CHARTERED ACCOUNTANTS™
AUSTRALIA + NEW ZEALAND

Professional Conduct Committee – 8 February 2021

Conflict of Interest and Breach of the Fundamental Principles of Integrity, Objectivity, Professional Competence and Due Care, Confidentiality and Professional Behaviour - Member A

At a meeting of the Professional Conduct Committee (PCC) of Chartered Accountants Australia and New Zealand held in private on 8 February 2021 by videoconference in respect of Member A of New South Wales, the PCC decided that the Disciplinary Tribunal would be likely to find that the Member's conduct did not comply with:

- By-Law 40(2.1)(h).

The PCC considered that this matter is sufficiently serious to warrant referral to the Disciplinary Tribunal.

However, the PCC decided to propose that an agreement be made with the Member which shall be entered on the Member's record, on terms that:

1. the Member receive a severe reprimand;
2. the Member be required to submit to a quality review pursuant to the CA ANZ Regulations, at the Member's cost, with particular emphasis on policies and procedures for managing conflicts of interests in circumstances of marriage breakdown, partnership and shareholder disputes, with the results of such review to be made available to the PCC;
3. the Member pay to CA ANZ the sum of $4,500 by way of contribution towards the costs of investigating and dealing with the matters the subject of the complaint and the case conference; and
4. the PCC will publish:
   a) details of these sanctions on the website of CA ANZ; and
   b) a notice in the digital and print magazine "Acuity",

   without disclosing the Member's name but disclosing the Member's State location, with a link to the published decision.

The PCC considers that it is in the public interest for this sanction to be published, but that there are no special circumstances which warrant disclosing the name of the Member.

<u>Background</u>

The Member was the accountant for over 20 years for the Complainant and her husband and their various entities including trusts and an SMSF. The Complainant was either a trustee or a joint trustee with her husband of these entities.

The Complainant and her husband's marriage broke down in 2017. The Member had a meeting with the Complainant's husband where he told the Member that he was planning to leave the Complainant but the Complainant was not told by her husband that he was leaving her until 10 days afterwards. During this 10 day period the Complainant's husband paid a deposit for the purchase of a substantial property out of their joint account and exchanged contracts.

Neither the Complainant nor the Member were aware of the purchase of the property by the Complainant's husband at the time the contracts were exchanged.

The Member continued to act for both the Complainant and her husband after the marriage breakdown. However, the Member failed to inform the Complainant that her husband had failed to secure finance for the purchase of the property and stood to lose the deposit. Instead the Member provided information to the Complainant on instructions from her husband as to an alternative way forward.

The bank ultimately declined to provide finance for the purchase of the property and the purchase did not proceed, with 50% of the deposit of being returned.

The Complainant retained her own accountant late in 2017.

In 2019, the Complainant contacted the Member regarding the preparation of financial statements and returns for 2018 for the trusts as the bank required this information otherwise it would foreclose on their loans.

The Complainant alleged that the Member continued to take instructions from her husband and did not include her in any decisions regarding the entities. The Member says that in relation to the 2018 financial statements and returns he only took instructions from the Complainant.

The financial statements and returns for the 2018 year for the trusts have not been signed by the Complainant as she has concerns regarding the treatment of certain transactions. The Member terminated the engagement before these issues could be resolved. The Complainant has not signed the documents prepared for the SMSF either.

The Member is no longer the accountant for the Complainant's husband, although he did do some work for him in 2020.

<u>Reasons</u>

Issue – Conflict of Interest and Breach of the Fundamental Principles of Integrity, Objectivity, Professional Competence and Due Care, Confidentiality and Professional Behaviour

The Complainant alleged that the Member had a conflict of interest as he prioritised the interests of the Complainant's husband after he became aware that he was planning to leave her, in circumstances where she did not become aware of this until 10 days afterwards. The Complainant alleged that, due to this conflict of interest, the Member breached By-Law 40(2.1)(h) on the basis that he breached pronouncements of the Accounting Professional and Ethical Standards Board (APES) and, in particular, the fundamental principles of integrity, objectivity, professional competence and due care, confidentiality and professional behaviour.

There are some differences between the Complainant's version of events and the Member's. However, it is clear that the Member knew that the Complainant's husband was at least considering leaving the Complainant 10 days before she did. It is also clear that, in spite of this knowledge, the Member continued to act for both the Complainant and her husband in their roles as trustees (joint or otherwise) of their various entities, including the trusts and the SMSF and for the Complainant's husband in his personal capacity. It was the Complainant's evidence that both she and her husband completely trusted the Member and would not contemplate taking any steps without discussing them with him.

The Member gave evidence that he did not write to the Complainant and advise her in relation to the potential loss of the deposit. The Member sent an email to the Complainant on instructions from the Complainant's husband where he put a proposal to her regarding an alternative way forward but there was no indication in this email that the Member had attended a meeting with the bank and the bank had declined to provide finance for the purchase of the property. The email appeared to have been sent by the Member to the Complainant's husband who then sent it to the Complainant. The email sent by the Member was headed *"Draft Email"*.

In relation to the financial statements for the trusts for 2018, the Member indicated that he had only acted on information and instructions provided by the Complainant. He had received requests for changes which he had made and then returned the financial statements to the Complainant, but the outstanding issues had not been resolved by the time he resigned from the engagement.

The Member said that the financial statements for the SMSF for 2018 had been prepared on information and instructions from the Complainant's husband and draft financials had been given to the Complainant. He had not received instructions from the Complainant regarding the allocation of contributions, despite requests to her for this information. The Complainant said she was concerned that the allocations appeared to favour her husband and she did not understand why this should be the case so she had not signed the financial statements.

The Member also provided information in relation to another trust of which the Complainant was the only trustee. He said this only held carry forward tax losses and a share of access rights to water infrastructure which was of minimal value. The Member's family also held a share in these rights. The Complainant was concerned the Member had said she should lodge a tax return for this trust in case her husband wanted to use it in the future, even though she was trustee.

The PCC considers that from the date the Member became aware that the Complainant's husband was at least contemplating leaving the Complainant, the Member was in an impossible position and the only action he could have reasonably taken was to withdraw from acting for both the Complainant and her husband. He did not just provide financial information but acted as the advocate for the Complainant's husband and clearly prioritised his interests over those of his other client, the Complainant.

In these circumstances the PCC considers that the Member had a conflict of interest which has continued until he ceased acting for the parties and breached the fundamental principle of objectivity as set out in section 120.1 of APES 110, which imposes an obligation on all Members not to compromise their professional or business judgment because of bias, conflict of interest or the undue influence of others. In relation to the issue of the financial statements for 2018, the PCC does not consider it is sufficient to say that the Member was only compiling these statements on the basis of historical information as there were issues in relation to the allocation of funds. The PCC is also concerned that the Member's family held an interest in the water rights, although the Member did not believe these rights were valuable.

The Member said that the Complainant had received independent advice from family members from the day she became aware that her husband was leaving her, and that she also had a solicitor, and her own accountant. The PCC considers that any independent advice received by the Complainant was not a sufficient safeguard to eliminate the threat to the fundamental principle of objectivity in the circumstances of this complaint.

The PCC also considers that the Member breached the fundamental principles of integrity, professional competence and due care and professional behaviour.

Section 110.1 of APES 110 provides that the principle of integrity imposes an obligation on all Members to be straight forward and honest in all professional and business relationships. Integrity also implies fair dealing and truthfulness. The PCC is of the view that the Member has not been straight forward in his dealings with the Complainant as he has prioritised the interests of her husband over her interests.

The PCC also considers that there has been a breach of the fundamental principle of professional competence and due care. Section 130.2 of APES 110 requires the exercise of sound judgment in applying professional knowledge and skill in the performance of Professional Service. The PCC considers that the Member has not exercised sound judgment in his communications with the Complainant as he has not warned her of the possibility that she could lose the deposit.

The PCC considers that there is no evidence to support the allegation that there has been a breach of the fundamental principle of confidentiality as set out in section 140.1 of APES 110.

The PCC is of the view that there has been a breach of the fundamental principle of professional behaviour as set out in section 150.1 of APES 110 on the basis that discredit flows from the breaches identified above.

Professional Conduct Committee
Chartered Accountants Australia and New Zealand

8 February 2021