



Appeals Tribunal of Chartered Accountants Australia and New Zealand (CA ANZ) Written decision dated 10 March 2021

- Case Number:** D-1238
- Member:** Nigel Edmund Tolley FCA of New South Wales
- Hearing Date:** 4 March 2021
- Tribunal:** Harold Werksman (Chair and lay member of this Tribunal)
Lyn Cox FCA
Bronwyn Morris AM FCA
- Representation:** Paul Forbes for the Professional Conduct Committee (PCC)
Jonathan Hyde for the Member
- Decisions:**
1. The Appeals Tribunal (this **Tribunal**) determined to:
 - (a) affirm the determinations of the Disciplinary Tribunal that its decision with reasons, mentioning the Member's name and location, be published on the CA ANZ website and that a summary of that published decision be published in the CA ANZ official publication *Acuity*;
 - (b) affirm the Disciplinary Tribunal determination that the Tax Practitioners Board and Australian Securities and Investments Commission be notified of its decision.
 2. This Tribunal imposed a cost sanction in the sum of \$9,220 for the full costs and expenses of the appeal.
 3. This Tribunal made the following directions regarding the conduct of the hearing and the publication of its reasons for decision:
 - (a) the hearing be private;
 - (b) to allow the Member's new evidence;
 - (c) to approve the Member's proposed amendment of his grounds of appeal;
 - (d) its decision with reasons, mentioning the Member's name and location, be published on the CA ANZ website (the **Published Decision**);
 - (e) a summary of the Published Decision mentioning the Member's name and location with a web address for the Published Decision be published in the CA ANZ official publication, *Acuity*;

- (f) publication on the CA ANZ website and in *Acuity* not to occur before three business days after provision of the written reasons to the Member and the PCC;
- (g) the Tax Practitioners Board and Australian Securities and Investments Commission be notified of the Published Decision;
- (h) except for the content of the Disciplinary Tribunal and this Tribunal written decisions with reasons, all written and oral evidence and submissions related to this determination are to remain confidential.

The date of effect of this decision is 4 March 2021 (By-Law 40(11.14)).



1. Introduction

- (a) On 17 November 2020:
 - (i) the Disciplinary Tribunal heard an application for interim suspension of the Member's membership, brought by the PCC;
 - (ii) the Member did not oppose the PCC's application;
 - (iii) the Disciplinary Tribunal determined:
 - (1) to suspend the Member from membership of CA ANZ on an interim basis pending further investigation and determination of the complaint; and
 - (2) that the period of interim suspension should end on the earlier of:
 - A. a. all civil and criminal proceedings against the Member; and
 - b. all regulatory investigations into the Member's conduct; in connection with the matters referred to in paragraphs 1 and 2 of the Notice of Disciplinary Action; or
 - B. further investigation and determination of the complaints arising from the matters referred to in paragraphs 1 and 2 of the Notice of Disciplinary Action.
- (b) By notification of appeal dated 8 December 2020 the Member appealed the following Disciplinary Tribunal decisions:
 - (i) interim suspension of his membership;
 - (ii) publication of his name in the Disciplinary Tribunal decision;
 - (iii) notification of the Disciplinary Tribunal decision to interested parties.
- (c) By written submissions dated 5 February 2021, the Member sought to amend his notification of appeal and withdraw his appeal against his interim suspension of membership.

2. The issues for determination:

- (a) Should the hearing be private?
- (b) Should the Member be allowed to introduce evidence he did not present to the Disciplinary Tribunal?
- (c) Should this Tribunal approve the Member's proposed amendment to his grounds of appeal?
- (d) Should the Disciplinary Tribunal decision with reasons be published?
- (e) Should the Disciplinary Tribunal decision with reasons be notified to the identified interested parties?
- (f) Should the Member be required to pay costs and if so, in what amount?
- (g) Was there any reason to suppress the Member's name from the published decision?
- (h) Should other parties be notified of this Tribunal's decision?
- (i) Should any confidentiality orders be made?
- (j) Should this Tribunal delay publication of reasons?

3. Should the hearing be private?

- (a) By-Law 40(13.12) states:
- (b) ... the ... Appeals Tribunal ... shall hold its hearings in public.
 - (c) The ... Appeals Tribunal ... may determine to hear any part of a hearing in private.
- (b) The Member requested the hearing be held in private because of the proceedings which were currently on foot in other jurisdictions and that it was important that the proceedings before this Tribunal be dealt with privately.
- (c) The PCC did not object, in the circumstances of this case, to the hearing being held in private.
- (d) This Tribunal determined that the hearing should be held in private to ensure that no prejudice to the Member occurred as a result of the hearing. The Tribunal then directed that a member of the public who had sought to attend the hearing, be excluded.

4. Should the Member be allowed to introduce evidence he did not present to the Disciplinary Tribunal?

4.1 Procedure of this Tribunal

By-Law 40 provides:

- 11.7 Every appeal shall be by way of rehearing but, unless the Appeals Tribunal directs otherwise, it shall not allow witnesses to be recalled who gave evidence before the Disciplinary Tribunal or to introduce any new evidence.

4.2 Member submissions

- (a) By notification of appeal dated 8 December 2020, the Member introduced evidence that he had not provided to the Disciplinary Tribunal. This evidence comprised certain correspondence (his **New Evidence**).
- (b) The Member submitted that his New Evidence was relevant to show that the publication of the reasons of the Disciplinary Tribunal and Appeals Tribunal were likely to be republished.

4.3 PCC submissions

The PCC objected to the introduction of the Member's New Evidence but agreed that it could be admitted subject to relevance and weight.

4.4 Tribunal decision and reasons

This Tribunal determined to allow the Member's New Evidence on the basis that it would consider its relevance and weight when making its decision.

5. Should this Tribunal approve the Member's proposed amendment to his grounds of appeal?

5.1 Procedure of this Tribunal

By-Law 40 provides:

- 11.3 A notice of appeal must state the grounds of appeal in full and the grounds so stated shall not thereafter be amended except with the approval of the Appeals Tribunal.

5.2 Member submissions

- (a) By notification of appeal dated 8 December 2020, the Member appealed, amongst other things, the interim suspension of his membership and provided grounds for that appeal.
- (b) By written submissions dated 5 February 2021, the Member advised that he did not appeal interim suspension of his membership.
- (c) At the hearing of his appeal, the Member confirmed that he was not appealing the interim suspension of his membership.

5.3 PCC submissions

The PCC did not object to the amendment.

5.4 Tribunal decision and reasons

Pursuant to By-Law 40(11.3), the Tribunal determined to approve the Member's amendment to his grounds of appeal, so that the interim suspension appeal was removed. The Tribunal made this decision because there was no prejudice to the appeal.

6. Should the Disciplinary Tribunal decision with reasons be published?

6.1 Disciplinary Tribunal determination

The Disciplinary Tribunal determined that:

- (a) its decision with reasons, mentioning the Member's name and location, be published on the CA ANZ website;
- (b) a summary of that published decision mentioning the Member's name and location with a web address for the full decision be published in the CA ANZ official publication, *Acuity*.

6.2 Member submissions

- (a) The Member:
 - (i) submitted that the Disciplinary Tribunal's determination with reasons should not be published at all;
 - (ii) submitted in the alternative that the decision to suspend the Member on an interim basis could be published with only his name and location and the fact of the interim suspension, but not the reasons;
 - (iii) referred to paragraphs 6(b) and (c) of the Disciplinary Tribunal determination and submitted it was wrong to give primacy to the interests of the public and the profession over the presumption of the Member's innocence and his right to a fair trial;
 - (iv) submitted that there was no utility in educating the public about the level of the charges that had been made against him;
 - (v) submitted that this Tribunal had to balance the need to ensure that the Member had a fair trial with the interests of the public and the members of CA ANZ;
 - (vi) submitted the exceptional circumstances which justified his request to this Tribunal to make a decision not to publish its reasons or the reasons for the Disciplinary Tribunal decision were:

- (1) the fact that he faced serious criminal charges, potentially involving a lengthy prison term;
 - (2) that he is entitled to the presumption of innocence;
 - (3) he had a common law right to silence;
 - (4) he willingly accepted interim suspension of his membership;
- (vii) submitted that the fact that there already had been some publicity did not provide a reason for further publication which would compound the chance of him not receiving a fair trial.
- (b) In making this submission, the Member referred to his New Evidence to show that the complainant had a personal and financial interest in publishing material about the Member and that there was a risk that the complainant would re-publish the reasons for the Disciplinary Tribunal decision, which would affect the fairness of his trial.
- (c) When asked by this Tribunal whether the public had an interest in knowing whether one of the members had been suspended, the Member submitted that he was entitled to the presumption of innocence and that, having consented to interim suspension, the Tribunal's objects and purposes would be satisfied by noting the suspension and identifying the individual.

6.3 PCC submissions

- (a) The PCC submitted that:
- (i) the question of whether to publish the reasons was dependent on whether there were exceptional circumstances as required by By-Law 40(12.3). The PCC submitted there were no exceptional circumstances in this case;
 - (ii) the Disciplinary Tribunal was circumspect in providing its reasons and made it clear that the charges were not admitted and would be strenuously denied. Further, that the Disciplinary Tribunal did not make any findings of guilt;
 - (iii) there were no findings of dishonesty or as to the integrity of the Member;
 - (iv) it was in the public interest that it should be aware that the Member had been charged with serious offences;
 - (v) the facts were sufficiently serious to justify interim suspension of membership;
 - (vi) the reasons were important because of the need for transparency so that members of the public and the members of CA ANZ should know why he had been interim suspended;
 - (vii) interim suspension is not a punishment but is a protective measure;
 - (viii) the Member could still practice as an accountant;
 - (ix) directed this Tribunal to five similar cases in which the Disciplinary Tribunal determined that members facing serious charges should be interim suspended and the Disciplinary Tribunal reasons be published. This case was very similar.
- (b) In making this submission, the PCC referred to the following evidence:
- (i) article by Ava Benny-Morrison 'Sleuths put freeze on Coca-Cola trustee', The Sunday Telegraph 19 July 2020;

- (ii) an email in the Member's New Evidence which the PCC submitted was factual.

6.4 Tribunal decision and reasons

This Tribunal determined to affirm the determinations of the Disciplinary Tribunal that its decision with reasons, mentioning the Member's name and location, be published on the CA ANZ website and that a summary of that published decision be published in the CA ANZ official publication *Acuity* because:

- (a) this Tribunal accepted that the reasons of the Disciplinary Tribunal were circumspect and emphasised the fact that the charges were denied and would be vigorously defended;
- (b) it is important that the public and the other members of CA ANZ understand that the reason for the Member's suspension on an interim basis is the fact that serious charges have been laid against him. Clearly the Disciplinary Tribunal and this Tribunal could make no findings as to his guilt and indeed accepted that he is entitled to the presumption of innocence. Nevertheless the public and the other members of CA ANZ are entitled to be advised of the fact that this Member has been the subject of such charges and may, in the future, be found to be guilty of those charges or some of them;
- (c) CA ANZ represents to the public and its members that its members are fit and proper persons to be members and that they are persons whom CA ANZ considers to be persons of honesty and integrity. In circumstances in which there is a risk that a member may be found by a court to be guilty of a serious offence, CA ANZ cannot continue to make unqualified representations concerning that member. It is obliged to draw to the attention of the public and its members its reasons for interim suspending that member so that in dealing with that member, members of the public and other members are aware that there may be adverse findings against that member in the future;
- (d) where the Member has agreed that his membership ought to be interim suspended, this Tribunal also had to weigh up the interests of the public and the other members of CA ANZ in understanding why he was being interim suspended, as against his submission that publication of the Tribunal reasons would result in him not receiving a fair trial. In this regard:
 - (i) there had already been publication in the media;
 - (ii) the Member had not suggested that he was widely known to the public or provided any evidence to show that publication of the reasons of the Disciplinary Tribunal or this Tribunal would affect his trial;
 - (iii) the fact that the reasons may be re-published by other persons who have an interest in doing so did not mean that the Member's right to a fair trial would be affected;
 - (iv) the reasons made it perfectly clear that no findings were being made by the Disciplinary Tribunal or this Tribunal as to the allegations;
- (e) in all of the circumstances this case did not appear to be any different from any other of the cases in which persons charged with serious offences and have not yet been tried, have had their membership interim suspended. The mere fact that there was some third party who may wish to re-publish the reasons did not, in this Tribunal's view, constitute an exceptional circumstance. Further, the fact that the Member strongly denies the charges was also consistent with earlier cases and was not an exceptional circumstance. Finally, there was nothing in the Disciplinary Tribunal reasons or in these reasons which would impact on the Member's right to the presumption of innocence or his right to silence.

7. Should the Disciplinary Tribunal decision with reasons be notified to the identified interested parties?

7.1 Disciplinary Tribunal determination

The Disciplinary Tribunal determined that the Tax Practitioners Board and the Australian Securities and Investments Commission would be notified of its decision, as interested parties.

7.2 Member submissions

The Member submitted that if any notification was made to third parties, it should be confined to the fact of interim suspension and his name, and no more.

7.3 PCC submissions

The PCC submitted that the reasons should be provided to the interested parties.

7.4 Tribunal decision and reasons

For the reasons set out at 6.4, this Tribunal determined to affirm the Disciplinary Tribunal determination that the Tax Practitioners Board and Australian Securities and Investments Commission be notified of its decision with reasons, as interested parties.

8. 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, this 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 and the Member agreed that the costs up to and including the Disciplinary Tribunal consideration of the PCC's application for interim suspension were reserved until final determination of the complaint.
- (c) The PCC submitted that the Member should pay the costs related to the appeal because the case before the Disciplinary Tribunal was concerned with whether or not the Member should

be suspended on an interim basis but that the appeal was about publication of the reasons for that interim suspension and that, having lost his appeal, the Member ought to pay the costs.

- (d) The Member submitted that costs should be reserved to final determination of the case because, if he was found innocent, he would be able to argue that he should not pay the costs.
- (e) This Tribunal determined that the Member should pay \$9,220 for the full costs and expenses of the appeal because:
 - (i) Regulation CR 8.12 mandates that members must pay the full amount of costs unless there is a reason to reduce that amount;
 - (ii) the amount of \$9,220 was the amount that had been incurred by or on behalf of CA ANZ in dealing with the Member's appeal;
 - (iii) whether or not the Member was ultimately found to be innocent of the charges laid against him would have no impact on whether the reasons for the Disciplinary Tribunal's and this Tribunal's decisions to suspend him should be published because those reasons contained no finding as to his innocence or guilt. In those circumstances, it was reasonable that the Member pay the costs of the appeal in full.

9. Should the Member's name be suppressed?

- (a) By-Law 40 states:

12.3 Where the ... Appeals Tribunal ... determines that a complaint is established, imposes a sanction adverse to the Member ... 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 ... Appeals 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 ... Appeals 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) For the reasons set out at 6.4 above, this Tribunal determined there were no exceptional circumstances and therefore the Member's name should be disclosed in the publication.

10. Should other parties be notified of this Tribunal decision?

- (a) By-Law 40(11.15) states:

The Appeals Tribunal ... may notify interested parties including other professional bodies, regulatory authorities, the Member's current and/or former employers, partners and 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.
- (b) For the reasons set out at 7.4 above, this Tribunal determined to notify this decision with reasons to the Tax Practitioners Board and Australian Securities and Investments Commission, as interested parties.

11. Should any details be kept confidential?

- (a) By-Law 40(13.12) states:
 - (d) The ... 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.
- (b) This Tribunal directed that, except for the content of the Disciplinary Tribunal's and this Tribunal's written decisions with reasons, all written and oral evidence and submissions related to this determination are to remain confidential.

12. Should this Tribunal delay publication of reasons?

- (a) The Member requested that he be given 72 hours from the date on which he was provided with this Tribunal's reasons before those reasons were published, in order to provide him time to consider whether to apply for a judicial review of this decision.
- (b) The Tribunal decided that the Disciplinary Tribunal reasons and this Tribunal's reasons must not be published until the expiry of a period of three business days after this Tribunal's reasons were provided to the Member and the PCC.



**Chair
Appeals Tribunal**

SCHEDULE 1: THE PCC'S ALLEGATIONS

The Professional Conduct Committee sought a determination that the Member's membership of Chartered Accountants Australia and New Zealand (Chartered Accountants ANZ) be suspended on an interim basis.

It was alleged that on or about 24 March 2020, while a Member of Chartered Accountants ANZ, the Member was charged with the following criminal offences:

1. Eleven counts of dishonestly obtaining financial advantage or causing financial disadvantage by deception, contrary to section 192E(1)(b) of the *Crimes Act 1900* (NSW); and
2. Two counts of knowingly dealing with the proceeds of crime, intending to conceal that it is proceeds of crime, contrary to section 193B(1) of the *Crimes Act 1900* (NSW).

The Professional Conduct Committee sought an interim suspension on the basis that it was necessary or desirable having regard to the criteria in By-Law 40(9.1), being the urgency of the matter, interests of the public, reputation of Chartered Accountants ANZ or the integrity of the profession of accounting, which were likely to be satisfied by reason of the Member's alleged conduct.

The time period for which the Professional Conduct Committee sought that the interim suspension apply was the earlier of:

- (a) six months after the full and final resolution of the later of:
 - i. all civil and criminal proceedings against the Member; and
 - ii. all regulatory investigations into the Member's conduct; or
- (b) further investigation and determination of the complaints arising from the matters referred to in paragraphs 1-2 above.

SCHEDULE 2: RELEVANT BY-LAWS

Section 4 – Rights and Obligations of Members

...

Certificates of Public Practice

...

34. ...

- (d) The certificate of public practice of a Member upon whom any of the sanctions referred to in By-Laws 40(9.1), 40(10.12)(a) to (d) of By-Law 40 or By-Law 41 has been imposed, shall, subject to any appeal under By-Law 40(11), ipso facto, be cancelled and, accordingly, cease to be a current certificate of public practice in terms of By-Law 34(a).

...

Section 5 - Professional Conduct

39. In this Section 5 unless the context requires otherwise:

...

- (h) **Costs** means any costs and expenses incurred by or on behalf of CA ANZ in relation to the investigation and determination of a complaint (whether through the Professional Conduct Committee, Disciplinary Tribunal, Appeals Tribunal or otherwise) and any other taxes, fees and charges, paid or payable on them, including, without limitation:
- (i) fees and disbursements of professionals, advisors or consultants employed, engaged or retained to investigate, represent, appear (as expert witnesses or otherwise), hear, or determine the complaint or advise on the same; and
 - (ii) other outgoings and disbursements including, without limitation, couriers, any transport, travel, accommodation, search fees, transcription services, outsourced photocopying, publication fees, room hire, video-conferencing, telephone conferencing and meals;

...

- (o) **Notice of Disciplinary Action** has the meaning given to it in By-Law 40(10.1);

...

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(1) Committees and Tribunals

40(1.1) For the implementation of the procedures referred to in this Section 5, there shall be the following committees and tribunals:

...

- (b) a Professional Conduct Committee which shall receive, initiate, investigate, determine and refer complaints;
- (c) a Disciplinary Tribunal which shall hear and determine complaints made to it by the Professional Conduct Committee; and
- (d) an Appeals Tribunal which shall hear and determine appeals of decisions of the Disciplinary Tribunal.

...

40(1.3) Subject to these By-Laws, the Regulations and the Charters, each committee and tribunal shall regulate its own affairs and may delegate any of its functions.

...

40(9) Interim suspension of Membership

40(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 accountancy, the Disciplinary Tribunal may suspend the Member from Membership of CA ANZ on an interim basis pending further investigation and determination of the complaint.

40(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 to CA ANZ that Member's certificate of Membership, certificate(s) of public practice and any other documents specified in By-Law 40(13.4); and
 - (iii) remains subject to the disciplinary processes and sanctions under these By-Laws (including this Section 5) as if still a Member.

40(9.3) The provisions of By-Law 40(10) apply to the procedures for a hearing on an application for interim suspension under this By-Law 40(9), except that:

- (a) the Notice of Disciplinary Action to be given in accordance with By-Law 40(10.1) must specify that the hearing is on an application by the Professional Conduct Committee for interim suspension;
- (b) the minimum 35 day time periods in By-Laws 40(10.1) and 40(10.3) are shortened to 14 days;
- (c) without prejudice to By-Law 40(13.8), By-Laws 40(10.12)(a) to (j), and 40(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 By-Law 40(10.15) is reduced to 7 days.

- 40(9.4) The provisions of By-Law 40(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 By-Law 40(9), except that:
- (a) the maximum 21 day time periods in By-Laws 40(11.1) and 40(11.2) (time for notifying appeal) are shortened to 14 days;
 - (b) the minimum 28 day time period in By-Law 40(11.6) (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 By-Law 40(11.15) is reduced to 7 days.

...

40(10) Disciplinary Tribunal

- 40(10.1) Subject to By-Laws 40(9.3)(a) and 40(9.3)(b), when a complaint is referred by the Professional Conduct Committee to the Disciplinary Tribunal, the Professional Conduct Committee must, unless the Member otherwise consents, give to the Member concerned a notice (Notice of Disciplinary Action) no less than 35 days before the Disciplinary Tribunal hearing setting out:
- (a) details of the complaint made against the Member and any particulars and information in support;
 - (b) the date, time and place of the hearing before the Disciplinary Tribunal; and
 - (c) where the Professional Conduct Committee's case against the Member will be presented at the Disciplinary Tribunal hearing by an independent Australian legal practitioner, a statement to that effect and, if known, the legal practitioner's name and firm, organisation or chambers.

...

- 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:

...

- (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(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(11.3) A notice of appeal must state the grounds of appeal in full and the grounds so stated shall not thereafter be amended except with the approval of the Appeals Tribunal.
- 40(11.4) The Appeals Tribunal may, at its discretion, require the Member to pay such amount as it determines to CA ANZ as security against the anticipated Costs which CA ANZ may incur in the conduct and hearing of the appeal.
- 40(11.5) The Appeals Tribunal may, at its discretion, stipulate a time period of not less than 28 days within which the Member must pay the amount referred to in By-Law 40(11.4) and, if it does so and the Member has not paid that amount at the expiry of that period, the appeal will automatically lapse.
- ...
- 40(11.7) Every appeal shall be by way of rehearing but, unless the Appeals Tribunal directs otherwise, it shall not allow witnesses to be recalled who gave evidence before the Disciplinary Tribunal or to introduce any new evidence.
- ...
- 40(11.9) The Member shall not later than 14 days (or such other date as the Appeals Tribunal prescribes) before the date of the hearing provide in writing to the Appeals Tribunal:
- (a) notice as to whether the Member will attend the hearing and, if represented, by whom (including details of that representative's name and firm, organisation or chambers); and
 - (b) notice of any other relevant fact or circumstance the Member wishes to bring to the attention of the Appeals Tribunal.
- 40(11.10) At every hearing before the Appeals Tribunal, the Professional Conduct Committee shall be responsible for the presentation of the case against the Member concerned. The Professional Conduct Committee may appoint an independent Australian legal practitioner to present the case on its behalf.
- ...
- 40(11.12) On each appeal the Appeals Tribunal may affirm, vary or set aside any determination of the Disciplinary Tribunal and may affirm, increase, reduce or set aside any sanction imposed and may impose any additional or alternative sanction or sanctions from those permitted to the Disciplinary Tribunal by By-Laws 40(9.1), 40(10.12), 40(10.13), 40(12.3), 40(12.4) (as applicable) and 40(13.8).
- ...
- 40(11.14) A determination of the Appeals Tribunal shall take effect as from the date it is made.

- 40(11.15) The Appeals Tribunal:
- (a) must give notice of its decision with reasons to the Member, the Professional Conduct Committee and the Professional Conduct Oversight Committee within 14 days of the decision; and
 - (b) may notify interested parties including other professional bodies, regulatory authorities, the Member's current and/or former employers, partners and 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.

...

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(12.5) No publication of a Disciplinary Tribunal decision or sanction will be made until the later of the day following the final date for its appeal under By-Law 40(11.1), and the determination of any appeal notified in accordance with By-Laws 40(11.1) to 40(11.3).

...

40(13) General

40(13.1) Expedition

The Professional Conduct Committee, Disciplinary Tribunal and Appeals Tribunal shall endeavour to investigate, hear and determine complaints in a timely and efficient manner.

40(13.2) Evidence

The rules of evidence do not apply to the processes and proceedings referred to in this Section 5.

40(13.3) Conduct and provision of information

Members must be open and honest in their dealings with the Professional Conduct Committee, Disciplinary Tribunal and Appeals Tribunal. Members must provide such information as is required of them by CA ANZ, the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal in connection with an investigation, a complaint or any matters arising from or in relation to it, in a timely fashion and in

any event within the time prescribed in this Section 5 and any applicable Regulations. Each of the Professional Conduct Committee, Disciplinary Tribunal and Appeals Tribunal may record its meetings, interviews, investigations, proceedings and hearings in any manner it decides, including by the use of stenography and sound recording technology.

40(13.4) Termination and suspension

If the name of a Member is removed from any Registers on termination or suspension 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.

...

40(13.6) Guidelines for the imposition of sanctions

In determining the sanctions to be imposed on a Member under this Section 5 (with or without the consent of that Member) the Professional Conduct Committee, Disciplinary Tribunal and Appeals Tribunal must have regard to the guidelines set out in any applicable Regulations.

40(13.7) Costs awards

When the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal determines whether or not to require a Member to pay Costs under this Section 5, and the amount of such Costs a Member is required to pay, it must have regard to the guidelines set out in any applicable Regulations.

...

40(13.12) Public and private hearings

...

- (b) Subject to By-Laws 40(13.12)(c) and 40(13.12)(d), and unless the Disciplinary Tribunal or Appeals Tribunal determine otherwise, each shall hold its hearings in public.
- (c) The Disciplinary Tribunal or Appeals Tribunal may determine to hear any part of a hearing in private.
- (d) The Disciplinary Tribunal or Appeals Tribunal may require, including as a condition of admission to a hearing, any person present to undertake to keep all or any part of a hearing, the evidence adduced at it or other information disclosed (including the identity of any persons present at or otherwise connected with the hearing) confidential on such terms as it determines.

SCHEDULE 3: REGULATION CR8 - DISCIPLINARY PROCEDURES

Issued 8 October 2019

8.1 Purpose

This Regulation supplements the professional conduct and disciplinary process provisions of Section 5 of the By-Laws.

8.2 Definitions

Unless expressly defined in this Regulation, capitalised terms used in this Regulation are defined in By-Law 2 and Section 5 of the By-Laws. The definitions in By-Law 39 shall prevail to the extent of any inconsistency between this Regulation and the By-Laws or between By-Law 2 and By-Law 39.

8.3 By-Laws

Refer to Section 5 of the By-Laws for provisions relating to Professional Conduct.

8.4 Charter

- (a) For the implementation of the procedures referred to in Section 5 of the By-Laws the Board has approved Charters for:
 - (i) the Professional Conduct Oversight Committee;
 - (ii) the Professional Conduct Committee;
 - (iii) the Disciplinary Tribunal; and
 - (iv) the Appeals Tribunal.
- (b) The Charter for each may be found [here](#).

8.5 Disclosure Events (By-Laws 40(3.1) and 40(3.2))

- (a) It is a Member's responsibility to give notice to the Professional Conduct Committee within 7 days of the occurrence of a Disclosure Event.
- (b) When required, such notice should be in writing in the [form prescribed](#).
- (c) Within 21 days of a Disclosure Event, a Member is also required to send a statement to the Professional Conduct Committee setting out the reasons why that Member considers that the Member's membership should not be affected, including suspended (whether or not on an interim basis) or terminated and that Member's name removed from the Registers. The time period is longer for the statement than the notice to allow a Member to gather evidence, including from referees, to explain any mitigating or extenuating circumstances.

8.6 Notification Event (By-Laws 40(3.3) and 40(3.4))

- (a) It is a Member's responsibility to give notice to the Professional Conduct Committee within 7 days of the occurrence of a Notification Event.
- (b) When required, such notice should be in writing in the [form prescribed](#).

8.7 Form of complaints (By-Law 40(4.1(a)))

- (a) Complaints made about a Member to CA ANZ pursuant to By-Law 40(4.1)(a) should be made using, and in the manner prescribed by, the [Complaint Form](#).

- (b) Anonymous complaints, or those made without adequately disclosing the identity of the person(s) making the complaint, will not be processed by CA ANZ.

8.8 Applications to the Professional Conduct Committee for legal representation (By-Laws 40(5.4) and 40(7.2))

Applications for the consent of the Professional Conduct Committee for legal representation should be made using, and in the manner prescribed by, the [Consent Form](#).

8.9 Application to the Reviewer (By-Law 40(8))

- (a) An application made to CA ANZ to request the review of a Final Decision in accordance with By-Law 40(8.2) can be made by the original complainant or the relevant Member and must be made:
 - (i) within 21 days of notification of the Final Decision;
 - (ii) using and in the manner prescribed by the [Final Decision Review Form](#); and
 - (iii) accompanied by:
 - A. payment of the Application Fee (which is AU\$500) in a manner prescribed by the Final Decision Review Form; and
 - B. the [Costs Agreement](#) duly executed by the applicant.
- (b) Every Reviewer appointed will be an independent Australian legal practitioner.
- (c) When lodged, the Final Decision Review Form must include all matters the complainant wishes to be considered by the Reviewer.
- (d) The Application Fee is non-refundable, but the Reviewer may recommend that CA ANZ refund the Application Fee to the applicant, where the Reviewer considers this to be appropriate.

8.10 Appeals Tribunal (By-Law 40(11))

- (a) An appeal of a determination of the Disciplinary Tribunal may be made by the Member the subject of the determination or the Professional Conduct Committee in accordance with By-Law 40(11.1).
- (b) Notice of appeal should be given using, and in the manner prescribed by, the [Appeal Form](#) and must detail all grounds of appeal.
- (c) Pursuant to By-Law 40(11.4) the Appeals Tribunal has a discretion to require the Member to pay to CA ANZ such amount as it determines as security against the anticipated Costs which CA ANZ may incur in the conduct and hearing of the appeal.

8.11 Guidelines for the imposition of sanctions (By-Law 40(13.6))

- (a) When the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal determines that it is appropriate to sanction a Member, in deciding what sanction(s) to impose and without limiting the matters it may consider, it may consider the following matters:
 - (i) the seriousness of the conduct;
 - (ii) whether the conduct has occurred before and, if so, the nature, extent and frequency of the conduct;

- (iii) the Member's responsibility and accountability for the conduct in the context of that Member's Practice Entity, including without limitation:
 - A. whether the conduct was systemic;
 - B. whether the Practice Entity's leadership were aware of or complicit in the conduct;
 - C. whether it forms part of a pattern of conduct; and
 - D. the Member's role, position and seniority in the Practice Entity;
 - (iv) whether the Member has failed to comply with any undertaking or agreement to remedy the conduct;
 - (v) any aggravating or mitigating factors raised which are relevant to the conduct in question;
 - (vi) the personal circumstances of the Member to the extent they are raised and relevant to the conduct;
 - (vii) any character and/or other references provided in writing in support of the good standing of the Member;
 - (viii) the maintenance of public confidence in the profession;
 - (ix) the maintenance of proper standards of professional conduct;
 - (x) deterrence; and
 - (xi) any other circumstances relevant to the practice of the Member and the profession.
- (b) The Professional Conduct Committee, the Disciplinary Tribunal and the Appeals Tribunal must balance the interests of the Member against the public interest, the reputation of CA ANZ, and the need to support the integrity of the profession of accounting and those of CA ANZ in determining what are appropriate and sufficient sanctions.

8.12 Costs awards (By-Law 40(13.7))

When the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal determines whether or not to require a Member to pay Costs under Section 5 of the By-Laws, and the amount of such Costs a Member is required to pay, it must require the Member to pay all of the Costs claimed by CA ANZ unless it determines that, having regard to the following matters, it is appropriate that the Member be required to pay only part or none of the claimed Costs:

- (a) whether and to what extent the complaint against the Member is found to have merit and whether or not there is ultimately a finding in favour of the Member;
- (b) the substance or seriousness of the complaint;
- (c) the conduct of the Member in relation to the investigation and disciplinary process, including whether the Member was open, honest and timely in the Member's dealings with the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal in relation to the complaint and whether the Member complied with the provisions of Section 5 of the By-Laws and any applicable Regulations during the conduct of the disciplinary process;
- (d) the extent to which the final sanctions determined differ from those that the Professional Conduct Committee or Disciplinary Tribunal gave the Member the opportunity to agree by consent;

- (e) whether to do so is reasonable in the circumstances;
- (f) the amount of the Costs incurred by CA ANZ in the conduct of the investigation and proceedings;
- (g) whether and to what extent the Member has previously been required to pay Costs to CA ANZ in respect of the complaint, its investigation, hearing and determination; and
- (h) whether the amount is reasonable in the circumstances.

8.13 Former Professional Conduct By-Laws (By-Law 42)

- (a) A copy of the By-Laws as at 28 July 2016 may be found [here](#).
- (b) A copy of the By-Laws as at 26 November 2014 may be found [here](#).

8.14 Confidentiality Obligations

- (a) Members must comply with the requirements set out in subparagraphs (b) – (d) below to ensure that any complaints made, investigations, reviews and disciplinary hearings carried out pursuant to Section 5 of the By-Laws are confidential;
- (b) Subject to subparagraph (c) below:
 - (i) all information, correspondence and other documentation sent and/or received by CA ANZ or disclosed or made available to you in connection with a complaint, its investigation and outcome, any review of that outcome (including the Reviewer's report, recommendation and/or any directions) and any disciplinary hearing (including disciplinary decisions) is confidential (Confidential Information);
 - (ii) Members must:
 - A. keep the Confidential Information confidential;
 - B. securely store and not disclose or permit disclosure of the Confidential Information;
 - C. comply with CA ANZ's directions regarding the Confidential Information;
 - D. do all other things prudent or desirable to safeguard the confidentiality of the Confidential Information; and
 - E. not publish or make a public announcement or statement in relation to the Confidential Information;
 - (iii) this clause does not apply to:
 - A. information that is already in the public domain (unless it is in the public domain because of a breach of this Regulation); or
 - B. details of complaints, investigations and/or decisions that CA ANZ has published or made available to the public in accordance with the By-Laws and Regulations;
- (c) The obligations contained in subparagraph (b) above do not prevent the disclosure of Confidential Information:
 - (i) that is required to be disclosed to comply with applicable law;

- (ii) to the Member's advisers and/or representatives (including business partners and staff of those advisers and/or representatives) for the provision of advice in relation to the complaint, its investigation, any review and any disciplinary hearings;
 - (iii) to the Member's current employer and business partners, including staff of the Member and/or that employer, to assist with responding to the complaint and any disciplinary hearings and/or to comply with any disclosure obligations;
 - (iv) to the Member's insurer or the insurer of the Member's current and/or former employer, to comply with any disclosure obligations; or
 - (v) if required, and with the consent of CA ANZ, for the purpose of the complaint, investigation and any disciplinary hearings pursuant to Section 5 of the By-Laws.
- (d) Any disclosure of Confidential Information pursuant to subparagraphs (c)(ii) – (v) above can only be made by Members if the person to whom disclosure is made is subject to the same confidentiality obligations as Members set out in this paragraph 8.14.

Commentary

The obligations set out above are in addition to the obligations of confidentiality contained in APES 110, Code of Ethics for Professional Accountants. More details about managing your confidentiality obligations are available as part of the complaint process and on request.