



## Written Submissions of the Financial Planning Association of Australia to the Royal Commission into Misconduct in the Banking, Superannuation and Insurance Industry

### Second Round of Public Hearings Monday 16 April 2018 to Friday 27 April 2018

1. This submission addresses issues arising from the Royal Commission's case study in relation to the financial advice received by Ms McKenna from Henderson Maxwell, in particular its Chief Executive Officer, Mr Sam Henderson, and the disciplinary process invoked by the Financial Planning Association of Australia ('the FPA') as a result of Ms McKenna's complaint about Mr Henderson made on 17 January 2017.
2. The FPA is a company limited by guarantee. It has a Constitution the terms of which are binding on the FPA and its members.
3. Under the FPA's Constitution, the FPA Board is empowered to make disciplinary regulations, not inconsistent with the Constitution or the *Corporations Act 2001* (Cth), setting out the FPA's disciplinary procedures.
4. The FPA Disciplinary Regulation 2016<sup>1</sup> ('Disciplinary Regulation') was endorsed by the FPA Board with effect from 1 July 2016. It applies to any complaint made on or after 1 July 2016.
5. These submissions deal with the following specific matters:
  - a. The role of the complainant in FPA disciplinary proceedings;
  - b. Confidentiality and publication considerations in FPA disciplinary proceedings;
  - c. The duration of the ongoing disciplinary process arising from Ms McKenna's complaint to FPA in relation to Mr Henderson's conduct.

#### The role of the complainant in the FPA disciplinary process

6. A complaint may be made by the FPA, a client of an FPA member, or any other person. Clients of FPA members need not be natural persons and may include corporate entities, partnerships and trusts.
7. Each complaint received by the FPA must be allocated to an Investigation Officer and must be investigated.
8. The Investigating Officer is not bound by the rules of evidence and may inform himself or herself in such manners as he or she thinks fit.
9. The Investigating Officer may seek information from a client (or former client) of an FPA member, even if the client is not the Complainant.

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<sup>1</sup> Exhibit 2.219 DGD-6

10. Clause 28 of the Disciplinary Regulation provides that an Investigating Officer may require a Complainant to give further information about the complaint or verify the complaint. However the Investigating Officer has no legal power to compel compliance with that ‘requirement’ by a Complainant, but may dismiss a complaint if further information is not given or the complaint is not verified.
11. To the extent that a complaint is not finalised by the Investigating Officer pursuant to sections 3.5 or 3.6 of the Disciplinary Regulation, he or she must prepare a report to the Chair of the Conduct Review Commission (‘CRC’) setting out the matters in clause 51, which include:
  - a. the complaint;
  - b. the alleged conduct investigated;
  - c. whether there is a case to answer in respect of the committing of one or more Breaches (as defined by the Disciplinary Regulation);
  - d. if the Investigating Officer is of the view there is a case to answer, particulars of each possible Breach and the material capable of proving it;
  - e. the likelihood of an alleged Breach being suitable for summary disposal pursuant to section 7.3 of the Disciplinary Regulation;
  - f. the likelihood of any possible Breach if proven constituting a ‘Minor Instance of Unsatisfactory Conduct’ (as defined by the Disciplinary Regulation) and being capable of being dealt with summarily pursuant to section 7.4;
  - g. whether the investigation was not able to be pursued in some respect, and the reason for any such inability;
  - h. any other matters that the Investigating Officer considers should be brought to the attention of the CRC; and
  - i. recommending an appropriate course of action for the further conduct of the matter.
12. In response to the Investigating Officer’s report the Chair of the CRC may make determinations as to summary dismissal pursuant to section 6.2 of the Disciplinary Regulation or the commencement of Disciplinary Proceedings pursuant to Part 7. Following the issue of a Notice of Disciplinary Proceedings the resolution of the complaint may take a number of paths, which include provision for summary disposal, if approved by the Chair of the CRC, or a hearing before a Disciplinary Panel in accordance with Part 8 of the Disciplinary Regulation.
13. The CRC and the Disciplinary Panel are empowered under the Disciplinary Regulation to exercise what may be described as a “protective jurisdiction”, in that one of its main purposes is to act in the public interest by protecting the public from misconduct/Malpractice by FPA members, or conduct that falls short of professional conduct. That purpose is consistent with the objects for which the FPA is established as reflected in clause 1.1(b) of its Constitution. Another purpose is the protection of the profession (whether it is properly described as a profession or an ‘emerging profession’).
14. One feature of exercising a “protective” role is that the disciplinary action is principally to protect the public, and the profession, rather than to punish the FPA member. In any Disciplinary Proceedings, the context in which the FPA member’s conduct occurred is a relevant consideration. Matters which may be relevant factors include, without limitation:

- a. whether the FPA member's conduct was deliberate, negligent or reckless;
  - b. whether the conduct has occurred before;
  - c. whether the member recognises his or her wrongdoing;
  - d. what steps the member has taken to improve his or her skills and knowledge following the complaint;
  - e. what contributing factors may have played a role in the conduct in question;
  - f. whether there is a demonstrated pattern of behaviour;
  - g. the potential for or actual harm as a result of the conduct; and
  - h. whether the member has acted to remediate any loss or harm caused by the conduct.
15. Complainants, who are clients (or former clients) of an FPA member whose conduct is the subject of complaint to the FPA, are not parties to the Disciplinary Proceedings and are not accorded the status of an 'advocate' under the Disciplinary Regulation. As such they are not afforded an opportunity to make submissions at any stage of the Investigating Officer's tasks or during Disciplinary Proceedings pursuant to Parts 7, 8 or 13 of the Disciplinary Regulation, as to the appropriate process, findings or outcome of the process. They are entitled, on request, to receive information regarding the status of their complaint and the conduct of the investigation or Disciplinary Proceedings arising from the complaint. The Complainant is required to keep that information confidential, unless advised otherwise by the Investigating Officer.
16. There are sound reasons for not affording a Complainant a 'right to be heard' as an advocate, and criticism directed to the FPA disciplinary process for not affording Ms McKenna (or other complainants) an opportunity to be heard in connection with the Disciplinary Proceedings is misdirected. These reasons include:
- a. Complainants have an opportunity to provide a detailed account of the conduct of the FPA member which is the subject of their complaint, and its impact upon them and their dependants. The Complainant's account will be considered by the Investigating Officer, and the CRC or Disciplinary Panel in the case of complaints that proceed to Disciplinary Proceedings under Parts 7 and 8 of the Disciplinary Regulation;
  - b. The impact of the conduct on the Complainant is but one of many factors that are relevant to the consideration of the appropriate disciplinary outcome (see paragraph 14 above);
  - c. It is possible that a Complainant may be a witness in connection with the Disciplinary Proceedings, which gives rise to potential for the Complainant's evidence to be challenged or criticised by the FPA member and/or rejected by the CRC/Disciplinary Panel. If the Complainant is given an opportunity to be heard as an 'advocate' in the Disciplinary Proceedings, the potential for objectivity might be materially compromised;
  - d. There is little prospect of 'independence' on the part of a Complainant seeking to vindicate the grounds of his, her or its complaint. The prospect of 'independence' is rendered even more unlikely if the Complainant has commenced legal proceedings

against the FPA member or his or her employer arising out of the conduct which is the subject of complaint;

- e. Complainants may not have an understanding or adequate understanding of the “protective” role of the disciplinary process;
  - f. There is potential for Complainants to be influenced by contemplation of retribution against a FPA member whose conduct is the subject of complaint. This would undermine the objectivity of any submission by the complainant as to the appropriate disciplinary outcome, and risk distraction from the ‘protective’ purpose of the Disciplinary Proceedings;
  - g. Complainants may not have a detailed or sufficient understanding of the Code of Ethics, the Rules of Professional Conduct, the Code of Professional Practice or FPA’s Continuing Professional Development Policy 2016 to enable them to properly and objectively evaluate the conduct that is the subject of complaint against those standards;
  - h. Complainants may wish to be legally represented in order to be heard in connection with disciplinary proceedings, which has the potential to introduce unnecessary procedural complexity and/or delay to the proceedings;
  - i. If Complainants are afforded a right to be heard in Disciplinary Proceedings, there is potential for Complainants to seek to improperly utilise information obtained by them from the FPA, the CRC or the Disciplinary Panel, in the course of the Disciplinary Proceedings, for an improper purpose such as to facilitate the vindication of private legal rights and remedies against the FPA member;
  - j. Unlike the CRC/Disciplinary Panel members who comprise of industry peers who have experience in and detailed knowledge of the financial planning industry which can be brought to bear on their evaluation of the FPA member’s conduct and any appropriate disciplinary sanction, the Complainant may lack sufficient knowledge of the financial planning industry or industry practices and standards to express informed views about the how a member’s conduct should be properly assessed and characterised and what, if any, sanction should be applied to the member;
17. There is nothing unorthodox in not affording a right to a complainant be heard, as an advocate, in respect of professional disciplinary proceedings invoked in response to a complaint. That is the practice in other professional disciplinary regimes, where the parties to the complaint process do not include the complainant. See for example:
- a. Legal Industry - Complaints to the Office of the Legal Services Commissioner with respect to a legal practitioner’s conduct, which are referred to the Law Society of NSW or the NSW Bar Association. The Complainant does not have a right to be heard before the Disciplinary Tribunal. In New South Wales, complaints against legal practitioners may be pursued by the relevant authority to the New South Wales Civil and Administrative Tribunal (NCAT), however where this occurs the relevant authority and the legal practitioner are the parties to the proceedings unless NCAT makes an order that the Complainant should be joined to the proceedings.
  - b. Health Care Industry - Complaints referred to the Health Care Complaints Commission with respect to health service providers, such as registered health practitioners and health organisations in NSW. The Health Care Complaints

Commission will deal with complaints made. The Complainant may be required to provide further information to the Health Care Complaints Commission, however the Complainant does not have a right to be heard before the Commission.

- c. Chartered Accountants - Complaints against chartered accountants are referred to the Professional Conduct Committee of Chartered Accountants Australia and New Zealand in relation to breaches of ethics, standards, rule and By-Laws of Chartered Accountants Australia and New Zealand. The Professional Conduct Committee receives, investigates and determines complaints. The Professional Conduct Committee may request the complainant to appear before the Professional Conduct Committee to discuss the complaint or any matter arising from it, however the Complainant is not a party to the proceedings and does not have a right to appear and be heard as an advocate.

18. No conclusion is warranted that the FPA Disciplinary Regulation is deficient for not conferring on a complainant a right to be heard in Disciplinary Proceedings.

### **Confidentiality and publication considerations in FPA disciplinary proceedings**

19. Clause 46 of the FPA Constitution deals with ‘Confidentiality’, and provides:

*“Subject to the Constitution, the Disciplinary Regulations and to the law, every person who by reason of his office in the FPA or connection with the FPA is exposed to, learns of or has access to information or knowledge concerning Members or the FPA must keep confidential all such information and knowledge and is not entitled to communicate or divulge those affairs or any part of them in such a way that the name of the Member concerned is identified unless with the prior consent in writing of that Member.”*

20. In accordance with clause 18.4 of the FPA Constitution, the Disciplinary Regulations may include provisions as to the publication of details (including the name of any member currently or previously involved) of any disciplinary proceedings conducted in accordance with the Disciplinary Regulations. The Disciplinary Regulations may include provisions for the publication of details of any disciplinary proceedings as a sanction to a FPA member, and for educational and professional interest purposes.
21. Part 13 of the Disciplinary Regulation deals with ‘Publication’, and makes general provision that the FPA is to publish the outcome of ‘Complaints, Investigations, Disciplinary Proceedings, and Reviews’. Publication is to be through the Financial Planning Magazine and on the FPA’s website. The Complainant’s name must be withheld from publication.
22. Once the Disciplinary Panel has reached a determination whether an FPA member has committed a Breach and the FPA has effected notification of the determination to the member, the FPA is required to publish details of that determination. In publishing the details of that determination the name of the member and the member’s employer at the time of the Breach is to be published. Additionally, once the Disciplinary Panel has determined whether any sanction should be imposed and the FPA has effected notification to the member, the FPA is required to publish (amongst other things) the determination and the sanction imposed, including the name of the member and the member’s employer at the time of the Breach.

23. Whilst investigation of a complaint or Disciplinary Proceedings against an FPA member are ongoing and have not been concluded, information about the complaint, including the identification of the FPA member whose conduct is the subject of the complaint, is treated by the FPA as confidential, consistent with the clause 46 of the FPA Constitution. That is the position in respect of Ms McKenna's complaint.
24. The Royal Commission received evidence about the capacity of an Investigating Officer, pursuant to section 7.3 of the Disciplinary Regulation, to invite an FPA member to enter into discussions for the summary disposal in whole or part of the Disciplinary Proceedings against that member, after the issue of a Notice of Disciplinary Proceedings. The Investigating Officer may, with the consent of the FPA member, seek the approval of the Chair of the CRC for the summary disposal in whole or part of the Disciplinary Proceedings on the basis of any one or more of the following:
  - a. Substantiation of an alleged Breach;
  - b. Dismissal of any one or more alleged Breaches;
  - c. Imposition of one or more agreed Sanctions, including fines;
  - d. Imposition of agreed costs consequences;
  - e. Restraining the FPA from publication of the Member's name in connection with the Disciplinary Proceedings and the outcome of the matter including any Sanctions.
25. There is evidence of occasions on which the outcome of the Disciplinary Proceedings has included agreement by the FPA not to publish the FPA member's name in connection with the summary disposal of disciplinary proceedings where disciplinary sanctions have been imposed.<sup>2</sup>
26. It is accepted by the FPA that one way in which the protective purpose of the FPA Disciplinary Proceedings can be advanced is by the publication of the name of members in respect of whom disciplinary sanctions have been imposed.
27. However mandatory publication of the name of an FPA member and any disciplinary sanctions against the member which form part of a consensual and CRC approved summary disposal of Disciplinary Proceedings will not always serve the public interest and the Disciplinary Regulation's protective purpose.
28. For example, mandatory publication may materially reduce the capacity of the FPA, through its Investigating Officer, to secure appropriate and timely disciplinary sanctions against a member by consent, and thereby avoid the need for the complaint to proceed to a Disciplinary Panel hearing (and possible Review proceedings under Part 14 of the Disciplinary Regulation), when there is no guarantee that a complainant will be a willing witness and no certainty as to the disciplinary outcome following a Disciplinary Panel hearing.
29. Further, the provision for summary disposal of Disciplinary Proceedings can be invoked in a range of circumstances including where the breach by the member, if proven, constitutes a 'Minor Instance of Unsatisfactory Conduct', which may in fact have had no adverse impact upon any member of the public. The Investigating Officer may have come to the view that the prospect of the FPA member repeating the conduct, or otherwise engaging in conduct in breach of the Code of Professional Practice is negligible.

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<sup>2</sup> Exhibit 2.224

30. It is a question of fact and degree as to whether in a particular case publication of the FPA member's name is necessary or appropriate to achieve the protective purpose of the Disciplinary Proceedings. The potential for publication of the FPA member's name if he or she fails to comply with sanctions consensually imposed and approved by the Chair of the CRC, may be sufficient and appropriate in a particular case to achieve the protective purpose.
31. Provision in the Disciplinary Regulation (section 7.3) which retains a discretion for the Investigating Officer to seek to secure a negotiated resolution of a complaint, which may include agreed sanctions, and non-publication of the member's name, subject to approval by the (independent) Chair of the CRC, is appropriate.

**The duration of the ongoing disciplinary process arising from Ms McKenna's complaint to FPA in relation to Mr Henderson's conduct.**

32. Ms McKenna made an internal dispute resolution ('IDR') complaint to Henderson Maxwell about Mr Henderson's conduct on 17 January 2017. On 7 February 2017 Mr Henderson responded to the IDR complaint in writing.
33. On 2 March 2017 Ms McKenna contacted the FPA (Mr Murphy, the FPA's Professional Accountability Manager, who was also the Investigating Officer under the Disciplinary Regulation) by telephone and arranged to meet with him on 6 March 2017.
34. On 6 March 2017 Ms McKenna met with Mr Murphy and made a complaint in writing. Ms McKenna notified Mr Murphy that she intended to obtain telephone recordings from SAS Trustee Corporation.
35. On 3 April 2017 Mr Murphy notified Mr Henderson verbally and by email that a complaint had been made against him.
36. On 4 April 2017 Ms McKenna delivered to FPA the recordings she had obtained on disc.
37. On 10 April 2017 Mr Murphy notified Mr Henderson by email that a complaint had been received by the FPA and that Mr Murphy would write to Mr Henderson and provide a copy of the complaint.<sup>3</sup>
38. Mr Henderson arranged to meet Mr Murphy on 26 April 2017.
39. On 28 April 2017 Mr Murphy wrote to Mr Henderson and informed him that Ms McKenna's complaint alleged conduct capable of constituting a Breach of Practice Standards 2, 3, 4 and 7, as well as certain underlying Rules of the FPA Code of Professional Practice.<sup>4</sup>
40. On 12 May 2017 Mr Henderson wrote a letter to Mr Murphy addressing (amongst other things) the purported 'draft' status of the statement of advice he provided to Ms McKenna on 14 December 2016.<sup>5</sup> There was a series of communications between Mr Murphy and Mr Henderson during May and June 2017.
41. On 7 August 2017 Mr Henderson, through his solicitors, provided a written submission in response to the complaint.
42. Mr Murphy undertook his investigation in relation to Ms McKenna's complaint in the period through to October 2017.

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<sup>3</sup> Exhibit 2.206

<sup>4</sup> Exhibit 2.207

<sup>5</sup> Exhibit 2.208

43. On 13 October 2017, Mr Murphy provided his Investigator's Report to the CRC pursuant to clause 51 of the Disciplinary Regulation.<sup>6</sup> He concluded that Mr Henderson had a case to answer in respect of a number of Breaches.
44. On 6 November 2017 Mr Henderson provided a detailed written submission to the CRC responding to Mr Murphy's Investigating Officer's Report dated 13 October 2017.<sup>7</sup>
45. On 17 November 2017 the CRC directed the FPA to commence Disciplinary Proceedings against Mr Henderson, and Mr Henderson was duly notified by the FPA in writing on that day that Disciplinary Proceedings had been commenced.
46. In December 2017 a hearing was scheduled before the Disciplinary Panel for 9 March 2018.
47. On 19 December 2017 a conference was held between the FPA and Mr Henderson's lawyers during which there was 'without prejudice' discussion about terms for possible summary disposal of the Disciplinary Proceedings.
48. On 20 December 2017 a directions hearing took place before the Chair of the CRC at which the Chair was informed of the 'without prejudice' discussions between the FPA and Mr Henderson's lawyers. The Chair directed that the terms of any agreement were to be provided to him for review under clause 75 of the Disciplinary Regulation by no later than 9 February 2018.
49. Mr Murphy ceased his employment with the FPA on 21 December 2017. Mr John Bacon, FPA's Head of Professionalism, temporarily assumed the role that Mr Murphy had been performing under the Disciplinary Regulation as Investigating Officer.
50. On 21 December 2017 a draft proposed application to the CRC pursuant to section 7.3 of the Disciplinary Regulation was sent by Mr Bacon to Mr Henderson's lawyers. On 22 December 2017 Mr Henderson's lawyers proposed some amendments to the proposed terms.<sup>8</sup>
51. On 12 February 2018 Mr Henderson consented to the FPA seeking the approval of the Chair of the CRC to the summary disposal of the Disciplinary Proceedings pursuant to section 7.3 of the Disciplinary Regulation. On the same day the proposed terms for summary disposal were sent by Mr Bacon to the Chair of the CRC.
52. On 6 March 2018 a directions conference of the CRC was held at which the Chair of the CRC made observations as to reasons why his approval to the proposed terms would not be forthcoming unless changes were agreed.<sup>9</sup>
53. The Disciplinary Panel hearing date on 9 March 2018 was vacated.
54. The Royal Commission has received evidence of communications in the period after 6 March 2018 between Mr Henderson's lawyers and the FPA in relation to the terms proposed for summary disposal of the Disciplinary Proceedings pursuant to section 7.3 of the Disciplinary Regulation that are acceptable to Mr Henderson. In particular on 13 April 2018 Mr Henderson, through his lawyers, provided a revised summary disposal agreement to Mr Bacon.<sup>10</sup> In this document, what had previously been the agreed findings of breach in the

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<sup>6</sup> Exhibit 2.212

<sup>7</sup> Exhibit 2.213

<sup>8</sup> Exhibit 2.222

<sup>9</sup> Exhibit 2.226

<sup>10</sup> Exhibit 2.215



proposal advanced to the Chair of the CRC on 12 February 2018, had been replaced with agreed outcomes which ‘acknowledge FPA’s concerns’.<sup>11</sup> The FPA has not agreed to this proposal by Mr Henderson.

55. Accordingly the Disciplinary Proceedings in relation to Mr Henderson have not concluded. Mr De Gori, the FPA’s Chief Executive Officer, gave evidence to the Royal Commission that he believed a decision as to whether to accept Mr Henderson’s revised proposed terms for summary disposal was imminent.<sup>12</sup>
56. FPA accepts that the period of time that has been taken to date in dealing with the complaint by Ms McKenna in relation to Mr Henderson’s conduct is unduly protracted. Negotiations with Mr Henderson pursuant to section 7.3 of the Disciplinary Regulation since 19 December 2017 have not been productive of a disciplinary outcome.
57. FPA accepts that there is identifiable scope for improvement in the case management of the disciplinary process, including in particular by the imposition of more onerous time limitations on steps to be taken by the parties in the course of the Investigation process and Disciplinary Proceedings that could improve the efficiency of the process without adversely affecting its efficacy. However, the limited resources of the FPA have been stretched in the period since December 2017 in the unusual circumstances of a contemporaneous Royal Commission inquiry, and that has been a contributing factor.
58. FPA is conscious of the need for procedural fairness to be afforded to members who are the subject of complaints which are dealt with pursuant to the Disciplinary Regulation. There is a balance to be struck between efficient case management and ensuring procedural fairness.
59. Besides acknowledging the scope for procedural and process improvements under the Disciplinary Regulation as revealed this case study, the FPA regards it as inappropriate to make any submission in relation to the Disciplinary Proceedings in respect of Mr Henderson whilst those proceedings are ongoing.

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Date: 4 May 2018

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<sup>11</sup> Transcript Day 17 24.04.18 at 113.4

<sup>12</sup> Transcript Day 18 - 26.04.18 at 6.7