Disciplinary Tribunal of Chartered Accountants Australia and New Zealand (CA ANZ) Written decision dated 13 December 2019

Case Numbers: D-1212 and D-1211

Members: Suelen McCallum CA and Riad Tayeh FCA of NSW

Hearing Date: 27 November 2019

Tribunal: David Fairlie (Chair and lay member of the Tribunal)
Ross Haslam FCA
Bob Grice AO FCA

Tribunal Legal Adviser: Jamesina McLeod

Representation: Paul Forbes for the Professional Conduct Committee (PCC)
Greg O'Mahoney with Stephen Morrissey for the Members

Decisions:

1. The Tribunal determined that:
   (a) the Members were the subject of adverse or unfavourable findings in relation to their professional or business conduct and competence;
   (b) the Members did commit breaches of *APES 110, Code of Ethics for Professional Accountants* and *APES 33o, Insolvency Services*; and
   (c) the Members' acts, omissions and defaults associated with 1(a) and (b) above did bring discredit on them, CA ANZ and the profession of accountancy.
2. The Tribunal imposed the following sanctions on each Member:
   (a) a censure;
   (b) that the Members' firm be subject to a quality review as soon as practicable, with the results of that quality review to be provided to the PCC.
3. The Tribunal imposed a cost sanction on each Member in the sum of $8,500 towards the 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) with the consent of the parties, both matters be heard together;

(b) its decision with reasons, mentioning the Members' names and localities, be published on the CA ANZ website (the **Published Decision**);

(c) a notice mentioning the Members' names and localities with a web address for the Published Decision be published in the CA ANZ digital and print magazine "Acuity";

(d) the Australian Securities and Investments Commission, Australian Restructuring Insolvency & Turnaround Association and Turnaround Management Association be notified of this decision;

(e) 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;

(f) the decision regarding confidentiality takes effect immediately; ie 27 November 2019.

The date of effect of this decision is 4 January 2020.

1. Introduction

(a) In around July 2019 CA ANZ became aware that the Australian Restructuring Insolvency & Turnaround Association (**ARITA**) had published a media release regarding a decision in March 2019 made by its Professional Conduct Committee about the Members which included findings that:

(i) accepting appointment as a liquidator subsequent to a material prior professional relationship constituted "*reckless, negligent or intentional behaviour or behaviour without mitigating factors within the scope of section 6.18.2C of the ARITA Code of Professional Practice*";

(ii) a financial penalty of $10,000 was imposed against the Members;

(iii) the Members were directed to "*attend ARITA's Essential Skills – Insolvency: Independence course at the next available opportunity*";

(**ARITA Determination**)

and the CA ANZ PCC initiated complaints in the same terms against each Member pursuant to the powers conferred by By-Laws 40(4.1) and 40(5.1) (the **Complaints**).

(b) After investigating the Complaints, the PCC referred the Members to the Tribunal by way of Notices of Disciplinary Action which alleged that:

1. the Members had been the subject of adverse or unfavourable findings by ARITA in relation to their professional or business conduct, competence or integrity;

2. the Members had committed a breach of sections 100.5(b), 120 and 220.5 of *APES 110 – Code of Ethics for Professional Accountants* (**APES 110**) and sections 4.13 and 4.20 of *APES 330 – Insolvency Services* (**APES 330**);

3. the Members' acts, omissions and defaults brought or could bring discredit on them, CA ANZ or the profession of accountancy.

(c) It was uncontested that:

(i) on 15 December 2016 the Members' firm issued a valuation report of the company then known as Hemisphere Technology Pty Ltd (**Hemisphere**) "*for use by management and shareholders in negotiations for the possible sale of the existing business and/or assets*" (the **Valuation**);

(ii) on 22 December 2016 Hemisphere sold, at a price consistent with the Valuation, certain assets (comprising trade debtors, stock and certain documents and records) to Hemisphere Technologies Australia Pty Ltd (**HTA**), and then on 23 December 2016 changed its name to its ACN;

(iii) on 17 January 2017 the Members accepted appointment as joint and several liquidators of Hemisphere;

(iv) on 27 January 2017 the first meeting of Hemisphere creditors was held;

(v) on 17 April 2018 the Members issued an Annual Report to Creditors (the **Report to Creditors**) which included the statement "*We do not believe the sale of the Company's assets prior to the appointment of liquidators is a voidable transaction, as it appears that sale transaction is consistent with the valuation and fair value appears to have been paid for the assets*";

(vi) on 29 June 2018 Justice Gleeson issued his judgment in the matter of *ACN 152 546 453 Pty Ltd (formerly Hemisphere Technologies Pty Ltd) (in liq)* [2018] NSWSC 1002 which granted appointment of an additional or special purpose liquidator on the application of Hemisphere's largest creditor (**Gleeson JA judgment**).

(d) The Members consented to their matters being heard together, and relied on joint written submissions and joint oral submissions such that the Tribunal was satisfied that submissions made in respect of one Member applied to the other (unless otherwise indicated).

2. The issues for determination

(a) Did ARITA make adverse or unfavourable findings in relation to the Members' professional or business conduct, competence or integrity, in breach of By-Law 40(2.1)(e)? (allegation 1)

(b) Did the Members breach APES 110 or APES 330 in the circumstances alleged, in breach of By-Law 40(2.1)(h)? (allegation 2)

(c) Did the acts, omissions and defaults associated with the matters described in allegations 1 and 2 bring, or potentially bring, discredit upon the Members, CA ANZ or the profession of accountancy, in breach of By-Law 40(2.1)(k)? (allegation 3)

(d) If the answer to (a), (b) or (c) was yes, what sanctions should be imposed on the Members?

(e) Should the Members be required to pay costs and if so, in what amount?

(f) Should other parties be notified of the Tribunal's decision?

(g) Should any confidentiality orders be made?

3. Did ARITA make adverse or unfavourable findings in relation to the Members' professional or business conduct, competence or integrity, in breach of By-Law 40(2.1)(e)? (allegation 1)

3.1 Agreed facts

The PCC and the Members agreed that the ARITA Determination contained adverse or unfavourable findings in relation to the Members' professional or business conduct.

3.2 PCC submissions

The PCC submitted that the allegation was made out by the findings of ARITA as published in the ARITA Determination. In response to the Members' submissions that little store should be placed on ARITA's conclusions due to the absence of any document exposing in detail the reasoning on which those conclusions were based, the PCC referred to the following evidence which had been provided by the Members:

(a) letter of 16 July 2018 to the Members in which ARITA set out its concerns:

> "…*ARITA notes that the* [decision in the matter of ACN 152 546 453 Pty Ltd (formerly Hemisphere Technologies Pty Ltd) (in liq) [2018] NSWSC 1002 dated 29 June 2018 ("the Decision")] *indicates that:*
> - *dVT Consulting Pty Ltd prepared* [the Valuation] … *for* [Hemisphere] *on 15 December 2016; and*
> - *you were appointed liquidators of* [Hemisphere] *on 17 January 2017 notwithstanding your prior professional relationship.*

> *...The nature of the work undertaken, namely the preparation of* [the Valuation] *"to assist management in forming a view on the value to* [Hemisphere] *for purposes of negotiations in relation to the business value of* [Hemisphere]*" and the reliance on* [the Valuation] *for a pre-appointment sale of the business to a related party, would be subject to review by a liquidator thereby placing you in a position of actual conflict of interest..."*;

(b) letter of 30 August 2018 to the Members in which ARITA further set out its reasoning:

> *"...ARITA's Professional Conduct Committee (PCC) has considered the concerns raised regarding the prior professional relationship your firm had with* [Hemisphere] *and its impact on your independence and ability to accept the subsequent appointment as liquidator...*
>
> *Having considered all of the information provided in this matter, including the Decision, the PCC has determined that Company Disciplinary Proceedings are to be commenced against you on the basis that the prior professional relationship constitutes a precluded relationship and your actions in accepting the subsequent appointment constitutes reckless, negligent or intentional behaviour...*
>
> *...the liquidators expressed the opinion that the sale of the Company's assets prior to the appointment of the liquidators was not a voidable transaction as it appeared (to the liquidators) that the transaction was consistent with the* [Valuation]*..."*;

(c) notification of ARITA's decision to the Members on 10 December 2018 setting out further reasoning behind the decision which the PCC submitted was "in clear and succinct terms"; and

(d) further letter from ARITA to the Members dated 28 February 2019.

3.3 Member submissions

(a) The Members submitted that although they did not contest that ARITA had made adverse or unfavourable findings in relation to their professional or business conduct, little store should be placed in the reasoning and determinations of ARITA. The Members submitted that, despite repeated requests by the Members to ARITA to provider further reasons, there was no document which explained the ultimate reasoning on which the conclusions of ARITA were based, and so the Tribunal could not form a view as to the cogency or force of ARITA's reasoning or the findings of ARITA.

(b) The Members also submitted that the findings did not enable them to grapple with that reasoning, so as to, for example, be in a position to highlight deficiencies which weigh against reliance on ARITA's conclusions for the purposes of the present hearing. In the circumstances, the Tribunal ought not merely adopt the decision of the ARITA.

(c) In making this submission, the Members referred to the letters received by the Members from ARITA referred to in 3.2(a) to (d) above.

3.4 Tribunal decision and reasons

(a) To find that there had been a breach of By-Law 40(2.1)(e), it was necessary to establish:

(i) there had been an adverse or unfavourable finding in relation to the Members;

(ii) the finding was made in relation to the Members' professional or business conduct, competence or integrity; and

(iii) the finding was made by a court of law, professional body, royal commission, statutory authority, regulatory authority, statutory body, commission or inquiry in any jurisdiction in Australia or elsewhere.

(b) It was uncontested, and the Tribunal found, that the decision published by the Australian professional body ARITA contained adverse findings in relation to the Members' professional or business conduct and competence. It followed that the breach of By-Law 40(2.1)(e) was established. The Tribunal considered the Members' and the PCC's submissions, however the Tribunal is not required to, and in this instance did not, go behind the reasons for the adverse or unfavourable findings made by ARITA to establish a breach of this By-Law.

4. Did the Members breach APES 110 and APES 330 in the circumstances alleged, in breach of By-Law 40(2.1)(h)? (allegation 2)

4.1 PCC submissions

(a) The PCC submitted that the Members should have declined to act as liquidators of Hemisphere when asked because:

(i) the Members' firm had acted for the entity within the prior two years in breach of the ARITA Code of Professional Practice for Insolvency Practitioners (**ARITA Code**) and APES 330, and in fact had acted for the entity only a few weeks prior to accepting engagement as liquidators; and

(ii) the matter in respect of which the Members had advised Hemisphere was material and was very likely to be the subject of dispute in the liquidation as:

(1) the engagement to provide a valuation of the entirety of the business of Hemisphere, in circumstances where that business was obviously in some financial difficulty, and with a view to what turned out to be an immediate sale followed by an immediate winding up, was very significant;

(2) Hemisphere's major creditor raised the significance of the Valuation at the first creditors' meeting;

(3) the Members effectively had to undertake a review of their own work and consider whether the sale was a voidable transaction. The Report to Creditors stated that the Members did not believe that the sale was a voidable transaction because it appeared to be consistent with the Valuation. The Members did not state in the report to creditors that Ms McCallum had prepared the Valuation.

In making this submission, the PCC referred to the following evidence:

(iii) the Valuation; and

(iv) the Report to Creditors.

4.2 Member submissions

(a) The Members submitted that the circumstances surrounding their appointment as liquidator enlivened the exception to the "two year rule" set out at s 6.8.1 of the ARITA Code. The Members made this submission having regard to the following matters:

(i) the Valuation assignment which occurred prior to their appointment as liquidators was "of limited scope" (ARITA Code, s 6.8.1A). It was confined to the provision of a valuation report to the management of Hemisphere in circumstances where the

Members were advised that Hemisphere had ceased trading, and was considering selling its remaining stock and assets to a third party;

(ii) while the Valuation was prepared "to assist" and "for use by" management of Hemisphere, neither the Members nor their firm provided any advice to Hemisphere's management in respect of any matter, including any sale of Hemisphere's assets. In other words, apart from the provision of the Valuation, the Members had not provided any services to Hemisphere or its management;

(iii) the Valuation assignment was for "limited time and/or fees" (ARITA Code, s 6.8.1A). In this regard:

(1) the entire engagement from beginning to the provision of the completed Valuation comprised a period of approximately 60 days (part of which involved the Members waiting for final figures in respect of stock and debtors);

(2) the Members' firm was paid $10,000 for the services provided in respect of the Valuation;

(iv) the Valuation was disclosed to Hemisphere's creditors immediately upon the Members being appointed as liquidators. Specifically, the following matters were disclosed in the Declaration of Independence, Relevant Relationships and Indemnities (**DIRRI**):

(1) the fact that prior to the Members' appointment as liquidator, their firm was engaged by Hemisphere to provide its management with the Valuation;

(2) the fact that the Members' firm was paid $10,000 for the Valuation;

(3) the fact that their appointment as liquidators occurred approximately four and a half weeks after the Valuation was provided to Hemisphere;

(4) the work undertaken in preparing the Valuation would assist the Members in developing an understanding of Hemisphere and its activities;

(5) the nature of the Valuation was such that it would not be subject to review and challenge during the course of the liquidation;

(6) the Valuation assignment would not interfere with the Members' (and most particularly Ms McCallum's, as the author of the Valuation) ability to comply fully with the statutory and fiduciary obligations associated with ensuring the liquidation of Hemisphere proceeded in an objective and impartial manner;

and no creditor raised an issue with respect to these matters.

(b) The Members also submitted that there had been no breach of the "Fundamental Principles" set out at s 100.5(b) of the Code of Ethics (or of s 120 which is similarly directed towards objectivity), where they at all times had sought to exercise their duties and responsibilities as liquidator independently, fairly and objectively. In the Report to Creditors, the Members wrote: "*We do not believe that the sale of* [Hemisphere's] *assets prior to the appointment of liquidators is a voidable transaction, as it appears that sale transaction is consistent with the valuation and fair value appears to have been paid for the assets*" (see part 2.2). This conclusion, and the reasoning on which it was founded, was arrived at objectively. The Members submitted that the evidence before the Tribunal fell short of establishing the requisite effect on their professional or business judgment.

(c) In respect of the alleged breach of s 220.5 of the Code of Ethics, the Members repeated and relied on the matters outlined at (a) and (b) above. The Members had formed the view, in

good faith and following careful consideration, that the potential conflict of interest could be *"eliminated or reduced to an Acceptable Level through the application of safeguards"*. Section 2 provides that "Acceptable Level" means *"a level at which a reasonable and informed third party would be likely to conclude, weighing all the specific facts and circumstances available to the Member at that time, that compliance with the fundamental principles is not compromised"*. The safeguard on which they principally relied was that of disclosing their earlier engagement (as well as the nature and scope of that engagement, together with the fees referable to it) to the stakeholders most capable of being affected by any conflict of interest arising - Hemisphere's creditors.

(d) In relation to the alleged contraventions of ss 4.13 and 4.20 of APES 330 the Members submitted:

(i) the relevant professional service was not material for the reasons (and in the circumstances) outlined previously;

(ii) there could be no suggestion that the services provided "related to the structuring of assets ... in order to avoid the consequences of insolvency"; and

(iii) the discrete services provided by the Members' firm prior to their appointment did not have the reasonable potential to lead to litigation claims. While the possibility of litigation attends the provision of almost any professional services by chartered accountants, the evidence fell short of demonstrating the necessary "reasonable potential" as at the relevant time (ie when accepting appointment) for these proceedings. There was nothing in the content of the Valuation, the circumstances in which it was commissioned and undertaken, or the manner in which it was provided which founded any such reasonable potentiality.

(e) In making this submission, the Members referred to the following evidence:

(i) the ARITA Code;

(ii) APES 110 and APES 330; and

(iii) the DIRRI.

4.3 Tribunal decision and reasons

The Tribunal considered the PCC's and the Members' submissions and determined that the Members had breached By-Law 40(2.1)(h) as alleged:

(a) in relation to APES 110 sections 100.5, 120.1 and 120.2 - the Tribunal was of the view that the Members' conduct lacked objectivity because:

(i) in their acceptance of appointment as liquidators, the Members stated only in the DIRRI that *"...Prior to our appointment, dVT Consulting Pty Ltd, an associate company of the Firm (as defined in the Code), was engaged by the Company to provide management with a valuation report. We were appointed approximately four and a half weeks after the report was provided to management. dVT Consulting was paid $10,000.00 for the services provided..."*;

(ii) at the first meeting of creditors when the Report to Creditors was challenged by a creditor, the Members still did not consider they had a conflict and ought resign as liquidators;

(iii) the Members' conduct gave rise to a perceived lack of objectivity;

(iv) the Members should not have accepted the appointment due to the threat of conflict; and

(v) the Members had not obtained any independent legal advice or other professional advice including from CA ANZ on whether the conflict could be managed;

(b) in relation to APES 110 section 220.5 - the Tribunal was of the view that the Members should not have accepted the appointment as liquidators because there was a conflict of interest and they did not seek to eliminate or reduce it to an acceptable level through the application of safeguards;

(c) in relation to APES 330 section 4.13 - the Tribunal was of the view that the Members had not complied with their professional independence obligations under this section because it considered the professional service to be material as that expression is used in the section, namely that it was likely to be subject to review by the Members during the course of the administration; and

(d) in relation to APES 330 section 4.20 - the Tribunal was of the view that the Members had not complied with their professional independence obligations under this section, in particular because the appointment had a potential to lead to litigation.

5. Did the acts, omissions and defaults associated with the matters described in allegations 1 and 2 bring, or potentially bring, discredit upon the Members, CA ANZ or the profession of accountancy, in breach of By-Law 40(2.1)(k)? (allegation 3)

5.1 Agreed facts

The following publications referred to the Members and were in the public domain:

(a) ARITA Determination;

(b) media article *DVT Pair Fined $10,000*, Insolvency News Online 20 March 2019; and

(c) Gleeson JA judgment.

5.2 PCC submissions

(a) The PCC submitted that the Members had brought discredit to themselves, CA ANZ and the profession of accountancy:

(i) the Members' conduct had been the subject of litigation and publicity, and it remained possible that there would be further investigations and potentially more public proceedings as a consequence, which may impact upon them as Members and on CA ANZ and the profession even more broadly;

(ii) the Members are both leaders of their firm. They hold Certificates of Public Practice and their conduct reflected on their firm and, by extension, all of those accountants who work there, and other accountants in public practice.

(b) In making this submission, the PCC referred to the following evidence:

(i) ARITA Determination;

(ii) media article *DVT Pair Fined $10,000*, Insolvency News Online 20 March 2019; and

(iii) Gleeson JA judgment.

5.3 Member submissions

The Members submitted that, with the benefit of hindsight and the events that have unfolded since their appointment, if they had their time over, the Members would have conducted themselves differently. Each is a deeply experienced, proud, longstanding member of the profession with an unblemished reputation for which they have worked extremely hard over many years. The Members accepted that their conduct had caused damage and discredit to the profession, those charged with ensuring standards within it, their colleagues and themselves, and emphasised that this was a matter of sincere regret which would not be repeated as the Members would seek legal advice next time in relation to any potential conflicts of interest.

5.4 Tribunal decision and reasons

The Tribunal, having considered the PCC's and the Members' submissions, determined that the Members had breached By-Law 40(2.1)(k) as alleged because:

(a) the Members' conduct had received adverse publicity and was likely to receive further adverse publicity;

(b) the Members are senior partners and role models of their firm which has 5 partners and 30 staff;

(c) the acts, omissions and defaults associated with the matters described in allegations 1 and 2 brought, and had further potential to bring, discredit upon the Members, CA ANZ and the profession of accountancy.

6. What sanctions should be imposed on the Members?

(a) Regulation 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.

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.

(b) The PCC submitted that:

(i) the Members should each be censured;

(ii) a quality review of the Members' firm should be undertaken:

(1) at their cost;

(2) with particular attention to conflicts of interest; and

(3) for the results of that review to be communicated to the PCC.

(c) The PCC referred to the Guidelines and noted that, in determining appropriate sanctions, the Tribunal:

> must balance the interests of the Member[s] against the public interest, the reputation of CA ANZ, and the need to support the integrity of the profession of accounting those of CA ANZ

The PCC submitted that the Tribunal should have regard to the following matters:

(i) the seriousness of the conduct. It is a serious matter for a member in public practice to accept an engagement where the possibility of conflict was so obvious and so obviously important in relation to the Members' responsibility and accountability for the conduct. It was clear that the Members themselves were the individuals who decided whether or not to accept this engagement and they should take full responsibility for the consequences of breaching the By-Laws;

(ii) the maintenance of proper standards of professional conduct. The sanctions imposed must send a message to the profession that conflicts cannot be taken lightly.

(d) The Members accepted that a censure was an appropriate sanction because:

(i) the conduct fell at the lower end of the scale;

(ii) it was discrete conduct, and did not form part of a recurring pattern of conduct;

(iii) it was conduct of the kind in which the Members had never previously been involved;

(iv) there was no suggestion that either of the Members had at any time proceeded other than in good faith. The Members had been completely frank about their shortcomings. If such a situation were to arise in the future, the Members would make a point of obtaining legal advice from a practitioner suitably qualified in the area of conflicts of interest as a priority before accepting any such appointment;

(v) they had already been sufficiently punished by ARITA in its findings;

(vi) they are people of good character, with good reputations in the profession and the wider community, who are highly regarded by their clients.

(e) The Members did not object to a quality review of their firm being undertaken.

(f) The Tribunal considered the PCC's and the Member's submissions and determined that each Member should be censured and that the Members' firm should be subject to a quality review, with the results of that review to be provided to the PCC. In reaching this decision the Tribunal considered in particular:

(i) the Members' conduct, which the Tribunal considered to be serious. Conflicts of interest, including the possibility of conflicts, are not to be taken lightly;

(ii) the Members' personal responsibility and accountability for their conduct. There were no other members of their firm responsible; and

(iii) the need to maintain proper standards in the profession.

However the Tribunal was satisfied that:

(iv) the conduct was not systemic;

(v) the Members admitted that the conduct was not best practice and submitted that, were the situation to arise again, they would act differently;

(vi) the Members at all times had acted in good faith;

(vii) the Members had already been fined by ARITA; and

(viii) ARITA had ordered the Members to undertake further relevant education;

so that more serious sanctions were not warranted.

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

(a) Regulation 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 sought the full costs of the proceedings against the Members in the amount of $10,225 each. The PCC submitted that, with respect to the eight factors which must be considered by the Tribunal in exercising its discretion not to award costs or only part of the costs claimed:

(i) with respect to (a), the complaint was established;

(ii) as to (b), the PCC regarded the Members' conduct as serious;

(iii) as to (c), the PCC accepted that both Members have been cooperative and while they did not accept ultimately that their conduct constituted a breach of the regulations, the PCC also accepted that they had shown genuine remorse and a commitment to ensure that the conduct would not be repeated;

(iv) as to (d), the PCC had not offered a consent agreement in this matter as it was considered that the matters were of high public interest, requiring referral to the Disciplinary Tribunal;

(v) as to (e), the costs sought against each Member were reasonable in the circumstances, particularly where the complaint was serious and has been established;

(vi) as to (f), there had been extensive investigation of the complaint and the PCC's casefiles were large. The amount assessed for each Member would have been greater if the hearings against each Member had been conducted separately;

(vii) as to (g), the Members had not previously been required to pay costs in relation to these disciplinary proceedings; and

(viii) as to (h), the costs were fair and reasonable and within the amounts provided in the guidance.

(c) The Members accepted that the appropriate course was for them to pay reasonable costs which they submitted in the circumstances would be for the Members to equally pay costs in the amount assessed against one of the Members. The Members submitted that there should be no duplication of costs given that:

(i) there was a complete overlap of factual and legal issues;

(ii) there had been no factual debate;

(iii) they had tried to engage constructively with the disciplinary process and the Tribunal in a way that would result in a short hearing.

(d) The Tribunal, having considered the PCC's and the Members' submissions, and each of the criteria in Regulation 8.12, determined that each Member should pay $8,500 towards the costs of the proceedings. Although the costs awarded were less than those sought by the PCC, the Tribunal was of the view there had been some overlap as the complaints were presented, and the hearings conducted, on a joint basis. Pursuant to Regulation 8.12(h) the Tribunal determined to award costs in a lesser amount than that sought by the PCC.

8. 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:

(i) the Australian Securities and Investments Commission;

(ii) ARITA; and

(iii) Turnaround Management Association;

be notified of this decision.

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 Members may, within 21 days after the notification of the written decision with reasons to the Members 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

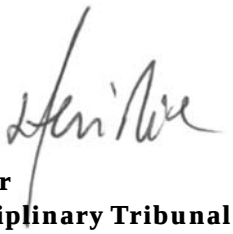
(b) sanction

(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 members of Chartered Accountants Australia and New Zealand (**CA ANZ**) the Members are liable to disciplinary action in accordance with:

1. By-law 40(2.1)(e), in that the Members have been the subject of adverse or unfavourable findings in relation to their professional or business conduct, competence or integrity by a professional body, in circumstances where in December 2018:

    a) the Australian Restructuring Insolvency and Turnaround Association Professional Conduct Committee (**ARITA PCC**) decided that the Members' conduct in accepting an appointment as liquidators of the Company approximately one month after preparing a valuation report on its behalf constituted "*reckless, negligent or intentional behaviour... within the scope of section 6.18.2C of the ARITA Code of Professional Practice*"; and

    b) the ARITA PCC imposed a financial penalty in the amount of $10,000 and a direction that the Members attend an 'Insolvency - Independence' skills course.

2. By-law 40(2.1)(h), in that the Members have committed a breach of sections 100.5(b), 120 and 220.5 of APES 110, *Code of Ethics for Professional Accountants* and section 4.13 and 4.20 of APES 330, *Insolvency Services*, in circumstances where:

    a) the Members accepted an appointment as liquidator of a company for whom their firm had prepared a valuation report approximately one month earlier;

    b) the Members expressed an opinion in their report to creditors dated 17 April 2018 that the sale of assets was not a voidable transaction as it appeared to the Members to be consistent with the valuation their firm had prepared and thereby compromised the Members' professional or business judgment due to the inherent conflict of interest in considering, as liquidator, the work of their own firm in circumstances where the company and its director had acted in reliance upon that work prior to the liquidation;

    c) the valuation report, and the subsequent sale of assets by the company, was:

        (i) the subject of investigation by the Members as part of their role as liquidator of the company; and

        (ii) material to the administration of the liquidation; and

        (iii) had the reasonable potential to lead to (and in fact did lead to) litigation claims against the Members or the Members' Firm by a stakeholder in the liquidation.

3. By-law 40(2.1)(k), in that the acts, omissions and defaults associated with the matters described in paragraphs 1 and 2 above bring, or may bring, discredit on the Members, CA ANZ or the profession of accountancy.

SCHEDULE 2: RELEVANT BY-LAWS

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:

(a) has failed to observe a proper standard of professional care, skill, competence or diligence in the course of carrying out that Member's professional duties and obligations;

...

(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(10.12) 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:

...

(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(10.16) 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.

...

SCHEDULE 3: EXCERPTS FROM CODES

ARITA CODE OF PROFESSIONAL PRACTICE FOR INSOLVENCY PRACTITIONERS

3rd Edition as amended 18 August 2014

...

Part C: Guidance

...

6. Independence

...

6.8 Professional Relationships within two years

Subject to the exceptions identified below, Practitioners must not take an appointment if they have had a Professional Relationship with the Insolvent during the previous two years. The purpose of this restriction is to avoid any perception of a lack of independence of the Practitioner. This is referred to as the 'two year rule'.

6.8.1 Exceptions to the two year rule

A number of narrow exceptions to the two year rule have been created because the exceptions may, in the specific circumstances, be in the interests of creditors, or the professional relationship was of such a nature as to have no material bearing on the independence of the Practitioner.

The Practitioner must examine the particular circumstances carefully and document clearly the reasons why and how the decision to accept the appointment was reached.

The onus of justifying how independence is preserved when relying on any of these exceptions is on the Practitioner. It is not sufficient for a Practitioner to simply include the relationship in a DIRRI. Such a declaration will not cure a real or perceived lack of independence.

Practitioners must be able to explain the circumstances that give rise to the potential conflict and the reasons for believing the exception can be applied in the circumstances. This must be recorded in writing on the relevant file.

If a Practitioner is relying on an exception to the two year rule to be able to accept the Appointment, the details of the exception must still be disclosed in the DIRRI.

At a minimum the creditors must be fully informed so that they understand the situation. The Practitioner should also consider seeking legal advice to determine whether court approval of such appointments should be sought.

A. Immaterial Professional Relationship

Where the Practitioner has had a prior professional relationship with the Insolvent within a period of two years before the proposed appointment, the Practitioner may accept the appointment if the prior professional relationship was an immaterial professional relationship'.

An immaterial professional relationship is an assignment that:

- was of limited scope; and limited time and/or fees; and
- would not normally be subject to review by the Practitioner during the course of the Administration.

When determining whether the prior professional relationship was an immaterial professional relationship, the Practitioner must consider whether a fully informed reasonable person would be of the same view.

A Practitioner must disclose to creditors in the DIRRI:

- the nature of the services provided in the prior professional relationship;
- the period or periods over which the services were provided;
- the fees received for those services, the unbilled time costs and outlays, and any amounts written off; and
- the Appointee's reasons for believing that the services provided do not result in a conflict of interest or duty

Example	
Nature of professional service	Reasons
The tax division of XYZ Firm prepared and lodged a BAS for the company 18 months ago. After the lodgement of that BAS, the company did not continue to use XYZ Firm. A fee of $2,500 was paid for these services.	I believe that this relationship does not result in a conflict of interest or duty because: • XYZ Firm did not provide ongoing services to the company. Other than preparing and lodging one BAS, XYZ Firm had no other professional relationship with the company and no other professional services were provided to the company. • The preparation and lodgement of one BAS by XYZ Firm for the company is not a matter that would be subject to review during the liquidation and will not influence my ability to be able to fully comply with the statutory and fiduciary obligations associated with the liquidation of the company in an objective and impartial manner.

B. Pre-appointment communications and meetings

The need for Insolvents (individuals or companies) to seek prompt and appropriate advice about their financial position is emphasised by the law and by the Regulators. It is common for Practitioners to give such advice or other information to the Insolvent about the insolvency process and options available to the Insolvent prior to taking an Appointment. Most insolvencies are initiated by the Insolvent - for example, the company, through its directors, appoints a voluntary administrator, or the individual debtor appoints a controlling trustee - and in such cases, it is necessary for the Insolvent and their advisor(s) to meet with the Practitioner in order to obtain the Practitioner's agreement to be appointed, and for a consent to act to be obtained.

Example

- A company will generally need to approach a Practitioner for advice on the insolvency or likely insolvency of their company before the board resolves to appoint a Practitioner as administrator under s 436A of the Corporations Act;
- An individual will need to approach a Practitioner for advice on options in personal insolvency, for example between a personal insolvency agreement or bankruptcy.

Notwithstanding that the Practitioner may meet with the Insolvent and give advice, he or she is a professional with obligations to all stakeholders, and the mere fact of this initial contact having occurred should not be taken to constitute a bias or lack of independence if the Practitioner is appointed. This is the case provided that any advice or information given by the Practitioner is restricted to:

- the financial situation of the Insolvent;
- the solvency of the Insolvent;
- consequences of insolvency; and
- alternative courses of action available to the Insolvent in the case of insolvency.

If the Insolvent is a company, a Practitioner must exercise care when meeting with directors to determine whether he or she is being asked to advise (a) one of more of its directors in relation to the Insolvent company itself, (b) one or more of its directors in respect of their obligations/ liabilities as directors of the Insolvent company or (c) one or more of the directors of the Insolvent company in relation to their personal financial affairs.

The provision of advice to the directors in either capacity (b) or (c) creates a risk to independence that will prevent the Practitioner being appointed to the Insolvent company unless information provided is of a general nature about the insolvency process and the consequences of insolvency.

Any advice which involves the Practitioner obtaining a detailed understanding of the director's financial position or access to their personal documents with a view to addressing the director's own personal solvency, will create a risk to independence in connection with any appointment to the Insolvent company.

In any such meetings, the Practitioner should be mindful of these issues:

- The Practitioner must not give any assurance to the Insolvent, or other parties, about the outcome of the insolvency;
- The Practitioner must explain to the Insolvent that information provided by them to the Practitioner at the meeting may be used by the Practitioner for the purpose of the Administration, unless otherwise stated; and
- The Practitioner should explain to the Insolvent that the Insolvent itself will have obligations to, or become subject to claims of the, or any, Practitioner in any Appointment.

If it becomes apparent that the director is seeking anything other than general information in either their capacity as a director or their own personal capacity, then if the Practitioner wishes to leave open the prospect of an appointment to the company, the Practitioner should recommend that the director obtain that advice from another Practitioner.

While pre-appointment communications and meetings generally raise no question of independence, a Member must disclose the circumstances whereby they had contact with the Insolvent prior to the appointment. The DIRRI has provisions for those circumstances to be disclosed.

The DIRRI does recognise that there can be instances where there is no contact at all with the Insolvent; for example in court appointments, or bankrupt estates transferred by the Official Receiver.

A Practitioner must disclose to creditors in the DIRRI:

- the number of meetings and time period over which advice was provided to the Insolvent, officers of the Insolvent (if the Insolvent was a company) and/or their advisors prior to the Appointment;
- a summary of the general nature of the issues discussed;
- the amount of any Remuneration received for this advice; and
- the Appointee's reasons for believing that the relationship does not result in a conflict of interest or duty.

If the Appointment is to a company, the Practitioner must disclose to creditors in the DIRRI:

- the names of the directors attending the meetings.

A Practitioner must also make a declaration that no information or advice, beyond that outlined in the DIRRI, was provided to the Insolvent, officers of the Insolvent (if the Insolvent was a company) or their advisors.

Example

Circumstances of appointment

This appointment was referred to me by XYZ Law Firm, the legal advisor to the company.

I had two meetings with the company, its directors (Mr A and Mr B) and legal advisor during the month prior to my appointment for the purposes of:

- obtaining sufficient information about the company to advise the company, its directors and legal advisors on the solvency of the company,
- to clarify and explain for the company and its directors the various options available to the company and the nature and consequences of an insolvency appointment, and
- for me to provide a consent to act.

I received no remuneration for this advice.

I believe that these meetings do not result in a conflict of interest or duty because:

- the Courts and ARITA's Code of Professional Practice specifically recognise the need for practitioners to provide advice on the insolvency process and the options available and do not consider that such advice results in a conflict or is an impediment to accepting the appointment;
- the nature of the advice provided to the company is such that it would not be subject to review and challenge during the course of the voluntary administration; and
- the pre-appointment advice will not influence my ability to be able to fully comply with the statutory and fiduciary obligations associated with the voluntary administration of the company in an objective and impartial manner.

I have provided no other information or advice to the company, its directors or advisors prior to my appointment beyond that which I have outlined in this DIRRI.

C. Investigating Accountant leading to Appointment

A Practitioner may, in some circumstances, accept an Appointment after acting as an Investigating Accountant (IA), whether the IA role was for a creditor of the Insolvent or the Insolvent itself.

However, Practitioners must always have regard to how a prior Investigating Accountant's appointment may affect their independence or the perception of independence. A Practitioner must not accept an appointment if the work undertaken in connection with the IA appointment would compromise their independence or be subject to review or challenge. Particular regard must be had to whether any remuneration received by the Practitioner for undertaking the IA may be a preference in a subsequent Appointment.

Where the IA role was for the Insolvent, the restrictions regarding pre-appointment advice apply (refer B above).

The following details about the IA appointment must be included in the DIRRI:

- who appointed the Practitioner;
- scope of the engagement;
- to whom the Practitioner reported;
- the period of the engagement;
- the fee paid;
- who paid the fee; and
- the Appointee's reasons for believing that the relationship does not result in a conflict of interest or duty.

Example - IA - appointment by the company	
Nature of professional service	Reasons
Prior to my appointment as Voluntary Administrator, I was engaged by the company to provide the company with a report on: • the financial situation of the company; • the solvency of the company; • consequences of insolvency; and • alternative courses of action available to the company. • The engagement occurred over a period of 2 months and I was appointed voluntary administrator one week after the report was provided to the company. I was paid a fee of $15,000 for the service provided.	I believe that this relationship does not result in a conflict of interest or duty because: • The work undertaken during the Investigating Accountant engagement has assisted me in developing an understanding of the company and its activities. • Much of the investigatory work done during the Investigating Accountant engagement is work that would have been done by myself in order to be able to report to creditors under s439A of the Corporations Act. As such, this information will be made available to creditors when I report to them in due course. • The nature of the report provided to the company is such that it would not be subject to review and challenge during the course of the voluntary administration. The Investigating Accountant engagement will not influence my ability to be able to fully comply with the statutory and fiduciary obligations associated with the voluntary administration of the company in an objective and impartial manner.

Example - IA - appointment for the Secured creditor		
Name	Nature of relationship	Reasons
ABC Bank - Secured Creditor of the company	XYZ Insolvency Firm undertook an Investigating Accountants engagement for ABC Bank prior to my appointment as Voluntary Administrator. The purpose of the engagement was to consider the company's financial position and the security position of the Bank. I reported to the Bank on the outcome of my investigations. The Investigating Accountants engagement continued for a period of two months and was completed one month prior to my appointment as voluntary administrator. I was paid $20,000 by ABC Bank for this engagement. XYZ Insolvency Firm also undertakes receivership and investigatory accountant roles for ABC Bank.	I believe that this relationship does not result in a conflict of interest or duty because: • The work undertaken during the Investigating Accountants engagement has assisted me in developing an understanding of the company and its activities. The investigation did not reveal any issues with the validity of ABC Bank's security in respect of the company. • The report that XYZ Insolvency Firm provided to ABC Bank is not of the nature that it would be subject to review during the voluntary administration. The work undertaken by my firm for ABC Bank will not influence my ability to be able to fully comply with the statutory and fiduciary obligations associated with the voluntary administration of the company in an objective and impartial manner.
Note: If you are disclosing an IA appointment for a Secured creditor, you will also have a relationship with that creditor to disclose.		

D. Transitioning appointments

A Practitioner may accept an Appointment which arises as a result of a transition from one type of Administration to another under the relevant legislation, subject to the terms of that legislation. For example, from an Appointment as a voluntary administrator to a creditors' voluntary liquidator; or a trustee of a personal insolvency agreement to a trustee of the bankruptcy.

A transitioning Appointment that occurs in accordance with the relevant legislation does not need to be disclosed in the DIRRI.

This exemption does not apply to a situation where a Practitioner is replacing an Incumbent during the transition from one type of Administration to another.

APES 110 CODE OF ETHICS FOR PROFESSIONAL ACCOUNTANTS

Issued December 2010

...

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:

...

(b) *Objectivity* – to not allow bias, conflict of interest or undue influence of others to override professional or business judgments.

...

SECTION 120

Objectivity

120.1 The principle of objectivity imposes an obligation on all Members not to compromise their professional or business judgment because of bias, conflict of interest or the undue influence of others.

120.2 A Member may be exposed to situations that may impair objectivity. It is impracticable to define and prescribe all such situations. A Member shall not perform a Professional Service if a circumstance or relationship biases or unduly influences the Member's professional judgment with respect to that service.

...

PART B--MEMBERS IN PUBLIC PRACTICE

...

SECTION 220

Conflicts of Interest

220.5 Where a conflict of interest creates a threat to one or more of the fundamental principles, including objectivity, confidentiality, or professional behaviour, that cannot be eliminated or reduced to an Acceptable Level through the application of safeguards, the Member in Public Practice shall not accept a specific engagement or shall resigned from one or more conflicting engagements.

...

APES 330 INSOLVENCY SERVICES

Revised September 2014

...

4. Professional Independence

...

4.13 A Member in Public Practice shall not accept an Appointment where the Member, the Member's firm or a Network Firm has during the prior two years provided a Professional Service to the Insolvent Entity, unless the Professional Service is considered immaterial or is referred to in paragraph 4.7.

4.14 A prior Professional Service is immaterial if it:

- was of limited scope, limited time and limited fees;
- will not be subject to review by the Member during the course of the Administration;
- will not affect the Member's ability to comply with the statutory and fiduciary obligations associated with the Administration; and
- does not create threats to the Member's ability to comply with the fundamental principles of the Code when performing the duties of the Administration.

...

4.20 A Member in Public Practice shall not accept an Appointment where the Member, the Member's Firm, a Network Firm or their Partners have provided Professional Services to the Insolvent Entity or any other Entity which:

- **has reasonable potential to lead to litigation claims against the Member or the Member's Firm by a stakeholder of the Administration;**
- **is material to the Administration; or**
- **was related to the structuring of assets of the Insolvent Entity in order to avoid the consequences of insolvency, even if that advice was provided at a time when the Entity was solvent.**

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.