



Disciplinary Tribunal of Chartered Accountants Australia and New Zealand (CA ANZ)

Written decision dated 23 February 2021

- Case Number:** D-1239
- Member:** John Scott Thomson CA of Western Australia
- Hearing Date:** 2 February 2021
- Tribunal:** Simon Wallace-Smith FCA (Chair)
Ross Gavin FCA
Elizabeth Gavey, lay member of the Tribunal
- Tribunal Legal Adviser:** Joshua Kangisser
- Representation:** Michael Bradley for the Professional Conduct Committee (PCC)
The Member represented himself
- Decisions:**
1. The Tribunal determined that:
 - (a) the Member committed a breach of:
 - (i) APES 305 *Terms of Engagement*;
 - (ii) APES 110 *Code of Ethics for Professional Accountants* with respect to professional behaviour;
 - (iii) APES 110 *Code of Ethics for Professional Accountants* with respect to confidentiality;
 - (iv) APES 310 *Dealing with Client Monies*;
 - (b) the Member committed acts, omissions and defaults which bring, or may bring, discredit upon him, CA ANZ and the profession of accountancy.
 2. The Tribunal imposed the following sanctions:
 - (a) a censure;
 - (b) a fine in the sum of \$5,000;
 - (c) to require the Member and the Member's Practice Entity to submit as soon as possible, at the Member's expense, to a review pursuant to CA ANZ Regulation CR 3.15 *Quality Control*, with the result of such quality review to be made available to the PCC. The Tribunal required that the quality review pay particular attention to the existence of terms of engagement, the Member's client acceptance and continuance procedures, and

compliance with trust account procedures in relation to the disbursement of client monies.

3. The Tribunal imposed a cost sanction in the sum of \$20,742 for the full costs and expenses of the proceedings.
4. The Tribunal made the following directions regarding the conduct of the hearing and the publication of its reasons for decision:
 - (a) its decision with reasons, mentioning the Member's name and location, be published on the CA ANZ website (the **Published Decision**);
 - (b) a summary of the Published Decision mentioning the Member's name and location with a web address for the Published Decision be published in the CA ANZ official publication, *Acuity*;
 - (c) the Tax Practitioners Board and the Australian Securities and Investments Commission be notified of this decision;
 - (d) except for the content of the Disciplinary Tribunal written decision with reasons, all written and oral evidence and submissions related to this determination are to remain confidential;
 - (e) the decision regarding confidentiality takes effect immediately from 2 February 2021.

The date of effect of this decision is 17 March 2021 (By-Law 40(10.18)).



1. Introduction

- (a) In December 2018 CA ANZ received a complaint from a former client of the Member (the **Complainant**) which complained, amongst other things, that the Member:
- (i) did not provide the Complainant with a terms of engagement when he commenced doing work for him;
 - (ii) paid fees from monies he held in trust for the Complainant, without first issuing invoices to the Complainant or otherwise notifying him of fees owed;
 - (iii) defamed the Complainant in correspondence and disclosed information he was not entitled to disclose; and
 - (iv) provided accounting services to the Complainant when the Complainant and the Member were in conflict;
- (the **Complaint**).
- (b) After investigating the Complaint including conducting a Case Conference over two days, on 8 October 2020 the PCC offered to enter into a consent agreement with the Member whereby:
- (i) he would receive a severe reprimand;
 - (ii) he would be fined the amount of \$5,000;
 - (iii) he and his Practice Entity would submit to a Quality Review as soon as possible;
 - (iv) he would pay the sum of \$4,600 towards the costs of investigating and dealing with the matter;
 - (v) the PCC decision would be published “*disclosing the Member’s name and locality*” (sic); and
 - (vi) there were “*no special circumstances that warrant[ed] disclosing the name of the Member*” in the published decision.
- (c) The Member did not return the signed Consent Agreement by the due date of 22 October 2020.
- (d) On 23 October 2020 the Member requested an extension of the Consent Period in order to obtain legal review and the Member’s attention was drawn to the Consent Period end date of 22 October 2020 and advised that, pursuant to By-Law 40(7.6):
- If the Member does not deliver the Member’s duly executed Consent Agreement in accordance with By-Law 40(7.5), the Professional Conduct Committee will refer the complaint to the Disciplinary Tribunal for hearing.
- (e) In December 2020 the PCC referred the Member to the Tribunal by way of Notice of Disciplinary Action (set out in full in Schedule 1) (the **NDA**) which, in summary, alleged that the Member:
1. did not document and communicate a terms of engagement to the Complainant, as required by APES 305 *Terms of Engagement* (**APES 305**);
 2. breached the fundamental principle of professional behaviour in APES 110 *Code of Ethics for Professional Accountants* (**APES 110**) by:
 - i) failing to send invoices to the Complainant after they were raised;

- ii) making “gratuitous and disparaging statements regarding personal matters concerning the Complainant” in professional correspondence;
- iii) a) asserting, in answer to questions from the PCC, that he had provided documentation to the CA ANZ Conduct & Discipline staff member investigating the Complaint on behalf of the PCC (**Complaint Investigator**) and that the Complaint Investigator had failed to provide that documentation to the PCC;
- b) referring to the Complainant as the PCC’s client on multiple occasions, including after being warned against doing so;
- during the Case Conference;
- 3. breached the fundamental principle of confidentiality in APES 110 by making statements in correspondence about the Complainant’s financial affairs without the Complainant’s consent;
- 4. breached APES 310 *Dealing with Client Monies* (**APES 310**) by paying his invoices without appropriate authority from the Complainant to do so, and as a result failed to maintain Records to appropriately document transactions in respect of Client Monies and failed to retain and ensure all such documentation was accessible for at least seven years;
- 5. committed acts, omissions or defaults which bring, or may bring, discredit upon him, CA ANZ or the profession of accountancy.

2. The issues for determination

- (a) Did the Member breach APES 305 by failing to document and communicate terms of engagement to a client? (allegation 1(a))
- (b) Did the Member breach APES 110 by failing to send invoices after they were raised? (allegation 1(b))
- (c) Did the Member breach APES 110 by sending an email that contained gratuitous and disparaging statements regarding personal matters of the Complainant? (allegation 1(c)(i))
- (d) Did the Member breach APES 110 by falsely asserting on multiple occasions that he had provided documentation to the Complaint Investigator and that the Complaint Investigator had failed to provide that documentation to the PCC? (allegation 1(c)(ii))
- (e) Did the Member breach APES 110 by referring to the Complainant as the PCC’s client on multiple occasions during the Case Conference, including after being warned against doing so? (allegation 1(c)(iii))
- (f) Did the Member breach APES 110 by making statements about the Complainant’s financial affairs without having authority to do so? (allegation 1(d))
- (g) Did the Member breach APES 310 in the circumstances set out in allegations 1(e)(i)-(iv) of the NDA? (allegation 1(e))
- (h) If the answer to (b), (c), (d), (e), (f) or (g) was yes, had the acts, omissions or defaults of the Member underlying those events brought or could they bring, discredit upon the Member, CA ANZ or the profession of accountancy? (allegation 2)

- (i) If the answer to (a), (b), (c), (d), (e), (f), (g) or (h) was yes, what sanctions should be imposed on the Member?
- (j) Should the Member be required to pay costs and if so, in what amount?
- (k) Was there any reason to suppress the Member's name from the published decision?
- (l) Should other parties be notified of the Tribunal's decision?
- (m) Should any confidentiality orders be made?

3. Did the Member breach APES 305 by failing to document and communicate terms of engagement to a client? (allegation 1(a))

3.1 Agreed facts

The PCC alleged and the Member admitted, that the Member committed a breach of s 3 of APES 305 by failing to document and communicate to a client (the Complainant) terms of engagement.

3.2 PCC submissions

- (a) The PCC submitted that:
 - (i) there was no engagement letter;
 - (ii) there had been clear admissions made by the Member throughout the matter that there was no signed engagement letter;
 - (iii) the Member changed his position in regard to the engagement letter during the PCC's investigation.
- (b) In making this submission, the PCC particularly referred to the following authorities and evidence:
 - (i) APES 305 which, the PCC submitted, required the Member to:
 - (1) document and communicate the terms of engagement (s 3.1);
 - (2) ensure that the Complainant understood the terms of engagement (s 3.2); and
 - (3) document the terms of the engagement in an engagement document (s 3.4);
 - (ii) 10 April 2019 letter from the Member's legal representative to the Complaint Investigator in which he wrote the Complainant was "*...a person to whom a formal engagement letter is unnecessary...*";
 - (iii) 4 September 2020 email from the Member to the Complaint Investigator in which he wrote "*...[o]n reflection it appears I have mistaken the disputes over our trust authority with having an engagement letter*".

3.3 Member submissions

The Member admitted the allegation and submitted that:

- (a) he may have mistaken the engagement letter with a trust authority document when he had stated there was a signed engagement letter;
- (b) he was sure that he had provided the engagement letter to the Complainant but had not followed up having a signed copy returned.

3.4 Tribunal decision and reasons

The Member admitted the allegation and the Tribunal was satisfied it was established because:

- (a) there was no evidence before the Tribunal that a signed engagement letter existed; and
- (b) failure to have an agreed terms of engagement is a breach of APES 305, in breach of By-Law 40(2.1)(h).

4. Did the Member breach APES 110 by failing to send invoices after they were raised? (allegation 1(b))

4.1 PCC submissions

- (a) The PCC submitted that:
 - (i) there were 11 invoices that allegedly were issued to the Complainant over an eight month period;
 - (ii) the Complainant said he had not received seven invoices at the time they were allegedly raised by the Member;
 - (iii) the Member said that he could prove that the invoices had been sent to the Complainant but subsequently was unable to provide that evidence;
 - (iv) the factual allegation of invoices not being sent to the Complainant had been proved and that this constituted a risk to both the reputation of the Member and of the profession because of his unprofessional behaviour.
- (b) In making this submission, the PCC particularly referred to the following evidence:
 - (i) transcript of the Case Conference held 1 September 2020 in which the Member stated:
 - “...they” (the invoices) “were all emailed to him and I’ve furnished copies to [the Complaint Investigator]”, 10 [38]-[40]
 - “I can provide those” (emails sending the invoices) “but I haven’t been asked for them”, 11 [6]-[7]
 - “Well, I’ll give you the email trails to show where he was sent them”, 11 [43]-[44]
 - (ii) transcript of the Case Conference resumed 17 September 2020 in which the Member stated:
 - “...We’ve made an error in not being absolutely fastidious in sending our documents out correctly and if we had of been, we wouldn’t be in this position, so I take responsibility for not sending the invoices out” 9, [28]-[32]

4.2 Member submissions

The Member admitted the allegation to the extent of two invoices and submitted that:

- (a) the internal controls in relation to the invoices fell short of what was expected;
- (b) the appropriate invoices were all raised and, except for two specific invoices, it was his belief they had been promptly sent out to the Complainant;
- (c) he used the same procedures for issuing invoices to all his clients and the Complainant was the only client who had raised a concern.

4.3 Tribunal decision and reasons

The Tribunal determined that the allegation was established because:

- (a) there was no evidence presented by the Member to substantiate if and when he had sent invoices to the Complainant;
- (b) the Member admitted that his firm had not been fastidious in sending out invoices and he took responsibility for that failure to do so;
- (c) in failing to send invoices to a client when they were raised, the Member breached APES 110 s 100.5(e) by not avoiding conduct that discredits the profession and s 150.1 in that a reasonable and informed third party would be likely to conclude that the Member's failure to send invoices to a client adversely affected the good reputation of the profession. A breach of APES 110 is a breach of By-Law 40(2.1)(h).

5. Did the Member breach APES 110 by sending an email that contained gratuitous and disparaging statements regarding personal matters of the Complainant? (allegation 1(c)(i))

5.1 PCC submissions

- (a) The PCC submitted that:
 - (i) an email sent by the Member to the Complainant's new accountant on 13 November 2020 (the **Email**) clearly contained statements that were misleading and inaccurate concerning the Complainant;
 - (ii) the Email contained a threat to report the Complainant to his trustee in bankruptcy and the Police if a complaint made by the Complainant to the legal practice board was not withdrawn;
 - (iii) the references made by the Member to the Complainant's personal circumstances in the Email were clearly of an unprofessional nature and could objectively be considered to be gratuitous and disparaging of the Complainant;
 - (iv) during the course of the PCC investigation, the Member changed his reasoning for sending the Email from one of a legal obligation to disclose, to a matter of professional courtesy, until finally the Member possibly reconsidered the wisdom in sending the Email;
 - (v) the Member conceded that he was extremely angry as he had treated the Complainant as a reasonable person up until that point;
 - (vi) the Email was clearly unprofessional in nature, it was gratuitous and disparaging and could not be considered a matter of professional courtesy to provide that information to the new accountant;
 - (vii) there was no doubt that it was not professional behaviour on the part of the Member and an objective third party would come to the same conclusion.
- (b) In making this submission, the PCC referred to the Email.

5.2 Member submissions

The Member denied the allegation and submitted that:

- (a) his statements in the Email were not gratuitous or disparaging, they were factual;
- (b) the Email should have been more measured and was sent in a moment of anger;
- (c) the Email was sent as a professional courtesy and he had received similar communications in the past from other accountants to warn him of potentially troublesome clients, for which he had been grateful;
- (d) he had thought he was dealing with a reasonable person, being the Complainant, and now totally regretted taking on the client and having anything to do with him.

5.3 Tribunal decision and reasons

The Tribunal determined that the allegation was established because:

- (a) the Email was inappropriate and unprofessional as it contained gratuitous and disparaging statements regarding personal matters concerning the Complainant;
- (b) the Member admitted the Email should have been more measured;
- (c) in sending the Email, the Member had breached APES 110 s 100.5(e) in that it was conduct that discredited the profession and s 150.1 in that a reasonable third party would be likely to conclude that, in sending the Email, the Member's conduct adversely affected the good reputation of the profession. A breach of APES 110 is a breach of By-Law 40(2.1)(h).

6. Did the Member breach APES 110 by falsely asserting on multiple occasions that he had provided documentation to the Complaint Investigator and that the Complaint Investigator had failed to provide that documentation to the PCC? (allegation 1(c)(ii))

6.1 PCC submissions

- (a) The PCC submitted that:
 - (i) there were a number of instances where the Member claimed to have provided information to the Complaint Investigator and that that person had not provided that documentation to the PCC;
 - (ii) there was no evidence of that information ever being provided to the Complaint Investigator;
 - (iii) because of the inconsistencies in the Member's assertions, the Tribunal should accept the evidence of the Complaint Investigator over the Member's;
 - (iv) the Member attempts to shift blame which is a disgraceful, unacceptable and inexcusable act, he has a loose approach to the truth and does not take his obligations to assist the investigation and the PCC seriously and honestly;
 - (v) the assertions to have provided documentation made by the Member were knowingly false;
 - (vi) because of the Member's actions outlined in (iv) above, the Member's actions were clearly unprofessional and clearly in breach of APES 110 ss 100.5(e) and 150.1.

- (b) In making this submission, the PCC referred to eight separate instances in the transcripts of the Case Conference held 1 and 17 September 2020 where, in answer to the PCC's requests for documents, the Member stated he had previously provided them to the Complaint Investigator.

6.2 Member submissions

The Member denied the allegation and rejected that his assertions were knowingly false and offered as a reason for his actions that he had "a lot of things on his mind at the time".

6.3 Tribunal decision and reasons

The Tribunal determined that the allegation was established because:

- (a) the Member did not provide any evidence refuting the allegation;
- (b) the papers before the Tribunal contained evidence that the documentation in question was not provided at the time stated by the Member or not provided at all;
- (c) the Tribunal was satisfied that:
 - (i) certain documentation was not provided to the Complaint Investigator by the Member, contrary to what he had stated;
 - (ii) the Complaint Investigator did pass on to the PCC all documents that had been provided by the Member;
- (d) in falsely asserting on multiple occasions that he had provided documentation to the Complaint Investigator and that the Complaint Investigator had not provided that documentation to the PCC, the Member had breached APES 110 s 100.5(e) in that it was conduct that discredited the profession and s 150.1 in that a reasonable third party would be likely to conclude that, in making those false assertions, the Member's conduct adversely affected the good reputation of the profession. A breach of APES 110 is a breach of By-Law 40(2.1)(h).

7. Did the Member breach APES 110 by referring to the Complainant as the PCC's client on multiple occasions during the Case Conference, including after being warned against doing so? (allegation 1(c)(iii))

7.1 Agreed facts

The PCC alleged and the Member admitted, that during the Case Conference he referred to the Complainant as the PCC's "client" on multiple occasions, including after being warned against doing so.

7.2 PCC submissions

- (a) The PCC submitted that:
 - (i) in referring to the Complainant as the PCC's client, the Member was suggesting that the PCC was not acting impartially;
 - (ii) in making this persistent suggestion, it showed disrespect and behaviour that was not professional under APES 110.

- (b) In making this submission the PCC referred to three instances in the transcript of the Case Conference where the Member referred to the Complainant as the PCC's client.

7.3 Member submissions

The Member admitted that he referred to the Complainant as "the client" during the Case Conference. The Member submitted to the Tribunal that he did not know what difference there was between "client" and "complainant".

7.4 Tribunal decision and reasons

The Member admitted the allegation and the Tribunal was satisfied it was established because:

- (a) there was evidence in the Case Conference transcripts that this behaviour had occurred on several occasions;
- (b) the Member did not produce any evidence or make any submission to the contrary;
- (c) the Tribunal was satisfied that this behaviour was disrespectful and unprofessional in breach of APES 110 ss 100.5(e) and 150.1 in that it discredited the profession and a reasonable third party would be likely to conclude it adversely affected the good reputation of the profession. The acts of the Member in drawing into question the integrity of the disciplinary process of a professional body in which he is a member, without substance, could undermine the standing and reputation of the profession. A breach of APES 110 is a breach of By-Law 40(2.1)(h).

8. Did the Member breach APES 110 by making statements about the Complainant's financial affairs without having authority to do so? (allegation 1(d))

8.1 PCC submissions

- (a) The PCC submitted that:
 - (i) the Member's threat to disclose allegedly undeclared assets to the Complainant's trustee in bankruptcy constituted disclosure of the Complainant's confidential information that the Member had acquired through a professional and business relationship;
 - (ii) although the Complainant was no longer a client of the Member, the duty of confidentiality continues after an engagement has ended;
 - (iii) there was no suggestion that the Complainant had authorised the disclosure of his confidential financial affairs to his new accountant;
 - (iv) the disclosure of this confidential information acquired by the Member through a professional and business relationship constituted a breach of APES 110 ss 100.5(d) and 140.6.
- (b) In making this submission the PCC referred to the Email.

8.2 Member submissions

The Member did not admit the allegation and provided no submissions other than those referred to in 5.2 above.

8.3 Tribunal decision and reasons

The Tribunal determined that the allegation was established because:

- (a) the Tribunal was of the opinion that the information disclosed by the Member was confidential because:
 - (i) it was sensitive financial information relating to the Complainant's bankruptcy;
 - (ii) the Complainant had said that information contained in the Email was confidential; and
 - (iii) the Member did not dispute the fact information contained in the Email was confidential;
- (b) the Member did not have a legal or professional right or duty to disclose the information to the Complainant's new accountant in the Email;
- (c) that information had been acquired by the Member during his professional and business relationship with the Complainant;
- (d) with respect to the disclosure:
 - (i) in his Complaint, the Complainant stated he had not consented to the disclosure;
 - (ii) the Complainant stated in the Case Conference that the information was confidential and that he had not consented to its disclosure; and
 - (iii) no evidence to the contrary was provided to the Tribunal;
- (e) as a result, the Member's conduct in disclosing the confidential information in the Email constituted a breach of APES 110 ss 100.5(d) and 140.6. A breach of APES 110 is a breach of By-Law 40(2.1)(h).

9. Did the Member breach APES 310 in the circumstances set out in allegations 1(e)(i)-(iv) of the NDA? (allegation 1(e))

9.1 PCC submissions

- (a) The PCC submitted that:
 - (i) the trust account authority was clearly deficient in that it was missing details. In particular it did not specify the client's name nor the description of services to which it applied. Therefore the trust account authority was not a proper basis for the Member to pay his invoices by withdrawing monies held on trust;
 - (ii) although the Member claimed that the authorities contained in the tax returns authorised the payment of his invoices, those authorities only related to the receipt of tax refunds into the Member's trust account in the Complainant's name and was no authority to pay the Member's own invoices from monies held on trust;
 - (iii) because the Complainant was not aware of some of the Member's invoices it was difficult for the Member to prove that he had the authority to pay those invoices from monies held on trust;
 - (iv) despite not holding an appropriate authority, the Member paid his invoices issued to the Complainant from monies held on trust;

- (v) in circumstances where the Member failed to obtain an appropriate authority, he did not maintain and retain proper records to document transactions in respect of monies held on trust;
 - (vi) as the Member provided no evidence his invoices had been issued to the Complainant prior to withdrawal of trust monies, it followed that the Member had not maintained and retained proper records relating to trust monies.
- (b) In making this submission the PCC referred to the following authorities and evidence:
- (i) APES 310 which, the PCC submitted, required the Member to:
 - (1) maintain records and appropriately document all transactions in respect of client monies (s 7.1); and
 - (2) abide by relevant laws and regulations and retain and ensure that all documentation in respect of client monies was accessible for at least seven years (s 7.3);
 - (ii) the trust account authority document executed by the Complainant on 10 November 2017 which, the PCC submitted, was clearly deficient as it was “missing crucial details” required for authority to draw fee payments from monies held on trust. That authority stated:

“...I, [the Complainant] hereby irrevocably authorise [the Member’s firm] to pay immediately any Trust Money received by them on behalf of the Insert Name into a Trust Bank Account, as defined hereunder, operated by them with the ANZ Bank...

We further authorise them to deduct from Trust Money the consideration for the completion of the engagement of their services for the following:

[blank]

We further authorise them to remit any remaining balance to the following bank account:

Account name: Savings a/c only CBA.

BSB: [blank]

Account number: [blank]...”

the Member’s reliance on that document during the Case Conference resumed on 17 September 2020 as authority to draw fee payments from trust monies. The Member said:

“The trust authority letter signed by [the Complainant] on 10/11/17. We’ve been through audits of our trust account every year since we’ve been, we’ve never had a problem with our audits. We have legal advice on this document and never had a problem with it. I don’t understand why it’s even being raised as a question” 16 [24]-[30]

the Member’s assertions about that document during the Case Conference held 1 September 2020, being:

“...the trust authority is very clear. It sets out exactly why the moneys are to be taken from the trust account and he signed it along with the other documents...” 9 [40]-[43]

and the Complainant’s evidence given at the Case Conference on 1 September 2020, being:

“I thought this was an authority to [the Member] and it was signed simultaneously with prepared tax returns, which I signed on that day in

front of [the Member]'s assistant and he referred to that as to be with client moneys, which was never explained to me. I didn't know, at that point in time our relationship was one of complete trust and I just thought this is part of the normal business method that I would need to comply with as a client.

I did write under "Account name" "Savings account only Commonwealth Bank" which they were aware, but I wasn't aware that the authority permitted [the Member] or [the Member's firm] to withdraw moneys at random without invoicing me" 9 [18]-[32]

- (iii) the Member's reliance during the resumed Case Conference on the Complainant's directions on his tax returns that any tax refunds be deposited into the Member's firm account which, the PCC submitted, did not assist the Member in terms of authority being held to use those trust funds to pay his own invoices. The PCC said:

"We also refer to, on 23, you'll see on the front of the tax returns again signed by [the Complainant] on 10/11/17 where he acknowledges that an invoice will be invoiced for the services "and I agree to pay this invoice in full" 16 [32]-[36]

9.2 Member submissions

The Member:

- (a) denied that:
- (i) he did not have an appropriate authority from the Complainant to pay his invoices from monies held by the Member on behalf of the Complainant (allegation 1(e)(i));
 - (ii) he paid his invoices from monies held by the Member on behalf of the Complainant without an appropriate authority to do so from the Complainant (allegation 1(e)(ii));
 - (iii) as a result he did not maintain Records to appropriately document transactions in respect of Client Monies (allegation 1(e)(iii)) and noted that his trust account had been audited and no issued identified; and
- (b) admitted, to the extent of two invoices, that he did not retain and ensure that all documentation in respect of Client Monies were accessible for at least seven years (allegation 1(e)(iv));

and submitted that:

- (c) the proforma trust account authority had been reviewed by a legal practitioner and other accountants were using a similar document;
- (d) he thought that his trust account processes were not uncommon among the profession.

9.3 Tribunal decision and reasons

- (a) The Tribunal determined that the allegations were established because:
- (i) the trust account authority was incomplete and therefore deficient. It did not identify the client name nor the services to which it related;
 - (ii) as the trust account authority held by the Member was deficient, the Member paid his invoices from monies held on trust without an appropriate authority;
 - (iii) the Member could not produce evidence of the invoices being sent to the Complainant;

- (iv) by not holding an appropriate authority nor evidence that invoices had been sent prior to them being paid from trust monies, the Member had failed to maintain records to appropriately document transactions in respect of the Complainant's trust monies;

and this amounted to a breach of ss 7.1 and 7.3 of APES 310. A breach of APES 310 constitutes a breach of By-Law 40 (2.1)(h).

- (b) The Tribunal noted that the Member was able to produce a trust account statement in relation to the Complainant's funds showing monies received and payments made. Payments were made for purposes other than the payment of the Member's invoices. This was not in issue and there was some evidence that these payments had been either authorised or instigated by the Complainant.

10. Had the acts, omissions or defaults of the Member brought or could they bring, discredit upon the Member, CA ANZ or the profession of accountancy? (allegation 2)

10.1 PCC submissions

The PCC submitted that:

- (a) the breaches under allegations 1(b), (c), (d) and (e) brought discredit upon the Member himself, CA ANZ and the profession;
- (b) there were extensive allegations of breach and of the Member behaving in an unprofessional manner, for example:
 - (i) he lied repeatedly in the Case Conference;
 - (ii) he unnecessarily caused an adjournment to the Case Conference;
 - (iii) he impugned the professional integrity of CA ANZ officers with no basis and falsely;
 - (iv) the statements made in the Email about the Complainant and the language used;
 - (v) the breach of confidentiality without consent which was quite an egregious failure of the duty of confidentiality;
 - (vi) he had no proper basis to disparage the Complainant;
 - (vii) a failure to deal with funds in trust without proper excuse;
 - (viii) his behaviour with respect to trust funds fell very short of what was expected and members of the public are entitled to expect that Chartered Accountants will comply with trust account requirements;
- (c) the behaviour of the Member brought discredit on himself and threatened the reputation of CA ANZ and the profession.

10.2 Member submissions

The Member did not admit that he had or might bring discredit and submitted that he:

- (a) totally rejected there were problems with his trust accounting but would accept there were deficiencies in internal controls, for which he took responsibility;
- (b) admitted that he had sent the Email to the Member's new accountant in a moment of rage;

- (c) had taken on the Complainant as a client in good faith in order to assist the Complainant during difficult times, and had every expectation he would get paid;
- (d) found funds and an insurance claim on behalf of the Member which other professional advisers had not discovered;
- (e) the Complainant had tried to discredit him. He questioned the motivation of the Complainant in making the Complaint.

10.3 Tribunal decision and reasons

The Tribunal determined that there had been acts, omissions and defaults on the part of the Member that did bring discredit upon the Member, CA ANZ and the profession of accountancy, in breach of By-Law 40(2.1)(k), because:

- (a) the importance of complying with trust account policies and procedures is critical in maintaining trust in the profession of accountancy and failure to do so does bring discredit to the Member, CA ANZ and the profession of accountancy;
- (b) the language used in the Email was of a disparaging and threatening nature and was highly inappropriate behaviour for a professional accountant and member of CA ANZ;
- (c) the disclosure of confidential information to a third party in the Email was highly inappropriate and in breach of ethical standards. The maintenance of confidentiality is essential for the proper functioning of the profession and the accountant/client relationship;
- (d) the Member's deficient trust account authority and the failure to send invoices to the Complainant prior to drawing his fees meant that the Complainant was unaware of amounts owing to the Member and the balance of monies held on trust on his behalf. This failure to keep the Complainant fully informed reflects poorly on the profession of accountancy and brought discredit to himself and the profession;
- (e) the Member was not honest or cooperative during the investigative process and this brought discredit upon himself. The Member's reference to the Complainant as the PCC's client unreasonably suggested that the PCC was not impartial in dealing with complaints and member disciplinary proceedings, thus bringing CA ANZ into disrepute.

11. What sanctions should be imposed on the Member?

- (a) Regulation CR 8.11, *Guidelines for the imposition of sanctions (Guidelines)* sets out the matters that may be considered by the Tribunal in deciding what sanctions to impose. In this regard the Guidelines refer to:
 - (a) ... (i) the seriousness of the conduct;
 - (ii) whether the conduct has occurred before and, if so, the nature, extent and frequency of the conduct;
 - (iii) the Member's responsibility and accountability for the conduct in the context of that Member's Practice Entity ...
 - (iv) whether the Member has failed to comply with any undertaking or agreement to remedy the conduct;
 - (v) any aggravating or mitigating factors raised which are relevant to the conduct in question;
 - (vi) the personal circumstances of the Member to the extent they are raised and relevant to the conduct;
 - (vii) any character and/or other references provided in writing in support of the good standing of the Member;
 - (viii) the maintenance of public confidence in the profession;

- (ix) the maintenance of proper standards of professional conduct;
 - (x) deterrence; and
 - (xi) any other circumstances relevant to the practice of the Member and the profession.
- (b) However, the Guidelines are not an exhaustive list of the matters that may be considered when deciding what sanction to impose and the Tribunal may have regard to any other relevant matters that are before it.
- (c) The PCC submitted that:
- (i) a censure;
 - (ii) a \$5,000 fine;
 - (iii) the Member and his firm submitting to a quality review with certain conditions;
- were the appropriate sanctions and that the Tribunal should have regard to the following matters:
- (iv) the Member had breached By-Law 40(2.1)(h) in five different ways;
 - (v) he had brought discredit on himself, CA ANZ and the profession of accountancy;
 - (vi) he had failed to comply with the fundamental principles of professional behaviour and confidentiality;
 - (vii) he had contravened a significant number of provisions of APES including critically important trust account obligations;
 - (viii) in particular with respect to the breach of the trust accounting provisions, a sanction should be imposed by way of specific and general deterrence;
 - (ix) it was important to sanction the Member in a way that sends a clear message that CA ANZ will not tolerate failures to act in a professional manner in respect of the control of client funds;
 - (x) the breadth of the Member's misconduct warranted the sanctions sought by the PCC as a minimum.
- (d) The Member submitted that:
- (i) he accepted that there were deficiencies in his processes and undertook to seek from CA ANZ templates and procedures in relation to his trust accounting;
 - (ii) he took responsibility for failures in internal controls;
 - (iii) he undertook to get further legal advice on the proforma trust account authority he was using.
- (e) The Tribunal determined to impose the following sanctions:
- (i) a censure;
 - (ii) a fine in the sum of \$5,000;
 - (iii) to require the Member and the Member's Practice Entity to submit as soon as possible, at the Member's expense, to a review pursuant to CA ANZ Regulation CR 3.15 *Quality Control*, with the result of such quality review to be made available to the PCC. The Tribunal required that the quality review pay particular attention to the existence of terms of engagement, the Member's client acceptance and continuance procedures,

and compliance with trust account procedures in relation to the disbursement of client monies;

because:

- (iv) of the number and seriousness of the established breaches;
- (v) of the evidence of the Member's unprofessional behaviour;
- (vi) some of the established breaches represented the Member's lack of cooperation with the investigative process which was an aggravating factor;
- (vii) breaches of trust account requirements suggested that a quality review of the Member and his practice was warranted;
- (viii) of the Member's failure to maintain a professional manner with communications generally and with the Email in particular.

12. Should the Member be required to pay costs and if so, in what amount?

- (a) Regulation CR 8.12, *Costs awards* states that when determining whether or not to require a Member to pay Costs, and the amount of such Costs, the Tribunal:

...must require the Member to pay all of the Costs claimed by CA ANZ unless it determines that, having regard to the following matters, it is appropriate that the Member be required to pay only part or none of the claimed Costs:

- (a) whether and to what extent the complaint against the Member is found to have merit and whether or not there is ultimately a finding in favour of the Member;
- (b) the substance or seriousness of the complaint;
- (c) the conduct of the Member in relation to the investigation and disciplinary process, including whether the Member was open, honest and timely in the Member's dealings with the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal in relation to the complaint and whether the Member complied with the provisions of Section 5 of the By-Laws and any applicable Regulations during the conduct of the disciplinary process;
- (d) the extent to which the final sanctions determined differ from those that the Professional Conduct Committee or Disciplinary Tribunal gave the Member the opportunity to agree by consent;
- (e) whether to do so is reasonable in the circumstances;
- (f) the amount of the Costs incurred by CA ANZ in the conduct of the investigation and proceedings;
- (g) whether and to what extent the Member has previously been required to pay Costs to CA ANZ in respect of the complaint, its investigation, hearing and determination; and
- (h) whether the amount is reasonable in the circumstances.

- (b) The PCC submitted that the Member should be required to pay costs in the sum of \$20,742 because:
- (i) all the alleged breaches had been made out;
 - (ii) Regulation CR 8.12 requires a member to pay all the costs claimed by CA ANZ unless it is appropriate a lesser amount be required to be paid having regard to the factors identified by the Regulation. The PCC considered there were no factors that warranted a departure from the principle requiring the Member pay 100 per cent of the costs;
 - (iii) this was a serious matter involving multiple breaches of fundamental principles and discredit. The Member's conduct and behaviour especially in the Case Conference mandated that the cost of the whole exercise should be borne by him. There were no circumstances that warranted a departure from the ordinary rule.

- (c) The Member indicated he had no response, but regretted the breakdown of the trust account procedures, admitted he probably acted in haste and would accept the penalty. He also indicated he would deal with the trust account issues the day following the hearing.
- (d) The Tribunal determined that the Member should pay \$20,742 for the full costs of the proceedings because:
- (i) the Member had the opportunity to agree to a consent agreement but failed to consent within the Consent Period;
 - (ii) of the Member's lack of cooperation with the disciplinary process;
 - (iii) the established breaches were serious. They involved multiple breaches of fundamental principles and discredit;
 - (iv) there were no factors present that would allow a reduction in the costs sought by the PCC in accordance with Regulation CR 8.12.
- (e) The Tribunal took exception to the Member's comment during the hearing that:
- "I see no point in making any further submissions. I think the Tribunal have already made up their minds"* 21 [50]-[51]

The acts of the Member in drawing into question the integrity of the disciplinary process of a professional body in which he is a Member, without substance, could undermine the standing and reputation of the profession.

13. Should the Member's name be suppressed?

- (a) By-Law 40 states:
- 12.3 Where the Disciplinary Tribunal ... determines that a complaint is established or imposes a sanction adverse to the Member ... it must direct that a notice be published by CA ANZ of its decision and the sanctions imposed (if any). Any such publication must disclose the name of the relevant Member unless the Disciplinary Tribunal ... considers that there are exceptional circumstances for not doing so. [emphasis added]
- 12.4 Publication ... may be in such form and publication as the ... Disciplinary Tribunal ... considers appropriate, including in CA ANZ's official publication, on CA ANZ's website or in any other manner that it may in its discretion direct.
- (b) The Tribunal determined there were no exceptional circumstances and therefore the Member's name should be disclosed in the publication.

14. Should other parties be notified of the Tribunal decision?

- (a) By-Law 40(10.16) states:
- The Disciplinary Tribunal may notify interested parties including other professional bodies, regulatory authorities, the Member's current and/or former employers, partners, clients of the Member or the Member's Practice Entity who are or may be affected by the Member's conduct to which the disciplinary action relates, of so much of a decision ..., the reasons for it and/or the sanctions imposed, as it thinks fit ...
- (b) The Tribunal determined that, due to the Member's association with those bodies, the Tax Practitioners Board and the Australian Securities and Investments Commission were interested parties and should be notified of this decision.
- (c) During the hearing, the Tribunal said that it had determined that the "Tax Agents' Board" be notified of this decision, rather than the Tax Practitioners Board. Tax Agents' Boards no long

exist as they were replaced with the Tax Practitioners Board. The Tribunal intended to refer to the Tax Practitioners Board, with which the Member is registered.

15. Should any details be kept confidential?

- (a) By-Law 40(13.12) states:
 - (d) The Disciplinary Tribunal ... may require, including as a condition of admission to a hearing, any person present to undertake to keep all or any part of a hearing, the evidence adduced at it or other information disclosed (including the identity of any persons present at or otherwise connected with the hearing) confidential on such terms as it determines.
- (b) The Tribunal directed that, except for the content of the Disciplinary Tribunal written decision with reasons, all written and oral evidence and submissions related to this determination are to remain confidential.

16. Rights of appeal

The Member and the PCC may give notice of appeal against any determination made or sanction imposed by the Tribunal, within 21 days after notice of the written reasons for such determination or sanction is given to them. Any such notice of appeal must be given using the form prescribed by the Regulations (By-Laws 40(11.1) and 40(11.2)).

While the parties remain entitled to appeal or while any such appeal awaits determination by the Appeals Tribunal, the following decisions shall not take effect:

- (a) breach of the By-Laws
- (b) sanction
- (c) costs sanction
- (d) publication
- (e) notification.

The Tribunal decision as to confidentiality took effect immediately.



Chair
Disciplinary Tribunal

SCHEDULE 1: THE PCC'S ALLEGATIONS

It is alleged that while a member of Chartered Accountants Australia and New Zealand (CA ANZ) the Member is liable to disciplinary action in accordance with:

1. By-Law 40(2.1)(h), in that the Member has committed a breach of:
 - a) section 3 of APES 305, *Terms of Engagement*, by failing to document and communicate to a client (the Complainant) terms of engagement;
 - b) sections 100.5(e) & 150.1 of APES 110, *Code of Ethics for Professional Accountants* by failing to send invoices to the Complainant after they were raised;
 - c) sections 100.5(e) and 150.1 of APES 110, *Code of Ethics for Professional Accountants*, in circumstances where:
 - i) he sent an email on 13 November 2018 to the Complainant's newly appointed accountant in response to an ethical letter which contained gratuitous and disparaging statements regarding personal matters concerning the Complainant;
 - ii) during the Case Conference he falsely asserted on multiple occasions that he had provided documentation to the CA ANZ Conduct & Discipline investigator in response to the PCC enquiries and that the investigator had failed to provide that documentation to the PCC;
 - iii) during the Case Conference he referred to the Complainant as the PCC's "client" on multiple occasions, including after being warned against doing so;
 - d) sections 100.5(d) and 140.6 of APES 110, *Code of Ethics for Professional Accountants*, in circumstances where he sent an email on 13 November 2018 to the Complainant's newly appointed accountant in response to an ethical letter, without the Complainant's consent, which contained statements regarding the Complainant's financial affairs;
 - e) sections 7.1 and 7.3 of APES 310, *Dealing with Client Monies*, in that:
 - i) the Member did not have an appropriate authority from the Complainant to pay his invoices from monies held by the Member on behalf of the Complainant;
 - ii) the Member paid his invoices from monies held by the Member on behalf of the Complainant without an appropriate authority to do so from the Complainant;
 - iii) as a result the Member did not maintain Records to appropriately document transactions in respect of Client Monies;
 - iv) did not retain and ensure that all documentation in respect of Client Monies is accessible for at least 7 years; and
2. By-Law 40(2.1)(k), in that the Member committed acts, omissions or defaults which bring, or may bring, discredit upon him, CA ANZ or the profession of accountancy, by engaging in the conduct referred to in paragraphs 1 b), c), d) and e) above.

SCHEDULE 2: RELEVANT BY-LAWS

Section 4 – Rights and Obligations of Members

...

Compliance Obligations

38A. A Member must at all times comply with the Supplemental Charter, these By-Laws and:

- (a) for all Members who are not subject to the NZICA Rules, the Regulations, any pronouncements issued by the Accounting Professional and Ethical Standards Board, Australian Accounting Standards Board and Auditing and Assurance Standards Board (or their successor entities) including the Code of Ethics, and any applicable pronouncements, instruments, technical or professional standards or guidance issued by any similar body whether in Australia or in a foreign jurisdiction;

...

Section 5 - Professional Conduct

39. In this Section 5 unless the context requires otherwise:

...

- (c) **Case Conference** means a meeting of the Professional Conduct Committee in respect of a complaint which has been notified to a Member in accordance with By-Law 40(7.1);

...

- (f) **Consent Agreement** has the meaning given to it in By-Law 40(7.3)(g);

- (g) **Consent Period** has the meaning given to it in By-Law 40(7.4)(c);

- (h) **Costs** means any costs and expenses incurred by or on behalf of CA ANZ in relation to the investigation and determination of a complaint (whether through the Professional Conduct Committee, Disciplinary Tribunal, Appeals Tribunal or otherwise) and any other taxes, fees and charges, paid or payable on them, including, without limitation:

- (i) fees and disbursements of professionals, advisors or consultants employed, engaged or retained to investigate, represent, appear (as expert witnesses or otherwise), hear, or determine the complaint or advise on the same; and
- (ii) other outgoings and disbursements including, without limitation, couriers, any transport, travel, accommodation, search fees, transcription services, outsourced photocopying, publication fees, room hire, video-conferencing, telephone conferencing and meals;

...

- (o) **Notice of Disciplinary Action** has the meaning given to it in By-Law 40(10.1);

...

40. Except as provided by By-Law 41, the By-Laws in this Section 5, including the following paragraphs of this By-Law 40, do not apply to Members who are also members of NZICA in respect of disciplinary matters over which NZICA has jurisdiction and which relate to the practice of the profession of accountancy by NZICA's members in New Zealand. Nothing in this By-Law 40 excludes from the operation of this Section 5, conduct of a Member:

- (a) who was, but is no longer, a member of NZICA; or

(b) who has subsequently also become a member of NZICA.

Except as provided by By-Law 41, no Member shall be sanctioned under both this Section 5 and NZICA Rule 13 in respect of the same conduct.

40(1) Committees and Tribunals

40(1.1) For the implementation of the procedures referred to in this Section 5, there shall be the following committees and tribunals:

...

(b) a Professional Conduct Committee which shall receive, initiate, investigate, determine and refer complaints;

(c) a Disciplinary Tribunal which shall hear and determine complaints made to it by the Professional Conduct Committee; and

...

40(1.3) Subject to these By-Laws, the Regulations and the Charters, each committee and tribunal shall regulate its own affairs and may delegate any of its functions.

40(2) Disciplinary action

40(2.1) A Member is liable to disciplinary sanctions under these By-Laws if (whether before or after the date of adoption of this By-Law) that Member:

...

(h) has committed any breach of the Supplemental Charter, these By-Laws or the Regulations, any pronouncements issued by the Accounting Professional and Ethical Standards Board, Australian Accounting Standards Board and Auditing and Assurance Standards Board (or their successor entities) including the Code of Ethics, or any applicable pronouncements, instruments, technical or professional standards or guidance issued by any similar body whether in Australia or in a foreign jurisdiction;

...

(k) has committed any act, omission or default which, in the opinion of the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal brings, or may bring, discredit upon that Member, CA ANZ or the profession of accountancy;

...

40(10) Disciplinary Tribunal

40(10.1) Subject to By-Laws 40(9.3)(a) and 40(9.3)(b), when a complaint is referred by the Professional Conduct Committee to the Disciplinary Tribunal, the Professional Conduct Committee must, unless the Member otherwise consents, give to the Member concerned a notice (**Notice of Disciplinary Action**) no less than 35 days before the Disciplinary Tribunal hearing setting out:

(a) details of the complaint made against the Member and any particulars and information in support;

(b) the date, time and place of the hearing before the Disciplinary Tribunal; and

- (c) where the Professional Conduct Committee's case against the Member will be presented at the Disciplinary Tribunal hearing by an independent Australian legal practitioner, a statement to that effect and, if known, the legal practitioner's name and firm, organisation or chambers.

...

40(10.4) The Member receiving a Notice of Disciplinary Action ... shall, unless the Professional Conduct Committee otherwise consents, not less than 14 days before the date of the hearing, state in writing to the Professional Conduct Committee:

- (a) whether the Member will attend the hearing and, if represented, by whom (including details of that representative's name and firm, organisation or chambers);
- (b) the matters the Member admits or disputes in the Notice of Disciplinary Action;
- (c) whether the Member intends to adduce any evidence at the hearing, and the names, qualifications and organisations of any witnesses the Member intends to call; and
- (d) any relevant fact or circumstance the Member wishes to bring to the attention of the Disciplinary Tribunal and the reasons for doing so.

...

40(10.7) Failure by the Member to comply with any or all of the above requirements (or to attend) shall not preclude the Disciplinary Tribunal from proceeding to hear and determine a Notice of Disciplinary Action at the appointed time.

40(10.8) The Disciplinary Tribunal may appoint a legal adviser who is an Australian legal practitioner to advise (attending the hearing as necessary) the Disciplinary Tribunal on matters of law, procedure and evidence.

40(10.9) At every hearing before the Disciplinary Tribunal, the Professional Conduct Committee shall be responsible for the presentation of the case against the Member. The Professional Conduct Committee may appoint an independent Australian legal practitioner to present the case on its behalf.

40(10.10) The Disciplinary Tribunal shall give the Member concerned or that Member's representative a reasonable opportunity of being heard and shall give due consideration to any material that Member may submit.

40(10.11) The Disciplinary Tribunal shall determine whether or not the complaint contained in the Notice of Disciplinary Action, or any part thereof, is established.

40(10.12) If the Disciplinary Tribunal determines that the complaint contained in the Notice of Disciplinary Action or any part thereof is established it may, ... having given the Member a reasonable opportunity of being heard on the question of sanctions, impose any one or more of the sanctions in the table below identified as applicable to that class of Member:

...

- (f) fine that Member an amount not exceeding \$50,000
- (g) censure the Member

...

- (j) require the Member or the Member's Practice Entity, at the Member's expense, to submit to an investigation or review or reviews, on such matters and on such terms as specified by the Disciplinary Tribunal, such terms to include that the results of such investigation or reviews are made available to the Professional Conduct Committee
- (k) require the Member to pay to CA ANZ all or any portion of the Costs incurred by or on behalf of CA ANZ (including by or on behalf of the Professional Conduct Committee) in investigating and dealing with the original complaint and the matters the subject of the Notice of Disciplinary Action as the Disciplinary Tribunal determines

...

40(10.15) Written notice of every decision of the Disciplinary Tribunal, including reasons for the decision and any sanctions imposed, must be given by the Disciplinary Tribunal to the relevant Member, the Professional Conduct Committee and to the Professional Conduct Oversight Committee, subject to By-Law 40(9.3)(d), within 21 days of the Disciplinary Tribunal's decision.

40(10.16) The Disciplinary Tribunal may notify interested parties including other professional bodies, regulatory authorities, the Member's current and/or former employers, partners, clients of the Member or the Member's Practice Entity who are or may be affected by the Member's conduct to which the disciplinary action relates, of so much of a decision (including a decision to suspend on an interim basis), the reasons for it and/or the sanctions imposed, as it thinks fit. The Disciplinary Tribunal will not do so until the day following the last date on which an appeal may be notified in accordance with paragraph 11.1. If an appeal is notified in accordance with paragraphs 11.1 or 11.2, the Disciplinary Tribunal will not make such a notification until that appeal is heard or otherwise determined.

...

40(10.18) A determination of the Disciplinary Tribunal shall take effect from the day immediately after the expiry of the period during which an appeal may be notified, if no appeal has been notified within that period.

40(11) Appeals Tribunal

40(11.1) Any Member in respect of whom any determination has been made by the Disciplinary Tribunal or upon whom any sanction has been imposed by the Disciplinary Tribunal may, subject to By-Law 40(9.4), within 21 days after notice of the written reasons for such determination or sanction is given to that Member, give notice of appeal in the form prescribed by the Regulations to the Appeals Tribunal against any such determination or sanction or both. At the discretion of the Appeals Tribunal later notice may be accepted.

40(11.2) The Professional Conduct Committee, may, subject to By-Law 40(9.4), within 21 days after notice of the written reasons for the determination or sanction imposed by the Disciplinary Tribunal against a Member is given to it, give notice of appeal in the form prescribed by the Regulations to the Appeals Tribunal against any such determination or sanction or both. At the discretion of the Appeals Tribunal later notice may be accepted.

- 40(11.3) A notice of appeal must state the grounds of appeal in full and the grounds so stated shall not thereafter be amended except with the approval of the Appeals Tribunal.
- 40(11.4) The Appeals Tribunal may, at its discretion, require the Member to pay such amount as it determines to CA ANZ as security against the anticipated Costs which CA ANZ may incur in the conduct and hearing of the appeal.
- 40(11.5) The Appeals Tribunal may, at its discretion, stipulate a time period of not less than 28 days within which the Member must pay the amount referred to in By-Law 40(11.4) and, if it does so and the Member has not paid that amount at the expiry of that period, the appeal will automatically lapse.
- ...
- 40(11.7) Every appeal shall be by way of rehearing but, unless the Appeals Tribunal directs otherwise, it shall not allow witnesses to be recalled who gave evidence before the Disciplinary Tribunal or to introduce any new evidence.
- ...

40(12) Publication of investigations and decisions

...

- 40(12.3) Where the Disciplinary Tribunal ... determines that a complaint is established, imposes a sanction adverse to the Member (including one with the consent of a Member or a written undertaking under By-Law 40(13.8)) or decides to suspend a Member on an interim basis, it must direct that a notice be published by CA ANZ of its decision and the sanctions imposed (if any). Any such publication must disclose the name and location of the relevant Member unless the Disciplinary ... considers that there are exceptional circumstances for not doing so.
- 40(12.4) Publication under By-Laws 40(12.1) or 40(12.3) may be in such form and publication as the ... Disciplinary Tribunal ... considers appropriate, including in CA ANZ's official publication, on CA ANZ's website or in any other manner that it may in its discretion direct.
- 40(12.5) No publication of a Disciplinary Tribunal decision or sanction will be made until the later of the day following the final date for its appeal under By-Law 40(11.1), and the determination of any appeal notified in accordance with By-Laws 40(11.1) to 40(11.3).
- ...

40(13) General

...

40(13.3) Conduct and provision of information

Members must be open and honest in their dealings with the Professional Conduct Committee, Disciplinary Tribunal and Appeals Tribunal. Members must provide such information as is required of them by CA ANZ, the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal in connection with an investigation, a complaint or any matters arising from or in relation to it, in a timely fashion and in any event within the time prescribed in this Section 5 and any applicable Regulations. Each of the Professional Conduct Committee, Disciplinary Tribunal and Appeals Tribunal may record its meetings, interviews, investigations, proceedings and hearings

in any manner it decides, including by the use of stenography and sound recording technology.

...

40(13.6) Guidelines for the imposition of sanctions

In determining the sanctions to be imposed on a Member under this Section 5 (with or without the consent of that Member) the Professional Conduct Committee, Disciplinary Tribunal and Appeals Tribunal must have regard to the guidelines set out in any applicable Regulations.

40(13.7) Costs awards

When the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal determines whether or not to require a Member to pay Costs under this Section 5, and the amount of such Costs a Member is required to pay, it must have regard to the guidelines set out in any applicable Regulations.

...

40(13.9) Interest

If ... the Disciplinary Tribunal ... has required a Member to pay Costs and/or a fine to CA ANZ by a specified date and such payment has not been received by CA ANZ by the due date, unless waived by CA ANZ, interest accrues and is payable on the amount due and outstanding from the due date to the date of final payment at the Default Rate.

...

40(13.12) Public and private hearings

...

- (b) Subject to By-Laws 40(13.12)(c) and 40(13.12)(d), and unless the Disciplinary Tribunal or Appeals Tribunal determine otherwise, each shall hold its hearings in public.
- (c) The Disciplinary Tribunal or Appeals Tribunal may determine to hear any part of a hearing in private.
- (d) The Disciplinary Tribunal or Appeals Tribunal may require, including as a condition of admission to a hearing, any person present to undertake to keep all or any part of a hearing, the evidence adduced at it or other information disclosed (including the identity of any persons present at or otherwise connected with the hearing) confidential on such terms as it determines.

...

Section 6 – Fees, Subscriptions and other payments due to CA ANZ

...

Interest

- 54.** If any payment is due to CA ANZ under or in accordance with these By-Laws but has not been received by CA ANZ by the due date, unless waived by CA ANZ, interest accrues and is payable at the Default Rate on the amount due and outstanding from the due date to the date of final payment.

...

SCHEDULE 3: EXCERPTS FROM STANDARDS

APES 110 CODE OF ETHICS FOR PROFESSIONAL ACCOUNTANTS

Compiled as at September 2017

...

PART A - GENERAL APPLICATION OF THE CODE

SECTION 100

Introduction and Fundamental Principles

...

Fundamental Principles

100.5 A Member shall comply with the following fundamental principles:

...

- (d) *Confidentiality* – to respect the confidentiality of information acquired as a result of professional and business relationships and, therefore, not disclose any such information to third parties without proper and specific authority, unless there is a legal or professional right or duty to disclose, nor use the information for the personal advantage of the Member or third parties.
- (e) *Professional behaviour* – to comply with relevant laws and regulations and avoid any conduct that discredits the profession.

Each of these fundamental principles is discussed in more detail in Sections 110 – 150.

...

SECTION 140

Confidentiality

...

140.6 The need to comply with the principle of confidentiality continues even after the end of relationships between a Member and a client or employer. When a Member changes employment or acquires a new client, the Member is entitled to use prior experience. The Member shall not, however, use or disclose any confidential information either acquired or received as a result of a professional or business relationship.

...

SECTION 150

Professional Behaviour

150.1 The principle of professional behaviour imposes an obligation on all Members to comply with relevant laws and regulations and avoid any conduct that the Member knows or should know may discredit the profession. This includes conduct that a reasonable and informed third party, weighing all the specific facts and circumstances available to the Member at that time, would be likely to conclude adversely affects the good reputation of the profession.

APES 305 TERMS OF ENGAGEMENT

Revised October 2015

...

3. Terms of Engagement for Professional Services

3.1 A Member in Public Practice shall document and communicate to the Client the Terms of Engagement.

3.2 The practice of documenting and communicating the Terms of Engagement should ensure that there is a clear understanding between the Client and the Member in Public Practice regarding the Terms of Engagement.

3.3 It is in the interests of both the Client and Member in Public Practice that the Member in Public Practice documents and communicates the Terms of Engagement, preferably before its commencement, to avoid misunderstandings with respect to the Engagement.

3.4 A Member in Public Practice shall document the Terms of Engagement in the Engagement Document.

3.5 The Terms of Engagement need not be in the form of a letter or agreement. For example, a standard format handout, brochure, leaflet or electronic communication is also acceptable.

3.6 The objectives and scope of some Engagements are established by law. Documentation of the Terms of Engagement cannot reduce obligations imposed by law. Where the Engagement is undertaken under Statute a Member in Public Practice should refer to the applicable provisions of the law in the Engagement Document.

...

APES 310 DEALING WITH CLIENT MONIES

Issued July 2013

...

Part A: Professional obligations of a Member in Public Practice who Deals with Client Monies

...

7. Documentation

7.1 A Member in Public Practice shall maintain Records to appropriately document transactions in respect of Client Monies.

...

7.3 Subject to legislative requirements, a Member in Public Practice shall retain and ensure that all documentation in respect of Client Monies is accessible for at least 7 years.

...

SCHEDULE 4: REGULATION CR8 - DISCIPLINARY PROCEDURES

Issued 8 October 2019

8.1 Purpose

This Regulation supplements the professional conduct and disciplinary process provisions of Section 5 of the By-Laws.

8.2 Definitions

Unless expressly defined in this Regulation, capitalised terms used in this Regulation are defined in By-Law 2 and Section 5 of the By-Laws. The definitions in By-Law 39 shall prevail to the extent of any inconsistency between this Regulation and the By-Laws or between By-Law 2 and By-Law 39.

8.3 By-Laws

Refer to Section 5 of the By-Laws for provisions relating to Professional Conduct.

8.4 Charter

- (a) For the implementation of the procedures referred to in Section 5 of the By-Laws the Board has approved Charters for:
 - (i) the Professional Conduct Oversight Committee;
 - (ii) the Professional Conduct Committee;
 - (iii) the Disciplinary Tribunal; and
 - (iv) the Appeals Tribunal.
- (b) The Charter for each may be found [here](#).

8.5 Disclosure Events (By-Laws 40(3.1) and 40(3.2))

- (a) It is a Member's responsibility to give notice to the Professional Conduct Committee within 7 days of the occurrence of a Disclosure Event.
- (b) When required, such notice should be in writing in the [form prescribed](#).
- (c) Within 21 days of a Disclosure Event, a Member is also required to send a statement to the Professional Conduct Committee setting out the reasons why that Member considers that the Member's membership should not be affected, including suspended (whether or not on an interim basis) or terminated and that Member's name removed from the Registers. The time period is longer for the statement than the notice to allow a Member to gather evidence, including from referees, to explain any mitigating or extenuating circumstances.

8.6 Notification Event (By-Laws 40(3.3) and 40(3.4))

- (a) It is a Member's responsibility to give notice to the Professional Conduct Committee within 7 days of the occurrence of a Notification Event.
- (b) When required, such notice should be in writing in the [form prescribed](#).

8.7 Form of complaints (By-Law 40(4.1(a)))

- (a) Complaints made about a Member to CA ANZ pursuant to By-Law 40(4.1)(a) should be made using, and in the manner prescribed by, the [Complaint Form](#).

- (b) Anonymous complaints, or those made without adequately disclosing the identity of the person(s) making the complaint, will not be processed by CA ANZ.

8.8 Applications to the Professional Conduct Committee for legal representation (By-Laws 40(5.4) and 40(7.2))

Applications for the consent of the Professional Conduct Committee for legal representation should be made using, and in the manner prescribed by, the [Consent Form](#).

8.9 Application to the Reviewer (By-Law 40(8))

- (a) An application made to CA ANZ to request the review of a Final Decision in accordance with By-Law 40(8.2) can be made by the original complainant or the relevant Member and must be made:
 - (i) within 21 days of notification of the Final Decision;
 - (ii) using and in the manner prescribed by the [Final Decision Review Form](#); and
 - (iii) accompanied by:
 - A. payment of the Application Fee (which is AU\$500) in a manner prescribed by the Final Decision Review Form; and
 - B. the [Costs Agreement](#) duly executed by the applicant.
- (b) Every Reviewer appointed will be an independent Australian legal practitioner.
- (c) When lodged, the Final Decision Review Form must include all matters the complainant wishes to be considered by the Reviewer.
- (d) The Application Fee is non-refundable, but the Reviewer may recommend that CA ANZ refund the Application Fee to the applicant, where the Reviewer considers this to be appropriate.

8.10 Appeals Tribunal (By-Law 40(11))

- (a) An appeal of a determination of the Disciplinary Tribunal may be made by the Member the subject of the determination or the Professional Conduct Committee in accordance with By-Law 40(11.1).
- (b) Notice of appeal should be given using, and in the manner prescribed by, the [Appeal Form](#) and must detail all grounds of appeal.
- (c) Pursuant to By-Law 40(11.4) the Appeals Tribunal has a discretion to require the Member to pay to CA ANZ such amount as it determines as security against the anticipated Costs which CA ANZ may incur in the conduct and hearing of the appeal.

8.11 Guidelines for the imposition of sanctions (By-Law 40(13.6))

- (a) When the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal determines that it is appropriate to sanction a Member, in deciding what sanction(s) to impose and without limiting the matters it may consider, it may consider the following matters:
 - (i) the seriousness of the conduct;
 - (ii) whether the conduct has occurred before and, if so, the nature, extent and frequency of the conduct;

- (iii) the Member's responsibility and accountability for the conduct in the context of that Member's Practice Entity, including without limitation:
 - A. whether the conduct was systemic;
 - B. whether the Practice Entity's leadership were aware of or complicit in the conduct;
 - C. whether it forms part of a pattern of conduct; and
 - D. the Member's role, position and seniority in the Practice Entity;
 - (iv) whether the Member has failed to comply with any undertaking or agreement to remedy the conduct;
 - (v) any aggravating or mitigating factors raised which are relevant to the conduct in question;
 - (vi) the personal circumstances of the Member to the extent they are raised and relevant to the conduct;
 - (vii) any character and/or other references provided in writing in support of the good standing of the Member;
 - (viii) the maintenance of public confidence in the profession;
 - (ix) the maintenance of proper standards of professional conduct;
 - (x) deterrence; and
 - (xi) any other circumstances relevant to the practice of the Member and the profession.
- (b) The Professional Conduct Committee, the Disciplinary Tribunal and the Appeals Tribunal must balance the interests of the Member against the public interest, the reputation of CA ANZ, and the need to support the integrity of the profession of accounting and those of CA ANZ in determining what are appropriate and sufficient sanctions.

8.12 Costs awards (By-Law 40(13.7))

When the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal determines whether or not to require a Member to pay Costs under Section 5 of the By-Laws, and the amount of such Costs a Member is required to pay, it must require the Member to pay all of the Costs claimed by CA ANZ unless it determines that, having regard to the following matters, it is appropriate that the Member be required to pay only part or none of the claimed Costs:

- (a) whether and to what extent the complaint against the Member is found to have merit and whether or not there is ultimately a finding in favour of the Member;
- (b) the substance or seriousness of the complaint;
- (c) the conduct of the Member in relation to the investigation and disciplinary process, including whether the Member was open, honest and timely in the Member's dealings with the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal in relation to the complaint and whether the Member complied with the provisions of Section 5 of the By-Laws and any applicable Regulations during the conduct of the disciplinary process;
- (d) the extent to which the final sanctions determined differ from those that the Professional Conduct Committee or Disciplinary Tribunal gave the Member the opportunity to agree by consent;

- (e) whether to do so is reasonable in the circumstances;
- (f) the amount of the Costs incurred by CA ANZ in the conduct of the investigation and proceedings;
- (g) whether and to what extent the Member has previously been required to pay Costs to CA ANZ in respect of the complaint, its investigation, hearing and determination; and
- (h) whether the amount is reasonable in the circumstances.

8.13 Former Professional Conduct By-Laws (By-Law 42)

- (a) A copy of the By-Laws as at 28 July 2016 may be found [here](#).
- (b) A copy of the By-Laws as at 26 November 2014 may be found [here](#).

8.14 Confidentiality Obligations

- (a) Members must comply with the requirements set out in subparagraphs (b) – (d) below to ensure that any complaints made, investigations, reviews and disciplinary hearings carried out pursuant to Section 5 of the By-Laws are confidential;
- (b) Subject to subparagraph (c) below:
 - (i) all information, correspondence and other documentation sent and/or received by CA ANZ or disclosed or made available to you in connection with a complaint, its investigation and outcome, any review of that outcome (including the Reviewer's report, recommendation and/or any directions) and any disciplinary hearing (including disciplinary decisions) is confidential (Confidential Information);
 - (ii) Members must:
 - A. keep the Confidential Information confidential;
 - B. securely store and not disclose or permit disclosure of the Confidential Information;
 - C. comply with CA ANZ's directions regarding the Confidential Information;
 - D. do all other things prudent or desirable to safeguard the confidentiality of the Confidential Information; and
 - E. not publish or make a public announcement or statement in relation to the Confidential Information;
 - (iii) this clause does not apply to:
 - A. information that is already in the public domain (unless it is in the public domain because of a breach of this Regulation); or
 - B. details of complaints, investigations and/or decisions that CA ANZ has published or made available to the public in accordance with the By-Laws and Regulations;
- (c) The obligations contained in subparagraph (b) above do not prevent the disclosure of Confidential Information:
 - (i) that is required to be disclosed to comply with applicable law;

- (ii) to the Member's advisers and/or representatives (including business partners and staff of those advisers and/or representatives) for the provision of advice in relation to the complaint, its investigation, any review and any disciplinary hearings;
 - (iii) to the Member's current employer and business partners, including staff of the Member and/or that employer, to assist with responding to the complaint and any disciplinary hearings and/or to comply with any disclosure obligations;
 - (iv) to the Member's insurer or the insurer of the Member's current and/or former employer, to comply with any disclosure obligations; or
 - (v) if required, and with the consent of CA ANZ, for the purpose of the complaint, investigation and any disciplinary hearings pursuant to Section 5 of the By-Laws.
- (d) Any disclosure of Confidential Information pursuant to subparagraphs (c)(ii) – (v) above can only be made by Members if the person to whom disclosure is made is subject to the same confidentiality obligations as Members set out in this paragraph 8.14.

Commentary

The obligations set out above are in addition to the obligations of confidentiality contained in APES 110, Code of Ethics for Professional Accountants. More details about managing your confidentiality obligations are available as part of the complaint process and on request.