Financial Advisers Disciplinary Committee **2013 FADC 002**

IN THE MATTER OF:	Financial Advisers Act 2008
BETWEEN:	FINANCIAL MARKETS AUTHORITY
	Complainant
AND	RODNEY IAN BOURKE-SHAW
	Respondent

Counsel:	R. Manttan for Complainant R. Raymond for the Respondent
Date of Decision:	26 September 2013

DECISION OF THE COMMITTEE ON DISPOSITION

Solicitors:
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1. After understandable delays, further to its decision of 13 August, the Committee received submissions from each counsel on penalty in respect of the four admitted breaches of the Code, on the basis of the redacted summary of facts annexed hereto. The parties have requested that this decision on penalty be dealt with on the papers.

Statutory framework

2. The purpose of the Financial Advisers Act 2008 (the **Act**) is to promote the sound and efficient delivery of financial adviser and broking services, and to encourage public confidence in the professionalism and integrity of financial advisers and brokers, by:

   2.1 Requiring disclosure by advisers and brokers, so that consumers can make informed decisions about whether to use an adviser and follow their advice;

   2.2 Requiring competence, so advisers have the experience and expertise to match a person to a financial product that meets their needs and risk profile; and

   2.3 Making advisers accountable for the advice they give.

3. By section 86 of the Act the Code of professional conduct for Authorised Financial Advisers sets out minimum standards of competence, knowledge and skills, ethical behaviour and client care. The Act provides in section 101;

> **101 Disciplinary committee may discipline authorised financial adviser for breach of code**
> (1) In this section, A is the person who is the subject of the complaint.
>
> (2) The disciplinary committee may take any of the actions referred to in subclause (3) if it is satisfied that A has breached the code.
>
> (3) In any case to which subsection (2) applies, the disciplinary committee may—
> (a) recommend that the FMA cancels A's authorisation:
> (b) recommend that the FMA—
> (i) cancels A's authorisation; and
> (ii) debars A for a specified period from applying to be re-authorised:
> (c) recommend that the FMA suspends A's authorisation for a period of no more than 12 months or until A meets specified conditions relating to the authorisation (but, in any case, not for a period of more than 12 months):
> (d) censure A:
> (e) order that A may, for a period not exceeding 3 years, perform a financial adviser service only subject to any

conditions as to employment, supervision, or otherwise that the disciplinary committee may specify in the order:
(f) order that A undertake training specified in the order:
(g) order that A must pay a fine not exceeding $10,000:
(h) take no action.

(4) No fine may be imposed under subsection (3)(g) in relation to an act or omission that constitutes an offence for which A has been convicted by a court.
(5) In any case to which subsection (2) applies, the disciplinary committee may order that A must pay costs and expenses of, and incidental to, the investigation by the FMA and the disciplinary committee's proceeding.

(6) The disciplinary committee may publicly notify the action in any way that it thinks fit.

(7) This section applies whether or not A is an authorised financial adviser at the time of the complaint, the investigation, or the disciplinary proceeding.

Factors for consideration in setting penalty

4. Rule 30 of the Committee's Procedure Rules provides:

> **30 Factors to take into account if a breach has been established**
>
> In determining what actions, if any, to impose on the Authorised Financial Adviser under ss101(3) or 101(5) of the Act, the Committee may take into account:
>
> (a) the nature of the charge;
>
> (b) the nature of the conduct of the Authorised Financial Adviser;
>
> (c) whether the Authorised Financial Adviser accepted a breach of the Code without the need for a hearing;
>
> (d) any other penalties imposed on the Authorised Financial Adviser
>
> (e) the conduct of the Authorised Financial Adviser during the investigation;
>
> (f) any offer of amends; and
>
> (g) any previous findings of misconduct against the Authorised Financial Adviser.

5. In this case Rules 30 (a), (b) (c) (d), (e) and (g) are relevant in that the Committee must assess the relative seriousness of the admitted breaches, take into account that Mr Bourke-Shaw accepted them , consider what weight to give the fact that he has surrendered his AFA status and reflect that he was co-operative during the investigation and has no previous history of breaching.

The seriousness of the breaches and other factors

6. The breach of 4 Code standards was a significant professional failure by Mr Bourke-Shaw. The breaches meant that:

   (a) His clients were unable to make informed decisions about their exposure to RAM because he withheld information with which they should have been provided. Full and open communication is a touchstone of the AFA/client relationship and while Mr Bourke Shaw was taking steps to improve his systems, progress was too slow;

   (b) Clients had not been given any meaningful assessment by him of the suitability of RAM to their individual circumstances. This is a crucial element of an AFA's role in relation to retail clients and personalised services; and

   (c) The expectation that written, verifiable information and advice should be available to clients, and to the FMA for review as regulator, was fundamentally undermined.

7. We acknowledge that Mr Bourke-Shaw found himself in a difficult position with regard to investments that had been made with RAM. In the face of Mr Ross's admitted frauds it is not clear that much could have been done, or losses avoided, even if his clients had been properly advised. Mr Bourke-Shaw was not directly responsible for the losses which arose because of the fraudulent conduct of Mr Ross, of which Mr Bourke-Shaw personally was also a victim.

8. Mr Bourke-Shaw has surrendered his AFA status with the detriments which flow as a consequence. This is of relevance now as the protection of the public is a matter of paramount importance. In addition, his cooperation with the investigation, acceptance of the breaches and past record are all to his credit in setting penalty.

The penalty

9. In its submission the FMA says there should be a censure and a fine.

10. Publication will occur under Rule 32 unless there are exceptional circumstances and that possibility has not been raised.

11. No application has been made for action under s101(3)(a)-(c) of the Act, and there is nothing about the circumstances of the case to have the Committee initiate such action.

12. It has been agreed between the parties that there should be no order as to costs.

13. Mr Raymond has argued that because of the acceptance and acknowledgement of his failings there is little utility in censure as the seriousness of the breaches is recognised by Mr Bourke-Shaw. Counsel submitted;

> It is submitted that the purpose of a censure in a disciplinary context is to sheet home to the respondent the seriousness of the breach. However, in this instance, the bringing of the charges by FMA and the manner of their resolution serves that purpose. Mr Bourke-Shaw does not need to be censured, he understand the gravity of the position, he regrets that the professional standards expected were not met by the time of the investigation, and in recognition of the circumstances, he has requested cancellation of his authorisation as an AFA. It is therefore submitted, with respect, that censure is neither necessary nor appropriate in the circumstances.

14. Counsel goes further and specifically notes that under s101(3)(h) of the Act the Committee is empowered to take no action and argues that is what should happen . He argued;

> The investigation and the charges with followed have taken a significant toll on Mr Bourke-Shaw. As with his fellow Cantabrians, he has been dealing with major issues relating to his house, which was badly damaged in the earthquake. More particularly, however, Mr Bourke-Shaw and his wife have, between them, lost $525,000 through their RAM investments. That is the capital invested, not the reported book value. They invested $360,000 personally and a further $165,000 through Oxford, which was Mr Bourke-Shaw's share as a shareholder.
>
> In addition he has incurred legal costs with Rolton McDuff and Counsel in dealing with the complaint, investigation and subsequent charges.
>
> Those factors, together with matter identified above, in particular his dealings with the FMA, prompt acceptance of the Code breaches, the steps that he was taking to improve his systems within Oxford, and his otherwise unblemished record over a 14 year career would, with respect, justify the Disciplinary Committee determining to take no further action.

15. We do not agree with the submission that censure is inappropriate. Although we acknowledge all the factors cited by Mr Raymond, it is imperative to denounce any significant breaches of the Code so as to reinforce the importance of compliance with the Standards.

16. We accept that Mr Bourke-Shaw knows and understands the seriousness of his breaches but that is only part of the equation. A

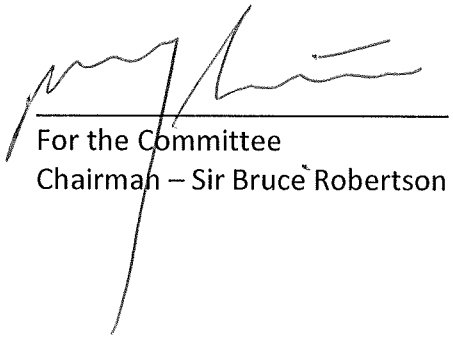
professional admonition and reprimand is a public and formal denunciation of the acts and omissions concerned and reinforces for the advisory profession as a whole the critical importance of compliance.

17. We are also satisfied that there should be a moderate monetary penalty. The punitive aspect of a fine reinforces the importance of the duties owed by any AFA but it should reflect the established culpability, which the Committee considers is at the lower end of the scale, though still significant.

18. In all the circumstances, Mr Bourke-Shaw is censured for the admitted breaches and is fined $1,000 in respect of each breach, being a total of $4,000.

19. Mr Bourke-Shaw has a right of appeal from this decision under s138(1)(b) of the Act. Such appeal must be brought within 20 working days after notice of this decision has been given to him, or within any further time a District Court Judge allows on application made before or after that period expires.

Dated at Wellington this 26th day of September 2013



For the Committee
Chairman – Sir Bruce Robertson

ANNEXURE

IN THE FINANCIAL MARKETS AUTHORITY DISCIPLINARY COMMITTEE ESTABLISHED UNDER THE FINANCIAL ADVISERS ACT 2008

[2013] FADC 002

Between	**FINANCIAL MARKETS AUTHORITY** Complainant
And	**RODNEY IAN BOURKE SHAW** Respondent

SUMMARY OF FACTS – WITH REDACTIONS MADE FOR PRIVACY REASONS

Next event date: Hearing on 16 August 2013 at 10.00am

FMA
FINANCIAL MARKETS AUTHORITY
TE MANA TATAI HOKOHOKO - NEW ZEALAND

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SUMMARY OF FACTS

Introduction

1. On 30 April 2013 the Financial Markets Authority (**FMA**) referred a complaint to the Financial Advisers Disciplinary Committee regarding likely breaches of the Code of Professional Conduct for Authorised Financial Advisers (**Code**) by Mr Rodney Bourke-Shaw, an authorised financial adviser (**AFA**) (FSP159586).

2. FMA considers that the conduct complained of is likely to be in breach of the following Code Standards:

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

   2.2 **Code Standard 8**: When providing a personalised service to a retail client an AFA must take reasonable steps to ensure that the personalised service is suitable for the client.

   2.3 **Code Standard 9**: When an AFA provides a personalised service to a retail client that is an investment planning service the AFA must provide a written explanation to the client of the basis on which those services are provided. The AFA must also take reasonable steps to ensure the client is aware of the principal benefits and risks involved in following any financial advice provided as part of that service, having regard to the characteristics of the personalised service.

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

3. References to documents in this summary are references to the Bundle of Documents submitted by FMA on 30 April 2013.

Background

4. During FMA's inquiry into the affairs of David Robert Gilmour Ross (**Mr Ross**), Ross Asset Management Limited (**RAM**) and related entities, FMA became aware that a number of investors had been referred to Mr Ross / RAM by Oxford Investment Services Limited (**Oxford**).

5. Following an application by FMA, in November 2012 the High Court appointed receivers to Mr Ross, RAM and related entities. In their first report dated 13 November 2012, the receivers identified (based on records from RAM's computer system) individual accounts holding investments to the purported value of NZ$449.6 million. However, only investments totaling $10.214 million existed, and were held by various parties such as

brokers, registries and banks.[1] The total losses to RAM investors are not yet known, but they are likely to be substantial.

6. On 20 November 2012, FMA received a complaint from two of Oxford's clients, Investor A and Investor B, who expressed concern that Mr Bourke-Shaw had failed to exercise reasonable care when recommending that they establish and contribute to an investment portfolio with RAM (**RAM Portfolio**).

7. On 26 November 2012, FMA's retail surveillance team carried out a monitoring visit to Oxford's offices. Mr Bourke-Shaw was interviewed during this visit. FMA also carried out a review of a selection of Oxford's client files.

8. Following this visit, Mr Bourke-Shaw voluntarily provided FMA with documents from his files, including correspondence between Oxford and RAM, notes of meetings between Oxford and Mr Ross and notes of meetings between the principals of Oxford.

9. Mr Bourke-Shaw has been providing financial services for approximately 14 years. He initially registered as a financial adviser on 22 November 2010 (FSP 32950) and became an AFA on 23 September 2011, authorised to provide financial advice, discretionary investment management services and investment planning services (FSP 159586).[2]

10. Mr Bourke-Shaw provided these services through Oxford, which was established in 1999, and which is owned jointly by interests associated with Mr Bourke-Shaw and his business associate. Oxford has approximately 140 clients.

11. In his interview with FMA, Mr Bourke-Shaw explained that his introduction to Mr Ross and RAM pre-dated the formation of Oxford, as he and his wife invested in a RAM Portfolio in 1997/1998.[3] He also explained that when they commenced Oxford, the principals of Oxford inherited clients from a former financial adviser, and a number of those clients had RAM Portfolios. Oxford continued to recommend RAM Portfolios to clients who wished to invest in international equities or wished to grow their investments. Mr Bourke-Shaw conducted initial research into Mr Ross which he relied on when recommending Mr Ross and RAM to clients.[4]

12. Mr Bourke-Shaw advised FMA that, based on advice from clients, total monies invested in RAM by Oxford clients over time was $12,479,093. As at November 2012, when RAM was placed into receivership, $6,570,585 had been withdrawn, leaving net client contributions of $5,908,508. This information was based on investment reports prepared for Oxford clients by RAM.[5] However, these totals did not include clients whose investments in RAM had matured and been paid out. Clients whose investments had matured had invested $1,451,304 and received a total of $3,679,152 on maturity of their investments, prior to

[1] http://www.pwc.co.nz/PWC.NZ/media/pdf-documents/receiverships/ross-group/ross-group-receivers-first-report-january-2013.pdf.
[2] BOD1-BOD2.
[3] BOD21-BOD26.
[4] BOD237-BOD239.
[5] BOD263.

the collapse of RAM.[6] Mr Bourke-Shaw explained that this meant that Oxford's clients had invested a total of $13,930,397 in RAM and a total of $10,249,737 had been withdrawn.[7]

13. Mr Bourke-Shaw advised that, as at the date of RAM's collapse, the net investment in terms of actual cash remaining in RAM by Oxford clients was $5,931,320.[8]

14. Investments in RAM represented 25% of Oxford's total client funds under management. Investment reports prepared by RAM for Oxford's clients as at 30 June 2013 valued Oxford clients' RAM portfolios as $36m.[9] This value, which was Oxfords' clients understanding of the value of their RAM Portfolios, comprised two-thirds of the total value of Oxford's funds under management ($54m).

15. On 5 December 2012 FMA advised Mr Bourke-Shaw that it intended to take action under s59 of the Act to cancel, suspend and/or debar his authorisation as an AFA on the basis that FMA considered that he had breached the Financial Advisers Act 2008 (the **Act**) and the terms and conditions of his authorisation. Mr Bourke-Shaw's AFA licence was suspended by FMA on 19 February 2013 for a period of four months. On 8 April 2013 Mr Bourke-Shaw requested cancellation of his authorisation as an AFA.

Facts and omissions relied upon

Oxford's concerns about clients' RAM Portfolios

16. In 2011 and 2012, Mr Bourke-Shaw and his business associate both held serious concerns about their clients' RAM Portfolios. During this time, Mr Bourke-Shaw did not convey the true nature or level of his concerns to his clients when discussing their investment portfolios.

17. In a meeting at RAM's offices on 13 July 2011, Mr Bourke-Shaw discussed with Mr Ross that he was concerned that:

    17.1 Oxford clients' portfolios were "over weighted" in favour of RAM investments, due to the apparent success of the RAM investments;

    17.2 RAM was a "one man band", and Oxford was reliant upon Mr Ross. Oxford was concerned about Mr Ross' health.[10]

18. On 21 November 2011, Mr Bourke-Shaw met with Mr Ross to discuss Oxford's increasing concern at the overweighting of clients' investment portfolios in favour of RAM and the need for Oxford to encourage clients to make scheduled withdrawals from their RAM Portfolios.[11]

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[6] BOD263.
[7] BOD265-BOD266.
[8] BOD268.
[9] BOD266.
[10] BOD55.
[11] BOD56.

19. In an Oxford board meeting on 15 June 2012, RAM was discussed in detail, and it was acknowledged that:

19.1 Oxford's clients needed to be made aware that their RAM Portfolios did not match their risk profile;

19.2 Risk was increased due to Mr Ross working alone with the support only of support staff;

19.3 Oxford's clients were vulnerable if Mr Ross became ill; and

19.4 There was no evidence of a succession or back up support plan, despite earlier discussions with Mr Ross that his son would join RAM and play an increasing role.[12]

20. During the meeting the principals of Oxford acknowledged that even where clients were happy to continue with their RAM Portfolios, they had a duty to strongly recommend to clients that they reduce their RAM Portfolios to reflect their risk profiles. They agreed that it should be Oxford's goal to implement a strategy to reduce RAM investments by 50% within two years.[13]

21. They also discussed future plans for Oxford, including the potential to sell Oxford's business, given the stress of severe earthquakes in Christchurch and declines in business values generally over the last 3 years.

22. Withdrawal requests that had been made with respect to RAM Portfolios held by interests associated with the principals of Oxford and RAM Portfolios held by other family members were not paid on time:

22.1 In March 2012 a family trust associated with Oxford requested redemption of its RAM Portfolio.[14]

22.2 On 1 May 2012, Mr Bourke-Shaw requested a withdrawal of $28,000 from his trust's RAM Portfolio.[15]

22.3 On 28 May 2012, a family member requested closure of [redacted] RAM Portfolio. Oxford notified RAM that [redacted] wished to purchase a house.[16]

22.4 Other family members who held RAM Portfolios also requested withdrawals and/or redemptions around this time.[17]

23. The withdrawal requests were not paid on time and attempts to follow up non-payment were largely ignored

23.1 Follow up emails were sent to RAM on 5 June and 10 July.[18] No responses were received.

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[12] BOD57-BOD59.
[13] BOD57-BOD59.
[14] BOD60.
[15] BOD61.
[16] BOD62.
[17] BOD65, BOD73, BOD76.

23.2 In an email to Mr Ross sent on 6 July 2012, Mr Bourke-Shaw noted that some Oxford clients' RAM Portfolios comprised 70% of their total portfolio and that this was "most imprudent" for retired clients.[19]

23.3 On 3 August, Mr Bourke-Shaw emailed Mr Ross, noting that repayment was outstanding on several withdrawal requests, including a request made on 1 March 2012 and stating:

> David, as I indicated to you some time ago, because of your excellent achievements over the last 13 years, we are at a point where a number of our clients' portfolios are unbalanced in international equities and as such we feel that, under the new regulatory regime we are all operating under, we have a real responsibility to reassess and instigate new asset allocations which are more appropriate for our elderly clients.[20]

23.4 Mr Bourke-Shaw, Oxford staff and in one instance an Oxford client sent follow up emails in August and September.[21] In his interview with FMA, Mr Bourke-Shaw confirmed that he did not receive any response to these emails or to attempts to contact RAM by telephone.[22]

24. Redemption and/or withdrawal requests from a number of Oxford clients had not been completed within the required timeframes, and by the end of August 2012 the following amounts were outstanding:[23]

Client	Amount	Request made	Repayment due
[redacted]	Closure	01/03/2012	31/07/2012
[redacted]	Closure	04/07/2012	17/08/2012
[redacted]	Closure	04/07/2012	15/08/2012
[redacted]	$[redacted]	24/06/2012	06/08/2012
[redacted]	$[redacted]	25/06/2012	10/08/2012
[redacted]	$[redacted]	26/06/2012	14/08/2012

25. Clients had not received their RAM quarterly reports for June 2012. In August 2012 Mr Bourke-Shaw emailed RAM inquiring why the quarterly reports had not been received.[24] No reasonable explanation was received, and RAM office staff said that Mr Bourke-Shaw's emails had been passed to Mr Ross for response.

26. Mr Bourke-Shaw attended a meeting at RAM's offices on 24 September 2012. At that meeting, Mr Ross said that he had been unwell, blamed his support staff and claimed that

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[18] BOD63-BOD64.
[19] BOD66.
[20] BOD67.
[21] BOD68, BOD69, BOD70, BOD74.
[22] BOD47-BOD48.
[23] BOD76. Mr Bourke-Shaw's family trust made a withdrawal request in May 2012, but Mr Bourke-Shaw subsequently extended the timeframe for repayment to 31 August 2012. Accordingly, it was not outstanding as at 31 August 2012.
[24] BOD77.

there was an increased amount of paperwork arising from the regulatory regime in USA, which was leading to delays in processing redemptions.[25]

27. On 29 October 2012 Mr Bourke-Shaw wrote to Mr Ross outlining "considerable concerns" with RAM's failure to complete requests for repayment and to respond to correspondence from Oxford.[26]

28. When Mr Bourke-Shaw discussed his clients' investment portfolios with them during review meetings, his focus in terms of any concerns conveyed was the client's investment portfolio being 'over weighted' in favour of their RAM Portfolios. Mr Bourke-Shaw attempted to persuade clients to rebalance their portfolios by reducing their RAM Portfolios. However, in some cases he did not give any reasons for his recommendation[27] and he did not raise any issues other than a concern about over weighting. In particular, Mr Bourke-Shaw did not tell clients that:

    28.1 He was concerned about the reliance that Oxford had on Mr Ross, who operated the RAM Portfolios as a 'one man band' and who had not been in good health.

    28.2 Mr Bourke-Shaw had not seen any evidence of succession planning, despite Mr Ross stating that it was in place for RAM.[28]

    28.3 He was concerned that clients' RAM Portfolios did not match their risk profiles.[29]

    28.4 By mid-2012 (or certainly by August 2012), there were serious concerns about Mr Ross and the operation of RAM's business, including liquidity concerns, given that a number of client requests for withdrawals and redemptions had not been completed and there was a lack of communication from RAM in response to attempts to follow up non-payment.[30]

Failure to undertake a full "Know Your Client" analysis

29. FMA reviewed five of Oxford's client files and identified several areas of concern:

    29.1 While some of the client files contained file notes demonstrating that Mr Bourke-Shaw had a basic understanding of his client's goals, needs and tolerance for risk, none of the client files contained sufficient information (such as a personal analysis document or questionnaire) to enable Mr Bourke-Shaw to identify his clients' full financial position, financial needs and financial goals.[31]

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[25] BOD78.
[26] BOD79-BOD80.
[27] BOD88. During her annual review in October 2012, Investor C requested to increase [redacted] RAM Portfolio. Mr Bourke-Shaw advised against this and recommends that [redacted] attend a seminar on PIE Australian Dividend Funds which was "appropriate for [redacted] growth investments with Oxford". No reason is given for this recommendation on the file note on Investor C's file dated 11 October 2012.
[28] BOD55.
[29] BOD57, BOD66.
[30] BOD66, BOD67, BOD68, BOD69, BOD76.
[31] For a copy of Investor C's client file see BOD88-BOD100. For a copy of Investor A and B's client file see BOD102-BOD236.

29.2 Client information contained on Mr Bourke-Shaw's client files had only been requested once – at the start of the client relationship. There was no evidence of ongoing review of the client's needs.

29.3 When interviewed by FMA, Mr Bourke-Shaw acknowledged that he did not always have the full picture of his clients' financial position and that clients often had other investments which he knew nothing about and did not ask.[32]

29.4 In three of the client files reviewed, the client described themselves as a "moderately higher risk" investor. One client said they were "moderate risk" and one file contained no risk analysis. All of these clients were referred into RAM Portfolios, which were high risk investments.

30. In [redacted] complaint, Investor B said that [redacted] expressed concerns to Mr Bourke-Shaw that [redacted] did not want "a risky investment". [redacted] said that [redacted] asked Mr Bourke-Shaw about the safety of their investment, given that RAM was very small.[33]

31. Mr Bourke-Shaw's client file for Investor A and Investor B did not contain any risk analysis or investor profile analysis.

32. Investor B says that when [redacted] spoke with Mr Bourke-Shaw in November 2013 and raised the concerns that [redacted] had asked about in 2009, Mr Bourke-Shaw told her that [redacted] should have been stronger in voicing those concerns and that [redacted] had the risk portfolio profile of "a 90 year old [redacted]".[34]

33. Mr Bourke-Shaw disagrees with Investor B and says that although Investor B was more conservative; a considerable amount of time was spent discussing the nature of the RAM Portfolios, the various risks involved and the volatility associated with investments in global shares and in the sectors that often made up the RAM Portfolios. Mr Bourke-Shaw says that he did not use the term "90 year old [redacted]" when referring to Investor B's risk profile, but that he would have tended to advise a reasonable balance between growth and income assets with a bias towards growth assets. He admitted that he may have indicated that an investment strategy comprising in large part income assets would be more suited to a "retired folk's portfolio".[35]

34. Mr Bourke-Shaw's handwritten notes of a meeting with Investor A and Investor B on 8 April 2012 state:

> "Investor B nervous – re RAM – shouldn't have invested.
>
> Felt that given their ages if looking to create capital growth for their futures – they needed to be aggressive – didn't go down well with Investor B.

[32] BOD28.
[33] BOD10.
[34] BOD10.
[35] BOD242-BOD244.

Next review in 6 months, need to look at RAM carefully – maybe not them."[36]

35. Mr Bourke-Shaw failed to adequately analyse RAM and Mr Ross before recommending RAM Portfolios to clients. Mr Bourke-Shaw relied on old accolades (dating back to the late 1990's) and the fact that he held a RAM Portfolio personally.[37] He also failed to adequately monitor Mr Ross' and the RAM Portfolios' performance over time. Oxford's website suggests that investments recommended to clients are closely evaluated and analysed.[38]

36. In FMA's view, a reasonable AFA in Mr Bourke-Shaw's position would have made further inquiries to ensure that he or she was satisfied that Mr Ross and RAM had complied with their obligations and that recommending RAM Portfolios to Oxford clients was appropriate.

    36.1 Mr Bourke-Shaw raised issues with Mr Ross, to which he did not receive a satisfactory response. However, Mr Bourke-Shaw did not make further inquiries:

        (a) Mr Bourke-Shaw asked Mr Ross whether the RAM portfolios were audited, and was told by Mr Ross that he "complied with his obligations". Mr Bourke-Shaw did not make any further inquiries, despite admitting in his interview with FMA that he did not know what Mr Ross' response meant.[39]

        (b) Mr Bourke-Shaw advised FMA that he queried the RAM Portfolios' performance during the global financial crisis with Mr Ross. Mr Ross' explanation was that losses were sheltered by an investment in Canadian mining stocks that had increased in value by over 100%. In his interview, Mr Bourke-Shaw explained that Mr Ross individually selected each client's portfolio,[40] meaning that not all clients would have held these Canadian mining stocks. A reasonable financial adviser would have made further inquiries of Mr Ross' response in these circumstances. Mr Bourke-Shaw did not do so.

Lack of documentation on client files

37. During FMA's monitoring visit in November 2012 and FMA's subsequent review of a selection of Oxford's client files, FMA identified several areas of concern regarding:

    37.1 A lack of client file documentation, and a lack of evidence suggesting an up to date understanding of clients' current situations and risk profiles;

    37.2 Of the five files that FMA reviewed, only three contained some form of written advice. Two of these related to the initial advice Mr Bourke-Shaw provided, and had not been updated following subsequent reviews.

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[36] BOD215. At the bottom of this file note are the words "Signed: Service Agmt, Scope of Service, Risk Profile, Gave Disclosure". FMA did not locate a copy of the risk profile on Mr Bourke-Shaw's client file during the monitoring review.
[37] See above, n 12.
[38] BOD101.
[39] BOD39-BOD40.
[40] BOD38.

38. In his interview with FMA, Mr Bourke-Shaw admitted that he did not record his advice in writing.[41]

ALLEGED CODE STANDARD BREACHES

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

39. This Code Standard sets out the minimum standards of client care with regards to all adviser dealings generally, as well as the requirement to communicate clearly, concisely and effectively.

40. FMA expects that AFAs will provide their services in a timely way. Communicating effectively also requires an AFA to take reasonable steps to ensure their clients understand the communication. FMA is concerned that Mr Bourke-Shaw failed to communicate his concerns to clients about RAM and about the suitability of their investment in a RAM Portfolio.

41. This Code Standard also embraces an AFA's obligation to transparently manage conflicts of interest and to only make recommendations in relation to financial products that have been analysed by the AFA to a level that provides a reasonable basis for such a recommendation.

42. In light of the facts set out in paragraph [28] above, FMA believes that Mr Bourke-Shaw breached Code Standard 6:

    42.1 Mr Bourke-Shaw failed to communicate concerns to clients, in that communications between Mr Bourke-Shaw and his clients did not reveal the true level or nature of concerns that Oxford had about clients' RAM Portfolios or his engagement with Mr Ross.

    42.2 It is unlikely that Oxford's clients would know that, by mid-2012, and certainly by August 2012, the Oxford principals held serious concerns about Mr Ross, the operation of RAM's business and potential concerns about the liquidity of the RAM Portfolios.

    42.3 In FMA's view, a reasonable AFA in Mr Bourke-Shaw's position would have made further inquiries and would have continued to analyse RAM after the referral of clients and on an ongoing basis, to ensure that he or she was satisfied that it was appropriate for Oxford to recommend RAM Portfolios to clients.

Code Standard 8: Suitability of personalised services to retail clients

43. This Code Standard requires AFAs to take reasonable steps to ensure that personalised services are suitable for clients.

44. In FMA's opinion, Mr Bourke-Shaw's recommendation to clients that they invest in RAM Portfolios comprised a personalised service, and was provided to retail clients.[42] The

[41] BOD33.

recommendation was made without Mr Bourke-Shaw ensuring that he had an up to date understanding of the client's financial situation, financial needs, financial goals and tolerance for risk. In some cases, Mr Bourke-Shaw did not give a reason for this recommendation.[43]

45. In his interview with FMA, Mr Bourke-Shaw described his clients as "a lot of retired folk" who wanted to keep the value of their capital and were looking for income, not generally growth investors.[44]

46. Mr Bourke-Shaw did not take adequate steps to ensure that the personalised services he provided were suitable for his clients, taking into account the client's age and risk profiles.[45]

47. In FMA's view, to comply with this Code Standard an AFA must demonstrate that they have gathered sufficient information to have an up to date understanding of their clients' financial position, financial needs and goals and tolerance for risk. It also involves demonstrating that they recommended suitable investments, for example, by applying an investment methodology, forecasting or benchmarking returns that clients would need to achieve on a periodic basis to achieve their investment goals.

48. Mr Bourke-Shaw used a "Portfolio Reallocation Coupon", a document prepared by Oxford which sets out an acknowledgement by the client they there were advised to reduce their RAM Portfolios and either chose to follow the advice or chose to remain with their current allocation.[46]

49. An AFA is relieved from the obligation to determine suitability of a financial service if:

    49.1 A client instructs the AFA in writing that the AFA is so relieved;

    49.2 The written instruction is signed and dated by the client; and

    49.3 The written instruction includes a clear acknowledgment from the client as to the advantages of the AFA determining suitability of their investments.

50. In FMA's view, the Portfolio Reallocation Coupon does not comply with the requirements of this Code Standard:

    50.1 It does not comprise a written confirmation by the client that they relieved Mr Bourke-Shaw from determining the suitability of the personalised services he provides to them.

    50.2 There is no written acknowledgement by the client that they understand the advantages of having Mr Bourke-Shaw determine suitability of their investments.

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[42] Mr Bourke-Shaw commented that he was not providing a full financial planning service but rather a financial adviser service on specific investments (see BOD268).
[43] BOD88.
[44] BOD32.
[45] BOD32.
[46] BOD88.

Code Standard 9: An AFA must provide a written explanation to the client of the basis on which the services are provided and take reasonable steps to ensure the client is aware of any principal benefits and risks involved in following any financial advice provided as part of that service, having regard to the characteristics of the personalised service

51. This Code Standard requires an AFA (when providing personalised services to retail clients on category 1 products) to:

    51.1 Provide a written explanation to the client of the basis upon which the services are provided; and

    51.2 To take reasonable steps to ensure that the client is aware of the principal benefits and risks involved in following any financial advice provided as part of that service, having regard to the characteristics of the service.

52. Only three of the five files that FMA reviewed contained some form of written advice. Two of these three pieces of written advice were letters that Mr Bourke-Shaw sent to clients containing his initial advice, and was not updated after subsequent reviews.

53. In his interview with FMA, Mr Bourke-Shaw admitted that he did not record his advice in writing.[47]

Code Standard 12: Keeping written information about personalised services for retail clients

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

55. On the basis of paragraphs [29], [37] and [38] above, Mr Bourke-Shaw failed to comply with this Code Standard.

56. FMA considers that a contributing factor leading to the unsuitable advice provided by Mr Bourke-Shaw was his failure to document the advice he gave and dealings he had with his clients. Mr Bourke-Shaw recommended a RAM Portfolio to Mr and Mrs Fletcher when he was aware (or should have been aware, based on his conversations with Investor A and Investor B) that a RAM Portfolio did not match Investor B's risk profile. Also, there is a discrepancy between the evidence of Investor B and the evidence of Mr Bourke-Shaw provided to FMA. This may have been resolved if Mr Bourke-Shaw had kept adequate documentation of his discussions with Investor A and Investor B and provided Investor A and Investor B with a copy of the written records.

57. Mr Bourke-Shaw has advised that he intended to cease offering financial advice from 31 March 2013 and that he would transfer his clients to a new AFA. Oxford wound down its financial adviser business from this date. The possibility of transfer of client files highlights the need for there to be clear written records on client files about personalised services provided to retail clients for use by the new advisers. A proper and effective transfer can only occur when accurate and up to date records are held by an AFA.

[47] BOD33.