

Professional Conduct Committee – 30 August 2021

Conflict of interest and failure to comply with obligation of professional competence and due care – Member A

At a meeting of the Professional Conduct Committee (PCC) of Chartered Accountants Australia and New Zealand (CA ANZ) held in private on 18 May and 30 August 2021 by videoconference in respect of Member A, 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)(a) and (h).

The PCC decided that for the reasons set out below the matters the subject of the Case Conference are sufficiently serious to warrant referral to the Disciplinary Tribunal. However, the PCC decided to propose that a Consent Agreement be made with the Member (Consent Agreement), which shall be entered on the Member's record, on terms that:

1. the Member receive a severe reprimand;
2. the Member pay to CA ANZ a fine in the amount of \$5,000;
3. the Member will undertake to advise in writing by no later than 30 September 2021 to the Complainant's new legal guardian (Guardian) the status of the financial statements and related compliance documents for the Superannuation Fund (Fund) or the Fund's trustee (Trustee) and any books and records in his possession regarding those financial statements and related compliance documents and provide a copy to CA ANZ by 7 October 2021;
4. the Member pay to CA ANZ the sum of \$5,277 towards the costs of investigating and dealing with the matters the subject of the complaint and the Case Conference; and
5. 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", with a link to the published decision, without disclosing the Member's name or locality.

The PCC considers that it is in the public interest for this sanction to be published in the terms set out in the proposed Consent Agreement but that there are no special circumstances which warrant disclosing the name or location of the Member.

The PCC noted that if the Member does not accept the proposed Consent Agreement in the time provided, the Member will be automatically referred to the Disciplinary Tribunal for hearing.

Background

The Member set up and was accountant for the Fund. The Complainant is a member of the Fund. The director of the Trustee is the former power of attorney of the Complainant (Attorney). At various times, the Member acted for the Complainant in his personal capacity, as well as the Fund, the Attorney personally as well as his entities and business (Business), which was an investment vehicle for the Member, the Attorney and three other individuals. The Fund lent \$210,000 to the Business in 2015. The Member subsequently ceased to act for at least the Attorney and his entities.

Reasons

Issue 1 – Failure to provide books and records

The Complainant alleged that the Member failed to provide the financial statements for the Fund upon request by the Guardian, and thereby failed to release books and records upon request in breach of CA ANZ regulation CR3.9 and failed to respond to correspondence/communications expeditiously in breach of CA ANZ regulation CR3.8.

The Member advised that:

- he was away overseas at the time of receipt of some of the correspondence from the Guardian and therefore did not receive it;
- there was a changeover in administrative staff which disrupted his normal business procedures;
- he provided the trust deed and initial documents for the Fund to the Guardian;
- he had not completed any financial statements or tax returns for the Fund and therefore he had nothing to provide the Guardian other than the initial documents referred to above.

In particular, the Member stated that in approximately 2016 he ceased to act for the Attorney and his various entities. Accordingly:

- the Fund's compliance obligations were not the Member's responsibility;
- it was the Attorney's responsibility to ensure the Fund maintained its records and complied with its obligations to the ATO; and
- after the Member ceased to act for the Attorney and his entities, he was not instructed to carry out any work for the Fund or the Trustee.

The PCC notes the Member's advice that he was unable to provide to the Guardian any financial statements or tax returns for the Fund because he did not prepare them. On that basis, the PCC does not consider that the Member is in breach of CA ANZ Regulation CR3.9, which requires members, after a change in appointment, to promptly make available for collection all books, papers, documents and other records belonging to the client. However, the PCC does consider that the Member should have clearly advised the Guardian of that fact, in compliance with his obligation pursuant to CA ANZ Regulation 3.8 to expeditiously reply to professional correspondence and enquiries.

Issue 2 – Professional competence and due care

The Complainant has complained that the Fund made a significant investment into a business, and then a property development. The Member set up the Fund and was involved with the business and the property development, while at the same time appointed as the Fund's accountant.

The Member advised as follows:

- the Business had five directors (including the Member and the Attorney) who were all equal shareholders;
- the Attorney lent a portion of the Complainant's Fund to the Business;
- the Business subsequently secured a property development. At about the same time, the Business disbanded and:
 - the Attorney took responsibility for repayment of \$80,000 of the loan from the Fund; and
 - the Member and another took over the property development and entered into an additional agreement for the repayment of the \$120,000 borrowed from the Fund;
- the component of the loan for which the Member took responsibility (with another) is still outstanding, pending completion of the property development. Some interest has been paid on the loan and the Member intends to repay the loan on the finalisation of the property development;

- he had expertise in relation to the nature of investments permitted by superannuation funds, including by undertaking professional development.

The PCC notes that:

- the Member has advised he was responsible for the initial setup of the Fund, on the instructions of the Attorney;
- the Member admitted he was engaged to carry out work for the Fund, but did not do so as he did not have the relevant information;
- the Complainant has asserted, and the Member accepted, that the Fund is not compliant with a number of its requirements, including to obtain a tax file number, prepare audited financial statements and lodge tax returns;
- the Member acknowledged that he was asked to provide information to the Guardian regarding the work he had carried out for the Fund and other related matters, but did not do so;
- the Member admitted that he is technically still the accountant for the Fund, but that he has not sought any instructions to complete the outstanding compliance matters for the Fund, including the preparation of financial statements and tax returns and the audit of the Fund;
- the Member was a director and shareholder of the Business when it accepted a loan from the Fund for the initial purpose of investment in the Business. The Member admitted that he did not seek any specific independent advice about whether or not this was an appropriate investment for the Fund, nor whether the investment complied with the requirements of the superannuation legislation.

In these circumstances, the PCC considers that the Member has failed to comply with his professional obligation of professional competence and due care pursuant to section 130 of APES 110, *Code of Ethics for Professional Accountants*. In particular, the PCC considers that the Member's failure to obtain a tax file number for the Fund after it was set up and seek instructions (at the minimum) to carry out the annual compliance work for the Fund demonstrated a failure to act diligently pursuant to section 130.1(b) and 130.4 of APES 110. In addition, the PCC considers that the Member's failure to adequately consider the appropriateness of the investment from the Fund into the Business, including the failure to obtain independent advice on this point, amounts to a failure to engage in Competent Professional Activity (the exercise of sound judgement in applying professional knowledge and skill in the performance of such service) pursuant to section 130.2 of APES 110.

As a result, the PCC considers that the Disciplinary Tribunal is likely to find that the Member's conduct did not comply with By-Laws 40(2.1)(a) and (h).

Issue 4 – Conflict of interest and imposition of safeguards

The Complainant alleged that the Member demonstrated a conflict of interest in relation to the investment from the Fund into a business in which the Member had an interest.

The Member acknowledged that he was appointed as accountant for the Fund, as well as the Complainant and the Attorney. He was also a director and shareholder of the Business. He was aware that a substantial investment was made by the Fund into the Business. He has acknowledged that in those circumstances he had a conflict of interest and that he did not put in place appropriate safeguards.

The Member advised that:

- he made significant and reasonable steps to manage any perceived conflict of interest in relation to the investment by the Fund in an entity in which the Member had an interest, by doing the following:

- he ensured the Attorney was acting in accordance with a Power of Attorney for the Complainant;
- he ensured the total loan to the Business by the Fund was only of a portion of the overall superannuation balance in the Fund;
- he ensured that the Complainant's investment was less than 50% of the total investment required for the Business;
- he considered that in the event of a collapse of the Business the Complainant could be reimbursed by selling machines owned by the Business;
- he was a 20% minority shareholder in the Business;
- the Business was assessed by him as low to moderate risk; and
- he gave some consideration to the nature of the other investments in the Fund, by seeking information to that effect from the Attorney.
- at some point, the Member developed serious concerns around how the Attorney executed his responsibilities for the Complainant, which is the reason why he distanced himself from him and ultimately ceased to act for all his entities (although during the Case Conference he acknowledged that he did still technically act for the Fund);
- the Attorney took possession of the equipment owned by the Business to satisfy \$80,000 of the Fund's loan;
- in addition, two members of the Business (including the Member) took over the property development project and entered into a loan agreement for \$120,000 of the Fund's loan. The finance agreement was established with a personal guarantee from the Member and detailed that interest repayments were to be made on the borrowed amount;
- initially considered that the Attorney was an appropriate person to do business with;
- acknowledged that he did not have adequate safeguards in relation to the loan from the Fund to the Business.

The PCC notes the Member's concession that he had a conflict of interest in the circumstances referred to above and that he did not put in place adequate safeguards to manage the threats resulting from such conflict. In particular, the PCC points out that the Member acted for each of the Attorney and his entities, the Fund, the Trustee and the Business during the period in which the Business (an entity in which he was both a director and shareholder) accepted a loan from the Fund.

Section 120.1 of APES 110 imposes an obligation on all members not to compromise their professional or business judgement because of bias, conflict of interest or the undue interest of others. In addition, section 120.2 of APES 110 states that a member shall not perform a Professional Activity if the circumstance or relationship biases or unduly influences the member's professional judgement with respect to that service. The appropriate management of a conflict of interest is further set out in section 220 of AES 110. In particular, section 220.1 identifies that a conflict of interest may create a threat to the fundamental principle of objectivity when:

- the member provides a Professional Service related to a particular matter for two or more clients whose interests with respect to that matter are in conflict; and
- the interest of the member with respect to a particular matter and the interests of the Client for whom the Member provides a Professional Service related to that matter are in conflict.

In the PCC's view, the Member's conduct falls into both those categories as he was acting for each of the Attorney, the Business and the Fund at the same time, in circumstances where the Business (in which the Member had an interest) borrowed money from the Fund for the purpose of a business venture. The PCC considers that the safeguards which the Member identified (as noted above) were inadequate to eliminate the threats or reduce them to an Acceptable Level (as required in section 220.5 of APES 110), because the threats as a result of the Member's own legal and financial involvement in the Business (and therefore as one of the beneficiaries of the loan from the Fund) were impossible to eliminate. As a result, the PCC considers that the Member's conduct is in breach

of the objectivity provisions in APES 110 as noted above, and therefore of By-Laws 40(2.1)(a) and (h).

Finally, the PCC notes that the Member accepted an engagement as auditor for the Fund, and issued an engagement letter for the audit, despite being responsible for the provision of the financial statements. While the PCC acknowledges that these financial statements were never produced, acceptance of the engagement as auditor as well as accountant for the Fund is a breach of the independence obligations in section 290 of APES 110.

Accordingly, the PCC considers that the Disciplinary Tribunal is likely to find that the Member's conduct did not comply with By-Laws 40(2.1)(a) and (h).

**Professional Conduct Committee
Chartered Accountants Australia and New Zealand**

17 August 2021