



Disciplinary Tribunal of Chartered Accountants Australia and New Zealand (CA ANZ) Written decision dated 7 July 2020

- Case Number:** D-1219
- Member:** John Powell Keefe FCA of New South Wales
- Hearing Date:** 24 June 2020
- Tribunal:** David Fairlie (Chair and lay member of the Tribunal)
Richard Rassi FCA
Ross Gavin FCA
- Representation:** Paul Forbes and Charlotte Hendriks for the Professional Conduct Committee (PCC)
The Member represented himself
- Decisions:**
1. The Tribunal determined that the Member:
 - (a) was found to have acted dishonestly by the Supreme Court of New South Wales and that decision has not been set aside on appeal;
 - (b) was the subject of adverse or unfavourable findings in relation to his professional and business conduct and integrity by the Supreme Court of New South Wales;
 - (c) has committed an act, omission or default which, in the opinion of the Disciplinary Tribunal brings, or may bring, discredit upon that Member, CA ANZ or the profession of accountancy.
 2. The Tribunal determined to terminate the Member's membership and remove the Member's name from the Registers on which it appears.
 3. The Tribunal imposed a cost sanction in the sum of \$6,638 for the full costs and expenses of the proceedings.
 4. The Tribunal made the following directions regarding the conduct of the hearing and the publication of its reasons for decision:
 - (a) 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) 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;
- (d) the decision regarding confidentiality takes effect immediately on 24 June 2020.

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



1. Introduction

- (a) In around June 2019 CA ANZ became aware of the Supreme Court of New South Wales decision *In the matter of Tresdar Pty Ltd* [2019] NSWSC 179 dated 1 March 2019, in which the Member was the First Defendant (the **Rees J Judgment**) and the PCC initiated a complaint pursuant to the powers conferred by By-Laws 40(4.1) and 40(5.1) (the **Complaint**).
- (b) After investigating the Complaint, the PCC referred the Member to the Tribunal by way of Notice of Disciplinary Action which in summary alleged that:
 1. the Supreme Court of New South Wales found that the Member had acted dishonestly;
 2. the Member had been the subject of adverse or unfavourable findings by the Supreme Court of New South Wales; and
 3. the acts omissions and defaults associated with allegations 1 and 2 brought, or may bring, discredit on the Member, CA ANZ or the profession of accountancy.

2. The issues for determination

- (a) Did the Supreme Court of New South Wales find that the Member had acted dishonestly, in breach of By-Law 40(2.1)(c)? (allegation 1)
- (b) Was the Member the subject of adverse or unfavourable findings in relation to his professional and business conduct and integrity by the Supreme Court of New South Wales, in breach of By-Law 40(2.1)(e)? (allegation 2)
- (c) Did the acts, omissions or defaults associated with the matters in allegations 1 and 2 bring, or could they bring, discredit on 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) Should any confidentiality orders be made?

3. Did the Supreme Court of New South Wales find that the Member had acted dishonestly, in breach of By-Law 40(2.1)(c) and was the Member the subject of adverse or unfavourable findings in relation to his professional and business conduct and integrity by the Supreme Court of New South Wales, in breach of By-Law 40(2.1)(e)? (allegations 1 and 2)

3.1 Accepted facts

The Rees J Judgment contained the matters set out in the particulars accompanying the Notice of Disciplinary Action:

- (a) as to allegation 1: Rees J Judgment [85], [104], [153] and [157]; and
- (b) as to allegation 2: Rees J Judgment [18], [20] [45], [62], [85], [104], [153] and [157].

3.2 PCC submissions

- (a) The PCC submitted that:
- (i) Rees J found that the Member:
 - (1) at [85] had lied opportunistically (the **First Lie**);
 - (2) at [104] had lied (the **Second Lie**);
 - (3) at [153] had acted fraudulently and lied in his evidence (the **Fraudulent Action**);
 - (4) at [157] had significantly abused a position of trust (the **Abuse of Trust**);
 - (5) at [18], [45] and [62] was an unsatisfactory witness;
 - (ii) the Tribunal is not required to go behind or make any findings in relation to the facts underlying these findings.
- (b) In making this submission, the PCC referred to the following excerpts from the Rees J Judgment:
- (i) in relation to allegations 1, 2(a) and 2(c), that the Member had lied, had acted fraudulently and had significantly abused a position of trust:

[85] Mr Keefe points to his description of the share ownership of Wakefield Park Motor Racing Circuit as corroborative of his account that Paul Samuels asked him to hide Paul Samuels' interest in Tresdar because, Mr Keefe says, the document also hid Mr Carter's interest in Wakefield Park Motor Racing Circuit. The plaintiff submitted that this was an opportunistic lie by Mr Keefe. I agree.

[104] In contrast, Mr Keefe agreed that loans between Mr Samuels' companies were simply entered into the cash book, with no loan documents prepared and no interest charged. Mr Keefe explained that he acquiesced to Paul Samuels borrowing money from Tresdar in this fashion because, "I saw this as an opportunity to give [Paul] something back". I consider this to be a lie.

*[153] Mr Keefe submits that Brendan Samuels bears a heavy onus in establishing the necessary intention as the allegation is tantamount to fraud, referring to section 140, Evidence Act 1995 (NSW); Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362; *Neat Holdings Pty Limited v Karajan Holdings Pty Limited* (1992) 110 ALR 449; [1992] HCA 66 and like authorities. Whilst it is not necessary to find fraud before granting the relief sought, I am comfortably satisfied that Mr Keefe's actions were fraudulent. Having now examined the records closely, I consider that Mr Keefe lied in his evidence, both in his affidavit and orally, in a manner that was calculated, brazen and apparently unstoppable.*

[157] I do not accept that injustice will arise. Mr Keefe has significantly abused a position of trust. To the extent that Brendan Samuels acquiesced in the payment of dividends to Mr Keefe, it was because Mr Keefe lied to Brendan Samuels and, at the time, Brendan Samuels trusted him as had his parents before him. Nor do I accept that Mr Keefe made financial and non-financial contributions to the management of Tresdar for which he was not remunerated by his annual fee. The asserted financial contribution is inconsistent with the available accounting material. The asserted non-financial contribution is at odds with the contemporaneous emails in respect of the sale and management of Darley Street. Whatever financial

contribution Mr Keefe made to Wybrown was slight and likely recompensed at the time.

- (ii) in relation to allegation 2(b), that the Member was an unsatisfactory witness:

[18] Mr Keefe is a retired chartered accountant. Mr Keefe is an intelligent man who gave, initially at least, precise and fair answers, indicating that he was well-prepared for the hearing and had a good recall of dates and figures. However, when pressed on his answers, Mr Keefe became evasive, gave inconsistent answers and, on occasion, speeches. Whilst Mr Keefe was able to give precise answers in respect of some matters which occurred in the 1980s, when pressed on improbable answers he retreated to saying that he did not understand or had not kept records, hadn't looked at all of the records and that it was a long time ago. Mr Keefe was evasive in the face of documents which he prepared. Mr Keefe failed to make reasonable concessions. Mr Keefe was an unsatisfactory witness. His answers were often non-responsive. Mr Keefe's evidence was so unlikely on enough occasions that I am not prepared to accept his evidence unless it is corroborated by contemporaneous documents, another reliable witness or is against his own interest.

[45] Mr Keefe says that he put his share in Tresdar in his name, rather than the name of Samben, as he had made a decision to separate from his wife but had not yet done so.

I didn't want the share to be held in the name of Samben because of the state of my relationship with Janet, my desire to keep this investment separate from her, and because I was not confident that she would sign any documents that needed to be signed in order for Samben to hold the share in Tresdar.

This explanation does not make sense. If Mr Keefe was contemplating separating from his wife, the fact that the share was held in his name would certainly have the result that it would be an asset that would form part of the marital pool of assets whenever he did decide to separate from his wife.

Putting the share in his name, rather than in the name of Samben, did nothing to remove the share from his wife's grasp. Nor did John Keefe separate from his wife Janet until August 1988, some eighteen months after the incorporation of Tresdar Pty Ltd. I do not accept Mr Keefe's evidence on this point. Mr Keefe later denied his earlier evidence as well.

[62] Mr Keefe's explanation of the money flows following sale of the motels is not corroborated by the available records. Mr Keefe variously said that "there were no records" in relation to a matter but then said "it's in here" referring to the accounts in a general way. Mr Keefe also said that one third of the profit of Wybrown on liquidation was transferred to Tresdar to acquire Darley Street. However, Mr Keefe said Wybrown was liquidated in 1992, after the motels had been bought and sold. Then he suggested that Wybrown's contribution comprised payments made to Brookfield Investments or Bolton Grange after the sale of the motels, whilst the "Investments" journal suggests that this was repayment of loan accounts. Mr Keefe estimated that Samben contributed about \$350,000 to Tresdar in this manner, "In that order, somewhere there". There was no basis to say this and I do not accept his evidence on this subject.

- (iii) in relation to allegation 2, that the adverse or unfavourable findings related to the Member's professional or business conduct and competence:

[20] In about 1981, Mr Keefe became Paul Samuels' accountant. On 1 June 1981, Mr Keefe became the company secretary of companies in the Brookfield Group. Mr Keefe gave accounting, financial and tax advice to Paul Samuels. Mr Keefe described the tasks he undertook for Paul Samuels as follows:

I acted as a business advisor to him, and as his agent in connection with his business interests. I held his power of attorney and was a signatory on his

business cheque accounts, including during the 1980s and 1990s when Paul [Samuels] ordinarily spent a significant period of time, around 3 to 5 months of each year in the UK and Europe...

[23] Mr Keefe estimated that, from 1981 to 2006, some 10 to 15 per cent of his accounting business was for Paul Samuels or his companies. Mr Keefe charged Paul Samuels an annual fee, rather than charging him on an hourly basis. Mr Keefe says he did not render an invoice, and was not otherwise paid for any of the work which he undertook as company secretary or director in Paul Samuels' companies but only charged for accountancy work. However, it seems to me that a more accurate description is that Mr Keefe provided a range of accounting and business services to Paul Samuels, for which he charged an annual fee. In return for that fee, Mr Keefe provided accounting services through his firm but also attended to a range of other tasks. There is no evidence as to what the annual fee was but, presumably, Mr Keefe negotiated a fee which he was prepared to accept in return for the wide range of services provided to Paul Samuels. It seems unlikely that Mr Keefe would have continued to provide those services over the 25 years or more of their association unless that was so.

3.3 Member submissions

- (a) The Member submitted in his letter to the PCC dated 11 July 2019 that:
 - (i) the litigation was brought about by the son of his late client. The dispute was over the ownership of a company that his client and the Member owned. The son inherited the client's share when the client died; and
 - (ii) he was devastated by the findings but was not in a position to appeal.
- (b) The Member submitted at the hearing that:
 - (i) he could not change what had happened in the Court and he did not agree with what had happened;
 - (ii) he had not lied as a witness;
 - (iii) he was not in a financial position to appeal the Rees J Judgment.

3.4 Tribunal decision and reasons

The Tribunal determined that the allegations were established. In reaching this determination the Tribunal considered:

- (a) [85], [104], [153] and [157] of the Rees J Judgment in relation to allegations 1, 2(a) and 2(c) amounted to findings that he had lied, acted fraudulently and significantly abused his position of trust;
- (b) [18], [20], [23], [45] and [62] of the Rees J Judgment in relation to allegation 2(b) amounted to a finding that he was an unsatisfactory witness and that this related to his professional business judgment and integrity;
- (c) the relevant passages of the Rees J Judgment speak for themselves and it is not the Tribunal's role to go behind the Rees J Judgment; and
- (d) the Member did not appeal the Rees J Judgment.

4. Did the acts, omissions or defaults associated with the matters in allegations 1 and 2 bring, or could they bring, discredit on the Member, CA ANZ or the profession of accountancy? (allegation 3)

4.1 PCC submissions

- (a) The PCC submitted that, in the Rees J Judgment:
 - (i) Rees J referred to the Member as a retired Chartered Accountant; and
 - (ii) the activities related to him practising as a Chartered Accountant.
- (b) In making this submission, the PCC referred to the Rees J Judgment [18] (reproduced at 3.2(b)(ii) above).

4.2 Member submissions

The Member submitted that he had:

- (a) sought to resign as a Member of CA ANZ in July 2019; and
- (b) ceased practising in 2006 and could not understand how the Rees J Judgment would bring discredit on CA ANZ or the profession. The Member submitted that if he had brought discredit that was something he could not change as Rees J had made a decision and he could not afford to appeal it.

4.3 Tribunal decision and reasons

The Tribunal determined that the allegation was established with respect to the Member's professional and business conduct and integrity, but not competence, because:

- (a) the Rees J Judgment is a public document and refers to the Member as a retired Chartered Accountant;
- (b) the findings against the Member in the Rees J Judgment relate to his practising as a Chartered Accountant;
- (c) the Member had sought to resign his membership, but only after he received notice of the investigation. In any event the By-Laws provide that members who have pending disciplinary action against them may be prevented from resigning until those proceedings are finalised; and
- (d) further publicity may yet arise in relation to the Rees J Judgment.

5. What sanctions should be imposed on the Member?

- (a) Regulation 8.11, *Guidelines for the imposition of sanctions (Guidelines)* sets out the matters that may be considered by the Tribunal in deciding what sanctions to impose. In this regard the Guidelines refer to:
 - (a) ... (i) the seriousness of the conduct;
 - (ii) whether the conduct has occurred before and, if so, the nature, extent and frequency of the conduct;
 - (iii) the Member's responsibility and accountability for the conduct in the context of that Member's Practice Entity ...
 - (iv) whether the Member has failed to comply with any undertaking or agreement to remedy the conduct;
 - (v) any aggravating or mitigating factors raised which are relevant to the conduct in question;

- (vi) the personal circumstances of the Member to the extent they are raised and relevant to the conduct;
 - (vii) any character and/or other references provided in writing in support of the good standing of the Member;
 - (viii) the maintenance of public confidence in the profession;
 - (ix) the maintenance of proper standards of professional conduct;
 - (x) deterrence; and
 - (xi) any other circumstances relevant to the practice of the Member and the profession.
- (b) However, the Guidelines are not an exhaustive list of the matters that may be considered when deciding what sanction to impose and the Tribunal may have regard to any other relevant matters that are before it.
- (c) The PCC submitted that termination of membership was appropriate and submitted that the Tribunal should have regard to the following matters:
- (i) the seriousness of the Member's conduct;
 - (ii) that the Member had been found to have lied in Court;
 - (iii) that the Member had been found to have been involved in a significant abuse of his position of trust over long period of time;
 - (iv) the finding was that the Member had engaged in a deliberate and planned fraud;
 - (v) public confidence could only be maintained by imposing the most serious of sanctions available to the Tribunal;
 - (vi) the Member had not accepted responsibility for his actions; and
 - (vii) there were no mitigating factors.
- (d) The Member submitted that:
- (i) he had not appealed the Rees J Judgment because he could not afford it but would have otherwise; and
 - (ii) he had retired in 2006 and had sought to resign from CA ANZ membership in 2019.
- (e) The Tribunal determined to terminate the Member's membership and remove his name from the Registers on which it appears. In reaching this determination the Tribunal had regard to the following:
- (i) the very serious nature of the Member's conduct and in particular that he was found to have lied to the Court in his evidence and to have significantly abused his position of trust over a long period of time; and
 - (ii) there were no mitigating circumstances justifying a lesser sanction.

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

- (a) Regulation 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 accepted that the Member had been cooperative in the process but submitted that all other criteria in Regulation CR8 were met and accordingly the Member should bear the full costs of the proceedings which amounted to \$6,638.
 - (c) The Member submitted that, whatever the costs were, those were the costs.
 - (d) The Tribunal accepted that the Member had cooperated with the PCC although noted that he had denied each allegation in the Notice of Disciplinary Action.
 - (e) The Tribunal determined that the Member should pay the full costs of the proceedings in the amount of \$6,638 because all the criteria in Regulation 8.12 had been satisfied, except that the Member had cooperated with the PCC during the disciplinary process.

7. 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.

8. 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.

9. 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)(c) in that the Supreme Court of New South Wales, *In the matter of Tresdar Pty Ltd [2019] NSWSC 179 (the Judgment)*, found that the Member acted dishonestly in circumstances where:
 - a) he lied in giving evidence to the court;
 - b) he significantly abused a position of trust; and
 - c) his actions were fraudulent.
2. By-law 40(2.1)(e), in that the Member has been the subject of adverse or unfavourable findings in relation to his professional or business conduct, competence or integrity by a court of law, in circumstances where the following adverse and unfavourable findings were made against the Member in the Judgment:
 - a) his actions were fraudulent;
 - b) he was an unsatisfactory witness; and
 - c) he significantly abused a position of trust.
3. By-law 40(2.1)(k), in that the acts, omissions and defaults associated with the matters described in paragraphs 1 and 2 above bring, or may bring, discredit on the Member, CA ANZ or the profession of accountancy.

SCHEDULE 2: RELEVANT BY-LAWS

Section 2 - Membership

...

Resignation

- 21.** Any Member may resign his or her Membership by sending his or her resignation in writing together with all moneys owing by him or her to CA ANZ, whether for subscription, fee or other amount, to the CEO:
- (a) Provided that no resignation shall take effect unless and until it has been accepted by the Board. The Board may decline to accept the resignation of a Member who is the subject of disciplinary action or professional conduct proceedings by either CA ANZ or NZICA or whose conduct, in the opinion of the Board, by virtue of matters brought to the attention of CA ANZ, may become the subject of professional conduct proceedings or who has been requested to provide information, given notice of or is undergoing a review or any follow up process arising from a review, investigation or professional conduct proceedings.

...

Section 5 - Professional Conduct

...

- 40.** Except as provided by By-Law 41, the By-Laws in this Section 5, including the following paragraphs of this By-Law 40, do not apply to Members who are also members of NZICA in respect of disciplinary matters over which NZICA has jurisdiction and which relate to the practice of the profession of accountancy by NZICA's members in New Zealand. Nothing in this By-Law 40 excludes from the operation of this Section 5, conduct of a Member:
- (a) who was, but is no longer, a member of NZICA; or
- (b) who has subsequently also become a member of NZICA.

Except as provided by By-Law 41, no Member shall be sanctioned under both this Section 5 and NZICA Rule 13 in respect of the same conduct.

...

40(2) Disciplinary action

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

...

- (c) has in any civil proceedings before any court of law, tribunal or similar body in any jurisdiction in Australia or elsewhere been found to have acted dishonestly (provided such finding has not been entirely set aside on appeal);

...

- (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(10.12) 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:

...

- (a) terminate that Member's Membership 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(10.18) 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.

...

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.