

**FINANCIAL ADVICE ASSOCIATION AUSTRALIA  
CONDUCT REVIEW COMMISSION (CRC) DISCIPLINARY PANEL**

**FAAA CONDUCT AND INTEGRITY REGULATION 2024**

**PROCEEDINGS REGARDING:** [REDACTED]

**DETERMINATION: FY 23/24 20 (final) ASIC NUMBER** [REDACTED]

**PANEL:** Gregory Burton SC, FCI Arb (Chair), Presiding Member

Lisa Palmer FAAA, Panel Member

Dacian Moses FAAA, Panel Member

**HEARING DATE:** On the papers

**DETERMINATION DATE:** 20 March 2025

**DETERMINATION:**

1. Find the alleged breaches are made out.
2. Suspend [REDACTED] (the member) from his FAAA membership while he undergoes education and training in the professional ethics and compliance requirements set by the FAAA Board or its delegate having taken into account the recommendations in that respect of the Head of Professional Standards.
3. Note that the suspension will end either when the FAAA Board or its delegate, taking into account the recommendations of the Head of Professional Standards and of any mentor to the member appointed by the Board or its delegate, is satisfied that the member understands and will comply with the FAAA principles, standards and rules, or on the operation of order 5, whichever is first.
4. Recommend that the Board or its delegate approach appropriate members to undertake the role of mentor to the member while orders 2 and 3 are performed.
5. If the Board or its delegate is not satisfied pursuant to order 3 within six months after date of this determination, then the member's membership is terminated unless the Board or its delegate extends the suspension period for a reason such as enabling the education and training to be completed.

## **REASONS FOR DETERMINATION**

### **Background, nature of complaint, procedural, relevant provisions of FAAA Conduct and Integrity Regulation 2024**

1. On 13 September 2024 the FAAA Investigating Officer (IO) provided a final report (the IO report) to the FAAA Board alleging that [REDACTED] (the member) had engaged in conduct which constituted a number of breaches of the FPA or FAAA Code of Professional Practice then in operation, being relevantly the 2013 Code and the 2022 Code. The complainants to the FAAA that prompted the investigation and report were [REDACTED] [REDACTED] clients of the member.
2. The complaint and report process is within the jurisdiction, under reg 27d of the FAAA Conduct and Integrity Regulation 2024 (CIR), of the FAAA Board to consider a final report of an IO and determine whether the complaint should be referred to the CRC for determination in accordance with procedures set out in and under CIR Schedule 4. The Board so recommended, agreeing with the recommended action in the IO report.
3. The complaint, received by the FAAA on 4 April 2024, was to the effect that the member had, over a number of successive years between 2019 and October 2022, completed and filed tax returns on their behalf, without the qualification to do so. Certain expenditure was claimed incorrectly in at least the 2022 return. An ATO investigation into the 2022 return reduced the amount of deduction that the clients received; the ATO “waived” a fine on this occasion. The complainants said that the ATO action demonstrated that the financial advice provided by the member to purchase an investment property was not in their best interest, since the costs were no longer offset by the tax refund.
4. In accord with the CIR, the member was provided with a draft of the IO report on 10 September 2024. His response dated 11 September 2024 is part of the papers with which the Panel has been provided. Apart from clarifying that the clients’ rebate from the ATO was reduced rather than having to be repaid, the member’s response did not lead to a change in the content of the IO report.

5. The member's response included communication from his doctor and a clinical psychologist concerning deterioration of his mental health following notification of the complaint and the investigation. The FAAA made the member aware of its wellbeing support programme which includes the services of a qualified psychologist.
6. Since the mental health issues arose after the conduct the subject of complaint, we agree with the FAAA assessment that it is not relevant to findings on that conduct. It may be relevant on any question of sanction that arises and that is where the member has, fairly, sought that it be considered.

### **Specific grounds of complaint**

7. The IO report focused on the following alleged conduct:
  - a. The member did not have the appropriate registration to complete and lodge the clients' tax returns.
  - b. The member lodged the returns using the clients' log in details for the MyGov portal and stored those details on file, including the answer to the clients' "secret question".
  - c. The member either advised that certain items of expenditure could be offset against income when this was not correct, or knowingly submitted the return including such items as "income related" when he was aware that they were not in fact "income related".
  - d. The member provided advice by email on 21 May 2021 to one of the clients that met the definition of personal advice under section 766B(3) of the *Corporations Act 2001* (Cth) but which was not followed by a Statement of Advice as set out in ASIC's Regulatory Guide 175 Part D pages 45-61. In accord with the FAAA's role under the CIR the grounds of complaint were widened to include this ground when it was allegedly uncovered in the course of the IO investigation.

## **Evidence**

8. There was provided to the FAAA a number of documents. These were summarised in the IO report and the central documents, detailed below, were provided to us.
9. The IO report said that the clients' documents established the member's stated understanding of the clients' incomes and said that the tax returns would be lodged on that basis. A letter from the ATO dated 26 October 2022 confirmed that the 2022 tax return had incorrectly claimed for several expenses, resulting in a \$5,662.52 reduction in rebate and what would have been a fine of 25% of the overclaimed amount (\$1,415.63) which had been waived "in this limited circumstance"; the clients were warned to take greater care in lodging future returns.
10. The clients' letter of 20 October 2022, in respect of the 2022 return: complained that the member did not ask for a detailed breakdown; said that by the clients listing everything "hopefully ... you [the member] could assess, question and advise on what is and is not actually claimable in our circumstance"; said that it was not understood how the figure the client presented "didn't flag as it came across your desk" and that "the amount of incorrect information contained within the lodgement completed by you on our behalf is concerning to us. ... I am at a loss how you could do our returns without knowing this or thinking this was in our best interests".
11. This was responded to on the same day by the member, who said "I have fully read your email and apologise that I didn't seek further clarification on your expenses and ascertained the best claiming expenses for your situation. ... Yes, the repairs and maintenance could be viewed either way and in this case, they [the ATO] have corrected the entry and called the expense capital in nature and not a repair which was the position we had tried to paint re concreting and fencing issues which they have rejected. The borrowing expenses have also been entered as per ATO guidelines but I didn't clarify the expenses individually in this case and did not seek further clarification from yourselves for this breakdown which I apologise for".

- 12.** The member's letter of 9 May 2024 to the FAAA following receipt of the complaint maintained as follows: the clients remained responsible for claimed rebates and lodgment despite the above matters and were made aware that he was not a tax agent or accountant; specific requests for tax-related information were referred to an accountant and the accountant's professional comments were relayed to the clients; in 2022 the member raised with the clients that the maintenance and repairs claimed were "excessive", with some (concreting) being capital in nature, but were included by him because the clients wanted to purchase a new caravan using the refunds and said that they were "happy" for the figure to remain; he had "assisted" other clients in a similar manner and also with Centrelink and other services, particularly during the covid pandemic, without charging a fee; he did not charge a fee to the clients for tax-related activities.
- 13.** At the end of the 9 May 2024 letter the member said: "I sincerely regret that I got involved with assisting the complainants and should have referred them to an accountant instead of trying to save them accountancy fees and inquiry fees from all specialists involved".
- 14.** The member's email of 29 June 2024 repeated the position on the 2022 return. There was detail on the interaction with the female client's mother. It was said that the clients asked if the member could assist the mother as she didn't have the cash reserves to do renovations "but they had been discussing using the equity in her residence to obtain funds". In a face-to-face meeting at the mother's residence on 25 May 2021, a financial services guide (FSG) and Adviser Profile was presented at the start of the meeting and discussed and "A Fact Find was completed during this meeting with a risk profile answered and explained". It was discussed that the mother could borrow as she wished \$10,000.00 for renovations plus an extra \$30,000.00 to be invested to assist in paying down the borrowed funds "plus give her the opportunity of some capital growth over time". The risk profile was completed with a balanced profile result and "It was advised that a Statement of Advice was required for any investment advice going further which [the mother] did not wish to proceed with at this point in time. [The mother and the client] had already done their own investigations around

reverse mortgages. As this is not part of our services we referred her to a licensed mortgage broker to assist her further. There was no further request for any advice from [the mother] and a summary email was sent to her and her daughter to confirm our meeting discussions. [The mother] has not contacted this office for any further assistance in this matter. Copy of the Fact Find attached. There was no charge for this meeting”.

15. In a further letter dated 11 September 2024, responding to the draft IO report, the member repeated earlier information with some elaboration and qualification (discussed below) on the interaction with the mother. He quoted a phrase from an email sent by the male client dated 11 August 2024 to the effect “caravan purchased want more cash from tax refund to ‘throw at it’”. The full email and context was not in evidence before us and in any event was not contemporary to the relevant events. The member also quoted discussion with the male client concerning the tax audit; again, the full email and context was not in evidence before us.

16. In the same letter the member said: “In hindsight, yes, [the clients] should have been referred to a taxation specialist and engaged such professional for the completion of their tax return at an additional expense to them but they were happy to use the MyGov system”. As already mentioned, the member had stressed the clients’ responsibility when lodging through the MyGov system.

17. The FAAA submitted that the member lodged the relevant tax return knowing of any incorrectness that he had discussed with the clients.

### **Alleged breaches**

18. The FAAA submitted that completing and lodging the 2022 tax return without proper registration was a breach of the FAAA Professional Code 2022 standard 2 since such conduct was not observing the spirit and the letter of the rules, regulations and by-laws. For earlier similar conduct in 2019-2021 the 2013 Code of Professional Practice principle 5 was breached because the member had not complied with appropriate rules, regulations and professional requirements.

19. The FAAA further alleged that the advice on claiming expenditures in the 2022 tax return constituted at least a breach of the 2022 Code standard 5 which required appropriate knowledge and skills to discharge the member's functions, including self-awareness when it would be appropriate to refer the client to another adviser or decline to give the advice. Alternatively, if the return was lodged knowing that it contained incorrect information, this was a breach of standard 2 of the 2022 code (Integrity) that required honesty and candour in all professional matters, to observe the letter and spirit as previously mentioned and that "conduct is approached in the spirit of utmost good faith and that actions are aligned with promoting a culture that supports and requires integrity in others". That the member was instructed to lodge the incorrect return and did so having given advice of the incorrectness was said itself to constitute the breach.
20. The FAAA alleged that the 2021 advice without complying with the statutory and regulatory requirement for an SOA, in the case of the mother, breached the 2013 Code principle 5 which, as said earlier, required compliance with appropriate rules, regulations and professional requirements.

#### **Consideration - liability**

21. Section 50-5 of the *Tax Agent Services Act 2009* (Cth) provides that only a registered tax agent can for a fee provide a defined tax agent service, which includes preparing and lodging a tax return under section 90-5. The exemption for advisers in section 90-15(3) does not include such services.
22. The member was not a registered tax agent.
23. The member has not sought to argue that what he did was not a defined tax agent service.
24. It appeared to be common ground that the member charged for his services to the client, that those services included the preparation and lodgment of tax returns over a number of years, and that the clients paid the fees charged.
25. The member said that there was no direct charge for the service of preparation and lodgment of the tax returns. We consider that such does

not make a material difference since the service was a component of the overall services for which fees were charged.

- 26.** The member acknowledged that a similar preparation and lodgment service was provided for other clients of the member, claimed to be without fee but without detail on the services and fees charged to those clients overall.
- 27.** In our view the member engaged in a direct contravention of the taxation legislation described above and we so find on the civil standard of proof (more probable than not). As set out earlier, contravention of an applicable law is a breach of the FAAA Professional Code 2022 standard 2 and Practice principle 5 of the 2013 Code of Professional Practice in relevant years when each such provision applied, which covers all the years the subject of the complaint.
- 28.** Additionally, even if the members' argument was accepted (which we do not) that a fee was not separately charged for the preparation and lodgment of tax returns, in our view such attempted circumvention would constitute at least a breach of the 2022 Code standard 2 in terms of the spirit of an applicable law.
- 29.** It makes no material difference to the contravention if the member explained, as he asserts, that the clients knew that he was neither a tax agent or accountant. Indeed, that he explained the same infers that he knew the pre-requisites concerning preparation and lodgment of tax returns and did not comply with them.
- 30.** It also makes no material difference to the contravention that the clients remained ultimately responsible to the ATO for the accuracy of what was prepared and lodged. It is the member's activity of preparation and lodgment that is the relevant focus of this contravention.
- 31.** It is to be noted that before us there is no evidence of challenge to the ATO's view that the deduction was not allowable and correctly disallowed after audit, with waiver of penalty on this occasion and accompanying admonition to take greater care in future returns.
- 32.** Further, the member's admission, in his response to the clients' complaint on 20 October 2022, constitutes an admission that, whether or not he

possessed the qualifications and skills necessary to give advice at all on the relevant claimed deductions, he did not take due care in at least two respects, namely, not clarifying the expenses individually and not seeking further clarification from the clients.

- 33.** The foregoing of itself is sufficient to constitute a breach of standard 5 of the 2022 Code set out earlier, in respect of the 2022 return.
- 34.** What is more concerning is the member's admission, in his letter of 9 May 2024, that he lodged the 2022 return having given advice that the amount claimed as a deduction was excessive and being told to include it anyway because the clients wanted to achieve a collateral benefit from a greater claimed deduction. It does not matter if the clients dispute that version and we make no finding in that respect, noting that the ATO has in this instance waived any penalty after audit. It is the member's version on which he acted, knowing that in his view the information declared in the return that he completed and lodged was, on what he alleged that he was told, incorrect. This moral failure compounds rather than excuses the nature of the conduct. That conduct thereby became a clear breach of the integrity principle in standard 2 of the 2022 Code. It was not a case of reliance on a contestable interpretation; it was following an instruction which the member had advised was factually incorrect to declare.
- 35.** We note that the later admission appears in some respects to be inconsistent with the member's initial response to the clients in October 2022 quoted earlier: "Yes, the repairs and maintenance could be viewed either way and in this case, they [the ATO] have corrected the entry and called the expense capital in nature and not a repair which was the position we had tried to paint re concreting and fencing issues which they have rejected". In this case we consider that we should rely upon the admission rather than the initial reaction.
- 36.** We have not taken into account the member's reference in 2024 to two snippets of quotations from client communication. We do not have the full documents and they in any event are not relevant to the focus on the member's conduct except that they could be seen as reinforcing his

knowledge of the incorrectness of what was in the 2022 return that he lodged.

- 37.** We also note that the member's expressed motivation of trying to assist the clients (including avoiding further professional expenses) does not excuse the contraventions in so doing. Indeed, as here, possible good intentions and pragmatism which does not follow the rules can have unintended and more serious consequences for all concerned.
- 38.** We turn to the final matter, being the member's interaction with the mother. Where there is inconsistency other than an admission by the member against interest, we have given more weight to the member's response in his letter of 29 June 2024 than to the elaboration in his email of 11 September 2024 (extracted in part below) that responded once he had sighted the draft IO report containing draft findings on the matter.
- 39.** As said in the member's 29 June 2024 letter set out above, the interaction with the mother took instructions on the mother's needs, being a source of funds for renovations when she was not working and was on a Centrelink pension. The indicia of a meeting to provide financial advice were undertaken, in the form of an FSG, an engagement letter and a Fact Find.
- 40.** Even if the mother and her daughter had determined on a reverse mortgage as appropriate and the meeting was an "initial meeting" as the member described it in his letter of 11 September 2024, there was no purpose that was express or could be inferred for having such a meeting other than seeking the member's views on the suitability of the product and any alternatives, after being provided with the person's needs and objectives. Just because a person consults with a specific preference does not preclude the discussion of that preference constituting advice.
- 41.** That more than general information was requested and given is consistent with the member's statement in both emails (but now quoting from the 11 September 2024 email) that "a Fact Find was commenced during the initial meeting" even if it was not signed by the mother, nor was an engagement letter.

- 42.** The member on his own explanation in his letter of 29 June 2024 appears to have gone substantially further than providing general information on a firm choice that the mother had made.
- 43.** The member provided a summary of the meeting nine days later which he said “was general in nature and not specific advice I felt”. That summary was in evidence before us. It contained more than merely general product information even if, as the member maintained, it was not specific to a particular financial product and was not accompanied by a PDS. It recited the mother’s need and objective consistent with what would appear in a fact find. It described the additional borrowing beyond the renovation amount as an idea from the mother and the female client being “a surplus amount to meet any unplanned day to day expenses” and invest those funds “to get some capital growth over time” and that they understood that they could access the surplus to assist with paying off the reverse mortgage loan. It then went into specifics of how the reverse mortgage could be structured as to management and expected investment return and the maximum value that could be borrowed.
- 44.** If the detail discussed emanated from the member then it was clear advice. Even if it emanated from questions raised by the mother or by her daughter, it still in the answers given constituted advice.
- 45.** Missing from that discussion, as recorded, was any mention of the inherent risks of borrowing additional funds with a potentially variable investment return against the security of what appeared to be the mother’s primary asset, her home, when the mother had limited income. A referral to a mortgage broker did not of itself satisfy that required aspect of advice once a discussion of the topic of forms of finance was embarked on, as in our view it was.
- 46.** The member said that on 23 June 2021 he provided further general information obtained from the internet in relation to reverse mortgages “to give [the mother and female client] more information prior to her meeting with the mortgage broker so she had a better understanding of the product”. A copy of that information was in evidence. While this in itself can be

accepted as general information rather than further advice, it is consistent with earlier information having been directed to confirming or changing the initial product preference.

47. In the above circumstances, we consider that there was personal advice given at the meeting of 17 May 2021. It was not suggested that the summary of meeting provided on 26 May 2021 was an SOA. In those circumstances the member gave personal advice without provision of an SOA in contravention of applicable law set out earlier. Such contravention again is a breach of Principle 5 in the 2013 Code.

#### **Consideration - sanction**

48. The contraventions that we have found are serious. They indicate at least a lack of understanding by the member of his professional obligations. One of them is in the clear category of failure to refuse to act on instructions that are against advice and are believed to be given for a collateral advantage.
49. Sanction must also take into account the protection of the profession's reputation and the public trust in the profession, together with the direct protection of the public from departures from professional requirements that are designed to ensure the basis for public trust.
50. These central considerations mean that the public and the profession must be protected from the continuance of practice of a member, to the extent that a professional association can achieve, while the member undertakes the required training in professional obligations and then demonstrates to the association's satisfaction that the member will in the future understand and fulfil those professional obligations.
51. We take into account, in setting a sanction that seeks to satisfy such requirements, that the member has acknowledged much of the conduct and has also to some extent acknowledged that aspects of that conduct were wrong. This is in respect of preparing and lodging the tax returns, where on the instigation of the Tax Practitioners Board the member has signed an undertaking not to undertake tax return related activity in the future.
52. There however remains the disturbing lacuna that there is no clear acknowledgement of the behaviour we have described as failure to refuse to

act on instructions that are against advice and are believed to be given for a collateral advantage.

- 53.** We have sympathy for what the member has disclosed about the effect of the events the subject of the complaint on his mental health, and refer again to the existing offers to assist him that are connected with the FAAA wellbeing resources and which we consider should be made available during and despite the suspension.
- 54.** However, that a member is suffering for having been the subject of complaint, investigation and adverse finding cannot inform the nature of the sanction except to take into account the extent to which admission and contrition indicate a growth in professional understanding that has already occurred and can objectively be assessed as having occurred.
- 55.** Taking into account the protective, reputational and restorative matters just described, in our view the appropriate sanction is to suspend the member from his FAAA membership while he undergoes education and training in the professional ethics and compliance requirements set by the FAAA Board or its delegate having taken into account the recommendations in that respect of the Head of Professional Standards. The suspension will end when the FAAA Board or its delegate, again taking into account the recommendations of the Head of Professional Standards and of any mentor to the member appointed by the Board or its delegate, is satisfied that the member understands and will comply with the FAAA principles, standards and rules. Since the CRC can suspend under CIR Schedule 4 para 15(E) only for a maximum of six months, if that satisfaction is not achieved with such six months then the member's membership is terminated. If there is a genuine, objectively-supported reason that the education and training cannot be undertaken during the suspension period (such as the relevant courses not be provided by third parties during that period), the FAAA Board or its delegate may consider whether a further period of grace prior to termination should be granted.
- 56.** Neither we nor, we understand, the FAAA Board can compel another member to mentor the member the subject of this complaint. However, we

urge consideration of the Board or its delegate approaching appropriate members to undertake that role as a service to their profession.

Dated: 20 March 2025

