



Disciplinary Tribunal of Chartered Accountants Australia and New Zealand (CA ANZ) Written decision dated 12 June 2020

- Case Number:** D-1222
- Member:** Gordon Victor Shrubsole FCA of New South Wales
- Hearing Date:** 27 May 2020
- Tribunal:** David Fairlie (Chair and lay member of the Tribunal)
Bronwyn Morris AM FCA
Kathryn Brown CA
- Representation:** Paul Forbes and Charlotte Hendriks for the Professional Conduct Committee (PCC)
The Member neither appeared nor was represented
- Decisions:**
1. The Tribunal determined that the Member:
 - (a) had been the subject of an adverse or unfavourable finding by the Australian Taxation Office in relation to his professional and business conduct, competence and integrity; and
 - (b) failed to comply with reasonable and lawful directions of an officer or organ of CA ANZ concerning the good order and management of CA ANZ.
 2. The Tribunal determined to terminate the Member's membership.
 3. The Tribunal imposed a cost sanction in the sum of \$6,985 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) the hearing proceed in the absence of the Member;
 - (b) its decision with reasons, mentioning the Member's name and locality, be published on the CA ANZ website (the **Published Decision**);
 - (c) 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";
 - (d) that the Australian Securities and Investments Commission, the Member's business consultant and the partners of Shrubsole Rabbitt and Co be notified of this decision;

- (e) 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;
- (f) the decision regarding confidentiality takes effect immediately on 27 May 2020.

The date of effect of this decision is 4 July 2020 (By-Law 40(10.18)).



1. Introduction

- (a) On 24 September 2018 the Australian Taxation Office (**ATO**) gazetted a Notice of Disqualification pursuant to subsection 126A(6) of the *Superannuation Industry (Supervision) Act 1993* (the **SISA**) to Gordon Shrubsole, effective 20 September 2018 (the **ATO Disqualification**).
- (b) On becoming aware of the ATO Disqualification, the PCC initiated a complaint pursuant to the powers conferred by By-Laws 40(4.1) and 40(5.1) (the **Complaint**) and commenced investigation of the Complaint.
- (c) As part of its investigation, the PCC sent a number of letters and emails to the Member. On 17 February 2020 the PCC determined that the Member be referred to the Disciplinary Tribunal for hearing. As part of its reasons for that decision, the PCC wrote *“The holding of a position as a trustee, investment management (sic) or custodian entails a special level of responsibility. The PCC is concerned about the Member’s lack of response to the complaint in the circumstances of a disqualification of this nature and that the fact that it appeared to amount to a breach involving other people’s money”*.
- (d) On 26 May 2020 the PCC received email advice from a business consultant who said he had been appointed the Member’s representative (**RC**), that the Member was not able to attend the hearing scheduled for 27 May 2020. RC further advised he was *“unable to fully be briefed on the matter”* by the Member.

2. The issues for determination

- (a) Should the hearing proceed in the absence of the Member?
- (b) If the answer to (a) was yes, was the Member disqualified as a responsible officer of a trustee, investment manager or custodian for the purposes of the SISA and did this amount to a breach of By-Law 40(2.1)(e)? (allegation 1)
- (c) Did the Member fail to comply with reasonable and lawful directions of an officer of CA ANZ in breach of By-Law 40(2.1)(i)? (allegation 2)
- (d) If the answer to (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) Was there any reason to suppress the Member’s name from the published decision?
- (g) Should other parties be notified of the Tribunal decision?
- (h) Should any confidentiality orders be made?

3. Should the hearing proceed in the absence of the Member?

3.1 Did the Member receive proper notice of the hearing?

- (a) The Member did not attend the hearing of the Disciplinary Tribunal.
- (b) The PCC informed the Member of its decision to refer the matter to the Disciplinary Tribunal for hearing, and provided its reasons for that referral, by letter dated 9 March 2020 sent to the Member’s email, residential and mailing addresses recorded on the General Register.

- (c) On 16 April 2020 the Notice of Disciplinary Action (**NDA**) was served on the Member via the Member's email address recorded on the General Register (the **Member's email address**). The Member was also notified of the hearing date, time and location at the time of the NDA service. The Member responded by email confirming receipt of that email on 21 April 2020.
- (d) The Tribunal was satisfied that the Member had notice that the hearing would take place on 27 May 2020. The Tribunal was also satisfied that the Member had notice that the Tribunal would be considering at the hearing the PCC's allegations and may impose sanctions if either of those allegations were established.

3.2 Should the hearing be adjourned?

- (a) On 18 May 2020 RC contacted the PCC by email and advised, amongst other things, that the Member "[was not able] to attend and or have the matter heard. He does not have access to any technology and is remaining at home ... with the current health issues in the community".
- (b) On 19 May 2020 the Tribunal Secretary spoke to the Member via his mobile phone number to discuss his response required under By-Law 40(10.4). The Member advised that the matter was with RC.
- (c) On 20 May 2020 the PCC sought clarification by email from RC as to whether the Member's inability was temporary or permanent and on 22 May RC responded by email that his understanding was that the issue was not temporary.
- (d) On 26 May 2020 the PCC sought from RC clarification of whether he would attend the hearing on behalf of the Member. RC advised he was "*unable to be fully briefed on the matter*". The PCC subsequently sought from RC clarification of whether he was seeking an adjournment of the scheduled hearing date. No response was received from RC prior to the scheduled hearing time.
- (e) The PCC also drew to the Tribunal's attention the following documentary evidence:
 - (i) 21 December 2018 email from the Member to the PCC (the **Member's Response**) in which he wrote "*for most of October and November I have been required to work outside of Sydney on assignments*";
 - (ii) 21 May 2019 email from the Member to the PCC in which he wrote "*I will be working interstate from Sunday 2 June and returning Tuesday 11 June 2019*";
 - (iii) 10 July 2019 file note of call made by the PCC to the Member which recorded that the Member "*advised that he would not be attending [the Case Conference scheduled for 18 July] as he has handed in his resignation from membership on 30 June 2019*"; and
 - (iv) CA ANZ letter dated 16 July 2019 advising the Member that, in accordance with By-Law 19, his "*resignation [had] not been accepted on the basis that there are matters concerning [him] which are the subject of disciplinary action or professional conduct proceedings*".
- (f) Having considered all this correspondence, the Tribunal was satisfied that it was not appropriate that the hearing be adjourned. It considered that the Member, and RC, had been given every opportunity to attend and would likely not attend a hearing at a future date.

4. Was the Member disqualified as a responsible officer of a trustee, investment manager or custodian for the purposes of the SISA and did this amount to a breach of By-Law 40(2.1)(e)? (allegation 1)

4.1 PCC submissions

- (a) The PCC referred to the ATO Disqualification and in particular the wording in the ATO Disqualification that the Deputy Commissioner of Taxation was *“satisfied that [the Member had] contravened the SISA on one or more occasions and the seriousness of the contraventions provides grounds for disqualifying [the Member]”*.
- (b) The ATO Disqualification was a matter within the terms of By-Law 40(2.1)(e), amounting to an adverse or unfavourable finding in relation to that Member’s professional or business conduct, competence or integrity.

4.2 Member submissions

- (a) In the Member’s Response he wrote:

“I draw your attention to the fact that the only members of the fund are my wife and myself and there is not a substantial amount of money in the fund. I am not a trustee of any other superannuation funds.”
- (b) No documentary evidence was provided by the Member in support of his statement.

4.3 Tribunal decision and reasons

The Tribunal considered the documentary evidence provided by the PCC and noted that no evidence had been provided by the Member to support the statement in the Member’s Response. The Tribunal found the allegation established because:

- (a) the ATO Disqualification amounted to an *“adverse or unfavourable finding in relation to”* the Member’s *“professional or business conduct, competence or integrity by”* a *“regulatory authority”*, in breach of By-Law 40(2.1)(e);
- (b) the contents of the Member’s Response were not substantiated or supported by any documentary evidence or further submission from the Member and in any event did not claim that he had not been disqualified; and
- (c) the Member may have had a right of appeal against the ATO Disqualification but there was no evidence of any appeal or that the ATO Disqualification had been overturned.

5. Did the Member fail to comply with reasonable and lawful directions of an officer of CA ANZ in breach of By-Law 40(2.1)(i)? (allegation 2)

5.1 PCC submissions

- (a) The PCC submitted that the Member had failed to comply with reasonable and lawful directions of an officer of CA ANZ because:
 - (i) the PCC had written to the Member on numerous occasions, starting 17 October 2018, and had received no substantive response from the Member regarding the circumstances of the ATO Disqualification;
 - (ii) holding a position as trustee, investment manager or custodian entails a special level of responsibility and the Member’s failure to respond was a serious matter;

- (iii) the Member's Response, which was a short note sent several months after the PCC's original request, was insufficient and constituted an almost deliberate failure to respond to the questions that were asked of the Member.
- (b) In making this submission, the PCC referred to the following evidence:
- (i) 17 October 2018 letter sent by post to the Member seeking information in respect of the background and circumstances surrounding the Complaint (the **PCC's request for information**);
 - (ii) 26 November 2018 letter sent by Registered Post to the Member, and delivery confirmation signed by the Member, requesting a response to the PCC's request for information;
 - (iii) 4 April 2019 letter sent by Registered Post to the Member requesting:
 - (1) an update as to the progress of lodging the outstanding SMSF tax returns; and
 - (2) a response to the PCC's request for information;
 - (iv) 8 May 2019 letter sent by Registered Post to the Member requesting a response to the PCC's request for information and noting that the PCC would consider the Complaint at its meeting scheduled for 6 June 2019;
 - (v) 23 May 2019 email to the Member:
 - (1) advising that his attendance was not required at the 6 June meeting; and
 - (2) requesting a response to the PCC's request for information;
 - (vi) 4 June 2019 letter to the Member sent by email and Registered Post, and email delivery confirmation, advising that:
 - (1) the Complaint would be considered by the PCC on 12 June 2019;
 - (2) the PCC would consider all material presently available to the PCC; and
 - (3) any information provided by the Member no later than 7 June may be considered by the PCC;
 - (vii) 27 June 2019 letter to the Member sent by email and Registered Post, and Registered Post delivery confirmation signed by the Member, advising the PCC's decision to refer the matter to a Case Conference scheduled for 18 July 2019 which the Member was required to attend;
 - (viii) file note of conversation between the PCC and the Member on 10 July 2019 in which it was recorded:

"I called the Member to clarify whether he intended on attending the case conference on 18 July 2019.

He advised that he would not be attending as he has handed in his resignation from membership on 30 June 2019.

I advised that his attendance is still required. He confirmed that he was unavailable to undergo a case conference";
 - (ix) email sent 11 July 2019 to the Member:
 - (1) requesting a copy of the Member's letter of resignation, as CA ANZ had no record of receiving it;
 - (2) drawing the Member's attention to By-Law 19(a); and

- (3) requesting that the Member confirm in writing that he would not attend the Case Conference;
- (x) email sent 16 July 2019 to the Member:
 - (1) attaching CA ANZ letter dated 16 July 2019 not accepting the Member's resignation due to the pending investigation; and
 - (2) asking whether the Member would attend the Case Conference scheduled for 18 July;
- (xi) email sent 18 July 2019 to RC agreeing to RC's request to adjourn the Case Conference;
- (xii) 5 August 2019 letter to the Member sent by email and Registered Post advising "*The PCC decided to adjourn its investigation of the complaint and the Case Conference to a date which would permit [the Member] to attend the Case Conference*";
- (xiii) 20 August 2019 letter to the Member sent by email and Registered Post, with email delivery confirmation and Registered Post delivery confirmation signed by the Member, requesting a response to the PCC's request for information;
- (xiv) email sent 12 December 2019 to the Member, and email delivery confirmation:
 - (1) requesting independent evidence supporting the further postponement of the PCC's investigation;
 - (2) advising that if evidence was not provided then the PCC would proceed to consider the Complaint at its 17 February Case Conference;
- (xv) 5 February 2020 letter sent by email and Registered Post to the Member, and Registered Post delivery confirmation signed by the Member, advising that no response had been received from the Member and that the PCC would consider the matter on 17 February 2020; and
- (xvi) 9 March 2020 letter sent by email and Registered Post to the Member notifying him of the PCC's decision to refer the matter to the Disciplinary Tribunal for hearing.

5.2 Member submissions

The Member made no submissions in response to the allegation that he had failed to comply with reasonable and lawful directions. The PCC provided to the Tribunal copies of the following correspondence sent by or on behalf of the Member:

- (a) the Member's Response, sent 21 December 2018, in which the Member apologised for not responding by the due date and advised "*Currently I have engaged the services of [RC] a business consultant to assist me in complying with the lodgement of outstanding taxation returns of the SMSF*" which he expected "*to be completed by 31 January 2019*".
- (b) email sent 21 May 2019 in which the Member acknowledged receipt of the PCC's 8 May letter;
- (c) email sent 12 July 2019 by which the Member sent:
 - (i) a copy of his resignation letter dated 28 June 2019 addressed to CA ANZ using an incorrect mailing address; and
 - (ii) a completed Cancellation of a Certificate of Public Practice (CPP) form dated 12 November 2019;

and in which confirmed that he would not be attending the Case Conference scheduled for 18 July 2019; and

- (d) email sent 18 July 2019 in which RC requested that the Case Conference be postponed to a date that would enable the Member to attend.

5.3 Tribunal decision and reasons

- (a) The Tribunal determined that the allegation was established. The Member, over an extended period of time and in breach of his obligations as a CA ANZ member, had failed to respond to the PCC's requests for information. Relevantly the By-Laws state:

40(4.4) A Member must respond in writing to the [PCC] within such period of time as the [PCC] specifies in its notification. The Member's written response must address all matters raised in the notification to the satisfaction of the [PCC].

40(5.2) For the purpose of any investigation, the [PCC] may:...

(b) require any Member to whom the investigation relates to provide the [PCC], within such period of time as the [PCC] specifies in its notification, any documents, things or information that are in the possession or under the control of that Member that may relate to the subject matter of the investigation;...

(e) require the Member at the Member's own cost to attend before the [PCC], on at least 14 days' notice to answer any questions and/or discuss the complaint or any matter arising from it;...

- (b) The Member's failure to respond undermines CA ANZ's authority and its ability to regulate its members. The PCC's requests for information were reasonable and lawful and concerned the good order and management of CA ANZ. It is a fundamental requirement of CA ANZ membership that members respond to reasonable and lawful requests from the organisation and failure to do so is a breach of the By-Laws.

6. 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 an appropriate sanction and that the Tribunal should have regard to the following matters:
- (i) the seriousness of the Complaint particularly because it involved the Member's role as a custodian or trustee which imposed on him an extra level of responsibility;
 - (ii) the Member had previously faced CA ANZ disciplinary action in relation to audits he prepared for years ended 31 December 1991, 1992 and 1993;
 - (iii) it was an aggravating factor that the Member had been afforded multiple opportunities to provide comments regarding his position on the ATO Disqualification and despite repeated requests and opportunity, including the adjournment of a Case Conference, failed to provide a substantive response;
 - (iv) in relation to the most recent email from RC in relation to the Member's personal circumstances:
 - (1) no independent evidence in support had been provided despite a number of requests;
 - (2) up until mid 2019 the Member advised he was still in practice and still travelling interstate for work;
 - (3) those personal circumstances may go towards explaining the Member's failure to respond or attend but did not appear to be relevant to the ATO Disqualification; and
 - (4) public confidence in the profession can only be maintained if a serious and proportionate sanction is imposed to reflect the gravity of disqualification as a trustee, investment manager or custodian for the purposes of the SISA.
- (d) The Member provided no submissions in relation to possible sanctions.
- (e) The Tribunal determined that the Member's membership should be terminated and his name removed from the Registers on which it appears. In reaching this determination the Tribunal took into account the following matters:
- (i) the ATO Disqualification appeared to involve serious misconduct by the Member in his capacity as a custodian or trustee for which termination of membership was the appropriate sanction;
 - (ii) the Member had had ample opportunity to explain his conduct to the PCC but he had not done so. In particular he had failed to attend the Case Conference which had been adjourned at the request of RC;
 - (iii) the Member's failure to respond to correspondence from the PCC which undermines the maintenance of proper standards of professional conduct and public confidence in the profession;
 - (iv) there was no medical or other evidence submitted which might explain or justify the Member's conduct; and
 - (v) the Member's previous disciplinary record.

7. 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 submitted that the Member should bear the full costs of the proceedings which amounted to \$6,985.
- (c) The Member provided no submissions in relation to potential costs.
- (d) The Tribunal determined that the Member should pay full costs of \$6,985 as each of the requirements in the Regulation in relation to whether costs should be paid had been satisfied. In particular:
 - (i) the Complaint had merit;
 - (ii) the ATO Disqualification and the Member's failure to properly respond were serious matters;
 - (iii) the Member had not been open or timely in his dealings with the PCC and he had not complied with the provisions of Section 5 of the By-Laws;
 - (iv) it was reasonable that the costs of the proceedings be borne by the Member and not the membership body; and
 - (v) the amount incurred in the proceedings was reasonable and had been properly incurred on behalf of CA ANZ.

8. Was there any reason to suppress the Member's name from the published decision?

- (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.

9. Should other parties be notified of the Tribunal decision?

- (a) By-Law 40(10.16) states:

The Disciplinary Tribunal may notify interested parties including other professional bodies, regulatory authorities, the Member's current and/or former employers, partners, clients of the Member or the Member's Practice Entity who are or may be affected by the Member's conduct to which the disciplinary action relates, of so much of a decision ..., the reasons for it and/or the sanctions imposed, as it thinks fit ...

- (b) The Tribunal determined that ASIC and RC be notified of the decision, as interested parties.
- (c) The Tribunal noted that the Member's employment status recorded in the General Register is "Shrubsole Rabbitt and Co - Partner". The Tribunal also directed that the partners of Shrubsole Rabbitt and Co be notified of the decision, as interested parties.

10. 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.

11. 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)(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 regulatory authority in circumstances where the Member has been disqualified as a responsible officer of a trustee, investment manager or custodian for the purposes of the *Superannuation Industry (Supervision) Act 1993 (Cth)* (SISA) on the basis that he had contravened the SISA on more than one occasion and the seriousness of the contraventions provides grounds for disqualifying the Member.
2. By-Law 40(2.1)(i), in that the Member had failed to comply with the reasonable and lawful directions of any officer or organ of CA ANZ acting within the powers conferred by CA ANZ's By-Laws and which relates to a matter concerning the good order and management of CA ANZ.

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:

...

- (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;

...

- (i) has failed to comply with any reasonable and lawful direction of any officer or organ of CA ANZ acting within the powers conferred by CA ANZ's Supplemental Charter, these By-Laws or the Regulations and which relates to a matter concerning the good order and management of CA ANZ;

...

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(10.16) The Disciplinary Tribunal may notify interested parties including other professional bodies, regulatory authorities, the Member's current and/or former employers, partners, clients of the Member or the Member's Practice Entity who are or may be affected by the Member's conduct to which the disciplinary action relates, of so much of a decision (including a decision to suspend on an interim basis), the reasons for it and/or the sanctions imposed, as it thinks fit. The Disciplinary Tribunal will not do so until the day following the last date on which an appeal may be notified in accordance with paragraph 11.1. If an appeal is notified in accordance with paragraphs 11.1 or 11.2, the Disciplinary Tribunal will not make such a notification until that appeal is heard or otherwise determined.

...

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.

...

40(13.12) Public and private hearings

...

- (b) Subject to By-Laws 40(13.12)(c) and 40(13.12)(d), and unless the Disciplinary Tribunal or Appeals Tribunal determine otherwise, each shall hold its hearings in public.
- (c) The Disciplinary Tribunal or Appeals Tribunal may determine to hear any part of a hearing in private.
- (d) The Disciplinary Tribunal or Appeals 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.

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.

**SCHEDULE 4: EXCERPT FROM SUPERANNUATION INDUSTRY (SUPERVISION)
ACT 1993
Compilation date 1 July 2018**

126A The Regulator may disqualify individuals

...

(2) The Regulator may disqualify an individual who is, or was, a responsible officer of a trustee, investment manager or custodian (the **body corporate**) if satisfied that:

(a) the body corporate has contravened this Act or the *Financial Sector (Collection of Data) Act 2001* on one or more occasions; and

(b) at the time of one or more of the contraventions, the individual was a responsible officer of the body corporate; and

(c) in respect of the contravention or contraventions that occurred while the individual was a responsible officer of the body corporate—the nature or seriousness of it or them, or the number of them, provides grounds for the disqualification of the individual.

...

(6) The Regulator must give the individual written notice of a disqualification, revocation of a disqualification or a refusal to revoke a disqualification.

(7) The Regulator must cause particulars of a notice given under subsection (6) or 344(6) (result of internal review) to be published in the *Gazette* as soon as practicable.