



Disciplinary Tribunal of Chartered Accountants Australia and New Zealand (CA ANZ)

Written decision dated 18 December 2020

- Case Number:** D-1231
- Member:** Keith Douglas Bowker CA of Western Australia
- Hearing Date:** 2 December 2020
- Tribunal:** Richard Rassi FCA (Chair)
Anita Hargreaves CA
Elizabeth Gavey, lay member of the Tribunal
- Tribunal Legal Adviser:** Julian Hammond
- Representation:** Paul Forbes and Charlotte Hendriks for the Professional Conduct Committee (PCC)
The Member represented himself
- Decisions:**
1. The Tribunal determined that:
 - (a) the Member was the subject of adverse findings by the Administrative Appeals Tribunal, in breach of By-Law 40(2.1)(e);
 - (b) the Member failed to observe a proper standard of professional care, skill, competence and diligence, in breach of By-Law 40(2.1)(a);
 - (c) the acts, omissions and defaults of the Member brought or may bring discredit upon the Member, CA ANZ and the profession of accountancy, in breach of By-Law 40(2.1)(k).
 2. The Tribunal determined to suspend the Member's membership for a period of two years.
 3. The Tribunal imposed a cost sanction in the sum of \$12,355 towards the costs and expenses of the proceedings.
 4. The Tribunal made the following directions regarding the conduct of the hearing and the publication of its reasons for decision:
 - (a) its decision with reasons, mentioning the Member's name and locality, be published on the CA ANZ website (the **Published Decision**);
 - (b) 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*;

- (c) the Australian Taxation Office and Australian Securities and Investments Commission be notified of this decision;
- (d) 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;
- (e) the decision regarding confidentiality takes effect immediately on 2 December 2020.

The date of effect of this decision is 9 January 2021 (By-Law 40(10.18)).



1. Introduction

- (a) In around July 2019 CA ANZ became aware that the Australian Securities and Investments Commission (**ASIC**) had issued a press release on 17 April 2019 titled “19-094MR ASIC bans Perth accountant from providing financial services for six years” (the **ASIC Press Release**).
- (b) The ASIC Press Release reported that the Member had been banned from providing financial services for six years (**Banning Order Decision**) following an ASIC investigation into the Member’s conduct between November 2016 and March 2017 in which it found that the Member:
- *applied for and sold shares on behalf of other people without their knowledge and/or consent;*
 - *knowingly provided false information to these companies which was then provided to the ASX so that the companies could meet the ASX minimum-spread requirement for admission to the ASX official list;*
 - *engaged in conduct relating to a financial product that was misleading or deceptive, or was likely to mislead or deceive;*
 - *contravened a financial services law; and*
 - *is likely to contravene a financial services law”.*

The PCC initiated a complaint pursuant to the powers conferred by By-Laws 40(4.1) and 40(5.1) (the **Complaint**).

- (c) After investigating the Complaint, including conducting a Case Conference on 20 July 2020 (after the Member’s appeal of the Banning Order Decision to the Administrative Appeals Tribunal (**AAT**) had been determined), 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:
1. on 6 March 2020 the AAT made adverse or unfavourable findings against the Member;
 2. the Member failed to observe a proper standard of professional care, skill, competence or diligence; and
 3. the Member brought or may bring discredit upon himself, CA ANZ or the profession of accountancy.

2. The issues for determination

- (a) Was the Member the subject of adverse or unfavourable findings by the AAT, in breach of By-Law 40(2.1)(e)? (allegation 1)
- (b) If the answer to (a) was yes, had the Member failed to observe a proper standard of professional care, skill, competence or diligence by engaging in the conduct underlying the adverse or unfavourable findings? (allegation 2)
- (c) If the answer to (a) or (b) was yes, had the acts, omissions and defaults of the Member underlying those events brought or could they bring, discredit upon the Member, CA ANZ or the profession of accountancy? (allegation 3)
- (d) If the answer to (a), (b) 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?

3. Was the Member the subject of adverse or unfavourable findings by the AAT? (allegation 1)

3.1 Agreed facts

The PCC alleged and the Member admitted, that the Member had been the subject of adverse or unfavourable findings against the Member in circumstances where he:

- (a) provided the names of investors to satisfy the minimum spread requirements in the listing rules for the Australian Securities Exchange (**ASX**) so that the companies could be admitted to the ASX Official List;
- (b) was found to have engaged in misleading or deceptive conduct in relation to a financial product in contravention of section 1041H of the *Corporations Act 2001* (Cth) (the **Act**) and imposed a banning order on the Member so that he was prohibited from providing financial services for a period of two years under s 920A(1)(e) and s 920B(2) of the Act.

3.2 PCC submissions

- (a) The PCC submitted that:
 - (i) the AAT had made a number of adverse or unfavourable findings in relation to the Member in determining his appeal of the Banning Order Decision, including that the Member had:
 - (1) provided the names of individuals who were not genuine investors in order to artificially satisfy the ASX minimum spread requirements;
 - (2) engaged in misleading or deceptive conduct in contravention of the Act;
 - (ii) the AAT affirmed the decision made by ASIC to impose a banning order and made a number of adverse or unfavourable findings in relation to the Member;
 - (iii) ASIC is a regulatory authority for the purposes of By-Law 40(2.1)(e);
 - (iv) with respect to the Member's submission that all individuals were aware of the transactions, the AAT Decision included findings that this was not the case.
- (b) In making this submission, the PCC referred to the AAT Decision and Reasons for Decision in *Re Keith Bowker and the Australian Securities and Investments Commission (AAT Decision)* and in particular at paragraphs [6], [67], [69], [73], [74], [84], [94], [102] and [103].

3.3 Member submissions

The Member admitted the allegation and submitted that:

- (a) there had been no sale or purchase of shares without the knowledge of the relevant individuals;

- (b) he had been *“trying to promote [his] accountancy practice and have a referral situation, trying to build the business ... to ultimately succeed and make money”*;
- (c) he had protected the investors and taken the financial hit on the shares going down;
- (d) he had already been punished quite severely;
- (e) the public outcry initially made it very difficult for him to find work and he was unemployed for a time.

3.4 Tribunal decision and reasons

The Member admitted the allegation and the Tribunal was satisfied it was established because the AAT, a statutory body, determined that the Member had breached the Act and banned him from providing financial services for two years. The AAT Decision contained the following findings which the Tribunal considered were also adverse or unfavourable to the Member:

“...the [Member] did engage in misleading or deceptive conduct...” [6];

“...he may not fully appreciate the seriousness of the conduct...” [74];

“...He should have been aware that he was doing something (or assisting somebody else to do something) that was wrong” [94];

“...[the Member’s] conduct falls within the three to 10 year banning range given that the conduct:

...

- *was deliberate. The [Member] did not undertake the conduct for immediate gain but he was motivated by an expectation of some sort of benefit;*
- *demonstrated irresponsibility and perhaps carelessness...”* [102].

4. Had the Member failed to observe a proper standard of professional care, skill, competence or diligence by engaging in the conduct underlying the AAT’s adverse or unfavourable findings? (allegation 2)

4.1 Agreed facts

The PCC alleged and the Member admitted, that the Member failed to observe a proper standard of professional care, skill, competence or diligence by engaging in the conduct referred to in allegation 1.

4.2 PCC submissions

- (a) The PCC submitted that:
 - (i) the adverse findings were relevant to the Member’s competence and integrity;
 - (ii) it accepted the Member’s breach of the By-Law was not in relation to his business conduct, as he was not in the business of providing financial services and did not hold an Australian Financial Services Licence (AFSL);
 - (iii) however the PCC noted that many of the Member’s clients were consumers of financial services and the Member had involved his employees, who were also signed up as investors. Accordingly, the actions of the Member were undertaken in the course of carrying out his professional duties and obligations.

- (b) In making this submission, the PCC referred to the following evidence:
 - (i) the ASIC Press Release;
 - (ii) the AAT Decision.

4.3 Member submissions

The Member submitted that:

- (a) he now understood that the term “genuine investor” did not refer to a real person as opposed to a made-up individual, but rather to whether that individual was genuinely investing. The Member acknowledged at this hearing that those investors had only been provided with the share offer in order to meet the ASX spread requirements;
- (b) he had been “clumsy” but not acted dishonestly, and he had not thought he was doing anything wrong when he asked people to invest;
- (c) he now appreciated that his role as employer may have caused his employees to feel that they could not opt out of agreeing to invest when he approached them.

4.4 Tribunal decision and reasons

The Member admitted the allegation and the Tribunal was satisfied that the Member had failed to observe a proper standard of professional care, skill, competence and diligence because:

- (a) the Member had deliberately breached the Act which demonstrated that he failed to properly understand the requirements of the law and the implications of his conduct;
- (b) the Member had embarked on providing services which were outside his area of expertise;
- (c) although the Member did not financially benefit from his actions, he admitted that he embarked on the conduct to improve his business client base through referrals;
- (d) the Member involved some of his clients and employees in conduct that was in breach of the Act and without the knowledge of some of those individuals;
- (e) the Member took advantage of the imbalance of power with his employees to involve them.

5. Had the Member committed acts, omissions or defaults that brought or could bring, discredit upon the Member, CA ANZ or the profession of accountancy? (allegation 3)

5.1 Agreed facts

The PCC alleged and the Member admitted, that the acts, omissions and defaults as set out in allegations 1 and 2, brought or may bring, discredit upon the Member, CA ANZ or the profession of accountancy.

5.2 PCC submissions

- (a) The PCC submitted that:
 - (i) the Member had acknowledged early on that discredit had been brought to himself;
 - (ii) the Member had apologised for any discredit that may be brought to CA ANZ;

- (iii) media coverage of the Banning Order Decision referred to the Member by name and identified that he was an accountant;
 - (iv) it accepted the Member's submission that none of the publicly-available material relating to the ban identified the Member as a Chartered Accountant.
- (b) In making this submission, the PCC referred to the following evidence:
- (i) the Member's letter to the PCC dated 23 August 2019 in which he wrote:

“...The Decision and the subsequent media releases in numerous publications has caused unnecessary discredit to me and significant reputational damage which has resulted in all of my clients leaving my corporate accounting firm ... I sincerely apologise to the Chartered Accountants ANZ for any discredit this matter has or may bring to the organisation and to the profession of accountancy...”;
 - (ii) the ASIC Press Release;
 - (iii) the AAT Decision;
 - (iv) the following media articles:
 - (1) Jotham Lian, 'Perth accountant barred from providing financial services for 6 years', Accountants Daily (online, 17 April 2019);
 - (2) Hannah Wootton, 'Perth accountant slapped with six-year ban', Money Management (online, 17 April 2019);
 - (3) Madeleine Stephens, 'Perth accountant banned for six years', Business News (online, 17 April 2019);
 - (4) Jotham Lian, 'AAT reduces accountant's financial services ban', Accountants Daily (online, 19 March 2020);

(the **Media Articles**).

5.3 Member submissions

The Member submitted that:

- (a) there were a lot of people in the industry who supported him and wanted to work with him once the ban lifted, so there had been no discredit to CA ANZ or chartered accountancy;
- (b) he deeply regretted the situation and wanted to move on;
- (c) there was very little public interest in the matter which was illustrated by the fact that no member of the public was observing this hearing;
- (d) he was sorry if there was any thought that he had brought discredit to CA ANZ.

5.4 Tribunal decision and reasons

- (a) The Member admitted the allegation and the Tribunal was satisfied that the Member had brought discredit on the Member, CA ANZ and the profession of accountancy because:
 - (i) the initial Banning Order Decision and the subsequent AAT Decision both identified the Member by name as an accountant and similarly the Media Articles identified the Member by name as an accountant;

- (ii) the seriousness of the decision against the Member strikes to the heart of what accountancy is about and therefore brings discredit to CA ANZ and the profession of accountancy in addition to the Member.
- (b) The Tribunal noted that the Member did not admit that he had brought discredit to CA ANZ however for the same reasons as noted in (a)(ii) above, the Tribunal was of the opinion that the seriousness of the Member's conduct had brought discredit to CA ANZ and the profession of accountancy.

6. What sanctions should be imposed on the Member?

- (a) Regulation CR 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 submitted that the appropriate sanction was for the Member's membership to be suspended for two years and that the Tribunal should have regard to the following matters:
 - (i) this was a case of serious misconduct which had resulted in a significant investigation by ASIC and ultimately a two year ban. The PCC accepted that there was no finding that the Member had acted dishonestly but submitted that the Member ought to have known he was doing something wrong;
 - (ii) it was not aware of the conduct occurring before but noted that it involved two separate companies;
 - (iii) at the time of the conduct the Member was a director of his own firm and he involved some of his employees by giving their names as investors. The PCC acknowledged that the AAT Decision included a conclusion that the Member had learned from his experience and was unlikely to engage in similar conduct again however noted that he may not have fully appreciated the seriousness of his conduct;
 - (iv) aggravating factors were:

- (1) the AAT had been satisfied that the Member knew he was providing names of investors to help meet the ASX minimum spread requirements;
- (2) the Member had seemed to fail to appreciate, at least until recently, the seriousness of his conduct as well as the imbalance of power in recruiting his employees;
- (v) the maintenance of public confidence in the profession, especially given the significant and widespread media coverage of the ban, could only be maintained if a sanction proportionate to the gravity of the offending was imposed;
- (vi) it did not accept the Member's submissions that:
 - (1) a five month suspension would be sufficient. In this respect the PCC noted that the Member had had the benefit of his CA ANZ membership since the ASIC ban came into effect and for the period during which the AAT Determination and PCC investigation took place; or
 - (2) the ban on providing financial services was a sufficient sanction, given that the Member was not in the business of providing financial services.
- (d) The PCC acknowledged that:
 - (i) the AAT's finding that the Member had learned from his experience;
 - (ii) the Member's submissions to the effect that he had learned from the experience;
 - (iii) the Member not being in the business of providing financial services;
 - (iv) the Member admitting the allegations; and
 - (v) the Member admitting remorse in a serious and genuine way;
 were mitigating factors.
- (e) The Member submitted that the AAT had appropriately dealt with the matter and there should be no further sanctions imposed on him because:
 - (i) the two year ban was sufficient sanction and he would be sanctioned twice if a suspension of his CA ANZ membership were to extend beyond the end date of the ban. The Member suggested that if his membership were to be suspended for two years then it should be backdated to commence on the same date as his ban;
 - (ii) he had provided the investor names to meet the ASX minimum spread requirements, not to circumvent those requirements;
 - (iii) his employment may be terminated if he lost his membership;
 - (iv) he was currently employed in a firm where there was no opportunity for the same situation to arise, so general deterrence was not relevant.
- (f) The Tribunal determined to suspend the Member's membership for a period of two years because:
 - (i) the Member's conduct was regarded by the Tribunal as a serious breach of the By-Laws and the Act;
 - (ii) it considered that the Member's acts had been deliberate and reckless;
 - (iii) it sends a clear message to members and the public that conduct of this nature will not be tolerated and sanctions will be imposed;

- (iv) the Member had the benefit of his membership during the period of the PCC's investigation;
- (v) a period of suspension for five months as requested by the Member was not regarded as sufficient in the circumstances and having regard to paragraphs (f)(i) to (iv) above.
- (g) The Tribunal noted that the Member:
 - (i) had cooperated with the disciplinary process and had ultimately shown remorse for his actions however this did not outweigh the elements outlined in (f)(i) to (iv) above;
 - (ii) had no previous disciplinary history.

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 proceedings in the amount of \$13,855 because:
 - (i) the complaint was established on the Member's own admission and was a serious breach of the By-Laws, involving misleading or deceptive conduct;
 - (ii) an award of full costs was fair and reasonable in principle when there was serious misconduct;
 - (iii) the amount of the costs was reasonable and only made up of external costs that had actually been incurred.
 - (c) The PCC acknowledged that the Member had been open, honest and timely in his dealings with the PCC.
 - (d) The Member submitted that he was experiencing financial hardship and appealed to the Tribunal to reduce the costs as much as possible.

- (e) The Tribunal determined that the Member should pay \$12,355 towards the costs of the proceedings sought by the PCC because:
 - (i) the complaint was found to have merit in that the allegations were both established and admitted by the Member;
 - (ii) of the seriousness of the breach of the By-Laws and the Act;
 - (iii) it was reasonable for the Member to pay the costs because it would not be reasonable for the membership to bear the costs of the Member's misconduct.
- (f) The Tribunal noted the Member had cooperated with the disciplinary proceedings and admitted the allegations in advance of the hearing which led to a shorter hearing and a reduction in the costs which were initially estimated for the proceedings.

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 Tribunal determined that the Australian Taxation Office and the Australian Securities and Investments Commission 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.

11. 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's 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)(e), in that on 6 March 2020, the Administrative Appeals Tribunal (AAT) in *Re Keith Bowker and the Australian Securities and Investments Commission* made the following adverse or unfavourable findings against the Member:
 - a) that he provided the names of investors to artificially satisfy the minimum spread requirements in the listing rules for the Australian Securities Exchange (ASX) so that the companies could be admitted to the ASX Official List; and
 - b) that he engaged in misleading or deceptive conduct in relation to a financial product in contravention of section 1041H of the *Corporations Act 2001* (Cth) (the Act) and imposed a banning order on the Member so that he was prohibited from providing financial services for a period of two years under s 920A(1)(e) and s 920B(2) of the Act.
2. By-Law 40(2.1)(a), in that the Member failed to observe a proper standard of professional care, skill, competence or diligence by engaging in the conduct referred to in paragraph 1 above; and
3. By-Law 40(2.1)(k) in that the acts, omissions and defaults as set out in paragraphs 1 and 2 above, bring or may bring, discredit upon the Member, CA ANZ or the profession of accountancy.

SCHEDULE 2: RELEVANT BY-LAWS

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);

...

- (s) **Registers** means the General Register, Regional Register and/or Overseas Regional Register;

...

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(2) Disciplinary action

40(2.1) A Member is liable to disciplinary sanctions under these By-Laws if (whether before or after the date of adoption of this By-Law) that Member:

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

...

(e) has been the subject of an adverse or unfavourable finding in relation to that Member's professional or business conduct, competence or integrity by any court of law, professional body, royal commission, statutory authority, regulatory authority, statutory body, commission or inquiry in any jurisdiction in Australia or elsewhere;

...

(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(10.1) 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(10.4) The Member receiving a Notice of Disciplinary Action or an amended 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:

- (a) whether the Member will attend the hearing and, if represented, by whom (including details of that representative's name and firm, organisation or chambers);

- (b) the matters the Member admits or disputes in the Notice of Disciplinary Action;
- (c) whether the Member intends to adduce any evidence at the hearing, and the names, qualifications and organisations of any witnesses the Member intends to call; and
- (d) any relevant fact or circumstance the Member wishes to bring to the attention of the Disciplinary Tribunal and the reasons for doing so.

...

40(10.9) At every hearing before the Disciplinary Tribunal, the Professional Conduct Committee shall be responsible for the presentation of the case against the Member. The Professional Conduct Committee may appoint an independent Australian legal practitioner to present the case on its behalf.

40(10.10) The Disciplinary Tribunal shall give the Member concerned or that Member's representative a reasonable opportunity of being heard and shall give due consideration to any material that Member may submit.

40(10.11) The Disciplinary Tribunal shall determine whether or not the complaint contained in the Notice of Disciplinary Action, or any part thereof, is established.

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:

...

- (b) suspend the Member from membership of CA ANZ for a period not exceeding 5 years and remove the Member's name from the Registers on which it appears

...

- (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) General

...

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(13.11) Adjournment

...

- (c) Each of the Disciplinary Tribunal and Appeals Tribunal may set, change or cancel the date of a hearing before it, or adjourn a hearing after it has commenced.

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.