidence, or by the documentary record. The statements that were contradicted at the hearing must be looked at

particularly carefully, and in the light of the documentary evidence, since Dalle Cort did not appear to explain or refute those contradictions.

5.10 Dalle Cort says that a 'number of fact finders were put together for Mr and Mrs D' but that the final one was completed at the meeting with Drummond. The documentary evidence certainly confirms the latter part of this statement, since the Confidential Client Profile (Exhibit 3) bears Mr and Mrs D' signatures, and they acknowledged in evidence that the signatures at the end of the document were theirs. (Transcript p 17). Those signatures seem to have been inserted on 20 April 2004 when Mr and Mrs D were in Brisbane. Stuart Drummond's signature seems also to have been inserted on the same date. They also acknowledged that the choice of risk preference or 'risk/volatility statement' as it is described on page 14 of the document was theirs (Transcript p17).

Mr and Mrs D were clear that the 'fact find' information in the confidential client profile was furnished in Cairns, not in Brisbane. It was furnished to Dalle Cort. (Transcript p 17-18). They were also confident that the hand-writing in which this information was recorded in the confidential client profile, was not theirs. (Transcript p16) They concluded that the 'fact find' information had been collected in Cairns, not by Stuart Drummond. (Transcript p 17). The particulars of how the confidential client profile got into the hands of Stuart Drummond are not clear, since Mr and Mrs D do not remember it being handed to them to take to Brisbane (Transcript p 16). The balance of the oral and documentary evidence would suggest that the financial information in the confidential client profile was gathered in Cairns with Dalle Cort's knowledge and participation. This confirms Dalle Cort's own statement that 'a number of fact finders were put together for Mr and Mrs D.' (Exhibit 3)

5.11 By contrast, Mr and Mrs D clearly recall the SOA being handed to them by Dalle Cort and taking it to Brisbane with them. (Transcript p 13, 14, 16 and 19). They spent time reviewing it (Transcript p 16, 26) before the meeting with Drummond. The account of the meeting with Drummond suggests that Mr and Mrs D were not told any new information material to their decision to implement the recommendations in the SOA (Transcript p19-21). In particular Mr and Mrs D remember Drummond *'went through pretty much the same as what Gus or Mr Dalle Cort told us about as well."* (Transcript p 20).

5.12 Dalle Cort states in his response (Exhibit 3) that 'As indicated in the initial Statement of Advice Stuart Drummond of our Brisbane Office signed off on the advice presented as Mr and Mrs D were holidaying in Brisbane.' This statement is true to the extent that Mr and Mrs D did obtain an additional review of the SOA from Drummond. But although their evidence is confused in places as to which document they signed where, when they were asked to look at their signatures on the SOA and recall where the authority to proceed on page 110 of the SOA (Exhibit 4) was signed they were clear. They gave straightforward evidence that they signed the authority to proceed in Cairns (Transcript p 21-22). They did so in the presence of Dalle Cort who gave them gifts to celebrate. The date on the authority is 7 May 2004, and Mr and Mrs D were clear they were back in Cairns by then, settling into their new house and

finalising their future financial arrangements with Dalle Cort and Storm Financial.

FPA Ethics & Rules 110 – the Failure to Provide a Suitable Financial Strategy Allegation

5.13 It is rather difficult to discern from his letter of 27 January 2010 (Exhibit 20) exactly the arguments Dalle Cort makes in response to the FPA's allegations of unsuitable advice. They seem to reduce to two points specific to this allegation. It is clear however, that some of the more general points Dalle Cort makes to defend himself (dealt with as legal arguments in Part VI below), also apply here.

5.14 The first of Dalle Cort's specific defence arguments, is that Mr and Mrs D agreed to the advice they were given. In the same vein, he says that Mr and Mrs D' agreement was renewed every time they entered a new SOA. Further Dalle Cort argues that each time they entered a new SOA the nature and effect of what they were agreeing to was fully explained to them. Dalle Cort's defence here in effect amounts to an argument of contributory negligence by Mr and Mrs D – they agreed and so they must bear the consequences of their agreement. We deal with the effectiveness of this argument in the suitability context, in Part VI below.

5.15 The second argument is that Mr and Mrs D were clients of Storm Financial and that all the advice they were given, was governed by the parameters that Storm had adopted. Dalle Cort asserts that: 'On every occasion all of these requests were sent through to Storm Financial central processing for the advice to be centralised and structured to meet the parameters that my dealer had allowed advise to past through its process' (Exhibit 20)

The implication from this statement seems to be that as he was simply following his dealer's protocols, Dalle Cort bears no responsibility for the advice that was given to Mr and Mrs D. This is pointed out particularly in relation to the letter sent to Mr and Mrs D on about 8 October 2008 in which Mr and Mrs D were advised to sell down their portfolio. Dalle Cort alleges that it was the principal of Storm Financial, Emmanual Cassimatis, who signed the letter to Mr and Mrs D. In fact, there was another letter to Mr and Mrs D dated the very next day, signed by Dalle Cort in identical terms. We deal with this in Part VI below because again it is mostly a legal question.

5.16 Thirdly in relation to the allegation that advice that was given to Mr and Mrs D in October 2008 to cash in their holdings was unsuitable, Dalle Cort says that the responsibility for the losses was that of Colonial First State the manager of the index funds in which Mr and Mrs D invested, or Colonial Geared Investments which offered them the margin credit with which they bought the interests in the fund. It was, in his view, not unsuitable advice which caused the losses. It was a combination of lack of relevant and timely data from the margin lender, and action by Colonial First State in closing the index fund, that caused the losses.

FPA Ethics & Rules 111 – the Failure to Provide an Explanation of Risk Allegation

5.17 The member responds to this allegation in his letter to the FPA of 27 February 2010 (Exhibit 20) by arguing that Mr and Mrs D attended educational workshops prior to becoming Storm Financial clients, and then attended subsequent workshops in which the risks associated with their current investment strategy were covered. Dalle Cort also argues that the SOA given to Mr and Mrs D, had sections dealing with risk management which discharged his obligations under this provision of the FPA Rules & Ethics. He also asserts that Mr and Mrs D had the SOA for a long period for review before signing, and asked many questions. Finally, he points out that Mr and Mrs D at his suggestion went to see Stuart Drummond in Brisbane and that Drummond took them through the SOA.

FPA Ethics & Rules 6 – the Bringing Discredit to the Profession Allegation

5.18 Dalle Cort denies that his conduct has ever bought the financial planning profession into discredit.

VI THE LEGAL QUESTIONS

Lack of Access to Liquidator's Files

6.1 In his letter to the FPA of 27 January 2010 (Exhibit 20) Dalle Cort assets that he has no file notes of his conversations with Mr and Mrs D, and the advice given to them. This he says, given the time that has passed, makes it impossible to recall a lot of the detail associated with Mr and Mrs D account. Further, Dalle Cort asserts in further correspondence just before the hearing (email to FPA from Dalle Cort 23 June 2010; letter Dalle Cort to FPA 25 June 2010) that he has attempted to obtain the file in Mr and Mrs D case from the liquidator of Storm Financial without success.

6.2 The FPA had in fact succeeded in obtaining some documents from Mr and Mrs D' file from the liquidator. All the documents relied on by the FPA in making allegations against Dalle Cort were provided to him in a folder with the FPA's Breach Notice in this matter in December 2009. So Dalle Cort was furnished, right from the start of these proceedings, with all the documents that the FPA used in making its case. The FPA Disciplinary Regulations require only that Dalle Cort be given 'details of the breach' and 'grounds on which the Breach is based' in the Breach Notice (Regulation 8.1). The practice of the CRC is to gofurther and ask the FPA to provide copies of all the documents it intends to rely on. In so doing the duty of natural justice to tell the FPA Member subject to CRC proceedings what the FPA's case is, so that the Member might defend themselves against the FPA's allegations, is more than discharged.

6.3 The FPA has no obligation to the Member to procure evidence for him or her. The CRC has no power to withdraw proceedings or part thereof because the Member can't find evidence they need to defend themselves. It is unfortunate

for Dalle Cort, that the fact that Storm Financial is insolvent has made access to evidence more difficult. The FPA has done what it can, and well beyond what it is obliged to do, to assist Dalle Cort with this problem. Finally, it is not entirely the case that Dalle Cort cannot remember the details of Mr and Mrs D' account. For example in his letter to the FPA of 27 January (Exhibit 20) Dalle Cort says: eg 'a number of fact finders were put together for Mr and Mrs D'. He also recollects 'over the time Mr and Mrs D were part of the Storm Financial process they consumed more funds on personal consumption then they presented as capital form their very first meeting.' These are recollections of considerable detail – and evidence that the Member may have more recollection than he believes.

The Lack of Opportunity to Attend in Person

6.4 In the same correspondence just before the hearing (email to FPA from Dalle Cort 23 June 2010; letter Dalle Cort to FPA 20 June 2010) Dalle Cort argued that for personal and financial reasons, he was unable to attend the hearing of the matter in Sydney in person. He requested the hearing be held by telephone hook-up. The CRC declined to approve this request. Despite having nearly a month's notice of the hearing date, Dalle Cort did not attend in person, nor did he appear by a representative. The CRC took the view that Dalle Cort had known about the likelihood of a hearing for over 6 months, and certainly from the date of the FPA's letter to him of 7 June 2010.

6.5 Although it is not expressly provided for in the FPA's Disciplinary Regulations, it is utterly clear from the structure and operation of those regulations, that it is intended that the Member attend CRC hearings in person. By personal presence is meant appearance at the same venue as the CRC panel, and the presentation of facts and argument orally. This is particularly clear from Regulation 9. That regulation provides specifically for the making of written submissions (Reg 9.2(e)) which wouldn't be necessary except that the assumption underlying the disciplinary regulations is that Members will appear personally, and the proceedings of the CRC will be conducted orally. Further, the disciplinary regulations at Regulation 9.3 provide that the proceedings of the CRC 'must be recorded in writing or electronically.' This is another strong indicator that the regulations contemplate oral proceedings, conducted in person. Other paragraphs of Regulation 9 which provide for calling of witnesses and panel questioning of witnesses are to the same effect.

6.6 Once it is established that the disciplinary regulations contemplate oral proceedings conducted in person, the secondary question becomes, whether the CRC has power to allow the proceedings to be conducted by telephone hook-up or video conference. While it is clear that the 'default' position contemplated by the disciplinary regulations is that proceedings will be conducted in person, it is also clear that in the 'conduct of proceedings generally' the panel has wide powers to 'conduct proceedings expeditiously' and to 'inform itself on any matter as it sees fit' (Reg 9.6). These powers would be sufficient to allow it to conduct hearings either wholly or partly by telephone or video conference, so long as all the participants could be heard

and fully participate, and that a complete and accurate recording could be made for the creation of a transcript.

6.7 Given that the 'default' assumption is that the proceedings will be conducted orally and with the Member present in person at the same place as the CRC panel, it will be at the discretion of the Chair of the CRC or her delegate, as to whether a Member will be able to participate by electronic means. That discretion will be conditioned by the nature of the allegations in question, the seriousness of the allegations, the number of Members and witnesses involved and whether the Members are represented by someone else, and whether for example they have been invited to have a 'McKenzie friend' in attendance. In this case, given the nature of the allegations (including one of dishonesty and of misrepresentation) proof of which is greatly assisted by personal presence and demeanour in giving evidence, it was decided to conduct the proceedings with the member personally present.

Bias and the Composition of the Conduct Review Commission.

6.8 Bias in domestic, contract based tribunals such as the CRC, is governed by different rules to those of courts and tribunals established by statute. In courts and statutory tribunals it is sufficient to disqualify a decision-maker that 'a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide' *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337. This does not mean that a judge or other decision-maker should be recused simply for having (as all humans do) values, pre-dispositions or principles or for the expression of general policy views or preliminary views: 'the question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion.' *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507.

6.9 Whether actual or apprehended bias is in issue, limits to these principles are recognised. The whole point of the bias principle is to maintain the confidence of litigants in the decisions of courts and tribunals, in the impartial and independent minded administration of justice. However, if allegations of bias are too easily acceded to, there will be another ground for lack of confidence in the decision-maker. There can be a real risk that the applicant alleging bias is seen to be manipulating the system not to avoid a prejudiced mind but to avoid an adverse result. Too eager a willingness to recuse a decision-maker is equally as damaging to the administration of justice, as the appearance or fact of bias. Accordingly, especially in relation to actual bias of the sort applying to the CRC, decision-makers should not be automatic or show timidity in agreeing to requests for disqualification.

6.10 By contrast, bias results in a void decision of a domestic tribunal like the CRC only when actual bias is established in the decision-maker. To prove actual bias a pre-existing, unalterable state of mind must be established, that renders the decision-maker's mind incapable of alteration: *Commissioner of Police v Ryan* (2007) 70 NSWLR 73. The cases demonstrate it is very difficult indeed, to establish actual bias. A charge of actual bias is tantamount to an

allegation of fraud, and a high evidentiary burden must be discharged. The most obvious example of actual bias, is where pecuniary conflicts are involved: the decision-maker has a current financial interest in or relations with one of the parties to the dispute. Actual bias may also arise from some direct or indirect relationship or contact with a party.In all these instances, whether the bias is operative will depend on the closeness of the connection, the nature of the link and the size and quality of the interest which derives from that link. The same applies to family and friendship, or personal involvement with the subject matter. In each case to establish actual bias it will be necessary to show that the quality of the interest or association will be material to and influential upon the decision-maker's mind so 'that it renders the decision-maker's mind incapable of alteration'.

6.11 Business, work, professional or institutional ties, are treated a little differently in tribunals like the CRC, from courts and statutory tribunals. These ties are more robustly tolerated because it is recognised that the operation of peer or professional tribunals would be frustrated if these types of association were enough to ground bias. Related, is the difficulty that many tribunals including the CRC are constituted by professional experts whose opinions are adopted by and shape the tribunal's determinations. This opinion may not be adduced as evidence in proceedings, and entails a bias to accept the correctness of conventional professional standards. This has been accepted as not amounting to disqualifying bias: *Gorman v NSW Medical Board* [2010] NSWCA 26. Similarly the law tolerates a greater level of unilateral communication by a decision-maker with one party, in a tribunal with inquisitorial powers like the CRC. Such a procedural method likely requires iterative and one-sided contact by the decision-maker with the parties. To address any lingering concerns about bias which might arise from this or the peer review nature of the CRC and professional opinion not adduced as evidence, the panel has adopted the practice of giving members a chance to make final comment on the next-to-last draft of any determination it is minded to publish: *National Companies and Securities Commission v Newscorp Ltd* (1984) 156 CLR 296. Although it too can be discharged at a lower level in a domestic tribunal, this practice is also adopted as a precaution in relation to the hearing rule of natural justice.

6.12 Applying this law to the facts of the case, it is clear that Dalle Cort could not sustain an allegation of actual bias against the tribunal. It is most unlikely that if it had been relevant, that he could have sustained an allegation of apparent bias, either. The opinions expressed in Professor Kingsford Smith's academic work, are distant in time and context from the CRC and this case. Those articles are the expression of general policy and regulatory theory opinions, on the position of the individual investor in times of financial crisis such as the Global Financial Crisis. They only make connections in the most general way with the Storm Financial corporate entity, and all from information in the public domain, referencing in detail material from the Parliamentary Committee website. There is no reference whatever, direct or indirect, to Dalle Cort. Even in the world of apprehended bias, it is not necessary for the adjudicator to have a blank mind: generally held values, opinions, principles and views are acceptable. The submission by Dalle Cort has fallen at the major hurdle of

establishing actual bias in this case. It fails to show that Professor Kingsford Smith misunderstands the difference between the CRC decision-making context and the academic research and publication one. That she has failed to see the difference in quality between making a theoretical academic argument and the making of specific findings of fact and law based on the submissions in this particular case. In short, Dalle Cort has failed to prove that Professor Kingsford Smith's mind is so made up through her academic work that it is not open to persuasion by the evidence and arguments made in this case.

6.13 On the contrary. The CRC has gone to great lengths to ensure that despite not attending the hearing, Dalle Cort's submissions have been taken seriously, and given the benefit of the doubt. Much care has been taken to set out what the CRC is able to understand Dalle Cort's written submissions as saying, to present them in the most favourable light. These submissions are difficult to follow. They demonstrate modesty of spelling and grammar and innocence of analytic content, making it hard work for the reader to divine their meaning and significance. This level of assistance by the CRC to the member, demonstrates quite the opposite of any of the hallmarks of bias. It has in fact resulted in the tribunal doing much of the work of the member in the presentation and consideration of this case. It is par excellence, the CRC striving to make itself open to persuasion by what evidence and arguments the member has chosen to provide. It is certainly not a level of assistance the CRC has or will commonly provide: it has been accorded to be scrupulously fair to this member who has chosen not to appear, but where the circumstances and allegations involved could result in very serious consequences for Dalle Cort.

Is a Representative Member Personally Liable for Conduct Done at the Direction of their Principal?

6.14 The FPA rules do not answer this question directly: unlike the *Corporations Act 2001* where section 945A(2) expressly provides that it is a defence to liability for unsuitable advice, if the principal has given the representative information or instructions about the giving of personal advice. Another salient difference between the *Corporations Act* provisions and the FPA Rules is that the former can result in criminal prosecution whereas the FPA Rules are squarely civil in character, and the sanctions are limited. There is therefore an important qualitative difference in the consequences of following directions as between the Corporations Act and the FPA Ethics and Rules.

6.15 That leaves us with the following questions: what is the personal *civil* liability of an agent who acts on instructions in giving advice, or passes to the client advice prepared by the principal? And, how does that civil liability in the ordinary law of agency fit in with the contractual membership rules of an industry association? The usual consequences of an authorised representative acting as an agent for a principal to conclude an advisor-customer agreement, is that the agent will create a privity of contract between the principal and the customer, without itself becoming an party to the contract. In this case, Dalle Cort causing Mr and Mrs D to become a Storm

client created a contractual relationship between them and Storm Financial – Mr and Mrs D were Storm's customers. That made Storm Financial liable for unlawful acts done by Dalle Cort causing damage to Mr and Mrs D. No doubt the authorised representative agreement between Dalle Cort and Storm provided that Dalle Cort should indemnify Storm for any liability it incurred to customers, because of Dalle Cort's conduct.

6.16 In response to the allegation that he gave unsuitable advice to Mr and Mrs D, Dalle Cort argues that he acted on instructions from Storm Financial and has no liability. It is true that the general law imposes on agents the duty to follow the instructions of their principals. But Reynolds points out in *Bowstead on Agency* (Sweet & Maxwell, 1985) at 140-141 that: 'Instructions which involve the performance of an illegal act normally need not be obeyed' citing *Cohen v Kittel* (1889) 22 QBD 680; *Donovan v Invicta Airways Ltd* [1970] 1 Lloyd's Rep 486. Further to our point Reynolds points out also at pp140-141:'In the case of a professional man he will be bound to a considerable extent by the rules and ethical standards of his profession and he could not be required to perform an act which was contrary to those rules or standards.' And 'thus a stockbroker is only required to carry out a sale of shares in accordance with the rules of the stock exchange and cannot be required to act other than in accordance with those rules.' *Hawkins v Pearce* (1903) 9 Com Cas 87; *Cunliffe-Owen v Teather & Greenwood* [1967] 1 WLR 1421. The same would likely follow from the principles set out in *Bell Group Ltd v Herald and Weekly Times Ltd* (1985) 9 ACLR, 697.

6.17 So although it is usually the case that an agent must act on the principal's instructions there are limits, and asking an agent to break the law or depart from the professional standards by which he or she is governed, overreaches these limits. Just as a stockbroker in Australia cannot act in breach of the Market Rules of the Australian Stock Exchange and all contracts it enters are subject to those rules, a financial planner cannot act in breach of the Rules and Ethics of the FPA. All other contracts, including the authorised representative agreement and the contract the representative planner procures the customer to enter with the principal, are subject to the FPA's rules. In well drafted authorised representative agreements, this position would be stated expressly.

So the second question above, about how civil liability in the ordinary law of agency fits with the contractual membership rules of an industry association, is answered by saying that the professional or legal obligations have priority. No liability in agency will be incurred by a representative planner who does not follow instructions to act unlawfully or in breach of professional standards.

6.18 The first question above, on the personal *civil* liability of an agent who acts on instructions in giving advice, or passes to the client advice prepared by the principal, depends on the nature and origin of the liability. Here we are concerned with liability for breach of the FPA Rules. There is nothing in those rules which exonerates a member who is a representative planner because he or she followed instructions. Indeed, the priority given by the general law to professional standards over contractual agency, points in the opposite

direction. So where the FPA Ethics and Rules require the representative planner to observe the suitability rule, there is nothing in those rules or in the general law of agency which excuses the planner from that requirement. To the extent that any provision of an authorised agency agreement would try to excuse a representative from liability for unsuitable recommendations it would likely face a challenge of being void for breach of public policy.

6.19 To the extent that the information or advice that is passed to the client by the representative having come originally from the principal consists of misrepresentations, the law divides the liability between the instances where the representative adopts the statements as their own, and instances where the representative passes on the information for what it is worth, without adopting it or endorsing it. Where the representative has adopted or endorsed the information or advice, they will be liable for it with the principal. It is not a large step to suppose that the same principle might apply for unsuitable recommendations.

Loss Caused by Colonial First State (Commonwealth Bank) not Dalle Cort's Conduct.

6.20 Dalle Cort argues that it was the conduct of Colonial first State (CFS) the manager of the Storm Financial badged index funds, that was the cause of Mr and Mrs D' loss and not hisconduct or that of Storm Financial. There are two points to be made in response to this argument. The first is that loss and its causation is not a relevant consideration for breach of the FPA Ethics and Rules that the FPA alleges Dalle Cort breached. All that the FPA needs to show is that Dalle Cort's conduct breached the standard of conduct required by the rules.This proposition is perhaps most easily grasped in relation to the obligation not to bring the profession of financial planning into discredit. The relevant moment for determining whether the rules have been discharged is generally the point of entry by the client into the customer contract with Storm, or of implementation of advice. That would be the case in an allegation of breach of the suitability requirement. The same will usually apply to an allegation of misrepresentation. An even earlier point of time might be relevant in an allegation of misrepresentation, if the customer relied on the adviser's conduct prior to entering the customer agreement or accepting advice.

6.21 The second point is that even if it were the case that loss had to be shown before there could be a breach of most of the FPA Ethics and Rules, it is not necessary in the general law of causation for the act of the adviser to be the only or even the primary cause of loss, before he or she could be liable. It is sufficient in most legal settings where causation is relevant, that the act of the party facing liability was a relevant causative factor – that 'but for' the act of the potentially liable party, the loss would not have been suffered. It is obvious that in this case, if it were not for the conduct of Dalle Cort in recommending the strategy he did to Mr and Mrs D, they would never have suffered the loss they did. However, as we have pointed out already, loss is not a relevant factor in the proof of breach of the FPA Ethics and Rules, and so we do not have to delay further on this point. It is also unnecessary for the FPA to prove Mr and Mrs D' loss to make out its case.

FPA Ethics & Rules 101 - the Misleading and Deceptive Conduct Allegation

6.22 FPA Rule 101 prohibits acts or omissions of a 'misleading' nature. By contrast with the prohibitions in the TPA and ASICA the FPA rule does not prohibit conduct 'likely to mislead'. It follows that conduct which has caused confusion or uncertainty in the minds of clients will not alone be enough to mislead. However, circumstances which do induce confusion or uncertainty are very much more likely to result in misleading conduct being relied upon, and loss occurring. They are also more likely to allow proof that conduct was objectively misleading.

6.23 Rule 101 is silent about whether intention to mislead is required. Following the interpretation of the TPA and ASICA provisions, and because of the burden of proving intent, the CRC considers it appropriate 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.

6.24 Generally for conduct to be misleading there must be a representation or conduct amounting to a representation (eg silence which allows a misunderstanding to persist) inducing error or misconception. The other person must rely on that conduct. It is possible for factually true statements to be misleading if the associated circumstances contribute to error or misconception. In the same way, silence may be misleading.

6.25 Predictions are a fertile ground for misleading conduct unless reasonably based and properly explained. To make lawful predictive statements the law requires that the maker have reasonable (objective facts and defensible assumptions) grounds to make the statement. The cash flow statements which were included in appendices to the various SOAs were predictions of the sort which the law requires to be supported by objective facts and defensible assumptions. Although the SOA of April 2004 states that the cash flow charts are only viability tests and not predictions or projections (at page 37 of the SOA), it is clear that is what they were. Indeed, in pages 36-39 of the April 2004 SOA some trouble is taken in setting out what is described as conservative assumptions for the calculation of the figures set out in the cash flow charts. However, one important assumption which was missing, and which the FPA alleges made the cash flow charts misleading, is the assumption (indeed the fact) that Mr and Mrs D would have to rely on further loans from banks in order for the cash flow to support the strategy which Dalle Cort advised.

6.26 A misrepresentation made in one part of a document 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. This is a danger in long, complicated documents, and one reason why ASIC has connected the failure to be 'clear, concise and effective' with liability for deceptive and misleading conduct. The Storm Financial SOA given to Mr and Mrs D was very long, with many appendices. The cash flow statements on

which the FPA says Mr and Mrs D relied were in these appendices, but the narrative which was supposed to provide assumptions for the cash flows and explain their operation was in pages 36-39 of the main body of the SOA (Exhibit 4). In fact this material contained nothing which corrected the omission to explain the need for reliance on bank loans to fund cash reserves alleged by the FPA to be a misrepresentation, but the length and multiplicity of parts of the SOA may have hidden that explanation if it had been there.

6.27 There are two further legal points to be made about the allegations of misrepresentation arising from the failure to explain the reliance on continuing loan funds implicit in the cash flow charts. The first is that silence can amount to misleading conduct. This position is express in the terms of FPA Rule 101 which includes the word 'omission' in its description of 'conduct' which may be misleading. It is also clear from the legal interpretation of the term 'conduct' in many other contexts in Australian law – and we see no reason to deviate from that interpretation in seeking the meaning of the FPA Rules when they are intended to be protective of member's clients. To determine otherwise would leave a large gap in that protection.

6.28 The second and last further legal point addresses advice given in teams. Where many people have been involved in advising a client, is one absolved from responsibility for misleading conduct, just because they were not present when formal documents were prepared or signed? Dalle Cort argued that as Stewart Drummond in Brisbane was present when the Client Profile was completed and the April 2004 SOA signed, and that he Dalle Cort was not in fact Mr and Mrs D' adviser. The law however is more subtle than to hang legal consequences on the chance or design of who fills in and is present when documents are signed. Where statements or other conduct have been part of complex negotiations towards a significant transaction, then those statements or conduct should not be considered in isolation but in the overall context. The conduct must be considered in its overall setting having regard to the material circumstances.

6.29 So the fact that Dalle Cort prepared many 'fact-finders' prior to the one signed in the presence of Drummond, is relevant to whether he was Mr and Mrs D' adviser. So is the fact (which may be inferred from the evidence given by Mr and Mrs D at the hearing) that it is more likely than not, that Dalle Cort prepared the Client Profile that was finally signed in Brisbane. This last inference seems even more probable when it is shown likely that Dalle Cort was the advisor involved in getting Mr and Mrs D personal information on the basis of which the April 2004 SOA was prepared which Mr and Mrs D took with them to Brisbane. It was this SOA that Mr and Mrs D say, and the date corroborates, was signed in Cairns at Storm Financial's office in Dalle Cort's presence. Even if as Dalle Cort asserts the SOA was signed in Brisbane, his role in material aspects of the advisory process would mean he may still be liable for misleading conduct on which Mr and Mrs D relied. Further, nothing in Dalle Cort's submission on the 'next to last draft' of this determination really changes that picture. He asserts that Mr and Mrs D visited Drummond twice not once, but there is no evidence of the nature and extent of this second visit

and it is clear in from the correspondence that Drummond was signing for Dalle Cort and saw him as Mr and Mrs D' lead adviser.

FPA Ethics & Rules 110 – the Failure to Provide a Suitable Financial Strategy Allegation

6.30 The material words of FPA Ethics and Rules 110 require the planner to 'develop a suitable strategy or plan for the client'. This plan must be 'based on the relevant information collected and analysed' a reference to the requirement to collect information from the client in FPA Rule and Ethic 108. These two rules operate together, and are two sides of the one coin. The planner collects information from the client to make an assessment of the type of strategy or plan that would meet the client's needs. This strategy may be to do nothing: or it may be to go home and pay off the mortgage and continue to make the highest contributions to an existing super fund that are affordable. Many Australians need only quite modest financial plans, at least in the earlier stages of their lives.

6.31 But often the strategy should be more sophisticated, and it may require the planner not only to develop a plan from the client's information, but also to access or do research to identify which interests or instruments (ie which products) are suitable for the client. The identification does not have to result in recommending the 'best', the rule requires only that what is recommended is suitable. In short the FPA Ethics and Rules prescribe a two step approach to a suitable recommendation: collection and analysing of client information to identify client needs and research and analysis to match the needs with suitable recommendations (usually but not always, acquiring financial products). The overall result is the development and implementation of a financial plan.

6.32 We have set out this discussion of the rules to make two related important points about the suitability obligation on advisers. The first point is that the adviser must match the plan and its implementation to the client's needs, not the client to the strategy and products. If the plan or strategy and its implementation is not based on meeting needs it will not satisfy the suitability obligation. Put shortly, the advice must be 'client centric' not 'product centric' or 'strategy centric'.

6.33 The second point is this. The role of the financial adviser is to discern the client's needs and put them into financial terms. Those needs include the need to be at peace with the level of risk they assume when the plan is implemented. That need may well convert into different (and lower earning) financial terms for risk averse clients than for those who are perhaps younger or for many other reasons may tolerate higher risk. The risks need to be disclosed to the client in terms the client is likely to understand (FPA Ethic and Rule 111). It is not the prerogative of the planner to either ignore the risk

preferences of the client or to train them to accept (or appear to accept) a higher level of risk than they wish to assume. The role of the planner is to develop a plan that is suitable for the client's needs, including the need to be content with the risk levels assumed. It is certainly not part of the role of the planner to act as a hidden persuader to get the client to believe they have financial needs greater than they do. It is also no part of the planner's role to coach clients to take on risks (which may not be properly explained) that they do not feel thoroughly comfortable with. Both these examples are, reverting to our prior point, attempting to mould the client to the strategy, not the strategy to the client. They amount to a breach of the suitability obligation and depending on the degree to which the client's instructions about risk have been ignored, may also involve a breach of the express terms of the client mandate.

6.34 Finally on the question of suitability, it is not to the point for a planner to say that he or she has made disclaimers, or obtained concessions or made disclosure which exempts them from the operation of the suitability obligation. The best view of the effect of exemptions, disclaimers and disclosures on the suitability obligation, is that they are virtually useless in reducing liability. Certainly under s945A of the Corporations Act 2001 there is no room at all for reducing liability flowing from the obligation to have reasonable grounds for advice by any of these devices. Similarly, using contract terms to position the client so their behaviour may be seen as akin to contributory negligence is also ineffective. We see no reason in principle and no compulsion or encouragement from the actual words of the FPA Ethics and Rules, to deviate from the Corporations Act 2001 position in the interpretation of FPA Ethics & Rules 110.

6.35 Speaking about specifics, where attempts by the advisor to avoid or diminish liability amount to paragraphs of general 'boiler plate' say about the nature and effect of risk, then they are not worth the paper they are printed on. Even if such attempts could be effective under the suitability rule, exemptions or disclaimers with force have to be precise and specific to the risks the client will actually face under the plan as implemented. Further, they must be bought to the particular attention of the client, and the effect explained, prior to entry to the mandate or the adoption of the SOA or any other document. Sometimes disclaimers or exemptions which pass these tests, are effective to reduce or avoid liability for negligence, though often in our statutory age, such attempts are ineffective under statutory provisions. But there is no authority that we are aware of where disclaimers and other analogous devices have been successful in reducing liability for breach of the suitability obligation, and certainly in the statutory context in Australia this is just legally not possible.

6.36 So continuing with specifics, even if fees or commissions are punctiliously disclosed, if they are disproportionately large for the size or duration of the investment, they will still render the advice unsuitable. Even if the majority of an adviser's clients are put into a prominent manager's funds and the return is appropriate, no amount of words saying that predictions are based on historical averages or that research houses were used to provide indicative

figures will suffice if there are just no good reasons to put that particular client into those funds. What is suitable for others (even the majority of others) is not necessarily suitable for all, and no number of general statements or disclaimers supported by averages or trends or opinions can change that.

FPA Ethics & Rules 111 – the Failure to Provide an Explanation of Risk Allegation

6.37 Rule 111 requires that an explanation of risk is given to customers 'in terms that the client is likely to understand'. An understandable explanation of risk is at the heart of informed client consent to the investment strategy they are agreeing to. A failure to properly inform a client about risk can result in allegations of misleading behaviour, discharge of the customer contract for breach and negligence in the discharge of advisory responsibilities. Explanations of risk that the client is likely to understand have two crucial components. Firstly, they must be explanations that are directly relevant to the risks involved with the strategy or products that the financial planner is actually advising them to take. An explanation of risk that is general as to product categories or asset allocation or to exogenous factors such as market volatility, tax liability or change in legal rules, is inadequate. It may be useful to orient the client in a general way, but it is quite beside the point in discharging the obligation to set out the particular risks that might diminish clients' financial wellbeing arising from the specific plan or products being advised. Inadequacy in so doing, is likely to disguise the real risk involved: it may as a result lead to inadequate assessment of suitability of a strategy or product, or even to the making of misrepresentations as to the nature and effect of risks.

6.38 Secondly, to comply with Rule 111 the planner has to explain the risk to the client in terms the client can understand. This will usually involve a one-to-one meeting with the client, in which virtually every page of the SOA they are about to sign is explained. This is consonant with the point just made, that it is the precise risks to be assumed by that client that must be disclosed and explained. It is not the general risks of an investing approach that might be explained in a seminar with others present, that is the object of this rule. It is the precise risks of the individual's proposed strategy that must be explained. And the explanation must be done in a fashion that responds to the client's level of financial literacy and experience, to the complexity of the strategy or products – 'in terms that the client is likely to understand'.

FPA Ethics & Rules 6 – the Bringing Discredit to the Profession Allegation

6.39 FPA Ethic 6 uses the word 'discredit' which the Macquarie Dictionary says means to 'injure reputation or esteem' or 'to destroy confidence in'. There is overlap with the word 'disrepute'. In a prior determination, after much discussion, the CRC concluded that for an FPA member's conduct to discredit the profession of financial planning, a member's conduct would require some 'moral deficiency' or be 'grossly inappropriate'. We adopt this meaning for this determination as well.

VII OUTCOME AND REASONS

FPA Ethics & Rules 101 - the Misleading and Deceptive Conduct Allegation

7.1 In relation to the FPA's allegations that Dalle Cort made misleading representations about the safety of investing using the Storm Financial strategy it is important to recall the context in which these representations were made. The context is one of an accumulation of factors which, intentionally or not, had the effect of driving Mr and Mrs D between one fear and another. One fear was that their allocated pension would run out of capital, before their lives ended. This was a real concern which Dalle Cort mentioned often including in his first announcement to Mr and Mrs D that he was moving from MLC to Storm Financial. Mr and Mrs D were sufficiently concerned about it to seek a second opinion from another financial adviser before leaving MLC and going to Storm Financial (Transcript p 12).

7.2 Their other fear was that the Storm Financial strategy was risky. Mr and Mrs D were aware enough of the risks of the Storm Financial strategy to take many months to become Storm Financial clients. They were aware enough of the risks to make a conservative selection of the risk level they preferred in the instructions they gave to Dalle Cort in the Confidential Client Profile they signed (Exhibit 3). They were aware enough of the risks to be adamant in early 2004 that they would not make their home available as a security for the loans they were recommended to take out (Transcript p33). Their evidence was clear that they sought, and were given repetitive assurances that Storm Financial had strategies for dealing with the ups and downs in value of the underlying equities that constituted their index fund investments. In particular that 'the LVRs - or that they just wanted to keep new clients in at 50 per cent.' (Transcript p23). That Storm Financial had insurance that would cover any loss they might suffer so that 'if things went bad, that we were definitely covered there, could be returned back to our original status.' (Transcript p 23). In relation to the mortgaging of their house in particular their evidence was they said to Dalle Cort:'the bottom line is we don't want to lose our home and Gus pretty well – I can't remember his exact words but he pretty well guaranteed that that's out of the question and they said, "We'll be looking after you, and you don't have to even worry about it."' (Transcript p33). Both Mr and Mrs D share these recollections, and although in other places in the evidence one corrected the other on tiny details, in this aspect of the evidence they had a unanimous memory of the conversations and what was said to them by Dalle Cort. Indeed, Dalle Cort does not deny that he made these statements to Mr and Mrs D, because he says, he believed them to be true. He says 'It was my understanding that should incorrect advice be given then that is why Insurance cover was carried by my Dealer Storm Financial as did MLC Financial Planning when I was an authorised representative. Should the Advise Mr and Mrs D were given be proven to be incorrect then the Insures will certainly have to look at compensating Mr and Mrs D should a case be brought against them." (Exhibit 20).

7.3 The trouble is that these reassuring statements were wrong. Dalle Cort says himself, that the insurance only covered client losses when advice given was 'proven to be incorrect'(Exhibit 20). It did not cover the wider range of risks that could come home to roost when a retired couple were advised to adopt a highly leveraged investment strategy, where borrowings were secured against their home. It was extremely unlikely that 'if things went bad, that we were definitely covered there, could be returned back to our original status.' (Transcript p 23). It may be that Mr and Mrs D could recover some compensation from the Storm Financial insurer, but because Storm Financial is in liquidation they will have to deal with the liquidator on this question, and share with others who have claims against the company, any proceeds of the insurance policy. If these qualifications on the capacity of insurance to act as compensation had been explained to Mr and Mrs D, it seems completely unlikely that they would have been reassured by the statements that Storm Financial had strategies and insurance that would cover them if things went wrong.

In his submissions in relation to the 'next to final' determination Dalle Cort brings new evidence of fact. He says he was present at the educational seminars by tele-conference from the Brisbane office. In the next paragraph after this, he says he made Mr and Mrs D hospitality greetings. In the initial response to the breach notice in early 2010 he denies speaking at the seminar, but does not deny being present, presumably in Cairns. There is no discussion of tele-conferencing there. The new statement by the Veivers that Dalle Cort presented as part of this final submission is not probative. It does not say who the presenter was, there is no evidence as to whether the Veivers were even present on the same date as Mr and Mrs D or even in the same room or venue. Mr and Mrs D' evidence is consistent – they say that the statements about the insurance restoring any losses and the 'other mechanisms' to protect the portfolio were made by Dalle Cort at the educational seminars in March 2004. They accept in the transcript that Dalle Cort disputes this assertion, but they do not resile from their version of events. Dalle Cort's evidence is variable –the panel prefers the evidence of Mr and Mrs D. Finally as the FPA points out in its final submission, Dalle Cort does not deny he made these statements in one on one meetings with Mr and Mrs D on other occasions.

7.4 Matters are more complex on the question of whether Storm Financial had 'other Mechanisms' to deal with risk. At the hearing Mr and Mrs D were asked about what these 'other mechanisms' or strategies were (Transcript p 23). They were unable to be very specific except to say that Storm 'wanted to keep new clients in at 50 per cent' Loan to Valuation Ratio (LVR) so as to avoid calls from their margin lender (Transcript p23). But Storm Financial's adherence to this preservative strategy did not last long. By the end of 2004 Dalle Cort was already in touch with Mr and Mrs D suggesting that they borrow more, and this time, offer their house as security. Again, reassurances were given that their house could never be the subject of a claim for repayment by the lender whose advances were funding the credit aspect of

the strategy Dalle Cort advised. Then followed a series of SOAAs and further loans so that by October 2008 Mr and Mrs D owed over $2 million dollars and their LVR had risen to over 90 per cent. Although how it would work, and the risks involved were not spelled out in the April 2004 SOA, this financial strategy of increasing loans was implicit in the strategy Dalle Cort recommended to Mr and Mrs D. It is central to the cash flow charts which recommend increasing deficits in cash reserves, but do not explain how they will be funded. No attempt to keep the LVR at 50% is made there.

7.5 So while Dalle Cort says he really believed that Storm Financial had strategies in place to make sure clients never lost money, and particularly their homes, he was again mistaken. The Storm Financial strategy which was adopted from the time of the April 2004 SOA, and probably discussed before, left no room for keeping LVRs at 50%. It required increasing borrowings right from the very beginning: it is just that this aspect was never explained to Mr and Mrs D so that they could understand the risks. Instead they were given assurances written (indeed the word 'assures' is used on p36 of the April 2004 SOA in relation to the cash flow charts and assumptions) and oral by Dalle Cort that they could rely on Storm Financial's strategies to preserve them from loss – assurances that whether intentional or not and believed in or not, were misleading.

7.6 The final misrepresentation that the FPA alleges was made by Dalle Cort to Mr and Mrs D was by omission. As discussed in Part VII it is possible for conduct that is an omission to be misleading, and there seems no doubt that in entering the SOA in April 2004 Mr and Mrs D relied on the cash flow charts and the assumptions that were made in relation to them in the body of the SOA. The cash reserves which are the particular item that the FPA says was misrepresented, are crucial to the operation of the leveraged strategy that Mr and Mrs D were recommended by Dalle Cort. It is from the cash reserves that the interest on the borrowings that Mr and Mrs D had made were to be paid, and from which they were to source their living expenses. Cash reserves were therefore pivotal to the strategy. The fact that it was never mentioned in writing, or orally, that these amounts would largely (some distributions from the index funds could be expected to make a contribution) be raised by borrowing against unrealised increases in value in the index funds themselves, was a major flaw in the communication of the plan by Dalle Cort. The omission, accompanied by the assurances of safety already analysed, disguised from Mr and Mrs D that from the beginning it was expected that they would borrow large amounts, and that their home would be included as a security. The omission left out completely the consequences to Mr and Mrs D if banks refused to continue advances, and left out the consequences should the index funds not realise a value that would cover the loans. As additional SOAs were offered to Mr and Mrs D they were lulled by the continuing effect of this omission and the apparent expertise of their advisers, to continue borrowing. In his response to the 'next to last draft' of the determination Dalle Cort asserts again that the cash reserves did not depend on continuing loans from banks, but brings no new evidence or legal points. The FPA submission also repeats what was presented at the hearing.

7.7 The Panel finds that Mr and Mrs D relied on Dalle Cort's statements and on this conduct in deciding to become clients of Storm Financial and to accept the recommendations made to them in the various SOAs that they received. Dalle Cort acknowledges he had a long standing 10 year professional advisory connection with Mr and Mrs D and a social relationship (their families travelled overseas together) (Exhibit 20). There is nothing elsewhere in the responses Dalle Cort made to the FPA's breach notice, that raises any reasons why Mr and Mrs D would not have come to trust Dalle Cort after the extended professional association, and the social connection, and to have relied on his representations and other conduct. It is not to the point that Dalle Cort believed some of the representations to be true. Nor does it exculpate Dalle Cort that other advisers were involved at points in dealing with Mr and Mrs D. His conduct was central to Mr and Mrs D accepting the advice and relying upon it. That conduct, in all three aspects, misled Mr and Mrs D into thinking that the advice they were given was much safer and sounder than it was.

FPA Ethics & Rules 110 – the Failure to Provide a Suitable Financial Strategy Allegation

7.8 We made two points above which are cardinal to the determination of this allegation. The first point is that under FPA Rule 110 the adviser must match the plan and its implementation to the client's needs, not the client to the strategy and products. Secondly, it is not the prerogative of the planner to either ignore the risk preferences of the client or to train them to accept (or appear to accept) a higher level of risk than they wish to assume. It is the responsibility of the planner to develop a strategy which complements the clients' needs, and if they cannot (eg they lack expertise or their APL does not include an obvious product) they must refer the client to another firm.

7.9 It is clear, from the long-standing planning relationship Dalle Cort had with Mr and Mrs D, starting at MLC, that he was very familiar with their circumstances and their investing purposes. It is also clear that he encouraged Mr and Mrs D to move to Storm Financial and to attend seminars he ran, designed to persuade people such as Mr and Mrs D to adopt the Storm Financial approach to investing. Several months passed as Dalle Cort worked with Mr and Mrs D to encourage them to borrow money, to invest in the equity markets and then to mortgage their home to borrow and invest further. As we have already determined, he was prepared to make misrepresentations to comfort Mr and Mrs D about the level of risk involved in the Storm Financial strategy.

7.10 In the course of his promotion to Mr and Mrs D of the Storm Financial strategy, Dalle Cort became blinkered to his responsibility to Mr and Mrs D to ensure that the strategy he was recommending was suitable. He overlooked that they had chosen a low level of risk from the options presented to them in the Confidential Client Profile (Exhibit 3). He also disregarded that they had said their annual income needs were about $30,000 per annum (Exhibit 3), and he persuaded them that they either needed or could have much more. He

downplayed the very considerable risks to a retired couple of mortgaging their home and taking on margin credit loans to invest all their financial assets in the stock market in order to pursue this largely unnecessary greater income. He ignored the fact that in cashing in Mr D's superannuation investments they would incur a large tax bill – there is even a suggestion that he deliberately hid this information from them (Transcript 39-40). He did not give much weight to the fact that Mrs D would lose a Centrelink pension which over her retirement years would be very valuable. And in advising Mr and Mrs D to convert their index funds to cash in October 2008, he failed utterly to review their quite changed financial circumstances, and to make a suitable recommendation. In recommending going to cash, but not paying down the loans he quite ignored his clients' very significant interest obligations and Mr and Mrs D' need to have money to live on. The fact that Storm Financial lent Mr and Mrs D money for one interest payment at the time this advice was being given, goes to underline how lacking in reasonable grounds the recommended strategy was. That they were relying on ad hoc unsecured loans to meet regular interest payments, an obligation integral to the strategy, shows how unsuitable was the advice they had received.

7.11 Dalle Cort argues in his defence that Mr and Mrs D knew and understood – that there was plenty of advice in the SOA about the risks of the strategy – that Mr and Mrs D became well enough educated to make their own decisions. But the point of the suitability obligation is that the responsibility remains with the adviser, it is not the business of the adviser to slough off the suitability to the client. There is anyway, no warrant for such a permission in the text of FPA Rule 110, or anywhere else in the FPA Rules. As we have said in the legal discussion above, no amount of disclaimers, exemptions or other boilerplate in SOAs or other documents will relieve the adviser from the suitability obligation. Similarly, no amount of persuasion, supposed education or coaching of clients will relieve advisers of the suitability obligation either.

7.12 In a similar vein, Dalle Cort argues he should not be disciplined for a breach of FPA Rule 110 because he was simply following instructions from his principal and he used materials authored and furnished by Storm Financial – notably the SOAs Mr and Mrs D were given. We accept that Storm Financial exercised considerable control over the recommendations to clients, including Mr and Mrs D. We do not accept that it then follows that Dalle Cort is exonerated from the consequences of those recommendations. Dalle Cort had a long standing advisory connection with Mr and Mrs D. He persuaded them to become clients of Storm Financial and to adopt the leveraged strategy to acquire index funds. He shared with Storm Financial an obligation to ensure Mr and Mrs D had suitable recommendations made to them. As Mr and Mrs D primary adviser, who know them best, and under whose advisory influence they were, it was up to Dalle Cort to ensure Mr and Mrs D took on only a suitable strategy.

7.13 Regardless of the recommendations in the SOAs prepared by Storm, it remained Dalle Cort's personal professional obligation to consider the financial consequences for Mr and Mrs D of the recommendations made to them regardless of who prepared them. It should also be remembered, that

the Storm Financial authors of SOAs did their preparation on the basis of information and analysis of needs identified for them by Dalle Cort from his conversations with Mr and Mrs D. It is not that Storm Financial was an entirely robotic provider of identical SOAs. It prepared SOAs on a pattern, but much of the detail was on the basis of what it was fed by its authorised representatives, who had the best opportunity of anyone to determine what was suitable for the clients they introduced to Storm Financial. Furthermore, there is no suggestion in any of the evidence that Dalle Cort resisted adopting or endorsing the SOAs presented by Storm Financial and the recommendations they contained. In fact, quite the contrary picture seems to be the case. In the end, the suitability obligation in FPA Rule 110 placed a moral and legal obligation on Dalle Cort to decide *on the basis of Mr and Mrs D' particular needs* what was suitable, and Dalle Cort failed to do this. Instead he was content not to identify a strategy that was suitable to the client, but regardless of the financial consequences to play a central role in trying to make the clients suitable for the strategy.

FPA Ethics & Rules 111 – the Failure to Provide an Explanation of Risk Allegation

7.14 Dalle Cort responds to the FPA's allegation that he failed to explain the risk to Mr and Mrs D in a way that they could understand, by pointing out that Mr and Mrs D attended educational seminars. He also points out that Mr and Mrs D had the SOA for a period, and that they asked a lot of questions though he does not say to whom those questions were asked, or whether proper answers were given. It is also clear from the evidence that Dalle Cort did not actually take Mr and Mrs D through the SOA and explain it to them personally. He left that to Stuart Drummond in Brisbane. As the evidence shows, that meeting to review the SOA was diverted from its target by the failure of the IT system Drummond wanted to use. As a result he curtailed the presentation of the SOA, giving Mr and Mrs D 'a shortened version of what he wanted to do on the screens' and they 'didn't get to really get through all the details we probably should have' (Transcript p19). Although Drummond explained the fees in greater detail than had been done before, Mr and Mrs D gave evidence that Drummond did not really know them, and that 'he was just reviewing all the same stuff that Mr Dalle Cort had told us and gone through with us.' (Transcript p20)

7.15 The picture which is presented by Dalle Cort's letter and this evidence is that Mr and Mrs D learned much of what they know about the investment risks they might face, in a general way, from attending the Storm Financial educational seminars. They also had a number of one-on-one meetings with Dalle Cort where they asked questions: but not about the actual SOA they finally signed. Further, the SOA itself, contained only very general statements about the risks Mr and Mrs D faced. This is not only significant in relation to Dalle Cort's suitability obligation as already canvassed, but also in relation to the explanation Mr and Mrs D were entitled to of the risks they were taking on. The SOA utterly failed to set out the particular risks Mr and Mrs D were being advised to take, and the effect on their future financial prosperity if those risks were realised.

7.16 It was only with Stuart Drummond in Brisbane that an explanation of the SOA Mr and Mrs D actually signed was attempted. Mr and Mrs D evidence is that much of the explanation of the risk to them was rushed, and that it was given by someone who did not know them, their financial preferences and risk tolerance. So it is difficult to be confident that even at this point Mr and Mrs D had the risk explained to them in terms that they were likely to understand. But even if Drummond had taken time to go through the SOA in detail and addressed every page, it is still unlikely that compliance with Rule 111 could have been achieved. This is for the fundamental reason that the explanation of risk in the SOA itself was badly defective. It was as we have observed a number of times in this determination, fatally general, and not at all tailored to the transactions Mr and Mrs D were being advised to make. Unless Drummond had gone a lot further than the SOA in oral explanation of the risks Mr and Mrs D were contemplating, it is not possible to conclude that Rule 111 was observed. We have not seen a shred of evidence that an attempt to explain the risks to Mr and Mrs D outside the terms of the SOA was made. This situation is not altered at all by Dalle Cort's response to the 'next to last 'draft of this determination. For all these reasons we conclude that Dalle Cort made no attempt to explain the nature of the investment risks involved in terms Mr and Mrs D could understand, and that no one else in Storm Financial did either.

FPA Ethics & Rules 6 – the Bringing Discredit to the Profession Allegation

7.17 Finally, did Dalle Cort's behaviour discredit the financial planning profession? He denies his conduct was ever dishonourable, but provides no evidence or details. His response is mere assertion.

7.18 We have accepted that overall there is lack of probative evidence to conclude that Dalle Cort's behaviour to Mr and Mrs D was intentionally dishonest. There are some passages in the evidence that tempted the panel to that conclusion. It is clear for example that Dalle Cort advised Mr and Mrs D to enter an allocated pension when at MLC, and then actively solicited them to follow him to Storm Financial. It is at least a plausible inference from this and the fact that Dalle Cort then persuaded them to adopt a high risk investment strategy, that he did this wilfully and with reckless indifference to the financial wellbeing of Mr and Mrs D. The panel was further tempted to the conclusion that this conduct was intentionally dishonest in the light of a statement of Mr D's in evidence, about the arrival of a large and unexpected tax bill. Mr D said that when he confronted Dalle Cort at his office for an explanation of the bill (a result of the cashing-in of his superannuation monies to place in the Storm Financial strategy) Dalle Cort's words were: 'Well, if I told you, you might not have signed up" (Transcript p39). Although tempted, in all the circumstances of this case, to find that Dalle Cort had acted with deliberate dishonesty, the panel has declined to make that finding, primarily because the evidence of this statement by Dalle Cort is unsubstantiated. Mrs D was not present, and neither was anyone else. Because of the absence of Dalle Cort from the hearing, there was no alternative explanation to test the accuracy of recollection of Dalle Cort's statement by Mr D. Accordingly, with some reluctance the panel has concluded that it cannot accord sufficient weight to

this evidence, to reach a finding of Dalle Cort's wilful dishonesty or reckless indifference.

7.19 However, it is still possible that a member may bring discredit to the financial planning profession without a finding that they have done so dishonestly. The calibre of the departures from acceptable financial planning practice in this case is gross. There was flagrant disregard of the suitability requirement – not once, but on at least two occasions. There was no attempt to properly spell out the risks Mr and Mrs D were being asked to take, and no attempt to explain them in a fashion that met Mr and Mrs D' financial capability or experience. We have found that serious misrepresentations were made – mostly to disguise the true nature of the risks that Mr and Mrs D were being asked to assume.

7.20 The degree of departure from good and established financial planning practice by Dalle Cort is evident from the peer opinion of one of the members of the panel, Ms Bowley. She put into discussion by the panel the professional opinion that it is an industry wide view that no pensioner would ever be advised to adopt a geared investing strategy. Her experience is that up to 15 years ago in reputable financial planning businesses, a plan that involved offering a geared strategy to a pensioner would result in a visit from the state compliance manager and possible loss of authorised representative status. In her experience in such a firm a decade and a half ago, the offering of the type of double-gearing advised to Mr and Mrs D did result in the dismissal of an authorised representative. This standard is then, well established, and known to professional planners. Where a client is not a pensioner, but is retired there are still strict and well understood limitations for advising a geared strategy. These are:

- No client funds are to be used to service the debt on the margin loan – this must all come from the cash flow returned by the geared investment – the loan to valuation ratio must therefore be below 50%;
- The clients must therefore have a moderately aggressive attitude to risk;
- The client must have surplus funds to put up if loan to valuation ration rises dramatically, without borrowing further.

As this determination makes clear, not one of these standards was followed.

7.21 Mr and Mrs D were not only caught between two fears – of the risk of the Storm Financial strategy and the risk of outliving their allocated pension. They were also caught by trust – trust in Dalle Cort. Although we have concluded that this panel has insufficient evidence to conclude that Dalle Cort acted dishonestly, we do conclude that most of the investing public would consider that Dalle Cort had breached the professional trust that Mr and Mrs D reposed in him. Because of this, and the serious breaches of FPA rules set out here, we consider that ordinary people would consider Dalle Cort's behaviour did the financial planning profession no credit. In failing to be utterly and consistently straightforward about the risks that Mr and Mrs D were assuming, Dalle Cort was leaving open the possibility that ordinary people would think all

or at least other financial planners would act as Dalle Cort did. We find that established standards for financial planning advice in recommending geared investments to retired and pensioner clients were thoroughly departed from, underlining further that Dalle Cort's was not decent commercial behaviour. The CRC concludes that Dalle Cort's behaviour is a gross departure from the FPA Rules and Ethics and well established professional standards of the type that could bring discredit on the financial planning profession.

VIII FINAL STATEMENT OF DETERMINATION

8.1 For these reasons the CRC finds:

A breach of FPA Ethics and Rules: Rule 101 but only that the statements were misleading. There was no evidence of dishonesty. Rule 110 – a finding of grossly unsuitable advice. Rule 111 Ethic 6 – a finding of gross breach of Ethic 6 leading to the discredit of the financial planning profession.

IX. SANCTIONS

9.1

Since the CRC has found breaches of the FPA Ethics and Rules it is authorized to impose sanctions. Those sanctions are available by force of paragraph 3.5.1 of the FPA Constitution and paragraphs 1.2 (definition of sanctions), 9.9 and Schedule B of the Disciplinary Regulations adopted by the FPA Board on 17 July 2007 (revised 4 June 2010).

9.2

On delivering its next to last version of these reasons to the parties the CRC inviting submissions in writing from the FPA and the member on the sanctions that it was minded to impose. It has considered those submissions and now makes final sanctions as part of this determination. The FPA made submissions on sanctions but Dalle Cort did not respond on sanctions in his final submissions.

9.3

The CRC determines the following sanctions:

(a) That Dalle Cort pay the costs of these proceedings in the amount of $3,533 costs to be paid within 30 days of the final determination in this complaint;

(b) That Dalle Cort be expelled from the Financial Planning Association;

(c) That having regard to the gross nature of the breaches of the FPA Rules and Ethics found by the panel, that Dalle Cort be disciplined by the publication of his name, the fact of his expulsion and the publication of these findings in full (being breaches proven, sanctions imposed and reasons for decision) by the Financial Planning Association.