

Determination of the Disciplinary Tribunal of Chartered Accountants Australia and New Zealand 21 August 2019

- Case Number:** D-1199
- Member:** Catriona Jane Rogers FCA of New South Wales
- Hearing Date:** 31 July 2019
- Tribunal:** Ross Gavin FCA (Chair)
David Gibbs FCA
Jenni Millbank, lay member of the Tribunal
- Tribunal Legal Adviser:** Jamesina McLeod
- Representation:** Paul Forbes for the Professional Conduct Committee (PCC)
Callan O'Neill for the Member
- Case description:**
1. Member failed to observe a proper standard of professional care, skill and competence in the course of carrying out the Member's professional duties and obligations.
 2. Member committed breaches of the By-Laws, APES 110 - *Code of Ethics for Professional Accountants* and APES 305 - *Terms of Engagement*.
 3. Member committed acts, omissions or defaults which bring, or may bring, discredit upon the 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 allegations 1(a), 1(b), 2(a), 2(b), 3(a), 3(b) and 4 and the Tribunal was satisfied the allegations had been established
- the Tribunal found the PCC established allegations 2(c) and 5.

1.2 DECISION ABOUT SANCTIONS

The Tribunal considered that the appropriate sanctions in these circumstances were that:

- the Member receive a censure
- the Member successfully complete within 12 months at her own cost the Ethics module of the Chartered Accountants ANZ Public Practice Program.

1.3 DECISION ABOUT COSTS SANCTION

The Tribunal determined that the Member pay to Chartered Accountants ANZ the sum of \$19,296 for the full costs and expenses of the proceedings (By-Law 40(10.12)(k)). No GST is payable.

1.4 DECISION ABOUT PUBLICATION

In accordance with By-Laws 40(12.3) and 40(12.4), 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 is a member of / holds statutory registrations administered by the following bodies, which will be notified of this decision:

- Tax Practitioners Board
- Australian Securities and Investments Commission
- Institute of Public Practitioners.

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

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)).

3. BACKGROUND

The Member filed income tax returns for the 2013, 2014, 2015 and 2016 financial years on behalf of the adult daughter (the **Complainant**) of a long term client (the **Father**). The Father had material control of a family trust which comprised individuals and entities within a family group and which made income distributions to individuals in the family, including the Complainant. The Complainant turned 18 in 2013. The Complainant's income tax returns were lodged by the Member on the instructions of the Complainant's Father without her written authority and were signed by him instead of by the Complainant. The Member attested to the accuracy of these returns.

The Member did not have a valid appointment from the Complainant and did not act on instructions from the Complainant.

Following the making of the complaint which led to the PCC's investigation, the Member disclosed information about the complaint to the Father without the Complainant's consent, on two occasions.

4. REASONS FOR DECISION

4.1 ALLEGATION 1

- The Member admitted allegations 1(a) and 1(b).
- The Tribunal was satisfied that the Member had lodged income tax returns without a valid appointment and without documenting and communicating to the individual the Member's terms of engagement, breaching section 3.1 of APES 305 - *Terms of Engagement* and By-Law 40(2.1)(a).

4.2 ALLEGATION 2

- The PCC submitted that:
 - the Member's integrity was not maintained by signing the declaration on returns which she knew to be false because the Complainant had not provided the authority for the returns to be lodged. The returns were signed by the Father to the actual knowledge of the Member
 - the Member had breached the fundamental principles of APES 110 - *Code of Ethics for Professional Accountants (APES 110)* in that her objectivity was compromised by the influence of the Father
 - the Member's actions also represented a lack of professional judgment and were a conflict of interest
 - the Member did not take reasonable steps to identify whether a conflict of interest could have arisen. The Member had an obligation to do so but had not communicated with or spoken to the Complainant in respect of her taxation affairs
 - the PCC was not in a position to determine whether the financial information included in the tax returns was factual in all respects.

- The Member admitted allegations 2(a) and 2(b). With respect to allegation 2(c) the Member submitted that:
 - the substance of the tax returns was accurate
 - there had been no conflict of interest because the Member did not receive a personal gain from the actions that were the subject of this hearing
 - the Member only became aware that there had been conflicts within the family once she received notice of the complaint
 - there was no actual conflict of interest at the time of the tax returns because the interests of the Father and the Complainant were 'in sync' in that the returns were beneficial to the Complainant.
- The Tribunal was independently satisfied that the allegations were established because:
 - the Member admitted allegations 2(a) and 2(b)
 - regarding allegation 2(c), irrespective of the content of the tax returns, about which the Tribunal makes no finding, the tax returns contained false declarations on the part of the Father and the Member
 - these false declarations were made on at least three annual tax returns
 - the Member was in breach of the fundamental principle of objectivity because she did not make due enquiry to ensure that there was no conflict of interest.

4.3 ALLEGATION 3

- The Member admitted allegations 3(a) and 3(b).
- The Tribunal was satisfied that the Member had disclosed the Complainant's confidential information to the Member's long term client, breaching sections 100.5 and 140 of APES 110, and that this constituted a breach of By-Law 40(2.1)(h).

4.4 ALLEGATION 4

- The Member admitted allegation 4.
- The Tribunal was satisfied that the Member had failed to observe a proper standard of professional care, skill or competence in lodging tax returns that were not signed by the individual tax payer, breaching the fundamental principle of integrity as prescribed by section 110 of APES 110, and that this constituted a breach of By-Law 40(2.1)(a).

4.5 ALLEGATION 5

- The PCC submitted that:
 - it is not necessary to establish that the Member had brought discredit upon herself, Chartered Accountants ANZ **and** the profession of accountancy, as the By-Law would be breached in respect of the discredit upon the Member alone, which she admitted
 - the Member's conduct does reflect on Chartered Accountants ANZ or the profession of accountancy because it reflects on her firm and the employees with whom she works
 - the fact that there had not been adverse media publicity to date did not preclude the possibility that there could be adverse publicity in the future.
- The Member submitted that:
 - she had brought discredit to herself but the Member did not admit that she had brought discredit to Chartered Accountants ANZ or the profession of accountancy

- there had been no evidence that a member of the public had been aware of, or had been adversely affected by, the Member's conduct and therefore no discredit to Chartered Accountants ANZ or the profession of accountancy had arisen.
- The Tribunal determined that the allegation was established because:
 - the Member had discredited herself by her breaches of the fundamental principles of integrity, objectivity and confidentiality
 - the Tribunal did not consider it necessary for evidence to be brought by a member of the public to establish discredit upon Chartered Accountants ANZ or the profession of accountancy
 - the Tribunal was satisfied that a reasonable member of the public, if aware of the findings, could consider them to bring discredit on Chartered Accountants ANZ and the profession of accountancy.

5. REASONS FOR SANCTIONS

- The PCC submitted that the appropriate sanctions were that the Member:
 - receive a severe reprimand
 - have an appropriate fine imposed against her
 - be required to successfully complete (as soon as practicable) the Ethics module of the Public Practice Program of Chartered Accountants ANZ
 because:
 - in the PCC's submission, it is self-evidently very serious for a registered tax agent to make and condone the making of false declarations on tax returns, and to file returns on behalf of an adult individual repeatedly without ever having communicated with that individual in any way
 - of the seriousness of the actions which were 'a long way short of professional' given the Member's seniority and experience
 - the nature and extent of the Member's actions appeared to be systemic as evidenced by her submissions to the PCC at the Case Conference held 16 April 2019 and implied by the Member's acknowledgment that she had subsequently changed procedures in her office in dealing with adult children in family trust situations
 - of the repeated nature of the conduct over a sustained period in multiple tax years concerning the Complainant's tax returns.
- The Member submitted that an appropriate and sufficient sanction was the requirement for her to successfully complete (as soon as practicable) the Ethics module with no severe reprimand, reprimand or fine because:
 - the Tribunal should give weight to the written character references that were handed up during the hearing
 - a previous determination of the Tribunal concerning a failure to comply with engagement obligations led to the imposition of no sanctions
 - the Member objected to the characterisation of her conduct as systemic and argued firstly that the Case Conference transcript did not establish this and secondly that it was not procedurally fair to make such a claim at the Tribunal stage
 - the Member has changed her processes and practices as a consequence of the complaint to ensure that such a situation does not arise again

- the imposition of a reprimand upon a practitioner of her seniority and experience would have an impact on her reputation disproportionate to the breach
 - the Member had an unblemished professional record spanning more than 40 years' membership and there was little chance of future professional non-compliance so as to warrant a deterrence sanction
 - the Member had largely accepted responsibility and conceded the substance of the complaint
 - the Member expressed contrition and had apologised to the Complainant for her professional non-compliance
 - her actions represented inattention, were confined to a single family situation and no deceit was intended.
- The Tribunal considered the character references which supported the Member's claim of a capable and unblemished professional career.
 - While the Tribunal is not bound by its previous decisions, consistency of approach and outcome is desirable. The Tribunal considered the previous case submitted by the Member but distinguished it as one that involved a breach of lesser seriousness.
 - The Tribunal is of the view that breaches of objectivity, confidentiality and integrity of this nature are of the utmost seriousness and that a message of general deterrence be clearly signalled to the profession concerning such breaches. Consequently the Tribunal found that the findings of wrongdoing were serious and determined:
 - to impose a reprimand on the Member
 - that the Member be required to successfully complete within 12 months at her cost the Ethics module of the Public Practice Program of Chartered Accountants ANZ.

The sanctions requested by the PCC of a severe reprimand and fine were not considered necessary because:

- the Member had been cooperative during the disciplinary process
- the Member demonstrated a clear understanding of the matters at hand
- the Member had largely accepted the allegations and had taken steps to improve the processes within her office to ensure breaches of this nature would not recur.

6. REASONS FOR COSTS SANCTION

- The PCC tabled a schedule of costs and submitted that the Member should bear the full costs of \$19,296 because there was no reason not to recover the full amount of costs given the substance and seriousness of the breaches.
- The Member submitted that the amount sought by the PCC was significant.
- The Tribunal accepted the PCC's submissions that the Member should pay the full costs of the proceedings, having regard to Regulation CR8 - *Disciplinary Procedures*. The PCC had established all of the allegations and no mitigating factors had been presented to the Tribunal which warranted a reduction in the costs awarded against the Member.

7. CHANGES TO CHARTERED ACCOUNTANTS ANZ CONSTITUTION

- On 12 August 2019 the Tribunal was informed that the Governor-General had approved a new Supplemental Charter and By-Laws, effective 30 July 2019.
- The sanctions available to the Tribunal under the 30 July 2019 By-Laws are different to the sanctions available under the previous By-Laws, in that the sanctions of "reprimand

the Member” and “severely reprimand the Member” have been replaced with “censure the Member”.

- At the time of hearing this matter the Tribunal was not aware that the Governor-General had approved the new By-Laws however the Tribunal had been provided with a copy of a letter sent from the PCC to the Member dated 16 July 2019. The PCC’s letter noted that constitutional documents were with the Governor-General for approval and that those documents would become effective on approval by the Governor-General. The PCC’s letter further relevantly stated that:
 - the PCC would recommend to the Tribunal that it impose a severe reprimand sanction on the Member or, if the constitutional documents were approved, a censure sanction
 - the PCC’s position was that the notice requirements in the new By-Laws will only apply to matters that are set down for hearing after the new By-Laws take effect. The Member was invited to advise the PCC if the Member intended to take issue with that position.
- By letter dated 12 August 2019 the PCC submitted to the Tribunal that in light of the new By-Laws being approved for commencement on 30 July 2019, the Tribunal *“should, in its written reasons, take the commencement of the new By-Laws into consideration and impose a sanction of Censure rather than Reprimand against [the Member]. The PCC invites [the Member] to make any submissions to the contrary in writing within 7 days”*. A copy of this letter was provided to the Member.
- The Member provided no submissions to the contrary.
- The Tribunal is of the view that, pursuant to the new By-Laws currently in effect, the sanction of ‘reprimand’ is now known as ‘censure’ and that it is appropriate that any references to ‘reprimand’ in this written decision should be read and take effect as if they were references to ‘censure’.
- Further, the Tribunal is of the view that the relevant notice provisions under which the Member received the Notice of Disciplinary Action were those in force at the time of service, and that the subsequent approval of new notice provisions does not affect this matter.



**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)(a), in that the Member failed to observe a proper standard of professional care, skill or competence in the course of carrying out her professional duties, in circumstances where the Member lodged income tax returns for the years ending 2013, 2014 and 2015 on behalf of an individual:
 - (a) without a valid appointment from that individual to act for them;
 - (b) without documenting and communicating to that individual the terms of the Member's engagement,and thereby breached Section 3.1 of APES 305, *Terms of Engagement*.
2. By-Law 40(2.1)(a), in that the Member failed to observe a proper standard of professional care, skill or competence in the course of carrying out her professional duties, in circumstances where the Member lodged income tax returns for the years ending 2013, 2014 and 2015 on behalf of an individual:
 - (a) without that individual's authority to do so;
 - (b) on the instructions of the individual's father, the Member's long-term client; and
 - (c) that were false in that, to the Member's knowledge, they were not signed by the individual taxpayer and were, instead, signed by the individual's father, the Member's long term client,in breach of the fundamental principle of Objectivity and sections 100.5, 120.1 and 220.1 of APES 110, *Code of Ethics for Professional Accountants*.
3. By-Law 40(2.1)(h), in that the Member committed a breach of the fundamental principle of Confidentiality as prescribed by Section 100.5 and 140 of APES 110, *Code of Ethics for Professional Accountants*, in circumstances where she disclosed to her long-term client confidential information belonging to an individual that the Member acquired as a result of her professional relationships, including:
 - (a) informing the Complainant's father of the complaint lodged to CA ANZ in or around September/October 2017; and
 - (b) forwarding requests for documentation made by the individual's newly engaged accountant to the individual's estranged father (on 20 October 2017).
4. By-Law 40(2.1)(a), in that the Member failed to observe a proper standard of professional care, skill or competence in the course of carrying out her professional duties, in the circumstances set out in paragraph 2(c) above and thereby breached the fundamental principle of Integrity as prescribed by Section 110 of APES 110, *Code of Ethics for Professional Accountants*.
5. By-Law 40(2.1)(k), in that the Member's conduct, as set out in paragraphs 1 to 4 above, brings or may bring discredit upon the Member, CA ANZ 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.

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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;

...

- (h) has committed any breach of the Supplemental Charter, these By-Laws or the Regulations, any pronouncements issued by the Accounting Professional and Ethical Standards Board, Australian Accounting Standards Board and Auditing and Assurance Standards Board (or their successor entities) including the Code of Ethics, or any applicable pronouncements, instruments, technical or professional standards or guidance issued by any similar body whether in Australia or in a foreign jurisdiction;

...

- (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

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SCHEDULE 3 - EXCERPTS FROM ACCOUNTING PROFESSIONAL & ETHICAL STANDARDS BOARD (APESB) STANDARDS

APES 110, Code of Ethics for Professional Accountants

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Fundamental Principles

100.5 A Member shall comply with the following fundamental principles:

- (a) *Integrity* – to be straightforward and honest in all professional and business relationships.
- (b) *Objectivity* – to not allow bias, conflict of interest or undue influence of others to override professional or business judgments.
- (c) *Professional competence and due care* – to maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent Professional Services based on current developments in practice, legislation and techniques and act diligently and in accordance with applicable technical and professional standards.
- (d) *Confidentiality* – to respect the confidentiality of information acquired as a result of professional and business relationships and, therefore, not disclose any such information to third parties without proper and specific authority, unless there is a legal or professional right or duty to disclose, nor use the information for the personal advantage of the Member or third parties.
- (e) *Professional behaviour* – to comply with relevant laws and regulations and avoid any action that discredits the profession.

Each of these fundamental principles is discussed in more detail in Sections 110-150.

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SECTION 110

Integrity

110.1 The principle of integrity imposes an obligation on all Members to be straightforward and honest in all professional and business relationships. Integrity also implies fair dealing and truthfulness.

110.2 A Member shall not knowingly be associated with reports, returns, communications or other information where the Member believes that the information:

- (a) Contains a materially false or misleading statement;
- (b) Contains statements or information furnished recklessly; or
- (c) Omits or obscures information required to be included where such omission or obscurity would be misleading.

When a Member becomes aware that the Member has been associated with such information, the Member shall take steps to be disassociated from that information.

110.3 A Member will be deemed not to be in breach of paragraph 110.2 if the Member provides a modified report in respect of a matter contained in paragraph 110.2.

SECTION 120

Objectivity

120.1 The principle of objectivity 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.

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SECTION 140

Confidentiality

140.1 The principle of confidentiality imposes an obligation on all Members to refrain from:

- (a) Disclosing outside the Firm or employing organisation confidential information acquired as a result of professional and business relationships without proper and specific authority or unless there is a legal or professional right or duty to disclose; and
- (b) Using confidential information acquired as a result of professional and business relationships to their personal advantage or the advantage of third parties.

140.2 A Member shall maintain confidentiality, including in a social environment, being alert to the possibility of inadvertent disclosure, particularly to a close business associate or a Close or Immediate Family member.

140.3 A Member shall maintain confidentiality of information disclosed by a prospective client or employer.

140.4 A Member shall maintain confidentiality of information within the Firm or employing organisation.

140.5 A Member shall take reasonable steps to ensure that staff under the Member's control and persons from whom advice and assistance is obtained respect the Member's duty of confidentiality.

140.6 The need to comply with the principle of confidentiality continues even after the end of relationships between a Member and a client or employer. When a Member changes employment or acquires a new client, the Member is entitled to use prior experience. The Member shall not, however, use or disclose any confidential information either acquired or received as a result of a professional or business relationship.

140.7 The following are circumstances where Members are or may be required to disclose confidential information or when such disclosure may be appropriate:

- (a) Disclosure is permitted by law and is authorised by the client or the employer;
- (b) Disclosure is required by law, for example:
 - (i) Production of documents or other provision of evidence in the course of legal proceedings; or
 - (ii) Disclosure to the appropriate public authorities of infringements of the law that come to light; and
- (c) There is a professional duty or right to disclose, when not prohibited by law:
 - (i) To comply with the quality review of a member body or professional body;
 - (ii) To respond to an inquiry or investigation by a member body or regulatory body;
 - (iii) To protect the professional interests of a Member in legal proceedings; or
 - (iv) To comply with technical standards and ethics requirements.

AUST140.7.1 The circumstances described in paragraph 140.7 do not take into account Australian legal and regulatory requirements. A Member considering disclosing confidential information about a client or employer without their consent is strongly advised to first obtain legal advice.

140.8 In deciding whether to disclose confidential information, relevant factors to consider include:

- (a) Whether the interests of all parties, including third parties whose interests may be affected, could be harmed if the client or employer consents to the disclosure of information by the Member;
- (b) Whether all the relevant information is known and substantiated, to the extent it is practicable; when the situation involves unsubstantiated facts, incomplete information or

unsubstantiated conclusions, professional judgment shall be used in determining the type of disclosure to be made, if any;

- (c) The type of communication that is expected and to whom it is addressed; and
- (d) Whether the parties to whom the communication is addressed are appropriate recipients.

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SECTION 220

Conflicts of Interest

220.1 A Member in Public Practice shall take reasonable steps to identify circumstances that could pose a conflict of interest. Such circumstances may create threats to compliance with the fundamental principles. For example, a threat to objectivity may be created when a Member in Public Practice competes directly with a client or has a joint venture or similar arrangement with a major competitor of a client. A threat to objectivity or confidentiality may also be created when a Member in Public Practice performs services for clients whose interests are in conflict or the clients are in dispute with each other in relation to the matter or transaction in question.

APES 305, *Terms of Engagement*

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1.2 APES 305 sets the standards in respect of Terms of Engagement for Members in Public Practice in the provision of quality and ethical Professional Services to Clients. The mandatory requirements of this Standard are in **bold** type...

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3. Terms of Engagement for Professional Services

3.1 A Member in Public Practice shall document and communicate to the Client the Terms of Engagement.

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