FINANCIAL PLANNING ASSOCIATION OF AUSTRALIA AND MEMBER

MARK KYNASTON.

BEFORE THE

FINANCIAL PLANNING ASSOCIATION OF AUSTRALIA CONDUCT REVIEW COMMISSION.

DECISION AND REASONS FOR DECISION

REGARDING: Mr Mark Kynaston CFP® (Member ID: 334671)

LICENSE HOLDER: Smith Coffey Pty. Ltd.

ORIGINAL COMPLAINANT: Ms Former Client.

CURRENT COMPLAINANT:
Financial Planning Association of Australia.

DETERMINING PANEL:

Mr Graham McDonald.

Conduct Review Commission - Deputy Chair.
Financial Planning Association of Australia. (FPA)

Mr Dacian Moses CFP®
Mr James Cotis CFP®

DATE OF DECISION: 29 November 2019

BACKGROUND AND PROCEDURAL ISSUES

1. Smith Coffey Pty Ltd is an Australian Financial Services Licensee. The Financial Planning Association of Australia (FPA) Professional Practice register records the Member is a representative of, and a shareholder in, the licensee.

2. In 2011 the Original Complainant, a dentist, sought advice from Mark Kynaston (the Member) to establish a personal risk insurance policy. The Member prepared a statement of advice (SOA) dated 25 August 2011 recommending that she change her current income protection Insurance Provider and take a policy with Asteron Lifeguard Insurance (Asteron) which the Original Complainant accepted. In 2015 the Original Complainant sought to increase the level of her cover. An updated SOA with the proposed changes was undertaken by the Member in 2014 and the recommendation made to adjust the Asteron policy was accepted in 2015. The relevant terms of the policies are covered later in these reasons.

3. In 2018 the Original Complainant sought the services of a new financial adviser. She did so on the basis of an understanding brought about by the proposed new adviser offering to arrange a rebate of the commissions paid on her insurance policy. However in correspondence dated 30 July 2018 to the Original Complainant's new adviser Asteron advised:

> *'In this instance we are unable to process the change of adviser on the above policy as it is set up with Guaranteed Commission for Life to the original adviser.'*

4. On 18 July 2018 the Original Complainant lodged a complainant with the FPA in which she asserted that it was unethical for Smith Coffey to continue receiving commissions from the insurer when they were no longer providing advice to her and claimed: 'Essentially, I am paying for a service I am no longer receiving'.

5. Following proceedings in the Australian Financial Complaints Authority, in respect of which the Licensee has acknowledged that a compensatory payment was made to the Original Complainant, the Original Complainant withdrew her complaint to the FPA. On 15 November 2019, pursuant to Rule 9 of the FPA Disciplinary Rules, the Head of Professionalism at the FPA became the Complainant.

6. In an email dated 24 October 2019 the Member notified the FPA of his resignation 'with immediate effect' and of his decision 'not to be involved in any further conduct, activity or communication with the FPA, including the disciplinary proceedings'. The FPA responded relying on clause 13.5 of the FPA Constitution which is in the flowing terms:

> '*13.5 The FPA must not accept the resignation of a Member:*
>
> *(a) whose conduct is the subject of a current investigation or proceedings under the FPA's Disciplinary Regulations;….'.*

7. Members of the FPA acknowledge and are bound by the FPA's governing Constitution. Despite the Member's withdrawal he and his solicitor were notified that a telephone Directions hearing was to take place on 28 October 2019 and were provided with the correct date, time and contact details. There was no appearance from either the Member or his solicitor and the hearing proceeded on an ex parte basis.

8. A copy of the directions made were emailed to the Member in which, among other issues canvassed, he was given 7 days in which to reconsider his earlier advice that he would no longer participate in the proceeding. It was directed that failure to respond within the 7 day period would result in the disciplinary proceeding being held on an ex parte basis. No response was received.

9. The FPA panel members appointed to determine any breach confirmed that, after their review of the Investigator's report and having considered the outcome from the Directions hearing, that they had no further questions to ask the FPA Investigator. On that basis the panel proceeded to determine the breach allegation on an ex parte basis on 20 November 2019.

THE ALLEGED BREACH

10. The FPA allege that the Member breached the FPA Code of Ethics Principle 4 which relevantly reads

> *'Fairness which requires providing clients with what they are due, owed or should expect from professional relationship and includes…disclosure of material conflicts of interest'.*

11. Alternatively it is alleged that General Conduct Rule 7.2 which relevantly provides that a 'Member must not engage in any act or omission of a misleading …nature or engage in any act which is likely to mislead…' has been breached.

12. The Investigator's report refers to breaches alleged to have occurred between 2011 and 2014. For the sake of clarity clause 2 of the 2019 Disciplinary Regulations relevantly provides that the current 2019 regulations apply to any Complaint on hand after 1 January 2019 irrespective of the date of the conduct to which the complaint relates.

13. Accordingly it is open to the Panel to consider conduct occurring in both 2011 and 2014. Because the conduct in each case occurred more than 3 years before the making of the complaint a determination must be made under clause 13 of the Disciplinary Regulations that the matters addressed in clause 12 have been met. In my capacity as Deputy Chair of the CRC I determine that:

> *(a) it is fair and just to deal with the complaint having regard to the delay and the reason for the delay (being that the issue raised in the complaint concerned non-disclosure of a commission arrangement between the licensee and an insurer was unbeknown to the Original Complainant and did not come her attention until 2018),*
>
> *(b) the complaint involves Malpractice (Malpractice is defined in Clause 3.1 of the FPA Constitution as including behaviour that contravenes the FPA Code of Professional Conduct which is alleged as constituting the breach is this case), and,*
>
> *(c) it is in the public interest to deal with the Complaint (as the practice concerned likely to have been present in other cases as adverted to in a response dated 29 September 2019 filed by the CEO of the licensee to the FPA Investigator's report).*

THE ADVICE GIVEN AND THE TERMS OF THE INSURANCE POLICY.

14. The Member recommended in a 2011 SOA that the Original Complainant change her Income Protection insurance arrangements to an increased life income protection policy along with an 'booster' policy securing an additional benefit payment for a 2 year period. While the Member provided a list of qualitative reasons in support of the recommended change of policy there was no attempt to make quantitative comparison of premiums for the same waiting and benefit periods or to compare the recommended policy with any other suitable policy. In 2014 the Member provided a further SOA in which he advised an increase in the income advantage policy and a change to a Level Premium structure.

15. A product disclosure statement, issued by Asteron and dated 11 October 2010, containing the application form which the Original Complainant signed. Under the heading 'what we pay your financial adviser'' the statement provides:

    (a) *'Your financial adviser may be paid a commission by Asteron for your policy. This commission is already included in the premium rates and is not an additional charge to you. In addition to this commission, we may make payments to Australian Financial Service licensees based on commercial arrangements. These payments are made by Asteron and are not an additional charge to you.*

16. Your financial adviser will provide details of the benefits he or she will receive if we issue you a policy in the Financial Services guide and, if applicable, the Statement of Advice that he or she will give to you.'

17. Nothing in either SOA referred to any commission arrangements entered between Smith Coffey and Asteron in respect of the policy issued to the Original Complainant. However both SOAs referred to the payment of what are described as 'advice fees' in relation to the initial premium and renewal premiums. These fees are expressed as being a percentage of the premiums paid.

18. In the 2011 SOA the initial fee was stated to be 72.50% of the $2,682.24 premium amount (being $1,944.62) and in the case of the renewal premium a fee of 22.00% of the $2,682.24 premium amount being $590.09.

19. These 'fees' were noted as being remitted to the licensee. Similarly expressed 'fees' were recorded in the same format, but for differing premiums, in the 2014 cost analysis. In each SOA a note to the detailed cost analysis states:

    (a) *'Please note that these costs are already included in the total premiums paid to the insurer(s) and are not additional costs to you.'*

20. In not any of the FSG or the two SOAs is there any mention of any arrangement between the Licensee and the Asteron which alerted the Original Complainant that commissions/fees would continue to be paid to the licensee for the duration of the policy even if she changed her financial adviser. This would be so unless the Licensee released that condition.

THE ISSUE

21. The FPA does not allege that the arrangement made for the payment of a commission to the licensee was illegal. What is alleged is that there was a requirement that the terms pursuant to which the payment of commissions should have been disclosed to the client. It is alleged that the breach should be determined under either the FPA Code of Ethics principle 4 or rule 7.11 of the Rules of General Conduct.

22. Smith Coffey undertook in their 2010 Financial Services Guide that its representatives would disclose any interests which may influence their advice about a financial product in any advice document issued to a client.

23. As the CEO response of 28 September 2019 acknowledged Rule 1.8(g) of the FPA Rules relating to Practice Standard 1 relevantly requires:

> *'…any commissions or any other pecuniary…benefit whether direct or indirect, received…by the Member or his … associate in connection with the professional service.' to be disclosed in an SOA.'*

SUBMISSIONS ON BEHALF OF THE MEMBER

24. There were two submission made on behalf of the Member. A written submission dated 28 September 2019 made in response to the FPA investigator's notification of the complaint was made by Mr M Glossop the CEO of Smith Coffey (in these reasons referred to as 'the CEO response').

25. A written submission from the Member's solicitor dated 30 September 2019 was also received (referred to in these reasons as 'the Member's solicitor's submission').

26. Both submissions disputed that any breach had occurred. The CEO response articulates that Smith Coffey

> *'..had arrangements with [the insurer] that maintain the commission payments with the originating adviser (even if the servicing agent changes) as long as the policy remains in place.'*

The response asserts that the arrangement resulted in reduced premium costs and spread the cost recovery more evenly over the life of the policy.

27. The CEO response refers to the Insurer's notification to the Original Complainant's new proposed adviser that it was 'unable to process the change of adviser' as an error. It notes a subsequent sentence in which the insurer confirmed it had out in place an authority for the '…new adviser… to get full information on the policy'.

28. The CEO response refers to 'commissions' for what are described in the SOAs as 'fees'. The response states the payments are '… are not fee payments made by the client for services provided….' and in that context '… it is the product issuer (and not the client) that decides the quantum of the commissions, the basis and the regularity and longevity of the payments' and stated that the arrangement had been disclosed to the Original Complainant.

29. The CEO response states that the agreement between the insurer and the licensee will remain in force as long as the policies remain in force. Payments to the licensee would only cease when the Original Complainant cancelled the policies. The response concludes there being 'no restrictive mechanisms in place …we had nothing to disclose'.

30. In a nuanced submission the Member's solicitor outlined the research and evaluation process that the licensee undertook in selecting the products which it recommends to clients. It states that 'special arrangements' would then be entered into between the licensee and the product issuer. It was claimed that the 'arrangements' typically provided benefits for the client and the licensee '… with the best interests of the client prioritised above all other interests or benefits'.

31. The Solicitor's submission concedes that while there may 'possibly' be potential consumer detriment arising from arrangements involving commission payments objectively this would be less probable absent any evidence of 'churning'. Churning is not an issue in this case and it was submitted that arrangements such as that involved in this case act as a disincentive to churning.

PANEL CONSIDERATION

32. The panel acknowledges, and agrees with, the proposition in the Member's solicitor's submission that care must be taken not to apply today's (2019) legal and regulatory requirements against those pertaining at an earlier time (2011 and 2014).

33. The FPA Rules referred to in the CEO's response were introduced in 2013. However the same provisions applied as at August 2011 in the FPAs Rules which had been introduced in July 2011.

34. There is no issue in this case as to the lawfulness of a licensee entering into a commission arrangement with a product provider in either 2011 or 2014.

35. The single issue relates to whether there was a requirement for the terms of that commission arrangement to be disclosed to the Original Complainant and if not whether that constituted a breach of either of the two provisions referred to earlier in these reasons.

36. A breach in either case would result in any non-disclosure not being, in the terms of the Licensee's FSG, 'appropriate'.

37. An aspect to consider is whether the cost analysis provided in the SOAs refers to a 'commission' or to a 'fee'. What is clear is that the detailed cost analysis notes that premiums are paid to the Insurance Provider and that the licensee then receives what are described as 'advice fees' paid by that provider. No fees are paid directly by the client.

38. Under the definitions of 'fees' and 'commissions' referred to in the CEO response and as applying in the FPA definitions applicable to both 2011 and 2014, it is not correct to describe the payment from the Insurance Provider to the licensee as 'fees' because they are not paid directly by the client.

39. Because those payments are made by the Insurance Provider to Smith Coffey they are more properly described as 'commissions'.

40. This is more than just a semantic quibble because the particularisation in the accompanying footnote obfuscates the payments as 'not being additional costs to you'. This, however while it evidences an unclear and hence unsatisfactory presentation to the consumer, and may have reflected industry practice at least in 2011, is not the, or a, determinative issue in this case.

41. The more fundamental issue is that there is no mention in either the FSG or the two SOAs of the restrictive nature of the commission payments ie that commissions are to continue to be paid to the licensee regardless of whether the Original Complainant wanted to retain Smith Coffey as her financial advice provider. It is this conduct which resulted in the complaint being made to the FPA by the Original Complainant.

42. While on behalf of the Member it is claimed that the advice that the Original Complainant was not entitled to change her financial adviser was mistakenly made by the Insurance Provider and not by the Licensee, the fact remains that she had never been expressly advised by the Member in the SOAs or in the FSG that, while the policies remained in force, a percentage of the premiums she paid to the insurer were contractually bound to be on paid as commissions to the licensee for the life of the policies.

43. Nor was the Original Complainant advised that if she changed her financial adviser that the commission payments being made to the licensee would continue unless she cancelled the policies. There is no way in which she could change financial advisers and retain the policy and negotiate a reduced premium payment short of the licensee agreeing. As is evident from the CEO response that consent would not be forthcoming.

44. If the Original Complainant was to change financial advisers to take advantage of proposed premium reductions she would be required to cancel the policies and start anew. Clearly there would be costs involved in making such a change eg her new adviser would be required to prepare a SOA. There may well be other significant disadvantages relating to indemnity issues, withholding exclusions and premium loadings not applicable to an existing policy but which would or may attach to a new policy – even if that new policy is taken out with the same Insurance Provider.

45. Because the terms of the arrangement were never disclosed to her in the advice provided by the Member she remained unaware of the any of these impediments up until she attempted to change her financial adviser in 2018.

46. While it is not necessary to find that an omission to disclose has resulted in loss for there to be a breach finding, it is the case that here the omission to disclose the restrictive arrangements stood to result in future detriment as the Original Complainant experienced. This being apparent it is surprising to the Panel that the CEO response discloses that licensee was, and has remained, unwilling to relinquish its contractual right to ongoing commissions when the Original Complainant ended the adviser-client relationship.

47. In the circumstances the Panel considers that the advice provided was not in the terms stated in the FSG ‘appropriate’ and by its silence on the retention arrangements the conduct of the Member was misleading. There were clearly financial advantages accruing to the licensee from the arrangements. One such advantage is what is described in the SOA as the fee payable for ‘on going advice’ which was to continue on an annual basis for the life of the policies and in respect of which there was no apparent undertaking to provide any annual advice. The SOAs do not record any plan for the giving of such annual advice.

48. Further the panel notes that the 2011 SOA does not contain a comparative cost analysis between the recommended product to the Original Complainant's then existing policy and there was no other suitable policy included which would have permitted a point of comparison to the recommended policy. That the Member did not do so restricts the client from access to one of the tools which would lead to a better informed choice as to which policy would suit her circumstances. The panel is satisfied that this omission, whether intentional or not, is evidence of an approach consistent with placing the client into a policy which would pay a commission for life

49. The panel is satisfied that the terms of the arrangement do not accord with the undertaking contained in the 2010 FSG that:

> *'[The licensee] ensures that its representatives disclose any interests which may influence their advice about a financial product. Such interests are recorded and are appropriately disclosed in any advice document provided to you.'*

50. Rule 7.2 expressly refers to omissions as being able to constitute misleading conduct. In this the Rule reflects the accepted legal interpretation that omissions can constitute misleading conduct. It is beyond argument that the provision of an SOA is a 'business and professional activity' and so the conduct falls as a breach within the terms of the Rule.

51. In reaching this decision the panel has not relied on any changes in the practice of financial planners occurring since 2011 or on any changes arising from the introduction of the 2013 FPA Code of Professional Practice or on any legislative changes.

52. It was the case that in both 2011 and 2014 that non-disclosure in the provision of business and professional advice amounted to a breach of the governing FPA Rules. This has remained the case during the entirety of the period considered in this review.

Mr GL McDonald

Financial Planning Association of Australia

Conduct Review Commission - Deputy Chair.

SANCTIONS DECISION IN THE MATTER OF

FPA

AND MEMBER

MARK KYNASTON

53. The Financial Planning Association's Conduct Review Commission (CRC) determined on 29 November 2019 that Mr M Kynaston (the Member) breached the Professional Code of Conduct. The CRC Panel found that when providing advice on an insurance product to the client he failed to disclose that if at any time in the future the client wanted to change her financial adviser that commissions payable to the Member, or his firm, arising from the policy would continue. The commission payable was to remain in place for the life of the policy. The panel found that the failure to provide advice about the retention arrangements connected to the policy amounted to misleading conduct in breach of the FPA's Rules of Professional Conduct.

54. On being advised that the FPA was undertaking disciplinary proceedings against him the Member on 24 October 2019 advised:

> *'I am writing to notify you of my resignation from the Financial Planning Association of Australia Limited (the 'FPA'). I am treating the resignation as having immediate effect and in that context will not be involved in any further conduct, activity or communications with the FPA, including the disciplinary proceedings you have referred to in your email. As a consequence of my resignation, I will be removing all references to my former membership of the FPA from all publications, stationary and all media involved in my financial planning business.'*

55. Since that notification, despite being given opportunities to do so, the Member has not responded to any correspondence in respect of this proceeding including not making submissions to the panel on the substantive claim or in relation to the imposition of any sanction. The Member accepted when he joined the FPA to be bound by the terms of the FPA Constitution which provides in clause 13.5 that the FPA cannot accept the resignation of a Member whose conduct is the subject of disciplinary proceedings. This provision was drawn to the Member's attention in an email dated 24 October 2019 from the FPA. The panel accepts that the reference to 'proceedings' is clearly intended to extend to a requirement that a Member complies with the terms of any sanctions determined by the CRC.

56. The panel has before it a submission on sanctions made by the FPA.

THE FPA SUBMISSION

57. The Panel accepts the FPA submission which highlights one of the main purposes arising from the undertaking of disciplinary proceedings is the protection of the public.

58. To achieve the protection of the public sanctions decisions are to reflect both the individual responsibility of the Member for his/her conduct and a general deterrence to discourage other Members from engaging in similar conduct.

59. The protection of the public is but one of the aspects connected to the public interest. The submission refers to the objects in clause 1.1 of the FPA Constitution which reflects three important aspects related to the public interest which is designed to ensure:

    - clients and prospective clients obtain fair and competent financial planning advice and to suppress malpractice,
    - the enhancement of public awareness and confidence in the planning profession, and,
    - the promotion of compliance with high standards of professional and ethical conduct within the profession and by members of the FPA.

60. Further, the submission refers to the no less important purpose; that sanctions are designed not to punish members, but rather to provide an opportunity to assist:

> *' the FPA member in understanding, correcting and rehabilitating the conduct which was found to be in breach of the Code…' .*
>
> *In respect of this aspect it is submitted that little would be achieved by the panel considering the expulsion of the Member from membership of the FPA.*[1]

61. The submission also comments on the fact that the Member, in addition to providing financial advice, is also a director of the company and of the licensee at the time of the conduct[2].

62. It is submitted that this elevates the seriousness attaching to the way in which the conduct should be regarded and gives rise to a concern about a possible conflict between the position of the Member as a person of authority in the licensee vis a vis his position as planner giving advice.

63. The FPA submit that[3]:

    (a) The Member be suspended from FPA membership for a maximum period of 2 years ;and,

    (b) The Member with approval from the Deputy Chair and FPA Head of Professionalism - during the period of suspension, and prior to readmission, [….] is to satisfactorily complete a conflict management course or other equivalent educational course on ethics and risk management; and,

    (c) During the period of suspension the Member submit to, cooperate with, and pay the costs of an independent compliance audit which will have full oversight of the advice provided during the suspension period. A compliance report from the independent compliance operator is to be provided every 104 days to the FPA. i.e. 14 days by the end of the financial quarter; and

    (d) Within a time frame that is approved by the Deputy Chair and FPA Head of Professionalism. A review and remediation program to be administered by an independent compliance operator. The scope of the review and remediation program should be clients that the Member recommended and/or implemented (insurance) advice with TAL and/or Asteron between 2012 and 2019. Specific emphasis should be disclosure of the identified agreement(s).[4]

64. In considering any sanctions the panel should act objectively and take into account that any sanction imposed should be appropriate to the gravity of the breach and not excessive. The submission refers the need to balance the above aspects when considering the sanctions to be imposed.

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[1] Submission paragraph 38.

[2] ibid at 29 and 30.

[3] ibid at para 37 and 38.

[4] ibid at para 49.

PANEL CONSIDERATION

65. In this case nondisclosure in advice provided has been determined to amount to misleading conduct. Conduct which results in a financial planner misleading a client is to be regarded as serious. This is particularly so when as, in this case, the conduct repeatedly describes commission income as fee income suggesting that control of payment rests with the client. In addition, the client was unknowingly left in a position that if she wanted to change advisers her new advisor would have no right to receive or rebate the commission as it was contracted to the Member and his firm for the life of the policy. The only option for the client was to cancel the policy. As the Member was, or should be aware, cancellation of a policy can give rise to significant disadvantages. In the breach decision the Panel noted these disadvantages may relate to:

> *' …indemnity issues, withholding exclusions and premium loadings not applicable to an existing policy-[and exist] even if that new policy is taken out with the same Insurance Provider.'*[5]

66. An aggravating factor which the panel found to exist was that the SOA provided to the client did not contain any cost comparative analysis between the recommended product and any other suitable product.

67. The panel commented that this inhibited the client from making a more informed decision as to which policy would best suit her. Whether this was embarked on as an intentional course or not, the panel was satisfied that it evidenced an approach which was consistent with withholding from the client information which would permit her to make a more informed decision.[6] It is conduct which aggravates the absence of advice concerning the inability to change advisers while retaining the benefits of the policy.

68. The panel accepts the FPA submission that the Member should not be expelled from the FPA. There is a clear distinction between expulsion of a Member and suspension of membership. The latter deprives the Member during the period of the suspension from the ordinary benefits of membership including voting at AGMs or voting for the election of members to positions within the FPA[7].

69. As referred to earlier in these reasons upon joining the FPA the Member committed himself to remaining a Member during the course of any proceeding which the panel accepts as extending to the time involved in satisfactorily satisfying the terms of any sanctions imposed[8].

70. The panel accepts that the more appropriate outcome in the case is for the Member's FPA membership to be suspended for the recommended 2 year period. Thereafter, provided he has complied with the sanctions imposed, his resignation may take effect.

71. In light of the sanctions imposed in the next succeeding paragraph, including the associated costs, the panel also considers that it would be inappropriate to impose any fine.

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[5] CRC breach decision para 43.

[6] ibid para 43.

[7] see clause 7.1 of the FPA Constitution.

[8] consistent with clause 17.1 of the FPA Constitution.

72. The panel also accepts that the public interest would best be served in the imposition of a sanction which in the words of Disciplinary Regulation 88(b) assists

> *'…the Member to understand, correct and rehabilitate…' the conduct the subject of the breach finding. Accordingly the panel accepts the thrust of the FPA submission that the Member during the period of suspension;*

(a) undertake and satisfactorily complete a course in ethics and risk management, and,

(b) submit to and cooperate with an independent compliance audit which is to have full oversight of the advice provided by the Member to be accompanied by a compliance report to be provided at within 28 days of the end of each quarter commencing from the date of operation of this sanction decision, and,

(c) the appointed compliance auditor to undertake a review and remediation program not limited to but including disclosure (or non disclosure) of the terms contained in all insurance recommendations made in implemented insurance advice provided by the Member for the period covering 2012 to the date of operation of this sanction decision.

(d) The Member, or his firm, is to pay all costs associated with the implementation of the above measures and is to comply with any recommendations made by the compliance auditor. The latter is to be appointed after consultation between the Chair of the Licensee and the FPA Head of Compliance with the latter having the final authority to decide on the appointment. The Compliance auditor is to report on measures (b) and (c) to the FPA Head of Compliance who is also to approve of the educational course referred to in (a) before the course is undertaken.

73. As provided for in Schedule B to the FPA Disciplinary Regulations the Member is to pay the reasonable costs associated with the investigation and panel expenses associated with the breach and sanctions decisions.