IN THE FINANCIAL ADVISERS DISCIPLINARY COMMITTEE

WELLINGTON REGISTRY

[2018] FADC 007

Under Part 4 of the Financial Advisers Act 2008

BETWEEN   **FINANCIAL MARKETS AUTHORITY** an independent Crown entity established under the Financial Markets Authority Act 2011

Complainant

AND   **A**

Respondent

AGREED SUMMARY OF FACTS

Dated   27   June 2018

Solicitor Acting:
James Simon Corcoran
Level 2, 1 Grey Street
Wellington
Tel: (04) 472 9830
E-mail : james.corcoran@fma.govt.nz

SUMMARY OF FACTS

Introduction

1   On 29 March 2018, the Financial Markets Authority (the **FMA**) referred a complaint to the Financial Advisers Disciplinary Committee regarding likely breaches of the Code of Professional Conduct for Authorised Financial Advisers (the **Code**) by A.

2   As an AFA, A is bound to meet the conduct obligations prescribed by the Financial Advisers Act 2008 (the **Act**), as well as the Code. The FMA considers that the conduct complained of is likely to be in breach of the following Code Standards:

   a   Code Standard 6: An AFA must behave professionally in all dealings with a client, and communicate clearly, concisely and effectively; and

   b   Code Standard 12: An AFA must record in writing adequate information about any personalised services provided to a retail client.

Background

3   On 23 May 2016, the FMA received a report from a Qualifying Financial Entity (**QFE**) dated 20 May 2016 (the **QFE report**). The QFE is an administrator of a Financial Advisers network.

4   The QFE report set out the process undertaken by the QFE between July 2015 and approximately 31 March 2016, to investigate AFAs within the network having relatively high levels of replacement business between 2011 and 2015. The QFE report set out the QFE's investigation of the four AFAs having the highest levels of replacement business in that period. A was one of the AFAs identified.

5   A has been registered as an AFA to provide Financial Adviser Services from March 2011. A provides services through a Registered Financial Services Provider (**RFSP**), which provides the following services: Wholesale and/or generic financial adviser services, and Employer or principal of a financial adviser and/or Qualifying Financial Entity. The RFSP is not a QFE but is part of the Financial Adviser network subject to the QFE report.

6   As a result of receiving the QFE report, the FMA instigated an investigation into the findings set out in the QFE report.

7   The FMA investigation involved:

   a   Obtaining further information from the QFE, regarding the issues and client files referred to in the QFE report;

   b   Writing to A to notify them of the FMA's investigation;

   c   Reviewing copies of the client files referred to in the QFE report;

   d   Interviewing A on 26 August 2016;

   e   Attempting to contact A's clients, whose files had been reviewed as part of the investigation, including:

	i	Emailing the clients, using addresses held on their files; and
	ii	Telephoning the clients, using phone numbers held on their files.

8   The FMA was unable to make contact with any of the clients whose files had been identified as of interest.

9   The FMA's referral relates to transactions involving the following four client files:

a   Client 1;

b   Client 2;

c   Client 3; and

d   Client 4.

Client 1

10   A contacted Client 1 in July 2013, in relation to the possibility of changing provider for their Business Survival policy, at that time held with the QFE.

11   On 15 August 2013, A met with Client 1 and provided them with information in relation to a policy provided by another provider. On 31 August 2013, Client 1 took out the policy.

12   On 19 September 2013, A provided Client 1 with a Summary of Advice (referred to as a Personal Insurance Plan) (**SOA**).

13   During the FMA interview A identified various circumstances and benefits Client 1 would receive from changing their policies, which were the foundation of the recommendation. Of note, the nature of Client 1's business had fundamentally changed. Further the policy provided a greater monthly benefit, would be payable directly to Client 1 (rather than to their business) and had a significantly higher Core Score (91/100 compared to 76/100 for the QFE policy).

14   The FMA is satisfied that the change in policies was in Client 1's best interests and was appropriate in the circumstances.

15   However, A's file did not contain the following documentation:

a   Needs Analysis;

b   A comparison of the relevant policies and the key differences between them; or

c   An explanation of the risks of changing provider; or

d   An explanation of the reasons behind the recommendation.

16   While an SOA was prepared it was not provided to Client 1 until after the replacement policy had been put in place.

17   Despite attempts, the FMA was not able to make contact with Client 1 to confirm the nature and extent of advice provided.

18   Standard 6 of the Code requires an AFA to deal with their clients professionally, including by communicating effectively and providing services in a timely way. It is noted that the Code in force at the times relevant to Client 1's file was the Code of Professional Conduct for Authorised Financial Advisers 2010 (the **2010 code**).[1]

19   On the basis of paragraph 16 above, A failed to comply with Standard 6.

Alleged Code Standard Breach – Standard 12

20   Standard 12 of the Code requires an AFA to record in writing adequate information about personalised services provided to retail clients.

21   On the basis of paragraphs 15 and 16 above, A failed to comply with Standard 12.

Client 2

22   In June 2013, Client 2 replaced their existing Business Survival insurance policy (held with the QFE) to a similar Business Survival policy provided by another provider.

23   When making recommendations to Client 2, A mistakenly advised that the new monthly benefit was $5,200 as compared to the monthly benefit under the QFE RPP policy of $4,994. In fact, the benefit referred to under the QFE RPP policy was a four-weekly benefit, such that its monthly value was $5,356.

24   During the FMA interview, A accepted that there had been a mistake. Further A advised that on recognising the miscalculation Client 2 had been contacted and informed him of it by A. Client 2 had confirmed that he was content to continue with the new policy cover.

25   A's conversation with Client 2, during which he advised Client 2 of the miscalculation, is not recorded in writing on the file.

26   Despite attempts, the FMA was unable to contact Client 2 to confirm the nature of any advice provided in relation to the miscalculation.

Alleged Code Standard Breach – Standard 12

27   Code Standard 12 requires an AFA to record in writing adequate information about personalised services provided to retail clients.

28   On the basis of paragraph 24 and 25 above, A failed to comply with Standard 12.

Client 3

29   A met with Client 3 in February 2014 in relation to a possible change to their life insurance provider. The notes on A's file record that the driver of the possible replacement was price, as their existing premiums were set to increase.

---

[1] The 2010 Code was in force from 1 December 2010 to 1 May 2014. The relevant Standards from the 2010 Code are set out in the Schedule to this Summary of Facts.

30   A advised Client 3 that they could save $40 to $45 per month by changing provider. Subsequently, on 20 February 2014, Client 3 applied to another provider for replacement policies.

31   The amount saved by Client 3 was in fact $12.59 per month.

32   During the FMA interview, A acknowledged that there had been a miscalculation. A further advised that Client 3 had been advised of the miscalculation.

33   A's conversation with Client 3, during which he advised them of the correct savings amount, is not recorded in writing on the file.

34   Despite attempts, the FMA was unable to contact Client 3 to confirm the nature of any advice provided in relation to the miscalculation.

Alleged Code Standard Breach – Standard 12

35   Standard 12 of the Code requires an AFA to record in writing adequate information about personalised services provided to retail clients.

36   On the basis of paragraphs 33 and 34 above, A failed to comply with Standard 12.

Client 4

37   Client 4 contacted A in March 2014 to cancel their insurance policy, due to concerns that the premiums were too expensive. At that time the premiums had increased from $189 per month to $536 per month.

38   A presented Client 4 with alternative insurance solutions, which would allow them to reduce the premiums payable, while still maintaining cover. Client 4 elected to take out life insurance with another provider, for $280,000 of cover, and cancelled their existing trauma cover.

39   The basis for Client 4's desire to cancel their policy was recorded in the "Replacement Policy Advice for Advisers" form held on A's file in the following terms:

> "*Client needs have not changed but premium has increased so much that [they] nees to look at [their] cover and look at what a level premium would cost and how much cover [they] could get for what [they are] prepared to pay.*"

40   The FMA is satisfied that the change in policies was to Client 4's benefit and was appropriate in the circumstances.

41   However, A's file did not contain the following documentation:

a   Needs Analysis;

b   A comparison of the relevant policies and the key differences between them;

c   An explanation of the risks of changing insurance providers; and

d   An explanation of the reasons behind the recommendation.

42   A provided Client 4 with an SOA, dated 7 April 2014. While the SOA addressed the basis of A's recommendation, it was not provided until after the application for the replacement policy had been processed.

Alleged Code Standard Breach – Standard 12

43   Standard 12 of the Code requires an AFA to record in writing adequate information about personalised services provided to retail clients. It is noted that the Code in force at the times relevant to Client 4's file was the 2010 Code.

44   On the basis of paragraphs 40 above, A failed to comply with Standard 12.

SCHEDULE

Code of Professional Conduct for Authorised Financial Advisers 2010

Code Standard 6

An Authorised Financial Adviser must behave professionally in all dealings with a client, and communicate clearly, concisely and effectively.

When providing financial adviser services to a client, an AFA must:

(a) *Provide only services that the AFA has the competence, knowledge, and skill to provide; and*

(b) *Provide the services and perform the AFA's obligation in a timely way; and*

(c) *Transparently manage any conflicts of interest that may arise in providing the services; and*

(d) *Make recommendations only in relation to financial products that have been analysed by the AFA to a level that provides a reasonable basis for any such recommendation, or analysed by another person upon whose analysis it is reasonable, in all the circumstances, for the AFA to rely.*

*Communicating "effectively" for the purposes of this **Code Standard** requires an AFA to take reasonable steps to ensure the client understands the communication.*

When transmitting the financial advice of another person to a client, an AFA must take reasonable care to ensure that the person providing the financial advice has an appropriate level of competence, knowledge, and skill to provide that advice, and either:

- *Ensure the client is aware that the AFA has not prepared the financial advice or assessed its suitability for the client; or*

- *Accompany the financial advice with the AFA's own financial advice in relation to the same subject matter (in which case the AFA may have further obligations under **Code Standards 8 and 9**).*

When providing financial adviser services to a wholesale client, an AFA must take reasonable steps to ensure the client is aware that the client is regarded as a wholesale client for the purposes of the Act and the Code, and also is aware of the consequences of that status.

Code Standard 12

An Authorised Financial Adviser must record in writing adequate information about any personalised services provided to a retail client.

*The information required to be recorded under this **Code Standard** in relation to each retail client must include:*

    (a)   information about:

        (i)   any personalised service provided or any financial product recommended to the client; and

        (ii)   any required explanation, and advice as to suitability, given to the client in relation to a financial adviser service or financial product; and

        *(iii)   the results of any enquiry or any oral confirmation from the client declining an explanation or suitability assessment under **Code Standards 8 and 9**; and*

    (a)   copies of all information and documents provided to the client in writing, or received from the client, in connection with the AFA's personalised services including—

        *(i)   any information provided under **Code Standard 7**; and*

        (ii)   any provision or confirmation of financial advice; and

        *(iii)   any explanation provided in accordance with **Code Standard 9**; and*

        *(iv)   any instructions from the client declining to provide information or declining an explanation under **Code Standards 8 or 9**; and*

        *(v)   any instructions from the client declining or acknowledging any limitations of a suitability analysis in accordance with **Code Standard 8**; and*

        (vi)   details of any complaint received in relation to the AFA's services.

*An AFA who is an employee may satisfy the AFA's obligations under this **Code Standard** by taking reasonable steps to ensure that relevant measures taken by the AFA's employer are consistent with the measures contemplated under this **Code Standard**.*

An AFA must comply with all obligations under the Privacy Act 1993. Without limitation, this includes obligations in relation to the use and disclosure of clients' personal information and the protection of that information from loss and unauthorised access, use, modification, or disclosure.