

**FINANCIAL ADVICE ASSOCIATION AUSTRALIA**

**conduct review commission (CRC) DISCIPLINARY PANEL**

FAAA CONDUCT AND INTEGRITY REGULATION 2024

**PROCEEDINGS REGARDING: [REDACTED] (Member no [REDACTED])**

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

**PANEL: Phillip Davies (Chair), Presiding Member**

Greg Cook FAAA, Panel Member

Cherie Feher FAAA, Panel Member

**HEARING DATE: 29 April 2025**

**DETERMINATION DATE: 29 August 2025**

**DETERMINATION:**

1. Find the alleged breaches are made out.
2. Give a reprimand to [REDACTED] (“Member”).
3. In addition, make an order that 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 view of the panel is that the additional hours of training should be in the order of 100 hours.
4. If the Board or its delegate is not satisfied pursuant to order 2 within six months after date of this determination that this additional training has been completed by the member, then the Member’s membership of the FAAA will be suspended for the earlier time of six months or the time it takes for the Member to satisfactorily demonstrate to the satisfaction of the Board or its delegate that those courses have been satisfactorily completed. It is important also that the member understands and will comply, and his practice staff will comply, with the FAAA principles, standards and rules.

**REASONS FOR DETERMINATION**

*Background, nature and grounds of complaint, procedural, relevant provision of FAAA Professional Code 2023.*

## Background

5. 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 FAAA Investigating Officer (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.
6. The background to this matter was that concerns were raised with the FAAA by a compliance professional who had been passed a copy of a PowerPoint to the FAAA. The document, which it was alleged was being used as the basis of presentations to the potential clients of the Member. The IO investigation examined two versions of the PowerPoint document, correspondence with the Member and a review of his firm's website. The Member is the firm's principle and – it is understood - only advisor, so in this context can be taken as responsible for the website's content. The Member also confirmed that this was the case and he had prepared each version of the PowerPoint slides when it was put to him at the hearing.
7. The Member has therefore confirmed that he was ultimately responsible for the content of both presentations. From the information provided the earlier version of the PowerPoint was in use by the Member for around a year from 2022 to June 2023. The later version of the power point has been in use by the Member from October 2023. Whilst the conduct and breaches are substantively the same, the two presentations therefore fall under different versions of the FAAA's codes. Whilst similar concerns were held by the FAAA Professional Standards team about both the 2022 and 2023 versions of the presentation, in light of the similarity between the two presentations, they were not looking to bring forward alleged breaches of the FPA Code of Professional Conduct 2013 (in force at the time). All alleged breaches are brought forward under the FAAA Professional Code 2023 (2023 Code). In short, the FAAA after investigation considered that the new PowerPoint Slides (Slides) was in breach of the 2023 Code. For the purposes of this decision the Panel will focus on the alleged breaches under the 2023 Code.
8. On 3 September 2024, the IO provided a Conduct Investigation Report-Outcome Recommendation to the CRC alleging that the Member had engaged in conduct which constituted a breach of Principle 4 of the 2023 Code (Principle 4). It is the view of the IO, that the presentation is flawed in that it presents information to clients in a manner that is likely to be misleading, given the disparity in knowledge that is likely to exist between client and advisor.

9. At the start of the hearing, the Chair outlined the course of the hearing process. The Chair indicated that the hearing had the same substantial process elements as any hearing as it was critical that procedural fairness be afforded to each of the parties. However, it was less formal than the processes of a court or tribunal. Certain documents were then gone through to show that the member had been provided with the draft and final IO reports and also a reference was made to the documents submitted by the Member and other relevant documents from the FAAA (see above the discussion on the various versions of the PowerPoint Slides and the origin and author of the slides per paras 6-7 above). The IO and then the Member presented their oral submissions.
10. The member cross-examined the IO at length and in detail and the IO similarly cross-examined the member. After that both parties made brief closing submissions to supplement what was already in writing and what was presented earlier orally. The hearing was then completed.

#### **FAAA Professional Code**

11. It is the view of the FAAA that a number of statements in the October 2023 presentation of the Member are potentially in breach of Principle 4. This Principle states:

*“This requires dealing with clients, colleagues and others in the professional sphere in a way that is just, and treating others in the way you would want to be treated. Financial planning professionals will have a far higher level of knowledge than clients and non-industry participants. Fairness requires that they use their greater knowledge to enable clients to make fully informed decisions, and never present advice in a way that omits or distorts material considerations.”*

#### **Evidence and submissions**

12. There are several key words or phrases contained in Principle 4 that require examination being the phrase and words “advice” and “omits or distorts material considerations” The key words in the second phrase are the word “omits”, “distorts” and “material”
13. In our view, the appropriate definition for the term “advice” in this context is the definition of Financial product advice in Section 766B of the Corporations Law which is broad in scope.
14. Under this provision the term “Financial product advice” means a recommendation or a statement of opinion ,or a report of either of those things ,that:

*“a) Is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products or an interest in a particular financial product or class of financial products; or*

*b) Could reasonably regarded as intended to have such an influence.”*

15. In our view, the representations and statements made in the Slides of the Member fit comfortably into the definition of advice set out above and in particular paragraph (b) of that definition. We acknowledge that the Member has described the Slides as “educational” in his written submissions or as “advertising” in his oral submissions. In particular, the Member suggests that the presentation is merely an initial presentation that highlights the services that a financial planner can provide if the prospective client decide to engage our services for personal advice. However, the Panel in view of the nature, scope, information and details contained in the presentation goes beyond the slides being purely educational or advertising and are more akin to the provision of advice in accordance with the definition of “advice” in the Corporations Act set out above.
16. The High Court in *Sola Optical Australia v Mills* (1987) 163 CLR 628 gave guidance about what the word “materiality” means. As a preliminary matter, their Honours suggested that it is a broad general requirement that is capable of satisfaction by objective inquiry.
17. The High Court at p 636 in that decision stated with approval that: “The Shorter Oxford English Dictionary defines the word “material” ,inter alia, to mean of such significance as to be likely to influence the determination of a cause.”
18. There is no judicial definition of the phrase “omits or distorts”. The definition of “omit” in the Oxford Dictionary means “leave out or exclude (someone or something), either intentionally or forgetfully”. The definition of “distorts” in the Oxford Dictionary means “gives a misleading or false account or impression of”.
19. In this case, taking the two definitions together it would seem that the phrase refers to the act of either leaving out or misrepresenting information, often with the intent to mislead or create a false impression.
20. In view of the definitions above in the context of assessing the Slides of the Member, the Panel considers that there are several breaches of Principle 4. This is on the basis that the principle states:

*“Fairness requires that they use their greater knowledge to enable clients to make fully informed decisions, and never present advice in a way that omits or distorts material considerations.” In this case various statements in the presentation does not allow clients to make fully informed decisions and presents advice in a way that omits or distorts material considerations.”*

21. Set out below are the statements within the presentation that the FAAA argue constitute breaches of Principle 4 and the response of the Member to these alleged breaches. The Panel reviewed each of these alleged breaches identified by FAAA and the Members responses and made their assessment as to whether in each instance a breach of Principle 4 occurred.

22. The Member made the following statement in the presentation. "Maximise Returns- Platform Superannuation funds have access to wholesale managed funds that can generally return 3% - 4% higher than industry funds over the medium term"
23. FAAA consider that this statement breaches Principle 4 because it is unsubstantiated and not reflective of actual returns and therefore omits material information and inhibits clients' from making fully informed decisions.
24. This is on the basis that there is a lack of clarity in the presentation as to what is meant by "wholesale type funds". When FAAA raised this with the Member, he cited the Netwealth website as a source relating to wholesale funds for the 2022 presentation, even though he did not provide figures from Netwealth to substantiate the claim of 3%-4% higher returns. The FAAA in response reviewed the Netwealth figures as well as the relevant Canaster performance figures for industry funds. The FAAA undertook a review of the Netwealth's figures for wholesale funds, the average annual performance over 5 years for the 30 wholesale funds listed was 5.8%. Similarly the FAAA undertook a review of Canstar's performance figures for industry funds over the same time period and they indicate the average annual return was 6.5%. The Panel note that the Member in turn considers that this analysis is being selective with the Canstar figures but do not agree with this assessment.
25. Moreover, the panel also reviewed the various sources raised by the FAAA in response to the Member. The panel notes with approval the FAAA position which demonstrates that the 5 year period for the returns were 0.5% lower for wholesale funds, rather than 3%-4% higher, as stated in the presentation. The comparative returns over one year were 10.3% (wholesale) and 9.9% (industry). The FAAA review of these figures indicates that the figures provided by the Member are not correct and could be determined to omit and distort material considerations that mean a consumer could not make a fully informed decision. Once again after the Panel reviewed all this material, it considered that this passage in the Presentation omits and distorts material considerations that mean a consumer could not make a fully informed decision.
26. We note the Member has cited actual returns from clients he has advised as his source and has provided examples of portfolios of wholesale funds. However, it is the view of the FAAA that these examples are necessarily selective and do not provide the broad and market- based picture. It is also the view of the Panel that these are selective examples and do not seem genuinely reflective of the market or the products the subject of the discussion. In short, it seems that the statements in the presentation do not refer to the actual relative performance of the type of funds in question.

27. The next statement in the presentation identified by the FAAA as being in breach of Principle 4 stated "Having an actively managed Superfund instead of passively managed can help protect your nest egg by making changes to the portfolio in the event of a severe market downturn such as covid"
28. It is the view of the FAAA that this statement breaches Principle 4 because it suggests that a portfolio with an active management strategy is better placed to derisk or otherwise take actions that materially reduces (or potentially eliminates) losses. This is a claim that a professional with a background in financial planning or investment management ought to be aware is not likely to be fulfilled consistently. The Member in response suggests that the FAAA are implying that the statement in the presentation equates to completely eliminating losses.
29. In the Panel's view, the point the FAAA are making is different from that. Rather they are making the observation in the statement that it is more likely than not to create an expectation on the part of retail clients that, by investing in the way promoted in the presentation, they would significantly mitigate the investment risk they are exposed to. The Panel prefers the interpretation of the FAAA rather than the Member. Accordingly, the Panel considers such a statement as such both omits and distorts material considerations and could prevent clients making a fully informed decision in this circumstance.
30. "In the event of a severe market crash or GFC, the share section of your portfolio can be transferred back to "cash" until the markets stabilise" (the accompanying graph also highlights 7 periods of market turbulence over the period from 1900 to 2010) is the next statement to be assessed in the presentation.
31. The Member suggests that what he was trying to emphasize here that there have been a number of "Black Swan" events throughout history and those that have sound and competent financial advisers generally come out of them better financially. However, the Panel consider that this is not the message that these words actually convey to the reader on an ordinary reading and proper construction of the statement.
32. The Panel accordingly agree with the FAAA that this statement breaches Principle 4 as the claim that is made is not supported by evidence, nor is it suitably qualified with an explanation of the risks applying. In addition, it would seem to be an appropriate and reasonable observation that a retail client reading this statement would be more likely than not to believe that following this particular strategy would enable them to significantly mitigate or avoid periods of market turbulence.
33. The FAAA suggests that the claim also offends Principle 4 in that it specifically states that shares can be transferred into "cash" in anticipation of falls in market value. If true, this would effectively eliminate the risk of capital loss inherent in investing in shares. It is our view that, for many clients, this would unfairly and inappropriately reduce their perception of the risk involved in investing.

34. Accordingly, the FAAA consider that this statement is again unfair, on the basis that it distorts material information and inhibits clients' ability to make fully informed decisions, and as such breaches Principle 4. In response, the Member suggests that the presentation does not make any recommendation to convert a cheque, money order or a bond into money. Moreover, the Member suggests that it is merely a recommendation to switch some of the portfolio out of equities at a time until the market stabilizes. In the Panels view, this is a very narrow view of these words in the presentation and are not to be preferred interpretation of these words. The Panel therefore agrees with the FAAA interpretation of these words in the presentation and how these constitute a breach of Principle 4
35. The next statement made in the presentation subject to review is the Table on slide 9 entitled "the 10 year plan"
36. It is the FAAA view that the table in the presentation breaches Principle 4 because it omits material information. The table sets out a nominal "passive" income of \$157,000 on a portfolio of 7 investment properties, without setting out key context such as potential investment risk associated with property, or the initial investment outlay.
37. The 7 investment properties are listed with a value of \$5,254,054, with annual "passive" income of \$157,799. There is a statement above the table which states "*our figures are based on a conservative 2.5% historical growth*".
38. The FAAA point out that 2.5% growth per year for 10 years would equate to an initial investment of \$4,078,878. This is a very large amount, beyond the reach of the vast majority of retail clients, and we would argue that it is unfair to include figures based on it as to do so omits relevant information and prevents clients making a fully informed decision.
39. The Member reiterates again that this presentation is not meant to be advice and suggests examples such as this are commonly found on the internet. He also suggests that the examples build in particular assumptions that are clear from the document itself. In the Panels view, the material provided by the Member should be vastly superior to investment material simply that could be accessed on the internet. Furthermore, the examples set out in this part of the presentation are not subject to the caveats that normally would be expected in such material and contain very bold statements with little or no qualification or context.
40. In the Panel's view for those reasons we agree with the assessment of the FAAA in respect to these statements that they are in breach of Principle 4.
41. The next statement in the presentation identified by the FAAA as being in breach of Principle 4 stated "Using your super to pay off the mortgage as a lump sum may not be the best option. If you are paying an interest rate of 5%, keeping your superannuation invested earning 7% - 13% can keep your money working hard for you. EG: 13% return – 5% opportunity cost of mortgage means your money is retuning 8% to you"
42. FAAA consider that this statement breaches Principle 4 for several reasons.

43. First, a 13% return would be likely to require an elevated risk profile – this is not explained. Further, there is clearly no guarantee that taking on an elevated risk profile will lead to returns in excess of the client’s mortgage rate (or indeed any return at all). However, using this strategy would guarantee ongoing mortgage payments. No context to this issue is acknowledged in the presentation and we would argue that failing to do so is unfair, as these omitted points are material information. Failure to include this information does not meet the requirement that advisors use their superior knowledge to enable clients to make fully informed decisions.
44. Secondly, the FAAA suggests that it is not clear how the 7 – 13% return would be achieved. In his responses to the FAAA queries, the Member cited actual client returns. However, it is our view, that these are necessarily selective and not indicative of wider market returns over the past 5 years (see for example, the average annual returns achieved by both wholesale and industry superfunds provided earlier in this report, which were 5.8% and 6.5% respectively).
45. FAAA makes the point that average mortgage rates are currently 6.28%. These have increased significantly over the last 5 years (generally considered the minimum investment period for “at risk” investments). This increase highlights one of the risks inherent in a strategy of this nature – that interest rates, and so potentially repayments, are volatile. This material information is omitted from the October 2023 presentation.
46. FAAA argues that this omission breaches Principle 4 and also does not align with an advisor’s obligation to use their superior knowledge to make fully informed decisions.
47. In response, the Member stated this is a strategy that they used during times of low interest rates since the GFC and will continue to be utilised once interest rates come back down to a reasonable 4.5%. The Panel is of the view that this approach is not clearly stated or emphasized in the relevant part of the materials nor does that material imply that this is the approach being advocated. The Member also suggests that they have used a balanced risk profile and index portfolio at this time with a rolling average return of 8% pa within his example projections. In the Panel’s view, this is not entirely clear from the statements made in the presentation slides and does not necessarily represent what is being presented in the slides. Accordingly, the statements made in the presentation are in breach of Principle 4.

## Consideration - sanction

47. The contraventions that the Panel have found are serious. They indicate a lack of understanding by the member of his professional obligations. It also indicates a lack of understanding of the possible consequences to potential clients if they sought to rely on the material or were influenced by that material in the presentation.
48. Sanctions 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.
49. 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.
50. The member sought to raise a number of matters in mitigation. He suggested that what he prepared was not "advice" and accordingly there was no demonstrable financial loss suffered by a client by virtue of this conduct. The Member suggested that there was no malicious intent in relation to his conduct, that this was an oversight and not a systematic problem with his practice. The Member also noted the pressures of family health circumstances and an otherwise unblemished record.
51. We have taken into account the family circumstances and the resultant pressures on the member but do not need to detail them in a published determination.
52. In part the circumstances put forward by the member in mitigation are self-contradictory: the matters are said to have arisen from "oversight" and not to be a "systematic problem" but the presentation seems to be a part of his materials to seek to encourage clients to engage him.
53. We take into account that the member at the hearing has made belated and partial acknowledgement of the difficulties associated with the presentation. He has also acknowledged to some extent that aspects of that presentations may have been in breach of Principle 4. It should be noted that this occurred only at the end of the hearing process.
54. Taking into account the protective, reputational and restorative matters and the mitigating circumstances put forward and not fully accepted as such, in our view the appropriate sanction is to issue a reprimand to the member and make an order that 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 Panel considers that the additional training required would be in the order of 100 hours.

55. If the Board or its delegate is not satisfied pursuant to order 2 within six months after date of this determination that this additional training has been completed by the member, then the member's membership of the FAAA will be suspended for the earlier time of six months or the time it takes for the Member to satisfactorily demonstrate to the satisfaction of the Board or its delegate that those courses have been satisfactorily completed. It is important in this regard that the member understands and will comply, and his practice staff will comply, with the FAAA principles, standards and rules.

Dated: 29 August 2025

(sgd) Phillip Davies , Chair

Panel members:           Greg Cook FAAA           Cherie Feher FAAA