

# Determination of the Disciplinary Tribunal of Chartered Accountants Australia and New Zealand 6 December 2016

**Case Number:** D-1150

**Member:** Peter Mark Dunham, FCA

**Hearing Date:** 1 December 2016

**Tribunal:** David Fairlie (Chair)  
John Gibson  
Richard Rassi

**Legal Adviser:** Zoe Taylor and Sid Wang

**Counsel:** Michael Bradley for the Professional Conduct Committee (PCC)  
Digby Luckhurst-Smith for the Member

**Case description:** Member suspended on an interim basis

## 1. DECISIONS

### 1.1 DECISION ABOUT THE PCC'S APPLICATION WHICH IS SET OUT IN FULL IN SCHEDULE 1

At a hearing of the Disciplinary Tribunal, not attended by the Member but at which he was represented by his Counsel, the Tribunal determined that the Member be suspended on an interim basis under By-Law 40 paragraph 9.1 until the earlier of:

- three months after the full and final resolution of all criminal proceedings against the Member; or
- further investigation and determination of the complaints referred to in the Notice of Disciplinary Action dated 14 November 2016.

For the period of interim suspension:

- the Member's name will be removed from the Registers on which it appears;
- the Member loses the rights and privileges of membership;
- the Member must surrender his certificate of membership, any certificate of public practice and any other accreditation, specialisation or other certificate or award held by the Member;
- the Member will remain subject to disciplinary processes and sanctions as if still a member.

### 1.2 DECISION ABOUT COSTS SANCTION

Costs are reserved at the request of the PCC until the final determination of the complaints referred to in the Notice of Disciplinary Action dated 14 November 2016.

### 1.3 DECISION ABOUT PUBLICATION

This decision will not take effect while the Member remains entitled to appeal.

The Tribunal will publish its decision, mentioning the Member's name and locality, on the website and in the journal of Chartered Accountants ANZ (paragraphs 12.3 and 12.4 of By-Law 40).

### 1.4 NOTIFICATION TO OTHER BODIES

The Member holds registrations and/or memberships with the following bodies, which will be notified of this decision:

- Tax Practitioners Board (**TPB**)
- Australian Securities and Investments Commission (**ASIC**).

## 2. RIGHT OF APPEAL

The Member may, within 14 days after the notification of the written decision with reasons to the Member of this Tribunal's decision, appeal in writing to the Appeals Tribunal of Chartered Accountants ANZ against the decision (paragraphs 9.4 and 11.1 of By-Law 40).

While the Member remains entitled to appeal, or while any such appeal by the Member awaits determination by the Appeals Tribunal, this decision shall not take effect.

### 3. TRANSITIONAL PROVISIONS

- By-Law 42(d) states:

*“In respect of the conduct of a Member prior to the Implementation Date, and save with the consent of a Member under paragraphs 7.3(f), 10.13, 11.10, 13.8 or otherwise, nothing in this Section 5 shall operate so as to increase the sanction imposed on a Member beyond those applicable to such conduct, or to make a Member liable to sanction for conduct which that Member would not otherwise have been, under the Former Professional Conduct By-Laws.”*
- The PCC submitted that although the investigation was commenced prior to the Implementation Date (being the date on which the new By-Laws came into force), By-Law 42(d) did not apply because an interim suspension is not a sanction.
- Alternatively the PCC submitted that even if the Tribunal determined that interim suspension is a sanction, much of the relevant conduct occurred after the Implementation Date and the Tribunal could still have regard to that conduct.
- The PCC submitted that an interim suspension was in the nature of a protective order and not a sanction because no finding of breach was required. In making the submission the PCC directed the Tribunal's attention to the table of sanctions set out in By-Law 40 paragraph 10.12 which did not include interim suspensions.
- The Tribunal accepted this submission. It did not consider the PCC's alternative argument.
- The Member made no submissions in relation to this matter.

### 4. ADJOURNMENT APPLICATION

- The Member sought an open-ended adjournment until the full and final determination of the criminal charges brought against him. In the alternative if the adjournment was not granted on this basis, the Member was willing to give an undertaking not to practice or hold himself out as a member of Chartered Accountants ANZ until then.
- The Member submitted that:
  - the matter is being prosecuted in South Australia and he cannot respond to the complaints in light of those proceedings
  - documentation supporting his case is to be tabled at an upcoming committal hearing
  - the Police seized the Member's computers, books and records in April 2016 and he has not practiced as a chartered accountant since that time, so that the suspension of his membership is unnecessary
  - the Member is discussing with the Australian Taxation Office (**ATO**) and TPB the conditions under which he could continue to practice as a tax agent at his home office.
- The PCC submitted that the matter was sufficiently serious to be dealt with now and that the undertaking proffered by the Member was not adequate because it did not deal with his continuing membership of Chartered Accountants ANZ.

- The Tribunal determined that it was not appropriate to grant an adjournment because:
  - the undertaking proffered by the Member was inconsistent with his discussions with the ATO and TPB in an effort to re-establish his practice as a tax agent
  - whilst the Member remains on the Register, there remains a risk that he may be held out as a chartered accountant or could still be considered as such by a member of the public
  - the matters raised in the complaints were serious
  - the Tribunal is not required to determine the truth of the allegations, only whether they warrant an interim suspension.

## 5. REASONS FOR DECISION ON INTERIM SUSPENSION

- The matters which the Tribunal must take into account in determining an application for interim suspension are set out at By-Law 40 paragraph 9.1 which states:
 

*“...if the Disciplinary Tribunal is satisfied that it is necessary or desirable to do so, having regard to the urgency of the matter, the interests of the public, the reputation of CA ANZ, or the integrity of the profession of accounting, the Disciplinary Tribunal may suspend the Member from Membership of CA ANZ on an interim basis pending further investigation and determination of the complaint.”*
- The PCC submitted that:
  - the allegations are serious and fall within the worst category of breach of trust
  - the allegations involved the misappropriation of between \$250,000 and \$300,000 from a not-for-profit organisation of which the Member was Treasurer over a lengthy period, based on a forensic accountant’s report
  - the forensic accountant was of the opinion that the Member had misappropriated money from the not-for-profit organisation which if proved in a court would constitute a criminal offence
  - ASIC saw fit to refer the matter to the prosecuting authority and criminal proceedings had been commenced against the Member based on the forensic accountant’s report
  - in light of the above the Tribunal should be satisfied that each of the factors set out in By-Law 40 paragraph 9.1 have been satisfied and that it was untenable that the Member continue to enjoy the rights of membership.
- The Member submitted that:
  - the Member has not provided a response to the forensic accountant’s report
  - he had not been able to practice since the Police had seized his computers, books and records in April 2016
  - there was no risk to members of the public or the reputation of Chartered Accountants ANZ as he was no longer practising
  - an interim suspension should not be considered until the criminal proceedings are resolved.
- The Tribunal accepted the Member’s presumption of innocence and it is not the Tribunal’s role to consider whether the allegations have been established.
- The Tribunal considered that because the complaints are serious, they come within the category of cases requiring an interim suspension order to be made because:

- the allegations contained in the forensic report could result in significant criminal penalties
- the allegations suggest breaches by the Member of the fundamental obligations of integrity and professional behaviour
- resolution of the court proceedings is likely to take a lengthy period of time and may result in adverse publicity to and put at risk the reputation of Chartered Accountants ANZ and the profession of accountancy.

  
**Chair  
Disciplinary Tribunal**

## **SCHEDULE 1 - THE PCC'S APPLICATION**

The Professional Conduct Committee seeks a determination that the Member's membership of Chartered Accountants Australia and New Zealand (Chartered Accountants ANZ) be suspended on an interim basis pending further investigation and anticipated disciplinary proceedings arising from allegations that he has engaged in acts of misappropriation of funds, as identified in complaints received by Chartered Accountants ANZ and the report prepared by Forensic Accounting Pty Ltd dated 1 December 2015.

## **SCHEDULE 2 - RELEVANT BY-LAWS**

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.

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### **9 Interim suspension of Membership**

9.1 On application by the Professional Conduct Committee for the interim suspension of a Member, if the Disciplinary Tribunal is satisfied that it is necessary or desirable to do so, having regard to the urgency of the matter, the interests of the public, the reputation of CA ANZ, or the integrity of the profession of accounting, the Disciplinary Tribunal may suspend the Member from Membership of CA ANZ on an interim basis pending further investigation and determination of the complaint.

9.2 For the period of a Member's suspension on an interim basis:

- (a) that Member's name shall be removed from the Registers on which it appears; and
- (b) that Member:
  - (i) loses the rights and privileges of Membership;
  - (ii) must surrender that Member's certificate of Membership, certificate(s) of public practice and any other documents specified in paragraph 13.4 to CA ANZ; and
  - (iii) save as provided in paragraph 4.3(e), remains subject to the disciplinary processes and sanctions under these By-Laws (including this Section 5) as if still a Member.

9.3 The provisions of paragraph 10 apply to the procedures for a hearing on an application for interim suspension under this paragraph 9, except that:

- (a) the Notice of Disciplinary Action to be given in accordance with paragraph 10.1 must specify that the hearing is on an application by the Professional Conduct Committee for interim suspension;
- (b) the minimum 28 day time periods in paragraphs 10.1 and 10.3 are shortened to 14 days;
- (c) without prejudice to paragraph 13.8, paragraphs 10.12(a) to 10.12(k), and 10.13 (sanctions) do not apply; and
- (d) the maximum period within which the Disciplinary Tribunal is to notify its decision and give reasons in accordance with paragraph 10.15 is reduced to 7 days.

9.4 The provisions of paragraph 11 apply to the procedures for an appeal of a decision by the Disciplinary Tribunal in respect of the hearing of an application for interim suspension under this paragraph 9, except that:

- (a) the maximum 21 day time periods in paragraphs 11.1 and 11.2 (time for notifying appeal) are shortened to 14 days;
- (b) the minimum 21 day time period in paragraph 11.4 (notice of hearing) is reduced to 14 days; and

- (c) the maximum period within which the Appeals Tribunal is to notify its decision and give reasons in accordance with paragraph 11.13 is reduced to 7 days.

9.5 The provisions of paragraph 9 do not apply to Non-Member Practice Entities.

...

#### **13.4 Termination and suspension**

If the name of a Member is removed from any Registers on termination or suspension (including suspension on an interim basis) in accordance with this Section 5, the Member's certificate of Membership, any certificate of public practice and any other accreditation, specialisation or other certificate or award then held by the Member is cancelled with immediate effect and must be delivered up by the former Member to CA ANZ.