

Financial Planning Association Conduct Review Commission

Member's Name:	Matthew Brown
Member's Employer:	MiQ Private Wealth Pty Ltd
Australian Financial Services Licensee:	Magnitude Group Pty Ltd
Panel Members:	<ul style="list-style-type: none">• Mr. G McDonald Chair• M/s P Elliott• Mr. M Chalmers

Introduction

1. At all material times Mr. M Brown (the Member) was and is a Certified Financial Planner and is the practice principal of the firm MiQ Private Wealth Pty Ltd (MiQ). He has been a member of the Financial Planning Association of Australia (FPA) since 12 January 1999. Members of the FPA have agreed to be bound by the 2013 FPA Code of Professional Practice (the Code). The Code consists of three components - the Code of Ethics, Practice Standards and Rules of Professional Conduct.
2. Members are also bound by a set of FPA Board endorsed Disciplinary Regulations (DRs) which are effective from 1 July 2016. The DRs govern the disposition of Complaints made concerning the conduct of Members. The DRs provide that complaints are to be determined by a Conduct Review Commission Panel (the Panel).
3. In this proceeding a number of complaints, arising from advice given to four different clients of the Member, have been made by the FPA against the Member.
4. The Panel consented to the Member and the FPA being represented by barristers. Mr S Gray, instructed by The Fold Legal, appeared for the Member and M/s V Hartstein appeared for the FPA. The Member assisted the Panel by answering questions asked of him at a hearing conducted on 17 September 2018.
5. The Panel had the following documentation:

- Report of the FPA Investigating Officer dated 30 May 2018 accompanied by two folders of supporting documents,
- a response to that report from The Fold Legal accompanied by a report from an external compliance firm (C report) which provided an expert independent assessment of the financial planning advice given to the four of the Member's clients the subject of this proceeding,
- the Notice of Disciplinary proceedings issued under schedule F of the DRs
- submissions filed on behalf of the parties provided prior to the hearing
- an exhibit(exhibit A) tendered during the course of the hearing, and,
- a set of documents filed on behalf of the Member following a request made by the Panel during the hearing (exhibit B).

6. The complaints divide into two broad issues:

- a) whether the Member by receiving insurance commissions following giving financial planning advice to Mr and Mrs A (Clients A1 and A2), Mr B (Client B), Mr and Mrs C (Clients C1 and C2) and a recommendation made by him for the payment of such commissions in advice given to Mr and Mrs D (Clients D1 and D2), breached the terms of an Agreement, and,
- b) alleged defects in the financial advice provided to the abovementioned clients.

In respect of (a) the Panel notes that there were 13 files examined by the FPA and that these allegations relate to 4 of those files.

The Insurance Commissions under the Agreement

Background

7. In 2013 the FPA and the trustee of the Cbus Superannuation Fund entered into an agreement entitled the Cbus Pilot Referral Service Agreement (the Agreement). Under the terms of the Agreement, FPA participating practices received referrals from the trustee to provide financial planning advice to members of the Cbus superannuation scheme. The Agreement, with some variations, was renewed for each of the 2015 and 2016 years being the relevant years in respect of the complaints in this proceeding. On behalf of MiQ, the Member signed annual acknowledgements to be bound by the terms of the Agreement for each of the years 2013 - 2016.

8. Clause 17 of the 2014 Agreement¹, and repeated in subsequent Agreements in 2015 and 2016, is relevantly as follows:

“Neither the Participating Practice nor any associate of the Participating Practice is to receive product commission in relation to any financial service provided to the Member as a consequence of the referral of the Member.”

Clause 18 reads:

“The participating practice must only apply fee-for-service charges for personal financial advice services for members referred under the referral program.”

9. In addition to the signed acknowledgements referred to supra in respect of each of the clients referred the Cbus Financial Planning Support team member provided a covering letter which relevantly reiterated:

“...the cost of any personal advice will be quoted in writing on a fee for service basis and there will be no product sales commissions.”

10. The Member admits that he received commissions on insurance arising from advice given to Clients A1 and A2 and Clients B1 and B2, and that he received a commission, described as a stamping fee, in respect of Client C. He also admits that he recommended the payment of such commissions to Clients D1 and D2.

The Alleged Breach

11. In the taking or recommending the payment of commissions it is alleged that the Member breached Code of Ethics Principle 8 which reads:

“Principle 8: Diligence

PROVIDE PROFESSIONAL SERVICE DILIGENTLY

Diligence requires fulfilling professional commitments in a timely and thorough manner, and taking due care in planning, supervising and delivering professional services.” and/or,

that he breached Practice Standard 7 rule 7.6 which reads:

¹ a similarly worded provision is contained in Clause 7 of the inaugural 2013 FPA-Cbus Pilot Referral Services agreement

“A member must only provide professional services including financial planning with proper legal authorisation, and in accordance with legal, regulatory and the FPA’s requirements”.

Submission on behalf of the Member

12. On behalf of the Member it is submitted that the mere fact that commissions were received, or advice given which would have resulted in the payment of commissions, does not amount to a breach of Code Ethics Principle 8. In support of this it is submitted that absent any element of negligence the breach of an obligation cannot in law constitute a failure to take ‘due care’ (*McWilliams Wines Pty Ltd v Booth Wine Transport* [1992] NSWSC (unreported 11 February 1992 per Giles J at p64). It is uncontested that the Member was aware of the terms of the Agreement and that there was no element of negligence involved.
13. It is also submitted that the terms of the Agreement are “not easy to read nor understand”. Reference is made to clause 9 of the Agreement as providing an example of a lack of clarity. It is not necessary to quote clause 9.
14. It is submitted in as far as advice to Clients D1 and D2 is concerned, as those clients did not accept the Member’s advice, there could be no ‘potential’ breach.

FPA Submission

15. The FPA submit that the Member failed to fulfill his professional commitments as the result of a lack of thoroughness or failure to take due care. The submission referred to the fact that the Member had signed the Agreement and had been provided with the referrals for each client. Reference was also made to the Member attending a Cbus seminar where the ban on taking commissions was discussed. It was submitted that no negligence need be found to establish a breach and the issue was one of strict liability.

Panel Consideration

16. The Panel does not accept the submission made on behalf of the Member that absent negligence the Member cannot be found to have failed to take due care. The facts in the *McWilliams* case involved a commercial dispute over the terms of a carriage agreement pursuant to which under which bulk wine was to be transported. The application of a term of the Code of Ethics in the instant case arises in an entirely different and distinguishable context.

17. Clause 8 of the Code of Ethics propounds a standard which a member is to abide by when delivering professional services. The non-compliance with the terms of the agreement evidences a lack of the Member fulfilling his professional commitment in a thorough manner and a failure to take due care in the delivery of his professional services to his clients. In the opinion of the Panel in the context of establishing financial planning as a profession the Code of Ethics should not be read in a narrow or limited way. It is open for the Panel to find that Ethics Principle 8 has been breached.
18. The Panel does not accept that the terms of the Agreement are difficult to read or understand. The Member signed the Agreement and must be taken to have read and understood its terms which are clearly expressed. While there is no reason to doubt the clarity in the terms in the Agreement the letters of referral repeat the ban against the taking of commissions.² Since in the opinion of the Panel there is no ambiguity evident in the terms of the Agreement there is no ground which supports the submission that surrounding facts and circumstances need be examined to resolve any ambiguity.
19. It is submitted that there is only a 'potential' breach in the case of advice provided to Clients D1 and D2. The Member was engaged to provide financial advice. It is the choice of the client to accept or not accept that advice. If that advice includes an element which, if accepted, would lead to a breach of the terms of the terms of the Agreement then that advice does not comply with the terms of the Agreement.
20. While as was submitted on behalf of the Member clauses 17 and 18 of the Agreement address different issues it is clear from a reading of both that in giving financial advice to Cbus superannuation members;
- participating practices are not to receive product commissions, and,
 - the only fees a participating practice can charge are fees for service
21. For the reasons stated the Panel is satisfied that it is open to find that a breach of the Principle 8 of the Code of Ethics has been established. The Code of Ethics is as the FPA states in the introductory section:

"The Code of Ethics is the top layer of professional regulation".

It is also open to consider the breach as a failure to meet Practice Standard 7 Rule 7.6. This is classified in the introductory section of Rules of Professional Conduct as constituting the third layer of professional regulation. The decision as to which provision should be invoked will depend on the surrounding circumstances and the gravity with which the breach is viewed. While this decision is to be made without regard to the issue of any sanction the seriousness of the breach finding will obviously impact on the consideration of any sanction.

² for example tab 12 in respect of Client C

22. Of the matters relevant to this aspect in the submission made on behalf of the Member, the Panel is satisfied as to the following:

(a) there is no evidence of deception in the Member's behaviour-the Member openly disclosed the insurance commissions and stamping fee in the relevant SOAs,

(b) the Member acknowledged that he received insurance commissions and stamping fees,

(c) upon being informed of the concerns held by the FPA , and despite not being compelled to do so by any adverse finding by the CRC, the Member repatriated the affected clients in a manner approved by the FPA ³.

(d) the Member has at all times acted candidly and cooperated with the FPA.

23. While the FPA in its submission did not address the issue that the FPA had previously approved one of the Member's files which disclosed the same information about insurance commissions it did not deny that this had occurred. In its submission to the Panel the FPA left open which of the Code of Ethics or the Practice Standard Rule 7.6 ought to be applied in the event of the Panel finding a breach has occurred.

24. The Panel is of the view that it would place the Member in an invidious position if it found that he had, on the same set of findings, breached both provisions. If that was be the finding it would open the unreasonable prospect of two sets of sanctions being applied to the one set of facts.

25. Having regard to all of the circumstances the Panel is satisfied that the breach should be characterized as breach of Practice Standard Rule 7.6 and not as a breach under the Code of Ethics. The Panel is satisfied that the breach is proven.

Clients A1 and A2

Background

26. At that time Clients A1 and A2 sought financial advice from the Member, Client A1 was a construction supervisor, then aged 62 and Client A2, a part time office administrator, was aged 58. Both were bankrupt. Client A1 was due to be discharged from bankruptcy in December 2016 and Client A2 in 2018.

³ submission paragraph 23

27. The Financial Planning questionnaire, dated 26 September and signed by both clients, records Client A1 as having \$810,000 and Client A2 \$550,000 invested in superannuation. Superannuation savings are not accessible by the trustee in bankruptcy. In the case of Client A1 the questionnaire describes \$500,000 of his superannuation as being 'preserved' and the balance of \$310,000 as being 'non-preserved'. Alongside each of the figures a question mark is recorded. There is no notation as to the status of Client A2's superannuation investment and her superannuation savings are not a matter the subject of this proceeding.
28. While both Client A1 and Client A2 had TPD and death insurance cover associated with their superannuation in respect of Client A1 there is a note to "check with Cbus". The Panel accepts this as being limited to the Member checking to confirm the cost of maintaining the insurance cover connected to Client A1's superannuation and notes that the preservation status of the superannuation balance was also checked at this time.
29. The goals which Clients A1 and A2 were seeking to achieve are recorded as including the purchase of a home for "...\$600,000 in January 2017". It is the proposed financing towards the house purchase from Client A1's superannuation savings which is of concern. This section of the questionnaire also records Client A1's desire to retire at age 65 with no debt. There are two items recorded under the heading of "Scope of Advice" with respect to superannuation namely-"Super review" and "Super Contributions". Later in the document when recording the limitations, and the reasons for the limitations, the following is recorded;

"Superannuation withdrawal for [Client A1]-as you don't want any advice on making a \$300,000 withdrawal from [Client A1]'s super to put towards your house purchase."

30. A file note dated 6 October made by the Member records:

"They want to buy a house as renting at the moment, they will use \$270,000 in cash and [Client A1] will withdraw \$300,000 from his Cbus super, and they will seek to borrow up to \$50k to make the purchase. For [Client A1] to access the \$300,000, he will retire from work in December, withdraw the funds and then go back to work in January 2017 with the same company-this has been cleared by his employer".⁴

The \$270,000 cash component was stated in the Questionnaire to come from money held in trust for Client A1 by Entity S. Entity S was described as managing Client A1's and A2's bankruptcy. It is apparent that Entity S is not their Trustee in bankruptcy.

⁴ Tab 21

- 31.** The Member issued an SOA dated 20 October 2016, in which under the heading of “Your Goals” the following items relevantly appear:

“You want to buy a house as you are renting at the moment [Client A1] will withdraw \$300,000 from his Cbus Super ...”,

and also relevantly the notation continues, repeating the contents of the abovementioned file note:

“[Client A1] for you to access \$300,000 from your super you will retire from work in December 2016, withdraw the funds and then go back to work in January 2017 with the same company. This has been cleared by your employer.”, and,

“You would like to review your super funds to make sure that they appropriate for your needs”

In the accompanying column under the heading “How you are Currently tracking” and alongside of the latter stated goal is recorded:

“[Client A1] you have a Cbus super of \$812,894 in place but will withdraw \$300,000 in December 2016”.

- 32.** Further in the SOA under the heading of “What My Advice Covers” the following is recorded under the subheading “Scope of Advice” as being advice which is not included in the financial plan:

“Superannuation Withdrawal for [Client A1]-as you don’t want any advice on making a \$300,000 withdrawal from [Client A1]’s super to put towards your house purchase”.⁵

The latter is a verbatim repeat of the wording contained in the questionnaire.

- 33.** Under the heading of ‘Things to Consider’,⁶ as to whether the advice proffered is appropriate, it is recorded that fully preserved funds invested in superannuation are not accessible until a ‘condition of release’ is met. Retirement or reaching the client’s preservation age are specifically noted as examples of conditions which may satisfy conditions of release. This statement is not entirely accurate-a superannuation contributor must reach his/her preservation age (in the case of Client A1 at least 55 years) **and** prior to reaching 60 years of age have retired without any intention of resuming paid employment. Under the same heading it is also noted that lump sum

⁵ Tab20 p13

⁶ Tab20 p22

withdrawals are not able to be made in the absence of unrestricted contributions until a condition of release has been met.

34. A condition of release as stated in the ATO website is:

*under 60 years of age – they can access their preserved benefits only when they reach preservation age, cease gainful employment **and have no intention to become gainfully employed in the future.***

Additionally the maximum amount the ATO permits a person to withdraw from their preserved superannuation savings on the ground of hardship is \$10,000 in any one year.

35. The response submission to the FPA investigator's report also maintains that the Member was informed by Client A1 that the condition of release would be based on hardship⁷. In his oral evidence to the Panel the Member referred to a file note made 26 September 2016 which records:

"He [Client A1] asked Cbus to release his super due to hardship, but they said he couldn't, because he was working. So he decided to stop working and access the super and hoping to go back to work again".

36. At the hearing the Member was asked whether what Client A1 was proposing to do in order to secure the release of his superannuation savings was something which he would query with his client. He responded that securing the release of the money was something scoped out by the client from the advice that the client wanted from the Member and that, since Client A1 was 'adamant' about this, he was following his client's instructions⁸.

Alleged Breach

37. It is alleged that Code of Ethics Principle 2 was breached in that the Member failed to exercise personal integrity in the clients' bankruptcy and the examination and advice given in respect of the client's (being Client A1's) superannuation affairs, and, Practice Standard 7. Rule 7.3 was breached by the Member not ensuring that his professional and ethical conduct was abided by and upheld in respect of the Financial Planning Profession third parties and the public and that his conduct reflected adversely on his integrity as a financial planner. Code of Ethics Principle 2 is as follows:

"INTEGRITY

⁷ ibid page 11 under the heading "Member Submission"

⁸ transcript p 30

PROVIDE PROFESSIONAL SERVICES WITH INTERGRITY

Integrity requires honesty and candour in all professional matters. Financial planners are placed in positions of trust by clients, and the ultimate source of that trust is the financial planners personal integrity. Allowance can be made for legitimate differences of opinion, but integrity cannot co-exist with deceit or subordination of one's principles. Integrity requires the financial planner to observe both the letter and the spirit of the Code of Ethics."

- 38.** On the information before it the Panel is unable to reach any conclusion as to Clients A1's and A2's bankruptcy arrangements. This aspect of the alleged breach is accordingly dismissed.

Submission on Behalf of the Member

- 39.** It is submitted that advice about the superannuation withdrawal of the \$300,000 from Client A1's superannuation savings to purchase a house was scoped out of the planning advice being sought. It is submitted that the FPA implicitly and correctly acknowledged that the Member did not play any part in devising or facilitating the withdrawal from Client A1's superannuation fund.
- 40.** It is submitted that the allegations against Member were based entirely on speculation that Client A1 withdrew, or was proposing to withdraw, superannuation funds improperly.

The grounds identified in clause 40 of the submission are:

- that there were express instructions from the clients not to advise on such matters and,
- the Member was obligatedto keep client information confidential, and,
- the Code of Ethics Principle 1 "Place the Client's Interests First" would be contravened by exposing a client to investigation based on the possibility of an anomaly and mere speculation as to the honesty of Client A1 about a matter which the member was not qualified or contracted to give,
- that Clients A1 and A2 confirmed in their testimonial of 20 February 2018⁹ that Client A1 had spoken directly to Cbus about securing release of his superannuation funds on the basis of hardship due to his bankruptcy and that he did not need the assistance of the Member in accessing the funds,

⁹ Tab23

- there is nothing asserted in the relevant conduct identified in the Schedule F notice to suggest that Client A1 was lying to the Member about the conversations he had with his employer concerning the release of the funds, and that Client A1 was not going to be honest in his dealings with Cbus,
- Client A1 had been honest in his dealings with Cbus.¹⁰

FPA Submission

- 41.** The FPA submission reiterated extensive quotes from a previous CRC decision which considered the interpretation of Code of Ethics Principle 2 and its relationship to the Rules in Practice Standard 7. It was submitted that it was apparent to the Member that it was Client A1's intention to make a false declaration to the Cbus Trustee in order to withdraw a portion of his superannuation funds which on the basis he was proposing he was not otherwise entitled to withdraw. It was submitted that there was no evidence that the Member counselled Clients A1 and A2 against making a false declaration.
- 42.** It was submitted that the Member had condoned dishonest and illegal behaviour of a client and had implicitly if not actually encouraged the client in this behaviour by providing financial advice to him based on his deceitful plan.

Panel Consideration

- 43.** In the hearing the Member confirmed that he discovered after investigation that all of Client A1's superannuation savings were 'preserved'¹¹. For superannuants aged between 55 and 60 years preserved funds can only be released if a condition of release is met. As the SOA disclosed it was necessary for Client A1 to satisfy a condition of release. As stated in the ATO information one of the grounds for release for a person in Client A1's circumstances is the cessation of work coupled with there being no intention of the person returning to work in the future.
- 44.** The submission to the Panel on behalf of the Member in paragraph 41 stating that there is no evidence suggesting that the funds were not released on compassionate grounds or that the funds may not have been released at all is unsustainable. If the funds had been released on compassionate grounds then that would have been mentioned by Clients A1 and A2 in their testimonial which refers only to the assistance given on the basis of 'bankruptcy and hardship'¹². Contrary to what is asserted in the submission the testimonial confirms that the released money was

¹⁰ Submission paragraph 40

¹¹ Transcript p 28

¹² tab 23

used to contribute to the purchase of a house. The Panel is satisfied that Client A1's released superannuation funds were used to contribute to the purchase a house.

- 45.** While it is true that in the response submission lodged by his solicitor (the response submission) to the FPA investigator's report that Client A1 never indicated any intention to permanently retire from work this misses the point¹³. It was clearly understood by the Member, as recorded in his file note of 6 October, and repeated in the SOA that Client A1 was proposing to retire in order to obtain the release of his superannuation savings and that he then immediately intended to return to work. The file note expressly discloses the reason for taking this course was to secure the release of Client A1's superannuation savings.
- 46.** The Panel is satisfied that the Member was aware from the date that the questionnaire was completed (26 September 2016) that hardship was not a ground on which Client A1 could rely to secure the early release of his superannuation savings¹⁴. It follows that the Member was aware of this at the time he provided financial advice. The facts contradict the response submission assertion that the Member was informed by Client A1 that the condition of release would be based on hardship¹⁵.
- 47.** The Panel is satisfied that the evidence discloses that the Member was told of the work related strategy on which Client A1 was proposing to embark in order to access the early release of his superannuation savings. The Member must be taken to be aware that this strategy did not accord with the conditions of release. The question is what, if any, professional responsibility did the Member have to advise Client A1 that what he was proposing would lead to a breach of the conditions of release and if he did have a professional responsibility and failed to fulfill it whether that amounts to a breach of Code of Ethics Principle 2? In posing this question the Panel appreciates that it has no information about the ground upon which Client A1 approached the Trustee for the release of the funds nor on the ground on which the Trustee determined to release the funds. The Panel specifically makes no findings in respect of the latter matters and restricts itself to the sole issue of whether the Member, given the circumstances disclosed by Client A1, failed any professional responsibility he had to provide advice on the proposed work related strategy and whether this amounted to a breach of Code of Ethics Principle 2.
- 48.** The C expert who provided the Member's solicitors with advice, after stating that the Member was aware of the client's intention to "...engineer a condition of release from his superannuation account ..." ¹⁶ commented:

¹³ page 11 under the heading "Member Submission"

¹⁴ ibid at para 35

¹⁵ response submission page11

¹⁶ C report paragraph 56

"I am unable to identify if or where the adviser provided education or advice to the client regarding this strategy"¹⁷.

The expert then concluded his report, which also analysed the financial advice given to Clients A1 and A2,

"The balance of the recommendations appear to be appropriate for the client and in the client's best interest."¹⁸

There was a failure to provide education or advice and the Panel regards this as a failure in the Member's professional duty to the Client.

- 49.** The financial planning industry forms an important function in providing professionally based advice to members of the public. A certified financial planner on learning that a client is proposing a strategy to embark on a course of conduct which on the face of it does not accord with the regulatory requirements has, at a minimum, a duty to advise the client that that proposed course breaches the regulatory requirements. The Panel is satisfied that that duty is not relieved by the client scoping out advice on the topic from the financial planner because that information will remain as the basis on which the financial advice is offered. If the proposed flawed strategy is proceeded with and the planner bases advice on that strategy the planner stands to compromise his/her personal integrity.
- 50.** Code of Ethics Principle 2 requires the provision of services to be undertaken with integrity. Integrity, require 'honesty and candour' in any dealings which a planner is involved. "Honesty" and "candour" are to be read disjunctively. Candour extends to cover such concepts as being open, straightforward, upright and transparent. This concept applies to all matters in which a financial planner may be engaged. It extends to the financial planner providing straightforward and upfront advice to a client who on the face of it may have breached, or may be proposing to breach, a regulatory requirement. There is no evidence which implicates the Member in advising Client A1 to engage in dishonestly to the Cbus trustee in making his superannuation fund withdrawal any more than there is any evidence that the trustee acted improperly in deciding to release the funds. The Panel is however satisfied that the Member lacked candour in failing to advise and document that the proposed strategy did not accord with the regulatory requirement. As Code of Ethics Principle 2 states the planner is in a position of trust and the source of that trust is the planner's personal integrity and the basis of that integrity requires the planner to provide candid advice to a client.
- 51.** Given the Member had information about the proposed superannuation strategy what, if anything, did his professional duty oblige him to do in order to ensure that

¹⁷ C report para 60.

¹⁸ ibid para 61

he would discharge his professional services to Client A1 with integrity? It is not suggested that the Member had any professional responsibility to report what he had learnt to the Trustee, any government agency or other body (eg FPA).

52. In such circumstances it is the planner's duty to provide candid information to the client in order to place the client in a position where he/she can make an informed decision that will protect the client's best long term interests. In the circumstances of this case, the Panel is satisfied that the Member failed to document any such advice or counseling to the client. The Member would have discharged his professional obligations to Client A1 with integrity if he had discussed the issue with Client A1 and provided him advice outlining when superannuation withdrawals could be made without breaching a regulatory requirement. The ultimate responsibility about which course the client follows is a matter for the client. However, placing the client in the position where the client at least had the information to guide him/her in his/her decision making would then result in the Member discharging his/her professional service with integrity.
53. That the Member did not follow this course results in the Panel being reasonably satisfied that there has been a breach of Code of Ethics Principle 2. In respect of the alleged breach of Rule 7.3 there is no promotional aspect or 'third party' involvement. While there is obviously a public interest in the maintenance of professional and ethical conduct by financial planners that aspect is incorporated in the finding that a breach of the Code of Ethics Principle 2 has been proven. The alleged breach of Rule 7.3 is dismissed.

Financial Advice Given to Client B

Background

54. Client B first sought financial advice from the Member in September 2015. At that time the SOA recorded that he was aged 62, was employed full time on a rounded income of \$98,417 per annum, had a TTR income stream, income from a rental property, savings, shares in ASX listed companies and superannuation all of which, after expenses, generated a net income of \$58,902 pa. Client B planned to retire in 5 years' time and was seeking to have a net income of \$60,000 pa in retirement. He was seeking to have tax effective advice in line with his stated risk profile.

Recommendation in SOA

55. After taking into account some anticipated future expenses (holiday, new car) and a desire to retain a cash reserve (of \$60,000) the Member, after determining a 'growth' risk profile advised Client B to take out margin loan of \$120,000 and combine that with other savings and shares and invest in a geared BT Select Portfolio Wrap platform. It was also recommended that a CFS First choice Wholesale pension be rolled over into a BT Select portfolio Superwrap pension. The

SOA recorded a recommendation that the geared investment be retained for at least 5 years. The SOA recommended retention of Life and TPD insurance coverage.

Alleged Breaches

56. The FPA allege a breach of Practice Standards 4.1 and 4.2 in that the Member failed to consider that the client's current investment strategy would achieve his retirement objective of an income of \$60,000 without undertaking the risks associated with a geared investment. It is also alleged that insufficient grounds were advanced in recommending the rollover from the CFS pension into the BT pension.

Submission on behalf of the Member

57. The Member submits that the SOA demonstrates an accurate analysis of his client's circumstances¹⁹. It is also submitted that the recommended margin loan represented a loan to value ratio of 33%, that the member's AFS licensee approved the strategy (a requirement for margin loans for client's over 60 years of age) and that a full risk profile had been undertaken. It was also submitted that the strategy was discussed with Client B-something which the Member confirmed at the hearing²⁰.

The FPA Submission

58. The FPA submitted that because of his goal of retiring in 5 years Client B's risk profile should have been assessed as being on the cusp of moderate/balanced risk profile rather than as having a growth risk profile. A moderate risk profile has a 3-5 years' timeframe and a balanced risk profile has a 5-7 timeframe whereas a growth profile has a 7-10 year timeframe. Accordingly the 'growth' risk profile was inappropriate. Attention was also drawn to:

- (a) the increased in fees payable from the proposed investment change ,and,
- (b) a lack of detail in the analysis of the alternative strategies section of the SOA which did not provide in depth analysis or outline costings, and,
- (c) there being no comprehensive consideration of the benefits from retaining his existing pension as opposed to the costs in rolling over to the recommended BT pension.

¹⁹ tab14 p8 and 9,and p34

²⁰ transcript p12 et seq

Panel Assessment and Decision

59. The C report determined that Client B was on course to meet his desired retirement outcome of an income of \$60,000 without undertaking a margin loan and that this strategy was antithetical to his best interests due to the proximity to his retirement. The Panel agrees that Client B was on course to meet his retirement goal without undertaking a margin loan strategy. The Panel is also of the view that the SOA failed to analyse and assess whether, if he continued on his current strategy, his retirement objective would have been reached. Nor did the SOA provide a comparison between his existing strategy and the proposed strategy.
60. However the C report did not refer to Client B's other stated objective of undertaking a tax effective investment. The letter of referral from the Cbus team specifically noted:

*'...looking to boost his wealth through tax effective salary sacrifice contributions...'*²¹

'Gearing' and 'investing' were also included in the scoping section of the questionnaire²². Undertaking a geared investment is not consistent as a short term strategy. However the Panel notes that Client B anticipated working for a further 5 years before retiring. It is not necessarily the case that a gearing recommendation is inappropriate to extend to a person in retirement-it all depends on the client's circumstances. In the opinion of the Panel, while there is room for differing opinions²³, the recommended strategy is reasonable, having regard to Client B's financial and other circumstances (eg good health, assets, other investments and income). In the circumstances the Panel does not conclude that there has been a breach in the recommendation of this strategy.

61. While the Panel is satisfied that there has been no breach of Practice Standards 4.1 or 4.2 it draws the attention to a lack of detail contained in the SOA. The C expert commented that the reasons for the stated recommendation made for the rollover of the TTR pension²⁴ are:

'predominately general statements with no direct relevance to the rollover from the CFS to the BT superannuation.'

Additionally the Panel notes the same concern in respect of the 'Alternative Strategy' section at p 34 of the SOA. While the member maintained in his oral evidence that these matters were discussed with Client B best practice dictates that

²¹ tab12 p2

²² tab13 p 20

²³ eg the conclusion reached in para 33 of the C report determined that the margin loan strategy was not in Client B's best interests due to his proximity to retirement

²⁴ tab14 at p24

if this had been recorded in the SOA in the instant case the need for a hearing of this alleged breach may have been rendered unnecessary.

- 62.** The Member admits that the evaluation he undertook in relation to Client B's CFS FirstChoice Wholesale (TTR) pension product fell short of best practice. Accordingly the breach of rule 4.7(e) is established and the allegation of breaches of Practice Standards 4.1 and 4.2 are dismissed.

Financial Advice Given to Clients C1 and C2

Background

- 63.** Clients C1 and C2 were respectively aged 65 and 61 at the time they were seeking financial planning advice in April 2016. Client C1 was in the process of selling a boat hire business which he operated as a sole trader and where he was earning approximately \$20,000 pa. He was then proposing to spend \$30,000 to purchase a courier business which it was anticipated would generate an annual income of \$80,000. Client C2 worked 22 to 26 hours per week in casual employment in childcare. Clients C1 and C2 had \$350,000 in cash in the bank. They lived in rented accommodation. They wanted to lend \$50,000 to their daughter. Client C1 had \$51,636 in superannuation with CBUS with \$60,000 life and \$30,000 TPD insurance. Client C2 had \$60,730 with Vision superannuation with life and TPD cover of \$5500. In addition Client C2 had a separate \$40,000 life insurance policy with AIA. Clients C1 and C2 had no dependents and no debt.

Alleged breaches

- 64.** In the SOA the Member made a number of recommendations about which there is no issue. The issues in respect of which breaches are alleged relate to the advised changes to Client C1's and C2's insurance coverage where it is claimed that the Member breached Practice Standard 4.1 in that he failed to evaluate the costs and benefits associated with the advised life insurance change which did not meet the client's objectives, needs and priorities. In respect of Client C2 it is also alleged that in breach of Rule 4.10 a recommendation to roll over her Vision Super to a BT Select Portfolio wrap was not in her best interests and that sufficient reasons for making the change were not provided.

Recommendation the SOA

- 65.** In the SOA dated 6 May 2016 the Member recommended that Client C1 retain his existing Cbus \$60,000 life and \$30,000 TPD insurance cover. It was also recommended that Client C1 take out a \$100,000 life only policy with BT life. For Client C2 the Member recommended cancellation of all of her current life and TPD cover and the substitution a \$100,000 BT life only insurance cover.

66. Additionally for Client C2 the Member recommended rolling over the full balance of her Vision Superannuation saving into a BT Select Portfolio Super Wrap with increased platform and investment costs of \$679 pa. The reasons given for the rollover were stated to be that the BT Superwrap:

- offered an increase in investment options from 9 in Vision super to 500 with BT Superwrap, and,
- provided access to direct reporting and which provided quality advice and support, and,
- ongoing service costs could be met from the investments, and, offered an ability to turn on investment protection in the future at an additional cost, and,
- was owned by Westpac Group and is regarded as one of the leading administration platforms available²⁵..

The FPA submission to the CRC

67. The FPA queried the increased costs associated with the insurance changes-an additional \$1701.15pa for Client C1 on top of the \$744.64pa for retaining the Cbus Super Life policy. For Client C2 the additional cost after cancelling her two existing policies and changing to BT life policy at an additional cost of \$405.43 pa was questioned.

68. In respect of the change recommended for Client C2's superannuation the FPA noted that there was no comparison made of the Vision and BT products and no costing was provided between continuing with Vision super as compared to moving to the BT product.

Submission on behalf of the Member

69. On behalf of the Member the conclusions in the Schedule F notice were denied in that the Member

- said that there was 'need' for TPD cover rather than that there was no ability for them to obtain that cover because of their ages, and,
- failed to properly assess their need for the proposed life insurance having regard to them nearing retirement and with no debts or dependents. Rather the personal circumstances, risk tolerance and the situation of either if the other was to pass away were such that the recommendation

²⁵ tab27 p23

was in their best interests and that the Member had carried out an evaluation and comparison of products to determine the most suitable, and

- given Client C1 was planning to pay \$65,000 from their savings to purchase the courier business the \$60,000 life cover he currently had was insufficient.

70. The Member conceded that making his recommendation for Client C2 to rollover the full balance of her Vision Superannuation to the BT Select Portfolio Superwrap was not in her best interests and the Panel is satisfied that the breach is proven.

Panel Consideration

71. The C report endorsed the Member's recommendations to increase their insurance coverage finding that given their current asset base it would be difficult if either of them passed away for the other to generate the necessary replacement income required²⁶. Except in as far as the additional premiums costs are concerned the FPA did not take issue with this conclusion²⁷.

72. On the material before it the Panel concludes that Clients C1 and C2 do not have a substantial cash flow. Should one of them pass away the other would face great difficulty in finding sufficient replacement income to maintain their current modest lifestyle even despite there being no debt and no dependents. The Panel notes the Member's conclusion that Client C2's existing Vision life and TPD cover would reduce with age and in any event cover would expire upon her reaching 70 years of age. Additionally while her existing AIA insurance remained at the same level it was not indexed. The proposed BT life insurance had the advantage of inbuilt CPI indexation and coverage continued to age 99. The BT insurance also had shorter waiting times before payment in the event of a terminal illness.

73. The Member recommended the cancellation of Client C2's TPD cover on the basis that it was a small amount (\$5,500). The Panel is satisfied that this is a reasonable decision in the circumstances. The saving in premiums would be better diverted to offset the increased premiums applicable to the recommended increase in life cover.

74. In the circumstances the Panel is satisfied that despite the increase in the cost of premiums the recommended insurance increased coverage for both Client C1 and Client C2 is reasonable. Accordingly the Panel finds that there has been no breach in respect of this aspect and the alleged breach is dismissed

75. The C report concluded that the rationale expressed in the SOA for Client C2 changing superannuation products relied on general statements with no direct relevance to provide sufficient justification before concluding that the rollover was not in the best

²⁶ report para 49

²⁷ Submission p19 para13

interest of the client ²⁸. The Panel agrees with this assessment and notes that the Member concedes that a breach of Rule 4.10 has occurred. Accordingly the Panel finds the breach of Rule 4.10 is proven.

Financial Advice Given to Clients D1 and D2

Background

- 76.** Clients D1 and D2, were aged 57. Client D1 is employed as a construction manager. Client D2 does not work. They have \$A 1,163,000 in cash in a bank deposit in New Zealand which it was proposed to transfer to Australia. Client D1 has Australian based Superannuation of \$241,000. In order to relocate in a place nearer to Client D1's work location they were hoping to sell their current Australian house in the next 12 months and then contributing a further \$60,000 intended to purchase another house. They sought financial advice from the Member about their retirement arrangements and tax effectiveness. When Client D1 retired at age 65 they were seeking to have a retirement income of \$70,000 pa.
- 77.** The SOA relevantly recommended that Client D1 take out a margin loan of \$200,000 and combine it with \$200,000 drawn from their savings to be invested in a BT SelectPortfolio Geared Wrap Investment. This was to be accompanied by additional insurance policies - life insurance of \$200,000, trauma insurance of \$50,000 and income protection of \$4000 per month.
- 78.** Clients D1 and D2 did not act on the advice provided to them by the Member. The Member in his oral evidence to the Panel said that this was because they were concerned about the costs they would incur if they proceeded to implement the advice provided²⁹.

Alleged Breaches

- 79.** The first alleged breach, that the member in not recognizing his limitations in the giving of tax advice thereby breach Code of Ethic Principle 6, was dismissed at the hearing when it was established that Clients D1 and D2 had mistakenly described themselves in the Financial Planning Questionnaire as being non-resident in Australia for tax purposes. The remaining alleged breaches (Code of Ethics Principle 1, Practice Standard 3 Rule 3.3(d), Practice Standard 4.2 Rule 4.5(a) Practice Standard 4.1) are concerned with the Member's assessment of the Client D1's and D2's risk tolerance. If their risk tolerance is found to be appropriate then the Panel is satisfied that it would be unable to uphold any of the breaches. The risk tolerance was undertaken in order to ascertain if it was suitable to recommend Client D1 and D2 undertake a margin lending investment. While not the only consideration the ascertainment of a

²⁸ C report paras 45, 46. and 47.

²⁹ transcript p 77

client's risk profile is a fundamental consideration when recommending clients undertake gearing investments.

The Risk Tolerance Assessment

- 80.** Risk tolerance is in part assessed by reference to a document entitled "Risk Profiler questions" utilized by MiQ which scores the responses to questions asked culminating in placing the client into one of six indicative risk categories.

The C report described how the point system is arranged as follows:

"The highest possible score achievable is twenty five points (25).

The lowest possible score is seven (7) points. The range of possible scores is nineteen points (19) placing the mid-point in the range of sixteen points (16).

The range for each of the risk profiles is:

High Growth	23-25 points	3 point range
Growth	20-22 points	3 point range
Balanced	16-19 points	4 point range
Moderate	12-15 points	4 point range
Defensive	9-11 points	3 point range
Cash only	7-9 points	3 point range".

- 81.** The Risk Profiler questionnaire consisted of seven questions each with four alternatives from which the client would choose the one which best represented his/her risk level tolerance. The scores on all questions for each of Client D1 and Client D2 were assessed at the same level. The answers to the following three questions are particularly relevant.

Question 1 requires an answer from the following choices:

"In general, how would you describe yourself financially?

1. A risk avoider
2. Cautious
3. Willing to take some risk after planning and forethought
4. A real risk taker.

[Clients D1 and D2] listed themselves as "cautious".

Question 4 is as follows:

'Suppose a year ago you'd invested your portfolio. Today you've checked its value and find it is worth 20% less. How would you feel?

1. Panic-I'd want my adviser to sell, and invest proceeds in cash
2. Nervous -I'd want my adviser to sell part of the portfolio, and invest the proceeds in a less volatile investment
3. Patient I'd sit tight, expecting the portfolio to recover
4. Positive-if I had any more money I'd invest it in the same portfolio

[Clients D1 and D2] listed themselves as "nervous".

Question 7 asked:

"Assuming all your money is held in cash, if how much of the amount of money, assuming it was all in cash, If you could improve your chances of improving your returns by taking more risk, would you be:

- (1) Unlikely to take much more risk?
- (2) Willing to take risk with a quarter of the money?
- (3) Willing to take more risk with half the money?
- (4) Willing to take more risk with all of the money?

[Clients D1 and D2] selected 4- the highest risk ranking point.

The overall result including the answers to the other questions was a score of 16 and the indicative risk profile was determined to be 'balanced'³⁰.

- 82.** Later in same document under the heading of "Preferred Risk Profile" are three questions which are aimed at assessing the clients' reaction to market fluctuations. Client D1's and D2's responses to these questions exemplify a good tolerance to dealing with market fluctuations.³¹
- 83.** There is provision for the clients to sign the risk tolerance assessment document. While the two declaration boxes are ticked and the document is dated there are no client signatures which, if signed, would confirm the clients as being 'comfortable with the risk profile'.
- 84.** In addition to the above the Panel had in exhibit A a summary of feedback provided by the Member to the FPA during an earlier part of the investigation. Attached to that document is a copy of the MiQ gearing policy with which the Member claims he fully complied.

³⁰ Tab 31

³¹ tab31at p6

85. In his oral evidence to the Panel the Member maintained that in assessing Client D1's and D2's risk profile he considered the totality of their circumstances. He also maintained that, even although they were scored as having the same tolerance ratings in the questionnaire, he considered their separate circumstances. He ventured that Client D2 was [financially] experienced having worked in a New Zealand financial institution and was "quite confident about her opinion on what she felt her money should be invested"³².
86. While the Member considered the gearing option as providing tax advantages he did not model the impact of superannuation as against gearing in determining whether gearing was required to meet their goals.³³ The Member also conceded that while he recommended that Client D2 invest in superannuation savings, taxed at 15%, he did not recommend leaving investments in her name even although she would only have an income of approximately \$2000pa-well below the threshold at which tax becomes payable³⁴.

Panel Consideration

87. The Risk Profiler assessment is, as the document itself proclaims, 'indicative' only and the resulting score, as the Member confirmed, should not be read as being determinative. However in this instance there are other indicators which raise concerns. Scrawled across the page in the Lifestyle and Financial Goals section of the Financial Planning Questionnaire is the notation 'Scairdy (sic) Cats'³⁵. While this may relate to concerns about risks Clients D1 and D2 feared associated with the proposed transfer of their money (being \$A1,163,000) from New Zealand to Australia it is indicative of their attitude to risk aversion. In the next page of the same document under the heading of Retirement the notation "Not Risk Takers" confirms the Member recording their conservative approach to investments. The fact that at the time they sought advice their funds outside superannuation were conservatively placed in bank term deposits and bank savings was also indicative that they were cautious investors. This is further confirmed later when in same document in a note of the outcome of discussions between the Member and Clients D1 and D2 records :

'Retire at the age of 65, ensure retirement savings are safe and provide a good income for dinners, wine etc'.³⁶

88. The C report expert concluded that the allocation of the points across the risk profiles 'appears to be reasonable'.³⁷ This assessment was made having regard to

³² transcript p79)

³³ transcript p86

³⁴ transcript p88/89

³⁵ tab30 at p5

³⁶ ibid p20

³⁷ C report Para 9 at p5

the information contained in the Risk Profiler Questions document and there is nothing in this section of the report which indicates that the expert considered any of the information contained in the Financial Planning questionnaire document even although he had that document before him as part of the file.

- 89.** The answer to question 7 in the Risk Profiler Questions document appears to the Panel to be inconsistent with the answers provided in questions 1 and 4. The answer in question 7 (a willingness to take more risk with all of the money) was also inconsistent with the other indications that Clients D1 and D2 were seeking 'safe' investment options. This calls into question as to whether the scoring was an accurate reflection of Client D1's and D2's risk tolerance.
- 90.** The object of undertaking a risk profile assessment is for the financial planner to reach a decision as to the risk profile which is appropriate to the client. The SOA should demonstrate why the risk profile which has been determined is appropriate to the client. This is not just achieved from considering the answers to the Risk Profiler Questionnaire but must be formed from the totality of evidence before the planner. While the Member maintained in his oral evidence to the Panel that the risk profile was "...based on a whole client scenario" ³⁸the Panel is not able to be satisfied that the determination of Client D1's and D2's risk profile has been reasonably demonstrated as "balanced" particularly having regard to a combination of:
- the number of times the clients indicated that they wanted 'safe' investments and were not risk takers,
 - the reference to feeling like 'scairdy cats' about moving money from New Zealand to Australia,
 - the conflicting information contained in the Financial Profile Questionnaire about their attitude to risk taking,
 - Client D1 and D2 current financial circumstances with no debt ,no dependents, and having sufficient income and assets to achieve their goal of a safe and low risk retirement by the time of Client D1's retirement in approximately seven or eight years' time.
- 91.** While the Panel acknowledge that Clients D1 and D2 had diverse and in some ways conflicting goals (tax effectiveness vs safe and secure investments) their financial position was such that without embarking on a margin lending strategy and only contributing to superannuation as the Member proposed they were on course to

³⁸ transcript p78 et seq

reach their stated retirement goal which would “ensure retirement savings are safe and provide a good income for dinners wine etc...”³⁹

92. Since tax effectiveness was a stated goal it is curious that the Member did not apparently consider leaving /and or placing more investments into Client D2’s name. The SOA did not reveal this as being considered and when asked in the hearing the Member described as being ‘..a good question’ and stated that he considered superannuation as being the best long term environment for retirement funds.⁴⁰The Panel notes that Clients D1 and D2 were recorded by the Member in the questionnaire as asking “Can we reduce tax **this year**”⁴¹ (emphasis added). This would appear to be a more immediate goal and one which the Member did not adequately consider when giving his advice.
93. Irrespective of whether the clients were seeking both short term and long term tax planning advice it was, given their circumstances, in Client D1’s and D2’s best interests to be provided with advice which more comprehensively compared their situation absent the risks associated with embarking on a gearing scenario. This is so regardless of any issues surrounding their risk profile. However it assumes greater importance when, at best, given the Panel’s finding that it is satisfied their risk profile as ‘balanced’ is marginal. The Panel is reasonably satisfied that the advice provided by the Member in respect of providing gearing recommendation absent also providing advice about other forms of investment results in breaches of Practice Standard 3 rule 3.3(d), Practice Standard 4.2 rule 4.5(a) and Practice Standard 4.1 being proven.
94. The Panel is satisfied that there is no evidence to suggest that the Member provided gearing advice to Clients D1 and D2 in order to serve the interests of MiQ by the generation of significant fee and commission revenue. The allegation that Code of Ethics Principle 1 has been breached is accordingly dismissed.
95. The Panel notes that in the circumstances where the Member assessed a balanced risk profile and based his advice on that decision the insurance recommendation would have been appropriate. Because of the Panel’s finding that the financial advice provided has breached the rules it follows that the breach in respect of the insurance breach must be upheld.

Conclusion

96. For the reasons stated the Panel is reasonably satisfied that it has been proved that the Member has breached the following provisions as set out in the Schedule F Notice:

³⁹ tab 30 page 20

⁴⁰ transcript p89

⁴¹ tab 30 page 6

1. Conduct concerning the Cbus Referral program terms of Service– Practice standard 7 Rule 7.6
2. Advice Provided to Clients A1 and A2–Code of Ethics principle 2.
3. Advice provided to Client B–Rule 4.7(e)
4. Advice provided to Clients C1 and C2 (in respect of Client C2 only)–rule 4.10.
5. Advice provided to Clients D1 and D2–rule 3.3(d), rule 4.5(a), and Practice Standard 4.1.

Otherwise the Panel has dismissed the following alleged breaches:

- (a) In respect of Conduct concerning the Cbus Referral Program- Principle 8 of the Code of Ethics,
- (b) In respect of Clients A1 and A2-rule 7.3
- (c) In respect of Client B-Practice Standards 4.1 and 4.2
- (d) In respect of Clients C1 and C2-Practice Standard 4.1
- (e) In respect of Clients D1 and D2-Code of Ethics Principles 1 and 6

97. While in the directions hearing it was suggested that the parties make submissions with respect to sanctions it was premature and inappropriate for the Member to do that where he denied the breaches. The FPA did address its view on sanctions. However the Panel invites both parties to make and exchange fresh written submissions on sanctions in view of the findings made by the Panel. The parties have 21 days to do so from the date on which this decision is conveyed to them. If further time is required then either party may on providing grounds apply to the Chair for an extension.

98. In accordance with DR110 (i) the Member has the right to seek a review of this determination in accordance with Part 14 of the DRs. The Member has 21 days from the date of notification of this decision within which to request a review. Pursuant to DR106 the Panel determines that the Member is to pay the FPA's costs and expenses.

Dated 31 October 2018

Sanction decision: FPA and Mr M Brown (the Member).

Panel: G McDonald, Chair FPA Conduct Review Commission

M/s P Elliott, CFP, Panel Member

Mr M Chalmers, CFP Panel Member

Date of Decision: 29 January 2019

Summary of the Panel's Decisions on Breaches.

In respect of the Panel's findings of breaches the Panel:

-has accepted the Member's submissions that he be reprimanded and apologize to the FPA in respect of all of the breaches and apologize to Cbus superannuation in respect of Breach number 1,

- has imposed a sanction suspending the Member's rights and privileges of FPA membership for a period of two years in respect of the Breach number 2, a decision additionally supported by the Panel's finding that there were breaches in the following three different aspects of the advice provided by the Member-the commissions breach, the ethics breach and the breach resulting in the failure to provide satisfactory financial planning advice to three of the Member's clients.

-accepted the Member's undertaking to complete a course to improve his knowledge of superannuation and decides in addition that he undertake to complete a course in ethics and risk management in Financial Planning, the courses to be at the direction of the FPA Head of Professionalism and to be completed to his satisfaction within a 24 month period. The Member is to provide details of improvements made to his practice procedures to the FPA Head of Professionalism within 21 days, or such longer period decided by the Head of Professionalism, who is to determine if those changes constitute a satisfactory level of improvement. If the changes do not meet the standard decided by the Head of Professionalism then the Member is to undertake a course to improve the practice procedures as decided by the Head of Professionalism at the Member's expense. "

To ensure that the best interests of Clients C1 and C2 and Client B have been addressed the Member is to provide an undertaking, as provided for in Schedule B clause 7(a) of the FPA Disciplinary Regulations, at the Member's expense, to:

- (a) refer the breach and sanctions decisions in Clients C1 and C1 and Client B files to Magnitude's internal review and remediation program for review, and,
- (b) abide by any decision arising from that review, including to pay the clients any remediation amount arising from the review.

Should Magnitude be unwilling or unable to undertake the review then the Member is to immediately notify the AFP Head of Professionalism who is to appoint another suitably qualified independent reviewer to under the review.

Background.

1. On 21 October 2018 the Panel appointed to decide alleged breaches by the Member reported its findings. It found breaches in five instances (one instance consisting of three related breaches) and dismissed breach findings in another 5 instances. The circumstances in those instances where a breach was established are briefly set out later in these reasons. Where breaches have been established FPA Disciplinary Regulation 111 provides that the Panel may impose any of the sanctions set out in Schedule B to the Regulations. The decision whether to impose any sanction is discretionary. Schedule B sets out a broad range of sanctions.

2. In accordance with Disciplinary Regulation 113 both the FPA and the Member were invited to, and did, make submissions on sanctions. An extension of time was granted to the Member to file a submission which was received on 17 December 2018. By that time the Member had had the advantage of considering the sanction submission made by the FPA. Since Regulation 113 provides only that the parties be given an opportunity to make submissions and does not expressly provide for the exchange of submissions or for answering responses to be made, the Member was placed in an advantageous position. His submission included a number of criticisms to the FPA approach in its submission. The Panel noted these while finding that it was not expedient to list all of them. Some, which the Panel considered particularly relevant, have been addressed later as part of these reasons. While the Panel considered inviting a response from the FPA to the criticisms it decided that, given the detail contained in, and strength of, the FPA submission little would be achieved by pursuing that course.

4. The Panel has taken into account the submissions of the parties which are summarised later in these reasons.

The Sanctions Principles.

5. It is not possible to consider the principles applicable to sanctions without taking into account the purposes for which the FPA is established. The FPA submission draws attention to the objects for which the FPA was established as set out in the Association's Constitution including to:

- (a) act in the public interest so that clients of FPA members and prospective clients obtain fair and competent financial planning advice and to suppress malpractice;
- (b) enhance public awareness of, and confidence in, the financial planning profession;

- (c) promote and ensure compliance with high standards of professional confidence and ethical conduct within the financial planning profession and by members of the FPA.

6. Each FPA Member commits to adhere to the professional standards established in the Code of Conduct. There are three components to the Code which together establish the standards which are to apply. In descending order of importance they are:

- The Code of Ethics,
- The Practice Standards, and,
- The Rules of Professional Conduct.

7. The Code of Ethics is the top layer of professional regulation and it establishes the ethical foundation for the other FPA standards of professional conduct. The FPA Practice Standards are the middle layer of professional regulation and they describe the expectations of practice for FPA members. The Rules of Professional Conduct as the third layer provide a more detailed exposition of the Practice Standards.

8. The FPA submission also points out to maintain the integrity of the Code and meet the expectations and interests of the public, as well as the peers of FPA members, where breaches of the Code are found to have occurred appropriate sanctions are to be imposed. While the submission of the Member concurs in the need to maintain the integrity of the Code it points out that the imposition of sanctions is discretionary and that an assessment of whether or not to impose a sanction should be undertaken as an initial step. Both parties agree that any sanctions imposed are to be considered and operate as being protective in nature rather than being punitive. In respect of the latter point the Panel agrees with the submissions of both parties that sanctions should aim to:

- assist Members in understanding, correcting and rehabilitating conduct where a breach has been found,
- protect the public, the profession and the peers of FPA Members,
- maintain the professional conduct standards,
- deter other FPA Members from engaging in similar or other unsatisfactory conduct.

9. In support of the above the FPA provided references, and extracted the principles applied, in cases in which courts had considered appeals from sanctions imposed by professional bodies on their members e.g, lawyers and medical practitioners. Those references stress the fundamental principle of ensuring the protection of the public interest not just from the actions of the individual practitioner who has been found to have committed breaches but the broader public interest that a profession has in the maintenance of professional standards. The submission from the Member acknowledges that is the approach which the CRC should consider in its protective role when deciding

any sanctions.⁴² The Panel endorses the protection of the public as constituting the foremost consideration. The Panel also acknowledges that the protection of the public, while it is an imprecise term incapable of definitive definition and is dependent on how the circumstances arising in different factual findings should be viewed, is not to be interpreted in a narrow manner.

The FPA Submission on the Specific Sanctions in this Case.

10. Because the principal view of the FPA was that the one sanction should be imposed for all breaches (subject to the imposition of fines in respect of individual breaches) it made limited submissions on the individual breaches. Accordingly the Panel has outlined the FPA position hereunder and, except in respect of some specific items, has not directly covered its exposition on individual breaches. The Panel has listed what it regards as pertinent aspects of the Member's submissions in respect of each breach in the section addressing the individual breaches.

11. The FPA invited the Panel to consider the one sanction of expulsion or suspension and the imposition of fines taking into account the total number of breaches and the other matters listed later in this section. The FPA submitted that the CRC breach findings included a wide range of unsatisfactory conduct including breaches relating to a lack of personal integrity, professional ethics and conduct which reflected adversely on the Member's integrity as Financial Planner.

12. The FPA acknowledged that the Member had repatriated the commissions connected with the Cbus referral program to the clients in a manner approved by the FPA and that the Member had co-operated with CRC in the disciplinary proceedings. Additionally the FPA noted that the CRC had directed the Member to pay the FPA's costs of the proceedings.

13. A summary of the pertinent findings made by the CRC in respect of each breach was set out. Such of these findings as the Panel considered assisted it in the determination of sanctions have been taken into account in its description of the matters relevant to each of the breach decisions set out later in these reasons.

14. The Panel accepts the FPA submission that the gravity of professional misconduct is not to be measured by reference to the worst cases but to the extent to which the conduct departs from proper standards.

15. The FPA also submitted that in determining the fitness to practice the whole of the conduct of the practitioner should be considered. In that respect it was submitted that the appropriate sanction in the circumstances of this case was expulsion because:

- (a) there are multiple breaches of the Code of Ethics, Practice Standards and rules;

⁴² submission paragraph 8

- (b) the breaches are not isolated in nature and encompass multiple areas of both the Financial planning Process and advice strategies;
- (c) the breach of Ethics Principle 2: Integrity, regarding financial planning advice to Clients A1 and A2, alone requires the panel to consider expulsion;
- (d) the Member's responses to the allegations of breaches of the Code show that he has no understanding of his ethical obligations, or insight into the seriousness of his breaches;
- (e) it is an unsatisfactory response to breaches of the Code to attempt to shift the responsibility to the FPA, Cbus or any other person;
- (f) by these breaches the Member has brought the profession into disrepute and damaged the FPA.

16. The FPA submitted that the period of expulsion should be for three years during which time the Member should undertake to complete courses approved by the CRC Chair on ethics and risk management in financial planning. It was also submitted that it was appropriate for the Member to be fined in respect of each breach and that not any of the breaches should be regarded as being a Minor Instance of Unsatisfactory Conduct⁴³. The FPA submission left it up to the Panel to determine the amount of any fine.

17. The FPA submitted that if expulsion was not accepted then in addition to any fines imposed the Member's membership of the FPA should be suspended for a 2 year period during which time he should be directed to complete the courses referred to in the preceding paragraph and that, after readmission, his practice should be subject to a supervisory period in accordance with directions made by the Chair of the CRC.

The Member's General Submission Sanctions in this Case.

18. In addition to the detailed submissions in respect of each breach which the Panel has noted later in this decision the Member submitted the following generic points.

19. The Member stated that he accepted the breach findings made by the CRC. It was submitted that he had undertaken steps to improve his advice practices and systems to avoid a repeat of the breaches. He submitted that:

- (a) he has insight into his wrong doing on each occasion;
- (b) he has shown remorse and contrition;
- (c) he has taken ownership of his mistakes;
- (d) other than these specific occasions he has otherwise conducted himself in a fit, proper and exemplary manner for more than 20 years, with a considerable number of years of faithful and loyal service to the FPA and its members.

⁴³ see Schedule B Clause 5(a) of the Disciplinary Regulations.

20. It was submitted that there was little likelihood of him re-offending in the manner the subject of the breaches or otherwise.

21. The Member submitted that "... the primary focus of the CRC should be one of issuing sanctions bearing in mind the specific breaches so as to provide general deterrence"⁴⁴

22. The Member conceded that it was appropriate for sanctions to be imposed. In determining the sanctions it was submitted that:

- consideration all of the circumstances including his personal and professional circumstances, the breaches and position taken by the Member to the complaint, and,
- regard should be had to the appropriateness of the total once individual sanctions had been set.

23. In its consideration of each breach it was submitted that the Panel should take into account:

(i) the gravity of the breach including its impact;

(ii) the motive behind each breach;

(iii) the attitude of the offender once it was highlighted that there was a potential breach;

(iv) the personal and professional circumstances of the offender.

24. Paragraph 24 of the Member's submission set out a detailed history of the Member's extensive professional contribution, including to the offices he held within the FPA, as well as non professional voluntarily undertaken community activities in which he had engaged, both of which have occurred over a lengthy period.

25. The Member pointed out the wide discretion available to the Panel including deciding on a reprimand, the ability to impose a wide range of undertakings (including directing that he undertake to participate in training courses) and direct that an apology be provided. The Member proposed in respect of two of the breaches⁴⁵, among other sanctions, that a 12 month period of 'good behavior' would be an appropriate sanction. While such a sanction is within the scope of sanctions which may be imposed the open ended nature of what in the circumstances would or should be considered to be 'good behavior' is, in the context of a proceeding based in the nature of an administrative proceeding, too nebulous a concept to be considered appropriate.

⁴⁴ Submission paragraph 5

⁴⁵ In respect of the Cbus commission issue and the advice provided to Clients D1 and D2

Some Preliminary Observations

26. In considering sanctions the Panel accepts that both the general professional and conduct specific to the breaches needs to be considered. The Panel acknowledges that the Member has cooperated in the CRC disciplinary proceedings. The Member, while he did not acknowledge a breach, had repaid the insurance commissions involved in the Cbus Terms of Service matter (Breach 1) and he did so before any proceedings were initiated by the FPA. It is to his credit that the Member accepted, prior to the CRC hearing, responsibility in respect of the following breaches:

Client B-the evaluation undertaken with respect to Client B's transition to retirement pension fell short of best practice in breach of rule 4.7(e)

Client C2-the rollover for Client C2's superannuation was not in her best interests and that constituted a breach of Rule 4.10

Client D1-A failure to properly assess the risk profile led to an inappropriate insurance recommendation.

A brief summary of the circumstances giving rise to the conceded breaches is addressed later in these reasons.

27. The Panel acknowledges that a Member has the right to a hearing to determine those issues where a breach is not conceded. It does not necessarily follow that in challenging the allegations leveled that a Member has not cooperated with the FPA processes or has, in some way, abrogated his/her professional responsibility in respect of his/her conduct. There is often disagreement surrounding the establishment of the facts and then determining whether the facts as found amount to breaches of the Code. It is the role of the CRC to determine the factual circumstances and decide if these result in the establishment of a breach of the FPA Code of Conduct.

28. While the Panel acknowledges the personal and professional contributions detailed in the Member's submission, the Panel must give primary consideration to the circumstances surrounding the breaches. In particular personal contributions made for the betterment of society, unconnected with any professional contributions, are of little consequence in the context of considering sanctions applicable for Code breaches. While past positive contribution to a profession may at one level be favorably regarded at another it makes the fact of breaches occurring more surprising and increases the potential impact on the reputation of the FPA.

29. While Regulation 111 states that a sanction may be imposed for 'each' breach the Panel acknowledges, where there is more than one breach, that consideration which takes account the totality of the sanctions imposed needs to be considered.

30. The Panel considers that there are three differing aspects reflected in its breach findings-namely-the breaches in respect of the Cbus Commissions, the breach in respect of the failure to give candid advice to Client A1 and the failures to properly consider the financial advice given to Client B, Client C2 and Clients D1 and D2. The Panel gives further consideration to this aspect later in this decision under the heading of ‘Totality’.

The Circumstances of the Breaches, the Member’s Submissions on each Sanction and the Sanctions

Breach 1 The Cbus Agreement-Practice Rule7.6.

31. In the breach finding the Panel decided that the Member had failed to take due care in charging insurance commissions in four instances, including in one instance a stamping fee and in another advising a commission would be charged if the planning advice was accepted, contrary to the terms of an agreement entered into between Cbus and the FPA the terms of which agreement were binding on the Member. This aspect of the agreement was further fortified by each of the referral letters to the Member from Cbus, which confirmed only a fee for service was to be charged.

32. In its findings the Panel accepted on behalf of the Member that:

- (a) there was no element of deception in the Member’s conduct,
- (b) the Member acknowledged that he had received, or stood to receive, commissions,
- (c) the Member voluntarily repatriated the commissions even although he had not been compelled to do so by any adverse finding by the CRC,
- (d) the Member has at all times acted candidly and cooperated with the FPA.

The Panel also acknowledged that the FPA did not deny that it had previously approved a file in which the Member had charged commissions.

The Member Submission in respect of Breach 1.

33. The Member submits that the breaches did not stem from any dishonest conduct but rather arose through a non deliberate misunderstanding on his part as to the operation of the Terms of Agreement. In his submission the Member states that he now accepts the CRC finding that the terms of the agreement are not ambiguous.⁴⁶

34. The Member submits that his then subjective belief as to the interpretation of the Terms of the Agreement was genuinely held. His submission draws attention to his claim

⁴⁶ para 26 of the Member’s submission

that the FPA had an identical view as to the interpretation to be applied at an earlier time.

35. The Member's submission accepts that the imposition of the following sanction is appropriate:

- (a) a formal reprimand,
- (b) a written apology to the FPA and Cbus,
- (c) the Member be placed on a period of good behavior for 12 months,
- (d) a fine of \$2500 be imposed suspended pending the Member's compliance with (c).

The Panel Sanction Decision in Respect of Breach 1

36. While breaches in respect of five clients have been established the Panel was satisfied that the Member had a genuinely held misunderstanding of the terms of the contract which banned the taking of commissions. The Panel found that there was little that was unclear in the contract terms, and that the ban was emphasised in each of the Cbus referral letters. However it is evident, by the fact that he openly disclosed in each of the advices given that he would charge a commission, in circumstances where he must be taken to be aware that his advice would be scrutinised, that he had not grasped the fact that the ban applied. As outlined the Member repaid the commissions prior to the commencement of any proceedings brought by the FPA. The Panel noted in its finding that the FPA did not deny that the Member had not been advised by it in respect of another client in similar earlier circumstances that commissions should not be charged.

37. The Panel does not find that the Member was on this issue trying to improperly reallocate blame to the FPA or to Cbus. The Panel also notes that the Member is no longer authorized to provide advice under the FPA/Cbus agreement and that he has consequentially lost that line of business.

38. The Panel accepts the Member's submission that a formal reprimand be applied and that he provide a written apology to both the FPA and Cbus. In circumstances where he has already refunded commissions, where commissions were paid, the Panel considered but decided that there is no utility in him being directed to provide apologies to his clients.

39. The Panel is not persuaded that the imposition of a fine is warranted. The reasons for this are expressed later in this decision under the heading of "Totality of Sanctions".

Breach 2 –Clients A1 and A2-Code of Ethics Principle 2

40. The Panel found in the breach decision that the Member had not counseled the client following Client A1 advising that he proposed to retire from full time work recommencing the following week in order to obtain the release of otherwise preserved superannuation savings to which he was not at the time entitled. While the Panel found that there was no evidence before it that the Member advised his client to embark on

this course, no evidence that the client carried out his proposal or that the Trustee engaged in any improper conduct in releasing the funds, it nevertheless found that the Member lacked candour by failing to advise and document that the proposed strategy did not accord with regulatory requirements.

The Member's Submission.

41. "The Member openly and without reservation accepts that the breach in relation to the Code of Ethics Principle 2 is serious and regrettable" but maintains that it falls at the "... lesser end of the scale".⁴⁷ It is submitted that the breach was not motivated by greed or personal gain, that he was aware of his obligations under the Code of Ethics, that there is unlikely to be a repetition of the breach and that he was not seeking to avoid his compliance obligations.

42. The Member submitted:

"...the breach arose because the Member mistakenly believed (at the time but not now) that he(sic) duty to advise Client A1 about the issue came to an end when it was carved out of the advice as requested by Client A1 and Client A1 was adamant that he did not wish to discuss it"(emphasis in the original).

The Panel decision on Breach 2

43. The Panel regards this as being the most serious breach because of the potential consequences which may result for Client A1 in not being informed of the accurate requirements about early access to his superannuation savings. The Panel is satisfied that maintaining silence in circumstances where a legal requirement is foreshadowed to be breached reflects not only on the ethics of the Member but brings the ethics of the profession into question. The conduct is not in the interests of the client, the public interest nor is it in the interests of the Member's FPA peers. Silence is not an option in the face such a potential regulatory breach. A breach of a principle of the Code of Ethics is to be regarded as a serious warranting, if not expulsion, at least a suspension of the Member's FPA rights and privileges for a period.

44. The Panel is persuaded that having regard to the Member's acknowledgement of, and remorse for, the mistake made, his past exemplary professional conduct, the unlikelihood of any repetition—factors which at one level the Panel acknowledges make his conduct more surprising— the Panel has decided to not to impose the ultimate form of sanction of expulsion.

45. After serious consideration the Panel has decided that the Member's FPA rights and privileges should be suspended for a period of two years during which time he is to complete the courses outlined hereunder. The Panel accepts the Member's submission

⁴⁷ Member's submission para29

that he make a formal written apology to the FPA, that he be reprimanded the breach and accepts his undertaking to engage in a course to improve his superannuation knowledge and skills at his own expense. The Panel also decides that he is to undertake a course in ethics and risk management in financial planning also at his own expense. Both courses are to be as directed by the FPA Head of Professionalism and be completed to his satisfaction.

46. The Panel also gave serious consideration to the FPA submission that the Member's practice ought be supervised for a period but concluded that this would not be necessary in circumstances where the Member has already undertaken steps to improve his practice procedures and has also undertaken to participate in remedial courses. It is not appropriate for the Chair of the CRC to be involved in the decision of the level at which the courses should be set or the ongoing monitoring of the level of compliance. The remedial courses are to be decided by the FPA Head of Professionalism and completed to his satisfaction within the period of 24 months.

47. In light of the sanction imposed the Panel sees little utility in the imposition of a fine for this breach.

Breaches 3 –Financial Advice provided to Client B Rule 4.7(e) and Breach 4 -Advice provided to Client C2 Rule 4.10.

48. The Member concedes that the evaluation he undertook in support of a recommendation for Client B to roll over his CFS First Choice Wholesale pension product to a BT Select Portfolio SuperWrap Pension fell short of acceptable practice and that this breached Practice rule 4.7(e). The SOA set out general statements without sufficiently explaining how the recommended change would benefit the client. The C report, obtained by the Member and submitted as part of the material considered by the Panel in the breach proceeding, commented that insufficient "...reasons were provided as to why the change from CFS to BT benefits the client as opposed to the adviser and/or licensee".

49. It is of great importance for the profession to present clients with information which provides a client with justification as to why a change of product is in the best interests of the client. General statements in the SOA -in this case which would be equally applicable to maintaining the status quo-do not fulfill that responsibility and leave the financial planner open to allegations that the change is recommended in order to 'churn' ie obtain increased fees or commissions. The Panel does not suggest that this is what motivated the Member in this case-merely that that is a perception which does not enhance confidence in the way in which the profession operates. It is desirable that SOA's be structured to provide the client with comparative information which more readily permits the client to grasp the benefits of adopting the recommended changes. While there may well be discussions in which advantages are canvassed there is an equally important need for SOAs to document the advantages. The creation of a permanent record places any such change advice given beyond doubt.

50. While the Panel does not find that the Member was engaged in churning it does not regard this breach as being a minor instance of unsatisfactory conduct. The Panel accepts the Member's submission that he be formally reprimanded and provide a written apology to the FPA.

51. The Member concedes that the same reasons apply in respect of Breach 4 as were outlined in respect of the sanction decided in breach 3. Aside from general statements equally applicable to the maintenance of the status quo no sufficient justification was provided to support a recommendation that Client C2 roll over her Vision Super to a BT Select PortfolioWrap Super. For the same reasons as previously expressed the Panel does not regard this as being a minor instance of unsatisfactory conduct. The Panel accepts the Member's submission that he be formally reprimanded and that he provide a written apology to the FPA.

52. To ensure that the best interests of Clients C1 and C2 and Client B have been addressed the Member is to provide an undertaking, as provided for in Schedule B clause 7(a) of the FPA Disciplinary Regulations, at the Member's expense, to:

(a) refer the breach and sanctions decisions in Clients C1 and C2 and Client B files to Magnitude's internal review and remediation program for review, and,

(b) abide by any decision arising from that review, including to pay the clients any remediation amount arising from the review.

Should Magnitude be unwilling or unable to undertake the review then the Member is to immediately notify the AFP Head of Professionalism who is to appoint another suitably qualified independent reviewer to undertake the review.

53. The Panel is not persuaded that the imposition of a fine is warranted for either of the above breaches. The reasons for this decision are expressed later in this decision under the heading of "Totality of Sanctions".

Breach 5 - Clients D1 and D2. Rules 3.3(d), 4.5(a) and Practice Standard 4.1

54. Because of inconsistencies in the responses the clients' gave in completing a Financial Risk Assessment **document** the Panel was not satisfied that, even when regard is had to the totality of the clients' circumstances, the Member's assessment of them as having a "balanced" risk profile was reasonable. The Panel noted that:

-on a number of occasions the clients indicated that they wanted "safe investments" and were not risk takers,

-there was reference to them being "scairdy (sic) cats" about moving funds from New Zealand to Australia,

-there was conflicting information about the clients' attitude to risk taking evident in the Financial Questionnaire which they completed,

-the clients' financial circumstances revealed no debt and no dependents and they had sufficient income and assets,

-the clients were on track to achieve a safe and low risk retirement in seven or eight years' time, and,

- there was no need for them to embark on a higher risk margin lending strategy which the Member recommended.

55. Additionally since taxation saving was a goal of the clients the Panel concluded that there was an apparent failure in the Member not providing alternative advice about investing some of their savings in a managed investment account in Client D2's name where the returns would be below the taxable threshold. However the Panel was satisfied that the Member did not provide gearing advice in order to generate greater fees and dismissed an allegation that he breached Code of Ethics Principle 1.

The Member's Submission on Sanction.

56. The Member submitted that an appropriate sanction would be:

- (a) a formal reprimand
- (b) written apology to the FPA;
- (c) the Member be placed on a period of good behavior for 12 months;
- (d) the Member undergo training to improve his advice and disclosure practices
- (e) a fine of \$2500 suspended pending compliance with (c)

The Panel Decision on Sanction

57. The Panel accepts that all three breaches should be determined under the one sanction as they all arise from the one set of advice given to Clients D1 and D2.

58. The breaches arise from a failure to properly assess the client's risk profile. This represents a fundamental flaw as a proper risk assessment forms one of the important basis upon which financial advice is then given. Care needs to be taken when reviewing client answers provided in response to questionnaire forms such as that utilized in this case. As the Member said in the hearing answers given by clients are but one part of a financial planner undertaking a client risk assessment. Nevertheless it is important for planners to be attuned to inconsistencies in answers so that a proper assessment appropriate to the client can be determined and this was a failure in the instant case.

59. It is equally important for planners to be aware of what advice clients are seeking – in this the clients expressly sought advice on reducing their income tax liability. However

there was no apparent consideration given to how investments could be made to achieve this outcome in circumstances where it was apparent that investments could be made on behalf of Client D2, who had little or no income, which would give returns below the income tax threshold.

60. The Panel notes that the clients, for reasons unassociated with the breaches, did not implement the advice provided by the Member.

61. The Panel accepts the Member's submission that he be reprimanded and provide a written apology to the FPA. The Member earlier in his submission stated that he had undertaken steps to improve his advice practices and systems. The Panel also decides that he is to inform the FPA Head of Professionalism in writing within 21 days of this decision (or such further time as decided by the Head of Professionalism) of the steps taken and if the Head of Professionalism is not satisfied that the steps taken represent a sufficient improvement then he is to determine a training course for the Member to undertake, at the Member's expense, to be completed within the next 24 months to the satisfaction of the Head of Professionalism.

62. The Panel is not persuaded that the imposition of a fine is warranted for either of the breaches. The reasons for this are expressed later in this decision under the heading of "Totality of Sanctions".

Totality of Sanctions

63. The decision to impose a 2 year period of suspension of FPA rights and privileges in respect of Breach 2 (failure to give candid advice to Client A1) reflects the seriousness with which the Panel regards that breach. The fact that the Panel made breach findings in three different areas –the Cbus commissions, the ethics breach and the failure in the provision of satisfactory financial advice to three of the Member's clients - further supports the imposition of the suspension sanction. Given that sanction the imposition of fines in addition to the period of suspension would result in an excessive burden given that the Member has been directed to pay the FPA costs-likely to be substantial given legal counsel was briefed (in response to the Member's request to be legally represented). The Member will also have ongoing costs associated with the training course he has been, or in the case of the sanction in Breach 5 may be, required to undertake. The Panel also earlier noted that he has lost the referral advice work under the Cbus arrangement.

The FPA Costs.

64. The Panel decided that the Member is to pay the FPA costs. The Member submitted that he accepted that he pay the FPA 'reasonable costs'⁴⁸. Regulation 106 of the Disciplinary Regulations which governs this issue does not set out any mechanism for

⁴⁸ submission paragraph 41.

the determination of any disputes about costs. The FPA maintain a separate accounting function detailing the costs it incurs. As stated earlier these are likely to be substantive in the instant case where counsel was briefed by the FPA in response to the Member obtaining consent from the Panel to brief counsel on his behalf. Should the Member not accept the FPA estimate of costs then the Panel recommends that on the expiration of the appeal period and providing no appeal is lodged, that the Chair of the CRC, providing the parties provide written consent to him deciding the matter, be permitted to finally determine the issue of costs. If an appeal is lodged then costs may be an additional matter which the appeal Panel may opt to consider.