

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

## Written decision dated 2 December 2020

- Case Number:** D-1235
- Member:** Darryl John Iseppi CA of Queensland
- Hearing Date:** 11 November 2020
- Tribunal:** Simon Wallace-Smith FCA (Chair)  
Ross Haslam FCA  
Danusia Cameron, lay member of the Tribunal
- Tribunal Legal Adviser:** Jamesina McLeod
- Representation:** Michael Bradley for the Professional Conduct Committee (PCC)  
The Member neither appeared nor was represented
- Decisions:**
1. The Tribunal determined that the Member:
    - (a) had been the subject of adverse or unfavourable findings by the Australian Securities and Investments Commission in relation to his professional or business conduct and competence;
    - (b) failed to comply with a reasonable and lawful direction related to a matter concerning the good order and management of CA ANZ.
  2. The Tribunal suspended the Member from membership of CA ANZ for a period of three years.
  3. The Tribunal imposed a cost sanction in the sum of \$10,588 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) the hearing proceed in the absence of the Member;
    - (b) its decision with reasons, mentioning the Member's name and locality, be published on the CA ANZ website (the **Published Decision**);
    - (c) a summary of the Published Decision mentioning the Member's name and locality with a web address for the Published Decision be published in the CA ANZ official publication, *Acuity*;
    - (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 on 11 November 2020.

The date of effect of this decision is 24 December 2020 (By-Law 40(10.18)).



## 1. Introduction

- (a) In around December 2019 CA ANZ became aware that the Australian Securities and Investments Commission (**ASIC**) had issued a press release on 5 November 2019 titled “19-299MR ASIC acts against SMSF auditor misconduct” (the **ASIC press release**) which included the following:
- (i) information about the Member had been referred to ASIC by the Australian Taxation Office;
  - (ii) the Member had been disqualified from being a Self Managed Superannuation Fund (**SMSF**) auditor “for significant auditor independence breaches and deficiencies in auditing the acquisition of shares, borrowings, valuation of assets, compliance with in-house asset requirements and regarding a non-commutable life pension”;
  - (iii) the action arose “following ASIC concerns about failures to meet requirements, including independence standards and auditing standards”;
- and the PCC initiated a complaint pursuant to the powers conferred by By-Laws 40(4.1) and 40(5.1) (the **Complaint**).
- (b) After commencing investigation of the Complaint, including scheduling a Case Conference, 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. had been the subject of adverse or unfavourable findings by ASIC in relation to his professional or business conduct, competence or integrity; and
  2. failed to attend the scheduled Case Conference.

## 2. The issues for determination

- (a) Should the hearing proceed in the absence of the Member?
- (b) If the answer to (a) was yes:
  - (i) had the Member been the subject of an adverse or unfavourable finding by ASIC in relation to his professional or business conduct, competence or integrity, in breach of By-Law 40(2.1)(e)? (allegation 1)
  - (ii) did the Member fail to comply with a reasonable and lawful direction of the PCC, in breach of By-Law 40(2.1)(i)? (allegation 2)
- (c) If the answer to (b)(i) or (ii) was yes, what sanctions should be imposed on the Member?
- (d) Should the Member be required to pay costs and if so, in what amount?
- (e) Was there any reason to suppress the Member’s name from the published decision?
- (f) Should any confidentiality orders be made?

### 3. Should the hearing proceed in the absence of the Member?

- (a) The Member did not attend the Disciplinary Tribunal hearing.
- (b) On 7 August 2020 the Member advised:
  - (i) he “...did not renew his membership. The same was due to renewal on 30 June 2020. As, and from, that time he ceased to be a member ... and consequently not only is their no purpose to the continuation of the consideration of the extant complaint, CAANZ has not legal basis to do so” (sic); and
  - (ii) that he would “not be participating in the CAANZ process as this would involve him being put to considerable expense and is, as outlined above, not lawful in any event”.
- (c) The PCC submitted that:
  - (i) the Member had been notified, through his representative, of the hearing date and time on 3 September 2020;
  - (ii) the Member, through his representative, on 29 October 2020 advised that he would not be participating in the hearing.
- (d) The Tribunal determined to hear the matter in the absence of the Member. In reaching this determination the Tribunal:
  - (i) considered the Member had been notified four times of the date of the hearing, on 3 September, 1 October, 15 October and 6 November 2020 and had, through his representative, acknowledged receipt of some of those communications and indicated that he did not intend to engage with the PCC or attend this hearing;
  - (ii) accepted the PCC’s written advice to the Member that he was still in membership with CA ANZ and therefore was still subject to the CA ANZ disciplinary processes. The By-Laws provide that members may seek approval to resign their membership by submitting a resignation in writing to the CEO:

21(a) Provided that no resignation shall take effect unless and until it has been accepted by the Board. The Board may decline to accept the resignation of a Member who is the subject of disciplinary action or professional conduct proceedings by either CA ANZ or NZICA or whose conduct, in the opinion of the Board, by virtue of matters brought to the attention of CA ANZ, may become the subject of professional conduct proceedings or who has been requested to provide information, given notice of or is undergoing a review or any follow up process arising from a review, investigation or professional conduct proceedings.

The Member was informed of the Complaint on 6 January 2020. The Tribunal did not accept the Member’s assertion that he ceased to be a member when he did not pay fees that became due, on his evidence, more than five months later. For a member to lose membership due to non-payment of fees, it was necessary for the Board, not the Tribunal, to make a determination pursuant to By-Law 23(b), which it had not done in the Member’s case.

**4. Had the Member been the subject of an adverse or unfavourable finding by ASIC in relation to his professional or business conduct, competence or integrity, in breach of By-Law 40(2.1)(e)? (allegation 1)**

**4.1 PCC submissions**

- (a) The PCC submitted that:
- (i) the Member had been subject to an adverse or unfavourable finding in breach of By-Law 40(2.1)(e), as evidenced by various press releases issued by ASIC and reported on by online media sources. The finding was squarely within the context of the Member's business conduct, competence or integrity and therefore the breach followed;
  - (ii) the Member did not challenge the disqualification order and it remained in effect.
- (b) In making this submission, the PCC referred to the following evidence:
- (i) ASIC Disqualification Order dated 12 July 2020, disqualifying the Member from being an approved SMSF auditor effective 19 July 2020 (the **ASIC Disqualification**);
  - (ii) the ASIC Press Release;
  - (iii) publicity surrounding the ASIC Disqualification:
    - (1) Tharshini Ashokan, 'ASIC acts on SMSF auditor misconduct', SMS Magazine (online, 5 November 2019);
    - (2) Sarah Kendell, '2 SMSF auditors disqualified', SMSF Adviser (online, 5 November 2019);
    - (3) Jotham Lian, 'ASIC disqualifies, imposes conditions on SMSF auditors', Accountants Daily (online, 6 November 2019);
    - (4) Mike Taylor, 'The Australian Securities and Investments Commission (ASIC) has disqualified two self-managed superannuation fund auditors and imposed conditions on the operations of another', Money Management (online, 6 November 2019); and
  - (iv) ASIC Statement of Reasons for Decision dated 12 July 2019 (the **ASIC Statement of Reasons**).
- (c) The PCC noted that the Member's only engagement with the disciplinary process was reflected in his response sent 9 March 2020 in which he dealt with allegation 1 only. In the Member's response, he put forward a number of arguments as to why ASIC was wrong in its decision, including that:
- (i) the Member was not involved in the administration of taxation work for audit clients and he provided copies of audit plans to the ATO;
  - (ii) the Member's records showed that trust deed reviews were undertaken and he relied on legislative exceptions in relation to the purchase of shares in related companies and his position with respect to the payment of pensions was reasonable.
- (d) The PCC further noted that:
- (i) the Member's 9 March 2020 response did not address the fact that he had been provided with several opportunities to convince the ATO that they should not refer him to ASIC. The Member responded to the ATO with a substantive response and that was taken into account by the ATO before it made its decision to refer him to ASIC;

- (ii) the Member was then given a further opportunity to convince ASIC not to make the disqualification order after the referral. The Member was unsuccessful in convincing ASIC not to make the disqualification order.

#### 4.2 Member submissions

By letter to the PCC dated 9 March 2020, the Member submitted that:

- (a) he had been disqualified as an SMSF auditor and that “[a]s a matter of law, this fact, of itself, is not a sufficient basis to make adverse findings against [him] as regards his membership of CAANZ”;
- (b) he had performed SMSF audits for approximately 34 years and had never had any adverse findings or similar issues arise;
- (c) the ATO’s audit was not random but had been “targeted at specific clients, some of whom were in dispute with the Commissioner of Taxation”;
- (d) the ATO made incorrect findings and findings on matters they had not referred to him for response;
- (e) ASIC “issued the disqualification notice without undertaking any independent review or hearing”;
- (f) he had stopped auditing SMSFs prior to the ATO review and had “decided not to challenge the notice due to the legal costs and lack of utility associated with the same”.

#### 4.3 Tribunal decision and reasons

The Tribunal determined that the allegation was established because:

- (a) the ASIC Press Release stated that ASIC had disqualified the Member “for significant auditor independence breaches and deficiencies in auditing the acquisition of shares, borrowings, valuation of assets, compliance with in-house asset requirements and regarding a non-commutable life pension”;
- (b) the ASIC Statement of Reasons included:
  - “As I am satisfied that [the Member] has failed to carry out or perform adequately and properly duties of an auditor under the [Superannuation Industry (Supervision) Act 1993]; it is not appropriate for [the Member] to remain an auditor and he should be disqualified from being an approved SMSF auditor under subsection 130F(2)” [49];
- (c) the Tribunal was satisfied this amounted to an adverse or unfavourable finding, and was therefore an automatic breach of By-Law 40(2.1)(e).

The Tribunal noted that the Member in his letter to the PCC dated 9 March 2020 stated that he disagreed with the ASIC Disqualification, which he said was incorrect for a number of reasons as set out in that letter. However the Tribunal was persuaded by the PCC’s submission that the Member had chosen not to appeal the ASIC Disqualification and the fact of its existence was the basis of the breach. The Member did not challenge the ASIC Disqualification and it remained in effect.

## 5. Did the Member fail to comply with a reasonable and lawful direction of the PCC, in breach of By-Law 40(2.1)(i)? (allegation 2)

### 5.1 PCC submissions

- (a) The PCC submitted that:
- (i) the PCC had scheduled a Case Conference for 18 August 2020 and had directed the Member to attend. He failed to attend;
  - (ii) By-Law 40(2.1)(i) makes it an automatic breach of the By-Laws if a member fails to comply with a reasonable and lawful direction of an officer of CA ANZ relating to a matter concerning the good order and management of CA ANZ;
  - (iii) the direction to attend the Case Conference was communicated to the Member four times. On each of these occasions there was an explicit direction for him to attend the Case Conference.
- (b) In making this submission, the PCC referred to the following evidence:
- (i) PCC letter to the Member's representative dated 2 July 2020 advising him of its 12 June 2020 decision to refer him to a Case Conference and notifying the date and time;
  - (ii) PCC letter to the Member's representative dated 31 July 2020 confirming the date and time of the Case Conference and advising that the Member was still in membership;
  - (iii) PCC email to the Member's representative sent 6 August 2020 confirming the date and time of the Case Conference; and
  - (iv) PCC letter to the Member's representative dated 13 August 2020 confirming the date and time of the Case Conference and advising that the Member was still in membership;
- all of which, the PCC submitted, contained an explicit direction for the Member to attend the Case Conference.

### 5.2 Member submissions

- (a) The Member:
- (i) by letter to the PCC dated 19 June 2020:
    - (1) submitted that he was selling his accounting practice;
    - (2) submitted that there was no utility in renewing his existing membership;
    - (3) requested that the *“existing processes be discontinued without any findings as it would be inappropriate to seek to put [him] to the cost and expense that are involved with continuing to respond to the [Complaint]”*;
  - (ii) by letter to the PCC dated 7 August 2020 submitted that he:
    - (1) had ceased practice as a tax agent;
    - (2) was in the process of finalising the sale of his business;
    - (3) was semi-retired;
    - (4) had not renewed his membership which was due for renewal on 30 June 2020 and from that time had ceased to be a member;

- (5) had “*ceased to be a member and consequently not only is there no purpose to the continuation of the consideration of the extant complaint, CAANZ has no legal basis to do so*” (sic);
- (6) would “*not be participating in the CAANZ process as this would involve him being put to considerable expense and is, as outlined above, not lawful in any event*”.

### 5.3 Tribunal decision and reasons

- (a) The Tribunal determined that the allegation was established because there was sufficient evidence before it to show that the PCC had made reasonable and lawful directions to the Member to attend the Case Conference and the Member had deliberately chosen not to.
- (b) The Member’s failure to respond undermined CA ANZ’s authority and its ability to regulate its members. It is a fundamental requirement of CA ANZ membership that members respond to reasonable and lawful requests from the organisation and failure to do so is a breach of the By-Laws. For the reasons stated at 3(d)(ii) above, the Tribunal did not accept the Member’s assertion that his membership had ceased.

## 6. 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 a suspension from membership of three years was an appropriate sanction, and that the Tribunal should have regard to the following matters:
  - (i) it was a serious case of misconduct;
  - (ii) the Member had two attempts at convincing the relevant regulatory bodies not to take adverse action against him and those bodies had given a full account of that and

- rejected his arguments. The Member did not challenge the ASIC Disqualification and had the opportunity to do that;
- (iii) the ASIC Disqualification was very serious, representing quite significant failures in terms of professional conduct and diligence. A disqualification order was an extremely serious outcome;
  - (iv) in respect of the failure to attend the Case Conference, the Member was given multiple directions and opportunities and he elected not to comply. This was a flagrant breach of his obligations as a member of CA ANZ. The PCC was unable to properly investigate the alleged breaches and the Member did not take the opportunity to put forward any substantial argument;
  - (v) the Member's failure to respond to the reasonable direction was very serious because it undermined CA ANZ's authority and ability to regulate its own members and it was important that, as both a specific and general deterrent, a strong signal was sent to all members that regardless of the circumstances, they could not simply ignore reasonable directions received from CA ANZ when dealing with compliance matters and disciplinary matters.
- (d) The Member provided no submissions with respect to possible sanctions.
  - (e) The Tribunal determined to suspend the Member from membership of CA ANZ for a period of three years because:
    - (i) it considered this was serious case, involving a number of serious breaches of the By-Laws and accounting and auditing standards;
    - (ii) the Member's behaviour in response to the disciplinary proceedings, including his deliberate failure to attend the Case Conference and this Tribunal hearing, was unacceptable and undermined proper standards of professional conduct;
    - (iii) it was appropriate to send a strong signal to all members that this conduct will not be tolerated because it is important that CA ANZ can regulate its members.
  - (f) The Tribunal noted that the Member:
    - (i) had indicated he no longer wished to be a member of CA ANZ however this was not a relevant consideration for the Tribunal in determining sanctions;
    - (ii) had been put on notice of the sanction the PCC would be seeking and had chosen not to respond.

## 7. 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 bear the full costs of the proceedings in the amount of \$10,588 because:
- (i) it was a serious and substantial matter;
  - (ii) the Member's conduct in response to the complaint and his conduct in relation to the investigation and disciplinary process had been far from exemplary, and his refusal to engage at all stood to his discredit;
  - (iii) the costs were clearly reasonable in context and there were no factors that would warrant a departure from the general rule that the unsuccessful member should be ordered to pay all the costs.
- (c) The Member provided no submissions with respect to costs.
- (d) The Tribunal determined that the Member should bear the full costs of the proceedings in the amount of \$10,588 because:
- (i) it accepted the PCC's submissions that this was a serious and substantial matter and the Member's conduct regarding the disciplinary process, being his refusal to participate, brought discredit on himself;
  - (ii) the Tribunal must make this finding as it considered that, after reviewing the factors in Regulation CR 8.12, none applied in this matter that might allow for a reduction to an award of full costs against the Member applied in this case.

## 8. 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.

**9. 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.

**10. RIGHTS OF APPEAL**

The Member may, within 21 days after the notification of the written decision with reasons to the Member of this Tribunal's decision, appeal in writing to the CA ANZ Appeals Tribunal against the decision (By-Law 40(11.1)).

The PCC may, within 21 days after notification of the written decision with reasons to the PCC of this Tribunal's decision, appeal in writing to the CA ANZ Appeals Tribunal against the decision (By-Law 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's 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)(e), in that the Member has been the subject of adverse or unfavourable findings in relation to his professional or business conduct, competence or integrity by a statutory or regulatory authority or statutory body, in circumstances where on 12 July 2019, the Australian Securities and Investments Commission disqualified him under subsection 130F(2) of the *Superannuation Industry (Supervision) Act 1993* (SISA) from being an approved SMSF auditor with effect from 19 July 2019.
2. By- Law 40(2.1)(i) in that the Member failed to attend the Case Conference as required by the Professional Conduct Committee (PCC) on 18 August 2020 and thereby failed to comply with a reasonable and lawful direction of the PCC acting within the powers conferred by CA ANZ's By-Laws and which relates to a matter concerning the good order and management of CA ANZ.

## SCHEDULE 2: RELEVANT BY-LAWS

### Section 2 - Membership

...

#### Resignation

- 21.** Any Member may resign his or her Membership by sending his or her resignation in writing together with all moneys owing by him or her to CA ANZ, whether for subscription, fee or other amount, to the CEO:
- (a) Provided that no resignation shall take effect unless and until it has been accepted by the Board. The Board may decline to accept the resignation of a Member who is the subject of disciplinary action or professional conduct proceedings by either CA ANZ or NZICA or whose conduct, in the opinion of the Board, by virtue of matters brought to the attention of CA ANZ, may become the subject of professional conduct proceedings or who has been requested to provide information, given notice of or is undergoing a review or any follow up process arising from a review, investigation or professional conduct proceedings.

...

#### Exclusion from Membership

- 23.** The Board may exclude a person or entity from being a Member if:
- ...
- (b) the Member fails to pay any subscription, fee or other amount payable by the Member to CA ANZ, including fees, fines and costs, within 3 months after the same has become due; or

...

### Section 5 - Professional Conduct

...

- 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(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:

...

- (e) has been the subject of an adverse or unfavourable finding in relation to that Member's professional or business conduct, competence or integrity by any court of law, professional body, royal commission, statutory authority,

regulatory authority, statutory body, commission or inquiry in any jurisdiction in Australia or elsewhere;

...

- (i) has failed to comply with any reasonable and lawful direction of any officer or organ of CA ANZ acting within the powers conferred by CA ANZ's Supplemental Charter, these By-Laws or the Regulations and which relates to a matter concerning the good order and management of CA ANZ;

...

#### **40(10) Disciplinary Tribunal**

...

40(10.4) The Member receiving a Notice of Disciplinary Action or an amended 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(10.12) If the Disciplinary Tribunal determines that the complaint contained in the Notice of Disciplinary Action or any part thereof is established it may, subject to By-Law 40(9.3)(c), and 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:

...

- (b) suspend the Member from membership of CA ANZ for a period not exceeding 5 years and remove the Member's name from the Registers on which it appears

...

- (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(10.16) 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(12) Publication of investigations and decisions**

...

40(12.3) Where the Disciplinary Tribunal or Appeals 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 Tribunal or Appeals Tribunal (as applicable) 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 Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal (as applicable) 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(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.

## **SCHEDULE 3: 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.*