NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS

NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS ACT 1996

IN THE MATTER	of the New Zealand Institute of Chartered Accountants Act 1996 and the Rules made thereunder
AND	
IN THE MATTER	of **Andrew James Brady,** Chartered Accountant, of **Christchurch**

DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS
22 January 2020

Hearing:	10-11 December 2019
Location:	The offices of Chartered Accountants Australia and New Zealand, Level 7, Chartered Accountants House, 50 Customhouse Quay, Wellington, New Zealand
Tribunal:	Mr MJ Whale FCA (Chairman) Mr DJH Barker FCA Mr N De Frere CA Ms B Gibson (Lay member)
Legal Assessor:	Mr David Laurenson QC
Counsel:	Mr Richard Moon for the prosecution
Tribunal Secretariat:	Janene Hick Email: janene.hick.nzica@charteredaccountantsanz.com

At a hearing of the Disciplinary Tribunal held in public at which the Member was in attendance and not represented by counsel he admitted Particulars 1(a)(ii), 1(d), 2(a), 2(b)(i) & (iii), 2(c) and 3 and denied Particulars 1(a)(i), 1(b), 1(c) and 2(b)(ii). He pleaded guilty to Charges 3 and 4, and not guilty to Charges 1 and 2.

During the hearing Particular 1(b) was amended by consent so that it read "*failed to advise and/or advise in writing X Limited and/or Mr W of:* As a result, the Member then admitted Particulars 1(b)(ii)-(iv).

The Charges and amended Particulars were as follows:

CHARGES

THAT in terms of the New Zealand Institute of Chartered Accountants Act 1996 and the Rules made thereunder and, in particular, Rule 13.50[1] the Member is guilty of:

1) Misconduct in a professional capacity; or

2) Conduct unbecoming an accountant; and/or

3) Negligence or incompetence in a professional capacity and that this is of such a degree and/or so frequent so as to bring the profession into disrepute; and/or

4) Breaching NZICA's Rules and/or Code of Ethics.

PARTICULARS

IN THAT

Being a Chartered Accountant in public practice, and in relation to a complaint the Member:

1. In respect of the sale and purchase of the business of X Limited:

   (a) Failed to identify and/or put in place appropriate safeguards to manage conflicts of interest and/or threats to his objectivity that arose by virtue of his differing roles and interests;

      (i) as accountant and/or business adviser for X Limited and/or its director, Mr W; and

      (ii) as accountant and or business adviser to Y Limited and/or its directors Mr A, Mr B and Mr C

   in breach of the Fundamental Principles of Objectivity (including sections 120.1, 220.1 and 220.3) set out in the Code; and/or

   (b) Failed to advise and/or advise in writing X Limited and/or Mr W of:

      (i) the risks to X Limited that would accompany an assumption that all trade debtors would be paid in full; and/or

[1] Formerly Rule 13.39 of NZICA's Rules effective 15 December 2014 to 29 May 2019

(ii) the potential impact of the side agreement relating to vendor finance on X Limited's ability to settle its outstanding creditors following the sale; and/or

(iii) the risks to X Limited in allowing the purchasers access to the accounting systems of X Limited prior to settlement

(iv) the risks that accompanied payment of X Limited's trade creditors ahead of X Limited's preferential tax debts; and/or

in breach of the Fundamental Principles of Professional Competence and Due Care (section 130.1) and/or Objectivity (including sections 120.1, 220.1 and 220.3) set out in the Code; and/or

(c) Lacked candour in his communications with Inland Revenue on behalf of X Limited, regarding X Limited's ability to meet outstanding tax obligations,

in breach of the Fundamental Principle of Integrity (including sections 110.1, 110.2 and 110.3) set out in the Code; and/or

(d) Included a deferred tax asset in X Limited's financial statements when the company was making ongoing losses[2];

in breach of the Fundamental Principles of Professional Competence and Due Care (section 130.1) set out in the Code; and/or

2. In respect of Z Limited:

(a) Agreed to an incorrect and/or misleading accounting treatment of GST in Z Limited's 2015 financial statements, including:

(i) writing off a GST debt of $301,668 without any valid basis or justification; and/or

(ii) failing to ensure appropriate disclosure of the GST debt and/or GST written off in the 2015 financial statements; and/or

(b) Provided misleading information to Z Limited's prospective financiers regarding Z Limited's financial position and/or failed to ensure appropriate information was provided to those financiers by:

(i) providing them with final 2015 financial statements and/or financial forecasts without any explanation of the GST write-off/adjustment; and/or

(ii) providing them with explanations regarding the GST write-off/adjustment that lacked candour and/or transparency; and/or

(iii) failing to alert them to the potential for a further adjustment when it became clear the GST write-off/adjustment was under review by Inland Revenue; and/or

(c) Reinstated the full GST debt in the 2016 financial statements as a prior year adjustment, without proper disclosure;

[2] As contained in old GAAP SSAP 12 Accounting for Income Tax

in breach of the Fundamental Principles of Integrity (including sections 110.1, 110.2 and 110.3) and/or Professional Competence and Due Care (section 130.1), and/or Professional Behaviour (section 150.1) set out in the Code; and/or

3. In respect of GST advice provided to Mr D, provided incorrect advice regarding the GST treatment of a property purchase, including that Mr D could claim GST when the sale and purchase agreement stipulated the purchase price included GST (if any) and/or when no GST had been charged as the transaction was an exempt and/or zero-rated transaction, in breach of the Fundamental Principles of Professional Competence and Due Care (section 130.1) set out in the Code.

BACKGROUND

Following the Member's departure from a chartered accounting firm in March 2017 and as a result of subsequent queries from the liquidator of one of the Member's clients, the firm conducted a broader review of the Member's client files (he apparently had over 200 clients). It identified matters of concern on just four files, and reported those concerns to the Institute (as it was ethically required to do under the Code of Ethics). The Institute requested that the firm make a complaint, which it did. The Tribunal notes that the Professional Conduct Committee ("PCC") is no longer pursuing the complaint in relation to one of the files, following an investigation by the Institute.

DECISION

The Tribunal finds that those particulars or parts of particulars which the Member has admitted are made out by the evidence before it – except for Particular 1(b)(ii). In relation to that particular and those that the Member has denied or taken issue with, the Tribunal finds as follows:

Particular 1(a)(i)

The Member's evidence was that he was at all times acting for and in the best interests of X Limited and its director Mr W, and not the purchaser of the business and its directors. X Limited and the purchaser had independently agreed on a "company value of $1" which was substantially more than an indicative offer received from an unrelated party. The Member's instruction from X Limited was to provide a balance sheet and structure to achieve receiving a purchase price which would see all creditors of X Limited paid. It was essential to get a deal done and this entailed the Member working closely with the purchaser.

The Tribunal accepts that the Member believed that he was acting at all times in the best interests of X Limited, its directors and creditors. However, given the relationships of the various parties to each other (one of the directors of the purchaser was the general manager of X Limited and another had been involved in obtaining finance for X Limited in the past) and given the company's financial position (it was insolvent), in the Tribunal's view conflicts of interest could and did arise in these circumstances. A telling example of the conflict is an email from the Member to a director of the purchaser providing details of debtors (disclosing $265,000 (27.15%) of which were 90 days or more overdue) and creditors of X Limited at the end of February 2016 and asking the purchaser what adjustments needed to be made in effect to the sales price.

In the Tribunal's view, the evidence discloses that the Member was in effect also advising the purchaser on some occasions, although by doing so he believed he was acting in the best interests of his vendor client. The Tribunal also agrees with the PCC that any third party reviewing some communications or being party to them would have been confused as to whom the Member was acting for.

The Tribunal accepts the evidence of the PCC's investigator that he had seen no indication that the Member recognised any conflicts of interest – in any event the Member had not put in place appropriate safeguards to manage potential or actual conflict or threats to his objectivity.

The Tribunal notes that the Member was acting in difficult circumstances as a result of the lack of engagement by the sole director of his vendor client who had apparently lost interest in the business. However, that simply highlights the need (and obligation) to ensure conflicts were properly managed.

At the hearing, the Member accepted that he had failed to identify the conflicts and that this clearly created confusion. Although the Member had believed he was doing the right thing by his vendor client, after hearing the evidence of the PCC's investigator he accepted that given all the circumstances that may not have been the case.

The Tribunal finds Particular 1(a) made out by the evidence.

Particular 1(b)

The Member has acknowledged that he did not give any advice in writing in relation to the matters referred to in Particulars 1(b)(ii)-(iv). This acknowledgement is consistent with the evidence of the PCC's investigator. However, the Member's evidence was that the matters referred to in Particulars 1(b)(ii)-(iv) were raised by him during subsequent meetings and phone conversations with the director - the director at times did not engage or wasn't prepared to make decisions.

The issue for the Tribunal is whether the PCC has established Particular 1(b) and that the Member did not actually advise X Limited and/or its director about the matters listed in Particulars 1(b)(ii)-(iv). The distinction is significant as the finding will in part inform the Tribunal's decision on the Charges. As the PCC acknowledged, the Member is not responsible for outcomes, simply the quality of the advice he may have given or his failure to provide appropriate advice.

Particular 1(b)(i): The Tribunal accepts the PCC's submission that advising the vendor to review debtors and creditors, as was done in writing here, is not the same as advising the vendor about the risks that would accompany the assumption. Although there is evidence that the Member advised the director of X Limited in writing that if all debtors were not collectible, based on the calculated sales price X Limited would be unable to pay IRD and trade creditors in full, the Tribunal accepts the PCC investigator's evidence that the Member gave no written advice to the director of what the potential implications of that would be or what might need to be done as a result. In the Tribunal's view, the Member's evidence, both in written statements prior to the hearing and at the hearing, leads to the conclusion that he did not actually provide that advice to the director either at all or in a way that would be expected of a chartered accountant.

The Tribunal finds this Particular proved on both bases.

Particular 1(b)(ii): The Tribunal accepts that the Member was not aware of the side agreement relating to vendor finance (payable three years from settlement instead of on demand as originally proposed) at the time of settlement of the sale and purchase agreement or at the time the Member wrote to the Inland Revenue Department on 29 March 2016. It is also understandable that he may not have appreciated the significance of the reference to a *term* loan agreement (emphasis added) contained in the earlier part of an email stream on 8 April 2016. It is in the Tribunal's view also understandable that he did not later turn his mind to the express provisions of the agreement as in fact the purchaser was initially repaying the vendor finance in a manner that enabled X Limited to meet its payment arrangement obligations to Inland Revenue.

To the extent that the Member may have failed to advise the vendor of the potential impact of the side agreement when he became aware of it, in all the circumstances the Tribunal does not consider that failure to constitute a breach of the Code warranting disciplinary sanction.

Particular 1(b)(iii): The Member was aware that the director had authorised access to the company's accounting system in early January 2016 - the Member's involvement was required to give effect to that access. Although there was no evidence of any structure around access and the Member acknowledged that the director would not have known how to restrict access, the Tribunal is of the view that the PCC has been unable to establish to the requisite standard that the Member did not advise the director to restrict access.

Particular 1(b)(iv): The PCC was unable to establish when the Member became aware that the director of X Limited had given directors of the purchaser signing authority on X Limited's bank account or of the risk referred to in the Particular. The Member's evidence was that following settlement of the sale he was not really involved in the affairs of X Limited except in relation to attempting to negotiate a proposal with the Inland Revenue Department. However, the Tribunal infers from his evidence under cross-examination that it is unlikely that he advised the director of the vendor of the risks when he became aware of what was happening, which in the Tribunal's view he should have done.

Particular 1(c)

In the Tribunal's view the Member's communications with the Inland Revenue Department of 29 March and 1 June 2016, which he either sent or authorised, were misleading. The 29 March email contained an unqualified statement saying *We expect all of X Limited's obligations will be settled in full* when the Member knew that that would only occur if X Limited could collect all its accounts receivable - any competent accountant aware that there were $250,000 of debtors more than 90 days overdue in a company that had serious solvency issues would have known that that was most unlikely. In the 1 June communication, details of the vendor finance do not appear to reflect the contractual terms (as set out in an email attached to the Member's subsequent communication with Inland Revenue on 26 October 2016).

The Tribunal finds this particular proved.

Particular 2(b)

The initial GST write off/adjustment had the effect of removing a liability from the balance sheet of just over $300,000.

The Member took issue with the description of the client's bank and other financier as "prospective" financiers. But the information was provided at a time when refinancing negotiations were taking place and, in the Tribunal's view, the description is sufficiently reflective of the situation.

The Member denied any attempt to mislead the financiers in order to obtain additional finance or secure the refinancing. He states that the bank agreed to the refinance after they had been fully informed of the adjustments. Against that background, the Member admitted Particulars 2(b)(i) and (iii) but denied Particular 2(b)(ii).

The Tribunal has reviewed the relevant communications to the financiers the subject of the allegations in Particular 2(b)(ii), and finds the explanations in them to be either untruthful or misleading.

In one communication, the Member referred to the adjustment being as a result of a GST error, when it was not an error and in the Tribunal's view he knew it was unlikely to be. The Member's evidence was that at the time he did not know the extent of the error –the Tribunal notes however that the subsequent voluntary disclosure made to Inland Revenue following receipt by the client of a notice from Inland Revenue of an (income) tax audit was for the same figure (within a few dollars) as the amount adjusted/written off.

In the other communication, the Member asserted that the GST amount in the client's management accounts didn't agree with what IRD said was owing and that IRD were happy with the returns as filed. As the Member well knew, GST returns are self-reporting and in the absence of a GST audit IRD will not know whether the returns are correct.

The Member asserts that both financiers have since indicated to him that they were satisfied with his subsequent explanations and were not misled. But even if that is so, it does not excuse the conduct. Further, the Tribunal notes that even after explanations were given, one of the financiers was still unclear about the reason for the adjustments.

The Tribunal finds Particular 2(b)(ii) to be proved.

The Charges

It follows from the Member's admissions and the Tribunal's findings on the Particulars that the Member is guilty of Charge 4, as he accepted.

In the Tribunal's view, the Member's conduct as found in Particulars 1, 2(b)-(c) and 3 constitutes negligence or incompetence (inability to perform to expected standards) in a professional capacity. In the Tribunal's view that conduct is of such a degree as to tend to bring the profession into disrepute. Accordingly, the Tribunal finds the Member guilty of Charge 3 as he also accepted.

The Tribunal must also determine whether any of the Member's conduct either in itself or cumulatively was such as to find the Member guilty of Charge 1 or 2, which are laid in the alternative.

Misconduct in a professional capacity (Charge 1) covers intentional wrongdoing, or conduct which is a deliberate departure from acceptable standards. It is something more than

professional incompetence or deficiencies in the practice of the profession. Whether any conduct constitutes professional misconduct is to be determined from the nature of the conduct and not from the consequences (although the consequences may have a bearing on penalty). The question the Tribunal has to consider is whether the Member so behaved in a professional capacity that the conduct under scrutiny would be reasonably regarded by other chartered accountants as constituting professional misconduct. The test is an objective one.

The charge of conduct unbecoming an accountant (Charge 2) involves something different to and less serious than misconduct in a professional capacity. It is conduct which departs from acceptable professional standards in a way significant enough to attract sanction for the purposes of protecting the public. The test is whether the Member's conduct was an acceptable discharge of their professional obligations, and the threshold is inevitably one of degree. The best guide to what is acceptable professional conduct is the standards applied by competent, ethical and responsible practitioners.

The PCC submitted that the Member's conflicts of interest (Particular 1(a)) were clear and sustained and towards the upper end of seriousness. Conflict management has always been an important issue. In relation to the Member's conduct under Particular 2, his conduct was wrong, clearly misleading and quite serious. If financiers cannot have faith in what a chartered accountant is telling them, it erodes the value of the designation. The PCC also submitted it is rare that an integrity breach such as that in Particular 1(c) and those referred to in Particular 2 would not result in a finding of professional misconduct. These breaches are sufficiently serious to justify such a finding.

The Member referred to his conduct under clause 2(a) as a mistake and acknowledged that the final financial statements for 31 March 2015 were such that the recipients of the financial information would have been lacking the full picture. He corrected this in the 2016 financial statements in a way that he thought was best. He put forward a number of mitigating factors in relation to the integrity breaches but in the Tribunal's view those relate more to penalty than liability.

The Tribunal considers that the Member's conduct referred to in Particulars 2(a) and (b) is sufficiently serious to constitute misconduct in a professional capacity. Preparing a set of financial statements where a significant liability was written off without any valid basis or justification and without proper disclosure so that recipients would not get the full picture, is serious and unacceptable. An aggravating factor is that the Member then knowingly provided misleading explanations to the financers about the adjustment that had been made. The conduct was a deliberate departure from acceptable standards.

Also the Member's conduct in not being straightforward and forthright in his communications with the Inland Revenue (Particular 1(c)) cannot be overlooked in this context.

The Tribunal finds the Member guilty of Charge 1.

PENALTY

The PCC sought an order that the Member be suspended for a period of not less than 18 months. It submitted that the Member's conduct involved a combination of serious conflicts of interest, competence and due care matters and integrity breaches.

The PCC referred to the factors identified by the Court in *Roberts v Professional Conduct Committee of the Medical Council of New Zealand* [2012] NZHC 3354 as being relevant where tribunals are determining penalty. They are, which penalty:

- Most appropriately protects the public and deters others;
- Facilitates the Tribunal's important role in setting and maintaining professional standards;
- Reflects the seriousness of the misconduct;
- Punishes the practitioner (although subsequently Courts have taken the view that punishment is more a by-product of the other factors);
- Allows for the rehabilitation of the practitioner, where appropriate;
- Promotes consistency with penalties in similar cases;
- Is the least restrictive penalty appropriate in the circumstances; and
- Looked at overall, is the penalty which is fair, reasonable and proportionate in the circumstances

The PCC also referred to the Appeals Council's decision in *Lee* (19 July 2013) where at [50] the Council stated that as a general rule, a finding of professional misconduct will normally result in the Member being struck off or at least suspended.

Here the PCC considered the key factors were the protection of the public and the maintenance of professional standards. It accepted that strike off would be inappropriate – it is not the least restrictive penalty and that penalty should be reserved for the most serious of offences which these were not. The Tribunal agrees.

In addressing the appropriate period of suspension, the PCC referred the Tribunal to a number of its more recent decisions, all but the last listed below involving misconduct in a professional capacity.

In *Hennessy* (28 July 2015), the Member had significant conflicts of interest that were not properly identified and not managed, which resulted in the intertwining of his personal and professional interests. He favoured his own interests at the expense of his clients. He was suspended for two years. But for mitigating circumstances, he may well have been struck off.

In *Moffat* (19 December 2014), the Member prepared financial statements and filed tax returns knowing them to be false and misleading. There was also conflict of interest, self-interest and financial benefit involved. He was suspended for two years.

Gormack (14 November 2016) involved numerous and significant conflicts of interest, as well as misleading conduct and self-interest (including an initial attempt to obtain a significant financial gain at the expense of the Member's clients). He was struck off.

Miller (18 September 2017) has a number of similarities to the present case. The Member recommended to his clients a retrospective amendment to the accounting treatment of an asset of $740,000 without a proper basis for doing so, which resulted in that asset not appearing in the financial statements of a company before it went into liquidation (no financial statements had in fact been altered). The Member then provided misleading information to the liquidator. The Member was suspended for two years. The PCC considered Miller's conduct to be more egregious than the Member's in this case.

In *Chan* (5 February and 28 March 2018), there were numerous particulars including mishandling (but not misappropriating) client funds and other client money issues and the provision of false or misleading information. The Member was suspended for two years.

In *Horrell* (17 January 2019) – conduct unbecoming an accountant - there were conflicts of interest which were serious and sustained and clear evidence of substantial self-interest. Given the circumstances of the offending the Member was suspended for four years,

The Member submitted that if the Tribunal considered it was necessary to levy a suspension, he could understand that but he would also like his resignation to be accepted.

The Member acknowledged both the shortcomings in his practice and his wrongdoing. He noted that at the time of the conduct referred to in Particular 1 he was under considerable stress as a result of the problems he was having with his partners in trying to exit the firm – also there were time pressures in trying to achieve the sale of the business on good terms as otherwise a financier would have appointed a receiver. He believed he was doing the best for his client. He acknowledged that although that explains some of his conduct, it does not excuse it. He accepted that he did not meet the standards expected of a chartered accountant in relation to all three matters.

However, the Tribunal is concerned that the Member does not have complete insight into his misconduct – for example, he describes his conduct in Particular 2(a) as a mistake when it was far more serious than that.

Members must understand that when doing the best for their clients, they must do so in a way that does not result in a breach of the Rules or the Code of Ethics. Here the Member went too far.

In reaching its decision the Tribunal has also had regard to the following:

- The Member's previously unblemished record;
- There was no self-interest or personal benefit from the conduct;
- The testimonials produced by the Member (including two from other professionals, one of whom was aware that he was involved in disciplinary proceedings);
- The Member's significant community service, including his work with disadvantaged youth;

Although not a factor in assessing penalty, the Tribunal observes that, as a result of the circumstances, the Member's files have been the subject of considerably more scrutiny than would normally be the case but only three matters (out of a client base of close to 200) have been brought before this Tribunal – three too many, but it would appear the Member's shortcomings are not more widespread.

Having regard to all the circumstances, particularly the fact that there was no self-interest and the Member derived no personal benefit from his actions, the Tribunal considers that the penalty which most appropriately reflects the *Roberts* factors, including the maintenance of professional standards and deterrence of others, is a period of suspension for 12 months. Simply allowing the Member to resign is not an option – his conduct warrants disciplinary sanction.

Pursuant to Rule 13.51(b) of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that Andrew James Brady be suspended from membership of the Institute for a period of 12 months.

COSTS

The Professional Conduct Committee seeks full costs of $39,151, including an estimate of $600 to publish the decision in the local newspaper.

The Tribunal's general approach is that the starting point is 100% of costs, noting that the Institute already bears the cost of abandoned investigations and costs up to the Professional Conduct Committee's decision to hold a Case Conference.

The PCC submitted that all but one part of one particular was proved. In relation to the amendment to Particular 1(b), the Member's evidence, and his agreement to amend the particular and subsequent concessions in relation to it, were not available to the PCC until the day of the hearing. There is therefore no reason to depart from the general approach.

The Member submitted that because his access to his client records was denied, that necessitated the appointment of the investigator and unnecessary costs associated with the appointment. The process would have been a lot more efficient if the PCC had requested that he be allowed access to his records.

The Member cooperated with the PCC in relation to the disciplinary process – the only particulars he denied were those where he believed the bar was being set far too high by the PCC.

Access to the client records is addressed below. However, the Tribunal considers that the nature of the complaints were such that an investigator would probably have been appointed in any event.

Having regard to all the circumstances, including its decision on the extent of publication, the Tribunal considers that an award of $32,000 is fair and reasonable.

Pursuant to Rule 13.53 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the Member pay to the Institute the sum of $32,000 in respect of the costs and expenses of the hearing before the Disciplinary Tribunal and the investigation by the Professional Conduct Committee. No GST is payable.

PUBLICATION AND SUPPRESSION ORDERS

The PCC sought publication of the Tribunal's decision on the CAANZ website, in *Acuity* and in the local newspaper, with mention of the Member's name and locality.

The Member sought suppression of his name. He was no longer in public practice so there would be no public benefit or no public protection aspect in publishing his name. He also submitted that further publishing his name would identify the clients the subject of the hearing, creating potential damage for them.

The Courts have held that in order to provide for the public interest in open justice and transparency, freedom of speech and the maintenance of confidence in the professional

disciplinary process, publication will be required in most cases – particularly where the case, as here, involves a serious charge. This position is strongly reflected in the Institute's Rules (Rule 13.44(1a) of the 2014 Rules)[3]. Public interest includes the interest in knowing the identity of a person found to have been guilty of a disciplinary offence, and avoiding impugning the reputation of other members.

However, the Tribunal must weigh these public interest considerations with the private interests of the Member. In *Whyte* (8 April 2014), the Appeals Council confirmed that unless there are special circumstances which justify a decision to limit or prohibit publication, publication will follow a finding of guilt. In *Qui* (21 May 2018), the Appeals Council held that where the private interests related to the health of the member, there would need to be compelling evidence of a highly prejudicial effect of publication on the member's health when considering whether the prejudicial effect outweighed the public interest.

Here, the Charge is serious and the Member's conduct was in part public facing. Although the Member states that he does not intend to return to public practice, that is not in itself a reason to suppress his name. As to the potential effect on the clients, the Tribunal cannot see that, in light of the suppression orders it proposes to make, publication will have any adverse impact on them.

The Tribunal considers that the public interest factors referred to above significantly outweigh the private interest factors to which the Member has referred. The application for name suppression is declined.

However, in light of the fact that the Member is no longer in private practice and not employed as an accountant in any business and it appears he is unlikely to be, the Tribunal does not consider that any wider publication than on the website and in *Acuity* is necessary.

Pursuant to Rule 13.78 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the names of the Member's and firm's clients and any information or documents which might identify them, be suppressed.

In accordance with Rule 13.55 of the Rules of the New Zealand Institute of Chartered Accountants the decision of the Disciplinary Tribunal shall be published on Chartered Accountants Australia and New Zealand's website and in the official publication *Acuity*, with mention of the Member's name and locality.

MEMBER'S ACCESS TO FILES

In a letter to the Institute dated 27 April 2018, the Member advised that his solicitor had written to the Member's former firm requesting access to the records relating to some of the matters the subject of these proceedings - that correspondence was in the context of the firm's alleged default in repaying an amount owed to the Member in relation to his retirement from the firm. It would appear that the Member's lawyers had made it clear that they were happy to discuss the best way for access to occur to ensure all parties were comfortable with the arrangements. The firm refused to provide access.

[3] The Tribunal considers that the Rule in force at the time the complaint was made applies (the current Rule dealing with publication being less favourable to the Member).

At the hearing the Member advised that he had also requested access to the relevant files for the purposes of responding to the complaint made to the Institute, and those requests were also refused. The Tribunal expressed concern about this situation and invited the firm to explain why access had been refused.

In the Tribunal's view, the explanation received from the firm following the hearing is at best disingenuous. Reference is made to unfettered access and direct access to computer systems and the possibility of providing the Member with copies of specific documents and records he requested. It appears that the Member did ask for documents and records – the three client files that he was involved with that related to the complaint. Given the time that had elapsed, the firm's submission that the Member would know which specific documents to request without the need to first review the files is simply untenable.

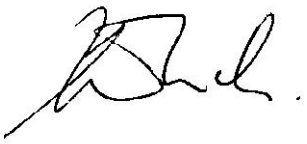
The Tribunal considers that appropriate arrangements could have been made for the Member to access the files without accessing the firm's computer systems, and without breaching client privilege or professional indemnity insurance provisions (the other stated concerns of the firm). In the Tribunal's view, for the firm not to cooperate in making those arrangements was unacceptable, more so because it was the firm which made the complaint.

However, in the circumstances (including that the investigator's report and supporting documents were provided to the Member, the basis on which the investigator gave evidence, the nature of that evidence and the admissions made by the Member), the Tribunal does not consider that there has been a breach of natural justice – or at least any breach which would have resulted in a miscarriage of justice. The Tribunal does not understand the Member to be claiming otherwise.

RIGHT OF APPEAL

Pursuant to Rule 13.63 of the Rules of the New Zealand Institute of Chartered Accountants, the parties may, not later than 21 days after the notification to the parties of this Tribunal's exercise of its powers, appeal in writing to the Appeals Council of the Institute against the decision.

No decision other than the direction as to publicity and the suppression orders shall take effect while the parties remain entitled to appeal, or while any such appeal by the parties awaits determination by the Appeals Council.



MJ Whale FCA
Chairman
Disciplinary Tribunal