

Determination of the Disciplinary Tribunal of Chartered Accountants Australia and New Zealand 6 December 2018

Case Number:	D-1189
Member:	Kelly Anne Howard CA of Victoria
Hearing Date:	16 October and 16 November 2018
Tribunal:	David Fairlie (Chair) Ross Gavin FCA Anita Hargreaves CA
Representation:	Brianne Gallagher for the Professional Conduct Committee (PCC) The Member represented herself
Case description:	<ol style="list-style-type: none">1. Member pleaded guilty to, and was convicted of, eight counts of theft, which conviction has not been set aside on appeal.2. Member has committed an act, omission or default which, in the opinion of the Disciplinary Tribunal, brings or may bring discredit upon that Member, Chartered Accountants ANZ and the profession of accountancy.

1. DECISIONS

1.1 DECISION ABOUT THE PCC'S ALLEGATIONS WHICH ARE SET OUT IN FULL IN SCHEDULE 1

At a hearing of the Disciplinary Tribunal, the Member admitted the allegations and the Tribunal was satisfied they were established.

1.2 DECISION ABOUT SANCTIONS

The Tribunal considered that the appropriate sanction in these circumstances was that the Member's membership be suspended for a period of three and a half years, concluding on 15 May 2022, that the Member's name be removed from the Registers on which it appears and that NZICA be notified of that suspension and removal.

1.3 DECISION ABOUT COSTS SANCTION

The Tribunal determined that the Member pay to Chartered Accountants ANZ the sum of \$7,000 towards the costs and expenses of the proceedings (paragraph 10.12(l) of By-Law 40). No GST is payable.

1.4 DECISION ABOUT PUBLICATION

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

In accordance with paragraphs 12.3 and 12.4 of By-Law 40, the Tribunal directed that:

- its decision with reasons, mentioning the Member's name and locality, be published on the website of Chartered Accountants ANZ (the **Published Decision**)
- a notice mentioning the Member's name and locality with a web address for the Published Decision be published in the Chartered Accountants ANZ digital and print magazine "Acuity".

1.5 NOTIFICATION TO OTHER BODIES

The Member holds registrations and/or memberships with the Australian Securities and Investments Commission, which will be notified of this decision.

2. RIGHT 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 Appeals Tribunal of Chartered Accountants ANZ against the decision (paragraph 11.1 of By-Law 40).

While the Member remains entitled to appeal, or while any such appeal by the Member awaits determination by the Appeals Tribunal, the following decisions shall not take effect:

- Decision about the PCC's allegations
- Decision about sanctions
- Decision about costs sanction.

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 Appeals Tribunal of Chartered Accountants ANZ against the decision (paragraph 11.2 of By-Law 40).

3. BACKGROUND

The Wathaurung Aboriginal Corporation is an Incorporated Aboriginal Association pursuant to the *Aboriginal Councils and Association Act 1976* (Cth), an Indigenous corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), a Registered Aboriginal Party pursuant to the *Aboriginal Heritage Act 2006* (Vic) and the Registered Aboriginal Party for Wadawurrung country. The Wathaurung Aboriginal Corporation operates as a non-for-profit organisation and performs a statutory role in the management of Aboriginal heritage values and culture within the Wadawurrung country.

The Member was involved with the Wathaurung Aboriginal Corporation due to strong family connections. The Member helped with the setup of the Wathaurung Aboriginal Corporation and managed the bookkeeping and accounting.

The Member was charged with, and pleaded guilty to, stealing \$266,499.82 from Wathaurung Aboriginal Corporation.

On 29 March 2017, the Tribunal Member was suspended on an interim basis.

On 25 June 2018 the Member was sentenced in the County Court of Victoria with a Community Correction Order lasting for three years, commencing on that date. In determining this was an appropriate sentence, the Judge made the following comments:

- [27] The offending is of course serious. You were in a position of trust, having set up the organisation and managing high-level donated funds which are provided by grants from Cultural Heritage Management, property developers and local councils ...
- [28] ... Your thefts were considered, involved significant sums and extended over a period of years.
- [29] In mitigation I have taken into account the submissions of your counsel, and in particular:
- your cooperation with the police investigation and plea of guilty both for its practical effect and as expression of remorse,
 - your stated remorse,
 - your maturity and the absence of any prior convictions or post-offence convictions,
 - your disadvantaged life and the consequential mental health conditions which have been longstanding and continue,
 - your consistent employment record,
 - the positive steps you have voluntarily taken towards your rehabilitation by seeking psychological counselling,
 - your prospects of rehabilitation which I regard as very high,
 - that the funds calculated as stolen have been repaid in full and, because of civil proceedings, to a greater extent than that represented by these charges by approximately \$108,000,
 - that the repayment of funds resulted in you having to sell your family home,
 - the distress to you from the impact your offending has had on your children, particularly your son, and on your relationship with your husband, and
 - the respect you feel you have lost in your community and the great shame and embarrassment this has caused.

The laying of charges against the Member and subsequent court proceedings and sentencing attracted coverage by national media.

Subsequently, pursuant to By-Law 40(10.13) the Member entered into an agreement with the PCC dated 5 October 2018 in which she admitted the allegations that she had breached the relevant By-Laws.

4. REASONS FOR DECISION ON BREACH OF THE BY-LAWS

- The PCC submitted that the Member admitted the allegations of breaches of:
 - By-Law 40(2.1)(b) in that on 9 August 2017 she entered pleas of guilty to the criminal offences for which she was charged and which have not been set aside on appeal
 - By-Law 40(2.1)(k) in that the guilty pleas bring or may bring discredit on the Member, Chartered Accountants ANZ or the profession of accountancy.
- Having regard to:
 - the Community Correction Order made on 25 June 2018 which stated that the Member had been convicted of theft in the County Court of Victoria
 - the Member's admission of the allegation

the Tribunal was satisfied the Member had breached By-Law 40(2.1)(b) and therefore the allegation was established.

- Having regard to:
 - the press articles that ensued from the criminal conviction
 - the Member's admission of the allegation

the Tribunal was satisfied the Member had breached By-Law 40(2.1)(k) and therefore the allegation was established.

5. REASONS FOR SANCTIONS

- The PCC submitted that:
 - conduct involving criminal convictions for eight dishonesty offences is objectively serious. There are several aggravating features, including that the sum of money stolen was significant
 - the conduct was committed over an extended period during which the Member occupied a position of trust with an organisation charged with the protection of the cultural heritage of the local indigenous people
 - the conduct, including the Member's role as bookkeeper and accountant and her membership of Chartered Accountants ANZ received media interest at a national level, and was thus capable of damaging public confidence in the profession
 - taking the above matters into account, the appropriate sanction in ordinary circumstances would be termination of membership. However in this matter there were extensive mitigating factors and it was appropriate to consider to what extent they reduced the Member's accountability for her conduct and to what extent they ought to moderate the sanction ultimately imposed
 - the mitigating circumstances included the Member's:
 - cooperation with authorities
 - early admissions and genuine remorse
 - maturity and the absence of any other conviction
 - consistent employment record
 - steps already taken towards rehabilitation, including seeking counselling and repaying the funds stolen

- unique personal circumstances

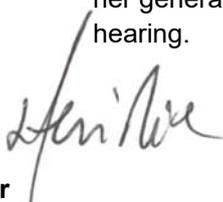
as well as the high regard in which the Member is held by her community, despite her transgressions

- it was therefore appropriate to moderate the sanction to a three and a half year suspension, noting that the maximum suspension period is five years
- it was appropriate in this case to consider that the Member had already been the subject of an eighteen-month interim suspension.
- The Member agreed that her membership be suspended and provided additional information as to the circumstances that led to the conviction.
- The Tribunal considered that breaches of this kind involving the misappropriation or theft of money would in the ordinary course warrant termination of membership. The Tribunal accepted that the sanction in this circumstance ought to be moderated because of a number of mitigating factors which were specific to the Member.
- The Tribunal came to the view that a suspension for three and a half years commencing on 16 November 2018 was appropriate. The Tribunal noted that it had the power to suspend members for up to five years and accepted the PCC's submissions that it was appropriate in this matter to take into account the period of the Member's interim suspension.
- The Tribunal also had regard to *Regulation CR1 - Admissions, Readmissions and Membership and Notification Obligations*, and noted that the Member would, amongst other requirements, have to satisfy fit and proper person requirements prior to being readmitted to membership at the end of the period of suspension.
- Of the available mitigating factors, the Tribunal placed significant weight on:
 - the Member's frank and honest responses to questions from Tribunal members
 - the Judge's sentencing remarks, including the following in particular:
 - [34] The basic purpose for which a court may impose a sentence are punishment, deterrence (that is, both specific to you and general -, which means to make an example of you to deter other like-minded offenders), rehabilitation, denunciation by the court and the protection of the community. In sentencing, I have to have regard to a range of matters such as the maximum penalty for the offence, the nature and gravity of the offence, your culpability and degree of responsibility for it, your personal circumstances and those of the victims. Each factor must be balanced in order to impose a sentence that is just in all the circumstances. I am required to balance the interests of the community in denouncing and punishing criminal conduct with the interests of the community in seeking to ensure that as far as possible, offenders are rehabilitated and reintegrated into society.
 - [35] I have carefully considered the submissions of your counsel and those of the prosecutor. I accept ... your otherwise good character, and the application and ability that you have shown to your life of full employment, raising a family, very significant community work and the other matters in mitigation very much reduce the emphasis that would otherwise be appropriate and necessary to place on specific and general deterrence.
 - ...
 - [39] I have considered the option of a sentence to imprisonment alone and also to a sentence tailored to combine some period in custody together with a community correction order. In my view, on balance, given the remarks of the Victorian Court of Appeal in the authority of Boulton and applying the provisions of the governing principles of the Sentencing Act (Vic), I am not satisfied that the purpose or purposes for which the sentence is imposed cannot be achieved by a community correction order with conditions attached without the necessity for actual confinement.

- the character references provided by the Member to the Court and to the Tribunal
- the fact that the Member continues to be employed in a financial role under supervision
- the Member's full and frank cooperation with the PCC
- the fact that the Member had repaid the funds the subject of the criminal charges
- the Member's demonstrated remorse and the steps she had already taken to ensure that she does not reoffend
- the fact that the charges only related to one entity with which the Member had a strong family connection and there was no suggestion that the charges involved any clients of the Member's practice.

6. REASONS FOR COSTS SANCTION

- The PCC submitted that the Member should pay \$7,000 towards the cost and expense of the disciplinary action and the Member accepted that she should pay this amount.
- The Tribunal accepted that this was the appropriate amount the Member should pay, noting that she had entered into the Agreement as to Sanctions on 5 October 2018 and her generally cooperative attitude towards the PCC and the Disciplinary Tribunal at the hearing.


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)(b), in that on 9 August 2017 the Member entered pleas of guilty to eight criminal offences, for which she was convicted on 25 June 2018 and which have not been set aside on appeal, being eight counts of theft pursuant to section 74 of the *Crimes Act 1958* (VIC).
2. By-Law 40(2.1)(k), in that the acts, omissions and defaults as set out in paragraph 1 above bring, or may bring, discredit on the Member, CA ANZ and/or the profession of accountancy.

SCHEDULE 2 - RELEVANT BY-LAWS

40. Except as provided by By-Law 41, the By-Laws in this Section 5, including the following paragraphs of this By-Law 40, do not apply to Members who are also members of NZICA in respect of disciplinary matters over which NZICA has jurisdiction and which relate to the practice of the profession of accountancy by NZICA's members in New Zealand. Nothing in this By-Law 40 excludes from the operation of this Section 5, conduct of a Member:

- (a) who was, but is no longer, a member of NZICA; or
- (b) who has subsequently also become a member of NZICA.

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

...

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:

...

- (b) has, before any court of law in any jurisdiction in Australia or elsewhere pleaded guilty to, or been found guilty of, any criminal offence which has not been set aside on appeal;

...

- (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; or

40(10.13) Subject to paragraph 9.3(c), the Disciplinary Tribunal may, with the written consent of the relevant Member and the Professional Conduct Committee, dispense with any or all of the procedures in this paragraph 10 and impose any of the sanctions permitted in paragraph 10.12 or accept a written undertaking under paragraph 13.8.

40(13.8) Written undertakings

The Professional Conduct Committee, the Disciplinary Tribunal or the Appeals Tribunal may, if it considers that it is appropriate to do so in connection with the consideration or determination of any matter before it, accept a written undertaking from a Member on such terms as it thinks fit at any time.