Disciplinary Tribunal of Chartered Accountants Australia and New Zealand (CA ANZ)
Written decision dated 9 December 2020

Case Number: D-1232

Member: Kenneth White CA of Victoria

Hearing Date: 21 October 2020

Tribunal: Simon Wallace-Smith FCA (Chair)
Jayne Godfrey FCA
Jenni Millbank, lay member of the Tribunal

Tribunal Legal Adviser: Jamesina McLeod

Representation: Michael Bradley for the Professional Conduct Committee (PCC)
John Ribbands and Glenn Hodges for the Member

Decisions:

1. The Tribunal determined that the Member:
   (a) committed a breach of APES 110 *Code of Ethics for Professional Accountants* with respect to objectivity and conflicts of interest, in breach of By-Law 40(2.1)(h);
   (b) committed a breach of Regulation CR 3.11 *Preparation of Legal Documents*, in breach of By-Law 40(2.1)(h); and
   (c) has brought, or may bring, discredit on the Member and CA ANZ, in breach of By-Law 40(2.1)(k).
2. The Tribunal imposed the following sanctions:
   (a) a censure;
   (b) to require the Member, at his own expense, to successfully complete the CA ANZ Public Practice Program (PPP) e-learning modules and day 1 of the PPP workshop within six months of the date of effect of this decision, and that the Member provide evidence of successful completion to the PCC;
   (c) to require the Member and the Member's Practice Entity, at the Member's expense, to submit to a quality review under the CA ANZ Regulations as soon as possible and that the results of such review be made available to the PCC.
3. The Tribunal imposed a cost sanction in the sum of $33,234 for the full costs and expenses of the proceedings.

4. The Tribunal made the following directions regarding the conduct of the hearing and the publication of its reasons for decision:

   (a) to accept into evidence the Member's expert report, which was not consented to by the PCC;

   (b) to accept the Member's late written submissions, which was consented to by the PCC;

   (c) following its decision on breach, that the parties provide submissions in writing on the remaining issues, including sanctions;

   (d) its decision with reasons, mentioning the Member's name and locality, be published on the CA ANZ website (the **Published Decision**);

   (e) a summary of the Published Decision mentioning the Member's name and locality with a web address for the Published Decision be published in the CA ANZ official publication, *Acuity*;

   (f) the Tax Practitioners Board, Australian Securities and Investments Commission and the Victorian Legal Services Board be notified of this decision;

   (g) 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;

   (h) the identities of the Member's clients be kept confidential;

   (i) the decisions regarding confidentiality take effect immediately from 3 December 2020.

The date of effect of this decision is 31 December 2020 (By-Law 40(10.18)).

1. Introduction

(a) From around 2005, the Member acted for two families who jointly owned a group of associated companies engaged in agricultural enterprises (**Client A** and **Client B**, collectively the **Clients**). In April 2017 the Clients agreed to separate their business interests, involving the separation of a number of corporate entities and the distribution of their properties and other assets. The Member continued to act for both Clients until Client B engaged an independent accountant in approximately May 2018. On 16 November 2018 the Member presented to Client B a document he had drafted. That document was already signed by Client A and specified a proposed division of assets and business interests between the Clients. This document was not signed by Client B, who ultimately sought independent legal advice. The separation of business interests finally occurred in October 2019.

(b) In January 2019 CA ANZ received a complaint from the legal representative of Client B (the **Complainant**) which claimed, amongst other things, that the Member:

(i) acted for two parties in a dissolution of partnership (the Clients);

(ii) drafted a *"purported[ly] binding agreement"* between the Clients:

(1) when the Member had not consulted one of the parties to the agreement, Client B; and

(2) which was *"manifestly and wholly inadequate"*;

(iii) did not provide Client B with access to financial documents;

(the **Complaint**).

(c) After investigating the Complaint including conducting a Case Conference on 30 June 2020, the PCC referred the Member to the Tribunal by way of Notice of Disciplinary Action (set out in full in Schedule 1) (the **NDA**) which in summary alleged that the Member:

1. failed to comply with the fundamental principle of objectivity as required by APES 110 *Code of Ethics for Professional Accountants* (**APES 110**);

2. carried out work which was required by law to be performed by a legal practitioner, in breach of CA ANZ Regulation CR 3.11 *Preparation of Legal Documents* (**Regulation CR 3.11**); and

3. by virtue of the conduct underlying allegations 1 and 2, brought or may bring discredit to the Member, CA ANZ or the profession of accountancy.

2. The issues for determination

(a) Did the Member commit a breach of APES 110 with respect to objectivity and conflicts of interest, in breach of By-Law 40(2.1)(h)? (allegation 1)

(b) (i) Should the Tribunal accept into evidence the Member's expert report for the purposes of determining allegation 2?

(ii) Did the Member commit a breach of Regulation CR 3.11 by carrying out work which is required by law to be performed by a legal practitioner, in breach of By-Law 40(2.1)(h)? (allegation 2)

(c) If any parts of allegations 1 or 2 were established, did those acts, omissions or defaults of the Member bring or potentially bring discredit on him, 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)(ii) or (c) was yes, what sanctions should be imposed on the Member?

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

(f) Was there any reason to suppress the Member's name from the published decision?

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

(h) Should any confidentiality orders be made?

(i) Other matters.

3. Did the Member commit a breach of APES 110 with respect to objectivity and conflicts of interest, in breach of By-Law 40(2.1)(h)? (allegation 1)

3.1 Agreed facts

The PCC and the Member agreed that the Member's conduct in acting for both parties simultaneously in a transaction was a conflict of interest as described by s 220.5 of APES 110.

3.2 PCC submissions

(a) The PCC submitted that:

(i) there was a clear conflict of interest by April 2017 when the Member was aware that the Clients were involved in a separation of assets and interests in dissolving the business entity;

(ii) in this situation the Member owed the Clients the same duties but was unable to perform for both as their interests diverged, whether or not they were themselves in dispute. This matter involved a complex and lengthy negotiation and valuation of assets between divergent interests;

(iii) the Member's own evidence demonstrated that he was aware of the conflict;

(iv) the Member did not identify and manage the conflict but rather continued to act for both Clients, with no safeguards put in place or steps taken in mitigation. There was no evidence that the Member took steps to ensure informed consent;

(v) the fact that neither of the Clients may have expressed concern about the situation was irrelevant because it was not the Clients' responsibility to identify conflicts of interest and object to them. The professional responsibility and onus to identify and manage conflicts of interest was on the Member.

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

(i) the Member's letter to the PCC dated 6 August 2019 in which, the PCC submitted, the Member acknowledged that it was not a simple matter but a complex negotiation, and in which he wrote:

"...This was a difficult situation in that communication between [Client A and Client B] was not great. I acted as a conduit between them..."

"...my conflict of interest in that I had acted for both sides in the initial stages of the business split..."

"...Should I have put myself in the position I did, trying to mediate between two parties - probably not...".

(ii) transcript of the PCC Case Conference held on 30 June 2020;

(iii) the document titled "Issues Register" which set out a number of disputed items between the Clients and of which the Member was aware.

(c) The PCC also referred to established principles on conflict of interest from case law involving legal practitioners:

(i) *Alexander v Perpetual Trustees WA Ltd* [2001] NSWCA 240;

(ii) *Hilton v Barker Booth and Eastwood (a firm)* [2005] 1 All ER 651; [2005] UKHL 8;

(iii) *Watson & Ors v Ebsworth & Ebsworth (a firm) & Anor* [2010] VSCA 335;

(iv) *Law Society of NSW v Nguyen* [2009] NSWADT 199.

3.3 Member submissions

(a) The Member submitted that:

(i) while this was a technical conflict of interest there was no lapse in ethical standards by the Member;

(ii) in acting simultaneously for two parties who were in conflict with each other the Member's conduct was less serious than if he had acted for a party in direct conflict with himself and received a benefit;

(iii) the Clients were aware of, and assisted by, the Member continuing to act for both of them through the early stages of the transaction;

(iv) this was in effect a hypothetical complaint because there was no adverse result and no evidence that either of the Clients was disadvantaged. To the contrary, with the help of the Member, litigation was avoided;

(v) there was no evidence of an actual breach of the Member's objectivity;

(vi) the onus was on the PCC to demonstrate that the Member took no safeguards. The Member acted responsibly, ethically and in the interests of both parties;

(vii) both Clients knew that the Member was acting for both of them and their consent to the technical conflict could be implied from the circumstances. This was sufficient to qualify as informed consent and to satisfy the safeguard requirements.

(b) In making this submission, the evidence referred to by the Member included:

(i) the Member's letter to the PCC dated 6 August 2019 in which, the Member submitted, he acknowledged there was a conflict of interest and explained how he had successfully managed the conflict and remained objective:

"...I acted as a conduit between them. My primary goals were to split the business in a way that was fair and reflective of ownership interest, and also to ensure that both sides had sustainable business outcomes from it..."

"...Simple answer to the question - did I have a conflict of interest - technically I was acting for both sides in the initial stages but at no stage do I believe this hindered my objectivity - that was to ensure equity and a sustainable future for both families"

"...If the fact that my conflict of interest in that I had acted for both sides in the initial stages of the business split compromised my objectivity, I fail to see how this can be evidenced..."

"...I truly do not believe my actions have brought disrepute to the profession. Should I have put myself in the position I did, trying to mediate between two parties - probably not. Has it caused stress in my life - absolutely...";

(ii) *Hilton v Barker Booth and Eastwood (a firm)* [2005] 1 All ER 651; [2005] UKHL 8, referring particularly to the second and third sentences of the passage identified by the PCC, which the Member submitted illustrated an example of a serious conflict of interest that "went off the rails", unlike the Member's conflict of interest that did not.

3.4 Tribunal decision and reasons

(a) The Tribunal determined that the allegation was established.

(b) The fundamental principle of objectivity in APES 110 s 100.5(b) requires a member to avoid threats to objectivity including conflicts of interest. The setting of the business dissolution meant that it was inevitable and foreseeable that the Clients' interests would diverge. In such circumstances the Member could not offer objective advice to both Clients.

(c) There was a clear conflict of interest from the time the decision was made by the Clients in April 2017 to separate their business interests because that process entailed the interests of the Clients diverging from each other. Due to the nature of the transaction being a separation of business interests, that conflict of interest threat continued for the duration of the transaction. APES 110 s 220.1 states that:

> 220.1 A Member in Public Practice may be faced with a conflict of interest when performing a Professional Service. A conflict of interest creates a threat to objectivity and may create threats to the other fundamental principles. Such threats may be created when:
>
> • The Member provides a Professional Service related to a particular matter for two or more clients whose interests with respect to that matter are in conflict; or

(d) APES 110 s 220.2 lists several examples of conflict of interest that were relevant to this case including the following:

> 220.2 Examples of situations in which conflicts of interest may arise include:
>
> …
>
> • Advising two clients at the same time who are competing to acquire the same company where the advice might be relevant to the parties' competitive positions.
> • Providing services to both a vendor and a purchaser in relation to the same transaction.
> • Preparing valuations of assets for two parties who are in an adversarial position with respect to the assets.
> • Representing two clients regarding the same matter who are in a legal dispute with each other, such as during divorce proceedings or the dissolution of a partnership.
>
> …
>
> • Providing strategic advice to a client on its competitive position while having a joint venture or similar interest with a major competitor of the client.
>
> …

(e) On the Member's own admission the Member:

(i) accepted that *"dissolution of the farming partnership between [the Clients]"* gave rise to a conflict of interest specifically s 220.5 of APES 110;

(ii) *"led [the Clients] by the hand"*, and had communicated to Client B that there would need to be a *"weaning off"* at some point. Nonetheless the Member continued to act for both Clients despite the acknowledgment that his engagement with Client B would end and his engagement with Client A would continue; and

(iii) had acted as a *"mediator"* and a *"conduit between"* the Clients.

(f) The Member put forward a number of factors which he considered led to no lapse in ethical standards. The Tribunal did not consider those factors persuasive. In any event, once the Member was aware there was clearly a conflict of interest, he was under a positive obligation to identify the applicable ethical standards and put in place appropriate safeguards. Those safeguards could have included:

(i) notifying the Clients of the conflict of interest and obtaining a letter of agreement from each of Client A and Client B for continuing to act;

(ii) strongly suggesting to both Clients they seek their own independent legal and accounting advice in relation to the transaction;

(iii) consulting with a third party such as a professional body, legal counsel or another member, regarding the conflict of interest;

(iv) considering whether the above steps would be sufficient and if not, whether the Member should have stepped aside given that he had access to confidential information about the whole entity and had potential to use it for the advantage of one of the Clients and not the other.

However, the Member did not provide evidence of having considered or implemented these safeguards or any others.

(g) The Tribunal was not persuaded by the Member's submission that the following factors sufficiently managed the conflict of interest:

(i) the Clients both knew that he was acting for both of them and implicitly consented to any conflict of interest;

(ii) the Clients were satisfied with the outcome of the transaction, and the separation of interests was implemented in its entirety without complaint from either of the Clients;

(iii) an independent accountant and independent lawyer were eventually engaged to provide advice to Client B, and the circumstances as to how those third parties were engaged was immaterial;

(iv) the Member acted objectively at all times and took advice from both Clients before determining his valuations.

(h) There was insufficient evidence before the Tribunal, other than the Member's assertion, that Client A and Client B had each understood the conflict so as to be able to give implied and informed consent. In a situation of such complexity and such serious conflict of interest, implied consent would not have been sufficient in any event. The Member provided no written evidence or records of having considered or implemented safeguards and even if the Tribunal accepted he had done so, they may not have been sufficient to manage the conflict.

(i) The Member's reliance on a satisfactory outcome did not remove the onus on him to behave professionally and comply with APES 110 in the pursuit of that outcome.

(j) The Tribunal accepted the PCC's submission that it was not the Clients' duty to manage the conflict, and therefore a lack of complaint from the Clients was not evidence of the absence of

a conflict. Similarly, the fact that Client B chose to take independent advice did not discharge the Member's obligation to have considered and made such a recommendation as an obvious and appropriate safeguard to manage the conflict.

(k) Considering APES 110 s 100.7, the Tribunal was satisfied that a reasonable and informed third party would be likely to conclude that the steps taken did not and could not bring the risk down to an acceptable level.

4. Did the Member commit a breach of Regulation CR 3.11 by carrying out work which is required by law to be performed by a legal practitioner, in breach of By-Law 40(2.1)(h)? (allegation 2)

4.1 Preliminary issue

(a) On 15 October 2020 the Member had submitted to the Tribunal what he described as an "expert report" which purported to contain expert opinion of Tony Joyce, consultant at Wisewould Mahony lawyers, as to:

> *"1. Whether [the Member] held himself out or passed himself off as a legal practitioner without having the legal qualifications required; and*
>
> *2. Whether in the preparation of the Agreement and advice he gave was he undertaking work which can only be carried out by a lawyer"*

(the **Joyce Report**).

(b) The PCC objected to the introduction of the Joyce Report on the grounds that the Member was represented by counsel who could give opinion on those matters to the Tribunal by way of submission such that it was inappropriate to allow and give weight to the Joyce Report as a true 'expert' opinion. The PCC submitted that the Member's counsel was before the Tribunal as his advocate and the Joyce Report would usurp the role of his counsel. In support of this submission the PCC provided the following authorities:

(i) *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705;

(ii) *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313;

(iii) *Allstate Life Insurance Co v ANZ Banking Group Ltd* (No 6) (1996) 64 FCR 79;

(iv) *Noza Holdings Pty Ltd v Commissioner of Taxation* (2010) 80 ATR 390.

(c) In response to the PCC's objection, the Member submitted that he had sought particulars from the PCC of the law relied on in the allegation that he had carried out work which was required by law to be performed by a legal practitioner and when none were forthcoming, he commissioned the Joyce Report. The Member submitted that the Joyce Report was admissible and went to the issue that he had not been afforded procedural fairness.

(d) The PCC submitted that if there had been a procedural fairness issue it had been resolved, and the Joyce Report could provide no practical assistance to the Tribunal.

(e) The Tribunal determined to accept the Joyce Report into evidence because after weighing the arguments put forward by the PCC and the Member, accepting the Joyce Report would cause no procedural unfairness and would not adversely affect the decision-making of the Tribunal or its ability to discharge its obligation to consider what weight ought to be placed on the Joyce Report as evidence in relation to whether allegation 2 was established.

4.2 Agreed facts

The PCC and the Member agreed that the Member drafted a document addressing the dissolution of the Clients' business relationship and distribution of assets.

4.3 PCC submissions

(a) In making its submissions, the PCC referred to the following evidence and authority:

(i) agreement drafted by the Member and signed by Client A with provision for Client B to sign on the term *"[t]he parties hereby agree to bound (sic) by the terms and conditions above"*;

(ii) section 10(1) of the Legal Profession Uniform Law (the **LPUL**):

> **10 Prohibition on engaging in legal practice by unqualified entities**
>
> (1) An entity must not engage in legal practice in this jurisdiction, unless it is a qualified entity

(b) The PCC submitted that:

(i) Regulation CR 3.11 prohibits Members from "carry[ing] out work which is required by law to be performed by legal practitioners". The relevant law in this instance was section 10(1) of the LPUL which prohibits entities - which includes individuals - from engaging in legal practice unless qualified to do so;

(ii) there was no complaint that the Member held himself out as a lawyer;

(iii) the opinion set out in the Joyce Report on the allegation was a matter of fact to be determined by the Tribunal and was not an expert opinion because it could have no weight beyond that of counsel's submissions on that point;

(iv) the statute does not define legal practice. What is acting in legal practice or providing legal services is a question of fact to be determined by applying the principles from case law;

(v) although there was no singular test to determine whether a person was engaging in legal practice, drafting a document which affects the legal rights of others can constitute engaging in legal practice if the matters are sufficiently complex and important to the interests of the parties affected by the document, and require the expertise of those with legal training and expertise in the law and which is beyond the expertise of the average person;

(vi) by drafting such a complex document and not advising the Clients that they should obtain legal advice regarding its contents, the Member was in effect purporting to provide legal advice to the Clients;

(vii) the Member was thus carrying out work which was required by law to be performed by a legal practitioner, in breach of By-Law 40(2.1)(h).

(viii) with respect to the Member's reliance on *Re Sanderson ex parte the Law Institute of Victoria* [1927] VLR 394, that the Member's conduct should be distinguished from the Sanderson decision as that decision involved an individual holding himself out to be a solicitor, which the PCC was not alleging the Member had done. The PCC further submitted that the Sanderson decision was not an authority for when a person was acting as a solicitor and in that respect Cussen J said:

> *"…I do not think it is advisable that I should endeavour to lay down any precise rule as to when a person acts as a solicitor…".*

(c) In making this submission, the PCC also referred to the following authorities concerning the admissibility of expert evidence in court:

(i) *Swart v Carr* [2006] NSWSC 1302;

(ii) *D'Alessandro & D'Angelo (a firm) v Bouloudas* (1994) 10 WAR 191;

(iii) *Attorney-General v Quill Wills Ltd* (1990) 3 WAR 500;

(iv) *Legal Practice Board v Said* (Unreported, WASC, Library No 940608, 31 October 1994);

(v) *Cornall v Nagle* [1995] 2 VR 188;

(vi) *Barristers' Board v Palm Management Pty Ltd* [1984] WAR 101;

(vii) *Legal Practice Board v Adams* [2001] WASC 78.

4.4 Member submissions

(a) The Member submitted that:

(i) the document was not a legal document because it was not signed by both Clients;

(ii) he had not been engaged in legal practice given the preparation of the document was a one-off event;

(iii) both Clients knew that he was not a lawyer and he did not purport to be a legal practitioner;

(iv) it was not an offence under the Victorian statute for a person who is not a lawyer to draft a contract;

(v) the Joyce Report and case authorities held that there is no prohibition on a non-lawyer providing advice in relation to the law as it related to their area of expertise;

(vi) the PCC had relied on Western Australian authorities when Victoria was the relevant jurisdiction and the relevant statutes differed such that little weight should be placed on non-Victorian authorities relied on by the PCC.

(b) In making this submission, the Member referred to the following evidence and authorities:

(i) expert report of Tony Joyce, Wisewould Mahony dated 15 October 2020;

(ii) *Felman v Law Institute of Victoria* [1998] 4 VR 324 which the Member submitted was a critical decision because it showed what the law in Victoria was and also distinguished the law in Western Australia from the law in Victoria;

(iii) *Cornall v Nagle* [1995] 2 VR 188 in which, the Member submitted, Phillips J said that a person may be regarded as acting or practising as a solicitor in one of three ways:

> *"(a) By doing something which, though not required to be done exclusively by a solicitor, was usually done by a solicitor and by doing it in such a way as to justify the reasonable inference that the person doing it was a solicitor…"*
>
> *"(b) By doing something that was positively proscribed by an Act or by the rules of court unless done by a duly qualified legal practitioner…"*
>
> *"(c) By doing something which, in order that the public might be adequately protected, was required to be done only by those who have the necessary training and expertise in law…"*;

(iv) *Legal Services Commissioner v Walter* [2011] QSC 132;

(v) *Victorian Legal Services Board v Jensen* [2018] VSC 740; and

(vi) *Re Sanderson ex parte the Law Institute of Victoria* [1927] VLR 394 in which Cussen J said:

> *"…What I do decide is that if a person does a thing usually done by a solicitor, and does it in such a way as to lead to the reasonable inference that he is a solicitor—if he combines professing to be a solicitor with action usually taken by a solicitor—I think he then does act as a solicitor…".*

4.5 Tribunal decision and reasons

(a) The Tribunal determined the allegation was established.

(b) The definition of legal work in Regulation CR 3.11 is not definitive and must be evaluated on a case by case basis.

(c) Regulation CR 3.11 states:

> **Preparation of Legal Documents**
>
> Members must not carry out work which is required by law to be performed by legal practitioners

and the commentary to that Regulation refers to statutory prohibitions on unqualified persons preparing legal documents:

> ***Commentary***
>
> *Legislation in various jurisdictions prohibits unqualified persons from preparing legal documents and Members should ensure that they do not contravene these laws. If in doubt, refer the client to their solicitor or, if appropriate, obtain the client's approval to instruct a solicitor.*

(d) The statutory prohibitions on unqualified persons engaging in legal practice vary from State to State across Australia. In Victoria where the Member was at all times practising, the relevant statute is the LPUL. Section 10 provides:

> (1) An entity must not engage in legal practice in this jurisdiction, unless it is a qualified entity

The statute does not definitively set out what conduct constitutes engaging in legal practice or providing legal services.

(e) Holding one's self out as a legal practitioner was not required in order to establish that the Member had engaged in providing a legal service. Therefore it was not relevant that neither of the Clients believed the Member to be a legal practitioner.

(f) The Tribunal accepted that the relevant case law established that it may not be engaging in legal practice for a professional to offer expert advice on the operation of law within the realm of their expertise. However the Member was not in this instance limiting his advice to the area of accounting or the financial consequences of the transaction. Rather, he was preparing documents that fell well outside of his professional expertise and scope of practice as a Chartered Accountant.

(g) The statute must be read in conjunction with case law which determines these issues. These cases provide that the question of whether someone has engaged in legal practice is a question of fact depending upon the circumstances of the case. It is an accepted principle across the case law that someone engages in legal practice if they undertake work that is required to be done only by those who have the necessary training and expertise in the law and which is beyond the expertise of the average person.

(h) The document prepared by the Member concerned a complex transaction involving the transfer of shares in companies and units of trust, transfer of water rights, real estate, the valuation of assets and the calculation of payments in a complex dissolution of a business entity.

(i) As a finding of fact, the Tribunal determined that this transaction was in the nature of a legal service and ought to have been undertaken by a qualified legal practitioner. The legal complexity of the rights and interests involved, the substantial alteration of the Clients' financial positions and the high value of the transaction all pointed towards this being a matter that required specialist expertise beyond the knowledge of the average person. This was by no means a mere clerical or mechanical drafting of a simple or agreed transaction. Due to the aforementioned complexity and the significant impact on the rights of the Clients, the preparation of the legal document in question was clearly a matter that required legal expertise.

(j) While the Joyce Report submitted by the Member expressed the view that the drafting of contracts is not the exclusive purview of lawyers and that the Member did not breach any legal prohibition, the Tribunal was not persuaded by that view in relation to this case. Notably many of the examples given in the Joyce Report referred to standard form contracts that are heavily regulated by legislation and which fall very far from the factual circumstances of this case, where a highly complex and customised commercial agreement was required.

(k) The Tribunal accepted the proposition that it would be permissible for a non-lawyer to prepare certain types of contracts and transactional documents in certain circumstances.

(l) The Tribunal also accepted the PCC's submission that the Victorian statute was not exhaustive or definitive and must be read in conjunction with the case law. The circumstances of each case will be critical in determining whether someone has engaged in legal practice or provided legal advice.

(m) With respect to the Member's submission that he had not been engaged in legal practice given that his preparation of the document was a one off event, the Tribunal was not satisfied that:

(i) on the wording of Regulation CR 3.11;

(ii) on the wording of the LPUL; or

(iii) the case authorities relied on by the Member;

an individual must be engaged in ongoing conduct in order to be found to be engaged in legal practice or providing a legal service.

(n) The Tribunal was of the view, taking into account the clear intention of the commentary in Regulation CR 3.11, that the concept of a legal document is wider than documents that are in final form and executed and includes the preparation of drafts.

5. If any part of allegations 1 or 2 were established, did those acts, omissions or defaults of the Member bring or potentially bring discredit on him, CA ANZ or the profession of accountancy, in breach of By-Law 40(2.1)(k)? (allegation 3)

5.1 PCC submissions

(a) The PCC submitted that:

(i) the Member's conduct or misconduct was of a level that was appropriate for the Tribunal to make a finding of discredit on not only himself but also CA ANZ;

(ii) the Member clearly did not think he had done anything wrong;

(iii) the conflict of interest was a serious case. The Member admitted that he was aware that the interests of the Clients were divergent from each other and that he continued to act for both sides notwithstanding that awareness;

(iv) it was unreasonable for the Member to continue to act in circumstances where the conflict existed. He took no action nor implemented safeguards to protect, mitigate or eliminate the risk the conflict created;

(v) the Member could have informed the Clients of the conflict, made suggestions to them or given them advice on how the conflict could have been resolved;

(vi) it was a fundamental failure to comply with one of the most important professional obligations of a CA ANZ member;

(vii) the drafting of the transactional document was a legal document that was to bind parties to a series of complex transactions. If the document was signed by both Client A and Client B without any independent review that would have been a very dangerous outcome;

(viii) the Member had failed to recognise the position he put himself in and failed to do anything about it, placing himself in the territory of discredit. He also failed to uphold the standards of CA ANZ.

(b) In response to the Member's argument that the allegations were duplicitous such that the PCC could not maintain allegation 3 where the first two were maintained [CU Note: amendment for clarity], the PCC submitted that the notion of double jeopardy had no application as this was not a criminal matter. The case relied upon by the Member concerned criminal charges in which the prosecution had relied upon separate events to found a single charge. The matter at hand was the opposite in the sense that it was a disciplinary case in which the same events were relied upon as the basis of separate offences.

Further there was no procedural unfairness to the Member in the way the allegations were framed. It is clearly established that in disciplinary proceedings different offences can arise from the same facts.

5.2 Member submissions

(a) The Member submitted that:

(i) acting where there is a conflict is not an issue but rather an issue may arise where there is a failure to implement safeguards;

(ii) Client B was ultimately represented by an independent accountant when the contract was prepared. The Member did say to Client B they would have to "wean" themselves off each other;

(iii) the Member's conduct was borne out by what ultimately transpired. With the benefit of hindsight, the safeguards that were put in place to ensure the Member's objectivity was not impaired were evident as both Clients allowed the transaction to be fully endorsed with no complaint;

(iv) the Member did his best to ensure both Clients were treated fairly and objectively and this was borne out by the ultimate transaction;

(v) the idea that the Member did not appreciate he had done anything wrong was misconceived as there was no evidence the Member did anything wrong;

(vi) there was no suggestion to establish that the Member had engaged in legal practice through presenting himself as a lawyer. The Member was before the Tribunal to defend an allegation he had drafted a contract which the law says he could not do;

(vii) in order to bring discredit upon the Member, CA ANZ or the profession of accountancy the conduct complained of must be conduct that was destructive of community trust in the profession;

(viii) the preparation of the document did not represent a fundamental departure from accountancy standards such that it was destructive of community confidence in the profession. Similarly, the conduct regarding the conflict of interest was also not of sufficiently damning character;

(ix) the allegation was duplicitous in that it relied wholly on allegations 1 and 2. On that basis it should be dismissed or, alternatively, clearly identified as an alternative to allegations 1 and 2. To maintain all three allegations was therefore a breach of procedural fairness and a form of double jeopardy;

(x) the Member's conduct with respect to both allegations 1 and 2 could not be viewed as conduct that eroded the level of trust that is reposed in members of the profession by members of the public. To meet that description it must involve elements of dishonesty or impropriety;

(xi) By-Law 40(2.1)(a)addresses a want of professional standards as it makes a member liable to disciplinary sanctions if they have "failed to observe a proper standard of professional care, skill, competence or diligence in the course of carrying out … professional duties and obligations". By contrast, the construction of By-Law 40(2.1)(k) involves a breach well in excess of a want of professional standards and requires conduct that is unethical and improper. Such a high standard was not made out on the present facts.

(b) In making this submission, the Member referred to the following authorities which he submitted established the necessity for dishonesty or some additional element in order to make a finding of discredit:

(i) *Walsh v Tattersall* (1996) 188 CLR 77; [1996] HCA 26, which the Member said established the impropriety of duplicity in the disciplinary allegations;

(ii) *HCCC v KREFT (No. 2)* [2012] NSWPST 1;

(iii) HAIG, Andrew David [2018] NSWMPSC 9; and

(iv) *Office of Local Government v Toma* [2016] NSWCATOD 21.

5.3 Tribunal decision and reasons

The Tribunal determined that the allegation was established to the extent that the Member had brought discredit to himself and to CA ANZ because:

(a) the Tribunal rejected the Member's submission that the allegation was duplicitous and could not be considered in addition to allegations 1 and 2. The issue of double jeopardy was not relevant in this context. It is well established in the disciplinary context and in the work of this Tribunal that different breaches of the By-Laws may arise from the same facts;

(b) the Tribunal acknowledged and accepted that there was no dishonesty or fraudulent intent on the part of the Member, but found that there had been a combination of a very serious conflict of interest and acting beyond scope of practice with no real understanding of the wrongdoing;

(c) the weight of the combination of both issues was sufficient to bring discredit to the Member and to CA ANZ;

(d) the Tribunal rejected the Member's submission that the positive end result of the transaction did not mean that the Member should not have taken proactive steps to deal with the conflict of interest;

(e) the Tribunal was not persuaded that the Member's conduct brought the profession of accountancy into disrepute because there was no evidence that the conduct was publicly-known;

(f) the Tribunal considered the allegation was properly considered under By-Law 40(2.1)(k).

6. What sanctions should be imposed on the Member?

(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.

(b) However, the Guidelines are not an exhaustive list of the matters that may be considered when deciding what sanction to impose and the Tribunal may have regard to any other relevant matters that are before it.

(c) The PCC and the Member agreed that additional training was appropriate.

(d) The PCC submitted that the following were appropriate sanctions:

(i) a censure;

(ii) additional training at the Member's expense regarding conflict of interest management; and

(iii) to require the Member and his practice entity to undergo a quality review under the CA ANZ Regulations at the Member's expense and on the condition that the results of that review were made available to CA ANZ;

and that the Tribunal should have regard to the following matters:

(iv) this was a serious case of misconduct that involved a breach of two By-Laws as well as a breach of seven provisions of APES 110 with respect to conflict of interest;

(v) it was important that the Tribunal imposed these sanctions to achieve both specific and general deterrence;

(vi) the Member would benefit from further training;

(vii) the sanctions were an appropriate response to a finding that the Member had engaged in carrying out legal work required to be performed by a legal practitioner;

(viii) the Member had previously faced disciplinary proceedings for carrying out legal work and the Member had failed to learn from his past mistakes. It was appropriate to impose further sanctions where the Member had engaged in the same conduct again;

(ix) the imposition of the combination of these sanctions would send a clear message that CA ANZ did not tolerate inappropriate reactions to conflicts of interest involving members, and will take action to ensure practitioners respond appropriately for the protection of the public.

(e) The Member submitted that only a reprimand coupled with additional training regarding conflicts of interest management were appropriate sanctions because:

(i) this was a not a case of serious misconduct as there was no wilful breach of the By-Laws. The PCC had made no allegation as to deliberateness or gross negligence and this could not be characterised as a serious case of misconduct;

(ii) the proved misconduct involved a fine line between permissible and impermissible acts and also involved situations which practitioners from regional communities were faced with on a daily basis;

(iii) the Member genuinely believed his conduct to be both permissible and in the best interests of the Clients. The Member believed that he had the implied consent of both of the Clients to continue acting in the conflicted situation by reason of the surrounding circumstances known to each of the Clients. In addition, the commercial relationship between the Clients was settled satisfactorily without complaint from either Client A or Client B that their interests were not appropriately protected;

(iv) there was no indication of systemic failure necessitating a quality review;

(v) the finding that allegation 1 was established did not support the proposition that there were seven separate breaches of APES 110, but rather a single conflict of interest situation;

(vi) general deterrence was not required in this instance and penalty-type sanctions, as opposed to individualised training, were not warranted;

(vii) the Member rejected the PCC's reliance on the Member having repeated previous misconduct regarding drafting of legal documents, and drew a distinction between the preparation of court documents previously drafted by the Member and the drafting of the document in this instance.

(f) The Tribunal determined to impose the following sanctions:

(i) to censure the Member;

(ii) to require the Member, at his own expense, to successfully complete the CA ANZ Public Practice Program (PPP) e-learning modules and day 1 of the PPP workshop within six months, and to require the Member to provide evidence of successful completion to the PCC;

(iii) to require the Member and the Member's Practice Entity, at the Member's expense, to submit to a quality review under the CA ANZ Regulations as soon as possible and that the results of such review be made available to the PCC;

because, having considered each party's submissions:

(iv) the Tribunal considered that the Member's conduct was a serious breach of APES 110 and this was the second time the Member had been found to carry out work which was required by law to be performed by an Australian legal practitioner. The Tribunal rejected the Member's submission that the context in this case differed from that of the previous disciplinary proceedings. The Tribunal found that in both instances the specialised, complex transaction involved should have alerted the Member's professional judgment that the expertise of a lawyer was required;

(v) where the interests of clients are divergent or in conflict this impairs the professional's ability to give independent objective advice to both which is fundamental to the duties of accountants;

(vi) it is incumbent upon members to recognise, avoid and/or mitigate conflicts of interest by implementing the appropriate safeguards, and the Member had not done so;

(vii) there were examples in APES 110 in relation to this specific conflict and it was clear there had been a lack of objectivity by the Member in dealing with both Clients;

(viii) the Tribunal accepted the PCC's submissions that:

(1) it was important to send a clear message that CA ANZ would not tolerate inappropriate reactions to conflicts of interest by members;

(2) training for the Member was appropriate specifically regarding conflicts of interest;

(3) a quality review of the Member's practice was appropriate. The Tribunal determined that there were distinct failures in the Member's understanding of his professional obligations. Further, the Tribunal was concerned about the Member's inability to present his original terms of engagement for the Clients, or any additional terms of engagement from when he became aware of the conflict. This inability, combined with the Member's evidence at the hearing, did not inspire confidence in the Tribunal that the Member had adequate systems in place to identify, manage and mitigate conflicts of interest or issues of scope of engagement. The Tribunal noted that the Member's practice was due for quality review;

(ix) the Tribunal was of the view that additional training directed towards scope of practice issues was required because the conduct established in allegations 1 and 2 involved both conflict of interest and a repeated failure by the Member to appreciate the appropriate limits of his scope of practice in undertaking legal work;

(x) the Tribunal considered that the Member exhibited a concerning lack of understanding of how the APES 110 fundamental principles applied in practice. The Tribunal noted the Member's submission that he believed he was acting in the best interests of the Clients and within his obligations, and had only made a technical breach. In this light the Tribunal found there was value in further training for the Member given that the Tribunal had found the Member failed to meet those obligations;

(xi) with respect to the Member's submission that a reprimand was an appropriate sanction, the Tribunal notes that reprimand is not a sanction available to the Tribunal under By-Law 40(10.12).

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

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

> …must require the Member to pay all of the Costs claimed by CA ANZ unless it determines that, having regard to the following matters, it is appropriate that the Member be required to pay only part or none of the claimed Costs:
>
> (a) whether and to what extent the complaint against the Member is found to have merit and whether or not there is ultimately a finding in favour of the Member;
>
> (b) the substance or seriousness of the complaint;
>
> (c) the conduct of the Member in relation to the investigation and disciplinary process, including whether the Member was open, honest and timely in the Member's dealings with the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal in relation to the complaint and whether the Member complied with the provisions of Section 5 of the By-Laws and any applicable Regulations during the conduct of the disciplinary process;
>
> (d) the extent to which the final sanctions determined differ from those that the Professional Conduct Committee or Disciplinary Tribunal gave the Member the opportunity to agree by consent;
>
> (e) whether to do so is reasonable in the circumstances;
>
> (f) the amount of the Costs incurred by CA ANZ in the conduct of the investigation and proceedings;
>
> (g) whether and to what extent the Member has previously been required to pay Costs to CA ANZ in respect of the complaint, its investigation, hearing and determination; and
>
> (h) whether the amount is reasonable in the circumstances.

(b) The PCC submitted that the Member should pay the full costs of the disciplinary proceeding. Having regard to Regulation CR 8.12, the PCC submitted that there were no factors that would warrant a departure from the principle of requiring the Member to pay the full amount of the costs incurred:

(i) the Tribunal found the allegations were established and therefore the substance of the complaint had been found to have merit;

(ii) the complaint against the Member was serious;

(iii) the Member disputed all the allegations;

(iv) it was reasonable for the Tribunal to make the costs order against the Member where the proceedings were costly and time consuming;

(v) the Member had not been asked to pay any costs in relation to these proceedings.

(c) The Member submitted that:

(i) no costs should be awarded;

(ii) the question of payment of costs could only arise when an allegation had been proved, so to suggest that the complaint had merit because the allegation was proved was tautologous. It was an irrelevant consideration as to costs;

(iii) the complaint was not serious, but more of a lapse in standards which might fairly be described as minor or marginal;

(iv) the Member did not dispute any of the underlying facts, thereby avoiding significant costs and inconvenience to the Complainant, the PCC and the Tribunal. The Member's case was simply one of legal interpretation which was properly open to be argued;

(v) any costliness arose as a consequence of the legal arguments which the allegations gave rise to. This was not a case where the Member disputed facts and engaged in conduct which unreasonably exacerbated costs.

(d) Having regard to each party's submissions and the considerations set out in Regulation CR 8.12, the Tribunal determined that the Member should be required to pay the full costs of the proceedings in the amount of $33,234 because:

(i) the allegations were serious and the Member had breached the By-Laws;

(ii) for the reasons set out in 5.3 above, the Tribunal determined to reject the Member's submissions with respect to double jeopardy and duplicitousness, having determined that the disciplinary offences were distinct and separate even though they arose from the same events;

(iii) there was no dispute that the Member had every right to present his case based on legal argument presented by his legal representative. However, given the Tribunal did not accept those legal arguments and ultimately did not make findings in favour of the Member, there were no considerations that displaced the requirement in Regulation CR 8.12, that the full costs arising from these proceedings in addressing those legal arguments should be recovered from the Member.

8. Should the Member's name be suppressed?

(a) By-Law 40 states:

> 12.3 Where the Disciplinary Tribunal … determines that a complaint is established or imposes a sanction adverse to the Member … it must direct that a notice be published by CA ANZ of its decision and the sanctions imposed (if any). Any such publication must disclose the name of the relevant Member unless the Disciplinary Tribunal … considers that there are exceptional circumstances for not doing so. [emphasis added]
>
> 12.4 Publication … may be in such form and publication as the … Disciplinary Tribunal … considers appropriate, including in CA ANZ's official publication, on CA ANZ's website or in any other manner that it may in its discretion direct.

(b) The Tribunal determined there were no exceptional circumstances and therefore the Member's name should be disclosed in the publication.

9. Should 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 PCC submitted that:

(i) the Tax Practitioners Board;

(ii) the Australian Securities and Investments Commission; and

(iii) the Victorian Legal Services Board;

should be notified of the Tribunal's decision.

(c) The Member was invited to provide submissions in relation to By-Law 40(10.16) but did not do so.

(d) The Tribunal determined that the Tax Practitioners Board, Australian Securities and Investments Commission and the Victorian Legal Services Board were interested parties and should be notified of this decision.

10. 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. The Tribunal further directed that the identities of the Member's clients be kept confidential.

11. Other matters

11.1 Members of the public observing hearing

(a) By-Law 40(13.12) states:

> (b) … the Disciplinary Tribunal … shall hold its hearings in public.
> (c) The Disciplinary Tribunal … may determine to hear any part of a hearing in private.

(b) Members of the public who had signed a confidentiality deed poll were admitted to observe the hearing. Those individuals joined by audio only.

(c) The Member did not request that the hearing be private but requested the identities of those individuals observing the hearing. The Member submitted that he required this information so that he could identify the source of any public disclosure of the proceedings, should that occur.

(d) The Tribunal determined that the Member would be provided with the identities of the observers to the hearing, if those individuals consented to the disclosure. In making this determination the Tribunal noted that the Member could contact CA ANZ if he became aware of any future disclosure of confidential information.

11.2 Member's late provision of information to Tribunal

(a) By-Law 40(10.4) states:

> The Member receiving a Notice of Disciplinary Action … shall, unless the Professional Conduct Committee otherwise consents, not less than 14 days before the date of the hearing, state in writing to the Professional Conduct Committee:
> …
> (d) any relevant fact or circumstance the Member wishes to bring to the attention of the Disciplinary Tribunal and the reasons for doing so.

(b) The Member was informed of his obligations under By-Law 40(10.4) on 10 September 2020. The Member was reminded of his obligations under that By-Law on 21 September, 28 September, 14 October and 15 October 2020.

(c) On the day of the hearing the Member sought leave to provide written submissions and an authority.

(d) The PCC did not object.

(e) The Tribunal determined to accept the Member's late written submissions and authority.

12. RIGHTS OF APPEAL

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

The PCC may, within 21 days after notification of the written decision with reasons to the PCC of this Tribunal's decision, appeal in writing to the CA ANZ Appeals Tribunal against the decision (By-Law 40(11.2)).

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

(a) breach of the By-Laws

(b) sanction

(c) costs sanction

(d) publication

(e) notification.

The Tribunal decision as to confidentiality took effect immediately.

Chair
Disciplinary Tribunal

SCHEDULE 1: THE PCC'S ALLEGATIONS

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

1. By-law 40(2.1)(h), in that the Member committed a breach of Sections 100.5(b), 120, 220.1, 220.2, 220.3, 220.5 and 220.11 of APES 110, *Code of Ethics for Professional Accountants* in circumstances where from approximately April 2017 until May 2018 he:

    a) continued to act for two clients who were:

        i. partners in a commercial farming business (the Business);

        ii. engaged in the division and separation of their interests in the Business; and

        iii. involved in a commercial dispute regarding the terms on which the Business was divided and separated;

    b) in doing so, had a conflict of interest;

    c) failed to implement sufficient safeguards to reduce to an acceptable level the threat to the fundamental principle of objectivity in the circumstances set out in subparagraph (a) above.

2. By-Law 40(2.1)(h), in that the Member committed a breach of CA ANZ Regulation CR3.11 by carrying out work which is required by law to be performed by a legal practitioner, that work being the drafting of a document purporting to be a legally binding contract between [Client A] and [Client B], in or about November 2018.

3. By-Law 40(2.1)(k), in that the acts, omissions and defaults as set out in paragraph 1 and 2 above bring, or may bring, discredit on the Member, 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:

...

(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

(h) require the Member, at the Member's own expense, to complete any professional development courses prescribed by the Disciplinary Tribunal within the time period and on the terms stipulated by the Disciplinary Tribunal

...

(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.

...

40(13.12) Public and private hearings

...

(b) Subject to By-Laws 40(13.12)(c) and 40(13.12)(d), and unless the Disciplinary Tribunal or Appeals Tribunal determine otherwise, each shall hold its hearings in public.

(c) The Disciplinary Tribunal or Appeals Tribunal may determine to hear any part of a hearing in private.

(d) The Disciplinary Tribunal or Appeals Tribunal may require, including as a condition of admission to a hearing, any person present to undertake to keep all or any part of a hearing, the evidence adduced at it or other information disclosed (including the identity of any persons present at or otherwise connected with the hearing) confidential on such terms as it determines.

SCHEDULE 3: EXCERPTS FROM STANDARDS AND REGULATIONS

APES 110 CODE OF ETHICS FOR PROFESSIONAL ACCOUNTANTS

Compiled as at September 2017

...

PART A - GENERAL APPLICATION OF THE CODE

...

SECTION 100

Introduction and Fundamental Principles

...

Fundamental Principles

100.5 A Member shall comply with the following fundamental principles:

...

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

...

SECTION 120

Objectivity

120.1 The principle of objectivity imposes an obligation on all Members not to compromise their professional or business judgement 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 Activity if a circumstance or relationship biases or unduly influences the Member's professional judgement with respect to that service.

...

PART B - MEMBERS IN PUBLIC PRACTICE

...

SECTION 220

Conflicts of Interest

220.1 A Member in Public Practice may be faced with a conflict of interest when performing a Professional Service. A conflict of interest creates a threat to objectivity and may create threats to the other fundamental principles. Such threats may be created when:

- The Member provides a Professional Service related to a particular matter for two or more clients whose interests with respect to that matter are in conflict; or
- The interests of the Member with respect to a particular matter and the interests of the client for whom the Member provides a Professional Service related to that matter are in conflict.

A Member shall not allow a conflict of interest to compromise professional or business judgement.

When the Professional Service is an assurance service, compliance with the fundamental principle of objectivity also requires being independent of Assurance Clients in accordance with Sections 290 or 291 as appropriate.

220.2 Examples of situations in which conflicts of interest may arise include:

- Providing a transaction advisory service to a client seeking to acquire an Audit Client of the Firm, where the Firm has obtained confidential information during the course of the audit that may be relevant to the transaction.
- Advising two clients at the same time who are competing to acquire the same company where the advice might be relevant to the parties' competitive positions.
- Providing services to both a vendor and a purchaser in relation to the same transaction.
- Preparing valuations of assets for two parties who are in an adversarial position with respect to the assets.
- Representing two clients regarding the same matter who are in a legal dispute with each other, such as during divorce proceedings or the dissolution of a partnership.
- Providing an assurance report for a licensor on royalties due under a license agreement when at the same time advising the licensee of the correctness of the amounts payable.
- Advising a client to invest in a business in which, for example, the spouse of the Member in Public Practice has a Financial Interest.
- Providing strategic advice to a client on its competitive position while having a joint venture or similar interest with a major competitor of the client.
- Advising a client on the acquisition of a business which the Firm is also interested in acquiring.
- Advising a client on the purchase of a product or service while having a royalty or commission agreement with one of the potential vendors of that product or service.

220.3 When identifying and evaluating the interests and relationships that might create a conflict of interest and implementing safeguards, when necessary, to eliminate or reduce any threat to compliance with the fundamental principles to an Acceptable Level, a Member in Public Practice shall exercise professional judgement and take into account whether a reasonable and informed third party, weighing all the specific facts and circumstances available to the Member at the time, would be likely to conclude that compliance with the fundamental principles is not compromised.

...

220.5 If the threat created by a conflict of interest is not at an Acceptable Level, the Member in Public Practice shall apply safeguards to eliminate the threat or reduce it to an Acceptable Level. If safeguards cannot reduce the threat to an Acceptable Level, the Member shall decline to perform or shall discontinue Professional Services that would result in the conflict of interest; or shall terminate relevant relationships or dispose of relevant interests to eliminate the threat or reduce it to an Acceptable Level.

...

220.11 In addition, it is generally necessary to disclose the nature of the conflict of interest and the related safeguards, if any, to clients affected by the conflict and, when safeguards are required to reduce the threat to an Acceptable Level, to obtain their consent to the Member in Public Practice performing the Professional Services.

Disclosure and consent may take different forms, for example:

- General disclosure to clients of circumstances where the Member, in keeping with common commercial practice, does not provide services exclusively for any one client (for example, in a particular service in a particular market sector) in order for the client to provide general consent accordingly. Such disclosure might, for example, be made in the Member's standard terms and conditions for the engagement.
- Specific disclosure to affected clients of the circumstances of the particular conflict, including a detailed presentation of the situation and a comprehensive explanation of any planned safeguards and the risks involved, sufficient to enable the client to make an informed decision with respect to the matter and to provide explicit consent accordingly.
- In certain circumstances, consent may be implied by the client's conduct where the Member has sufficient evidence to conclude that clients know the circumstances at the outset and have accepted the conflict of interest if they do not raise an objection to the existence of the conflict.

The Member shall determine whether the nature and significance of the conflict of interest is such that specific disclosure and explicit consent is necessary. For this purpose, the Member shall exercise professional judgement in weighing the outcome of the evaluation of the circumstances that create a conflict of interest, including the parties that might be affected, the nature of the issues that might arise and the potential for the particular matter to develop in an unexpected manner.

...

CR3 – PUBLIC PRACTICE REGULATIONS

Issue date July 2015

...

Practice Management

...

Attention to Correspondence and Enquiries

1212 Members must reply to professional correspondence and enquiries expeditiously.

Issue date 28 July 2016

...

Practice Management

...

3.8 Attention to Correspondence and Enquiries

Members must reply to professional correspondence and enquiries expeditiously.

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.