

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

Case Number:	D-1204
Member:	David John Leigh, interim suspended CA of Queensland
Hearing Date:	1 August 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) The Member neither appeared nor was represented
Case description:	<ol style="list-style-type: none">1. Criminal conviction for fraud.2. Member subject of adverse or unfavourable findings by the Australian Financial Security Authority and the Australian Securities and Investments Commission.3. Member committed acts, omissions or defaults which have brought discredit upon the Member, Chartered Accountants ANZ and the profession of accountancy.

1. CONTACT WITH MEMBER

The Member did not attend the hearing of the Disciplinary Tribunal. The Member was served with the Notice of Disciplinary Action, and notified of the hearing date and time, under cover of letter dated 1 July 2019 sent by prepaid Express Post to the correctional facility within which the Member is housed.

The Member subsequently responded on 9 July 2019 to a separate letter also dated 1 July 2019 (**Member's Response**). While the Member did not formally concede the allegations, he acknowledged the likelihood of termination of membership as the outcome of these proceedings.

The Tribunal was satisfied that the Member had notice of the hearing and that the Tribunal would be considering the matters contained in the Notice of Disciplinary Action and, if established, whether to impose a sanction on the Member on that day, and accordingly determined the hearing should proceed in the absence of the Member.

2. DECISIONS

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

At a hearing of the Disciplinary Tribunal not attended by the Member, the Tribunal found that the PCC had established the allegations.

2.2 DECISION ABOUT SANCTIONS

The Tribunal considered that the appropriate sanction in these circumstances was that the Member's membership be terminated.

2.3 DECISION ABOUT COSTS SANCTION

The Tribunal determined that the Member pay to Chartered Accountants ANZ the sum of \$18,549 for the full costs and expenses of the proceedings (By-Law 40(10.12)(k)). No GST is payable.

2.4 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".

2.5 NOTIFICATION TO OTHER BODIES

The Tribunal was informed that the Member holds no current registrations or memberships and the Tribunal determined not to notify any bodies of this decision.

3. 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)).

4. BACKGROUND

In October 2010 the Member was appointed as joint and several liquidator of Neolido Holdings Pty Ltd ACN 102 472 015 (in Liquidation) (**Neolido**), while a partner of PPB Advisory.

In February 2018 the second joint and several liquidator of Neolido (the **Complainant**) was notified by a secured creditor of Neolido that a fraud may have taken place. The Complainant subsequently lodged a complaint with Chartered Accountants ANZ which stated that the Member as liquidator had authorised payments in the sum of \$800,000 to an unauthorised bank account in the Member's control.

On 22 August 2018 the Disciplinary Tribunal suspended the Member's membership on an interim basis, pending resolution of all investigations and proceedings relating to the substance of the complaint.

On 29 January 2019 the Australian Financial Security Authority (**AFSA**) cancelled the Member's registration as a personal insolvency trustee.

On 4 February 2019 the Australian Restructuring Insolvency & Turnaround Association (**ARITA**) terminated the Member's membership following AFSA's decision.

On 22 February 2019 the Australian Securities and Investments Commission (**ASIC**) cancelled the Member's registration as a liquidator.

On 3 May 2019 the Member was convicted as a result of pleading guilty to three counts of fraud under the Queensland Criminal Code and imprisoned for seven years. The Member will be eligible for parole after serving 22 months in custody.

5. REASONS FOR DECISION

5.1 ALLEGATION 1

The Tribunal was satisfied that the allegation had been established because the Member had been convicted for fraud in a court and sentenced to time in prison, in breach of By-Law 40(2.1)(b).

5.2 ALLEGATION 2

- The PCC submitted that there had been adverse or unfavourable findings in relation to the Member's professional or business conduct, in that:
 - a disciplinary hearing of AFSA found in part that the Member was no longer a fit and proper person, had dishonestly used his position and had falsified financial records
 - the Member's membership of ARITA was the subject of an implicit adverse finding in that it had been cancelled automatically following the decision of AFSA

- the Member's registration as a liquidator had been cancelled by ASIC, the given reasons for which included that the Member was no longer a fit and proper person to hold such a position.
- The Tribunal was satisfied that the allegation had been established as there had been clear and unequivocal adverse and unfavourable comments made in the AFSA, ARITA and ASIC determinations about the Member's conduct, in breach of By-Law 40(2.1)(e).

5.3 ALLEGATION 3

- The PCC submitted that:
 - the Member's conduct represented serious dishonesty
 - fraud was the greatest professional offence that could be committed by a Chartered Accountant
 - the Member's position as a liquidator should be beyond reproach
 - there were aggravating factors including that the Member had abused his duties, his financial position and the trust expected of a liquidator
 - the adverse comments about the Member had been widely reported in the media
 - there had been separate acts over a period of time
 - in the Member's actions, he had lied to employees and other third parties and thereby involved them unwittingly in his fraud
 - the amount involved in the Member's attempt to obtain personal gain was significant.
- The PCC accepted that there were mitigating factors with respect to the Member that were taken into account in the criminal process including:
 - the Member had refunded \$100,000 prior to detection
 - the Member's actions were confined to one client
 - the Member had expressed contrition
 - the Member's actions arose from personal financial difficulties.
- The PCC also drew the Tribunal's attention to the Member's Response which stated the following matters to be included on the record:
 1. *There was substantial material provided to the Court for my sentence hearing, which led to a material mitigation in my punishment.*
 2. *The material presented contained a large number of character references, medical reports and statement of personal circumstances. It also included details of material reparations.*
 3. *I have been a member of CA ANZ (and predecessors) since [1996], and am only aware of 3 possible prior complaints. Two of these were managed by ARITA, and both had substantial bearing on my statement of personal circumstances, and medical reports.*
 4. *The sentencing judge acknowledged that my actions giving rise to the complaints were entirely out of character, and further noted my likelihood of recidivism was nil, or virtually nil.*

The above points are not provided in an attempt to alter any decision or conclusion of the Tribunal, but merely to be noted on the record.
- The Tribunal accepted the PCC's submissions with the result that the Tribunal was satisfied that the allegation had been established because of the serious and criminal dishonesty, abuse of position involved, and the widespread negative coverage of the conduct in the media, in breach of By-Law 40(2.1)(k).

6. REASONS FOR SANCTIONS

- The PCC submitted that the appropriate sanction was termination of membership because:
 - the breaches represented the most serious conduct an accountant could commit with serious aggravating factors including the seniority and experience of the Member, the breach of legal and fiduciary duties, the inclusion of employees and attempt to include third parties in the Member's conduct, the quantum of misappropriated funds, and the repeated nature of the conduct over time
 - the need to maintain public confidence in the profession warranted a sanction proportionate to the seriousness of the breaches.
- The Tribunal noted that the Member stated in the Member's Response that he was *"prepared for the Committee to terminate my membership of CA ANZ, without further material or cost"*.
- The Tribunal accepted the PCC's submissions and determined that the appropriate sanction was termination of the Member's membership because:
 - the Member no longer met the criteria of 'fit and proper person' as set out in Regulation CR1 - *Admissions and Readmissions*
 - the conduct involved a dishonest use of position and falsification of records for the purpose of financial gain
 - the Member as a Court-appointed liquidator held a position of trust and fiduciary obligation which was deliberately abused.

7. REASONS FOR COSTS SANCTION

- The PCC submitted that full costs were fair and reasonable given:
 - the complaint had been established
 - the seriousness and complexity of the matters the subject of the allegations
 - the costs also included the interim suspension hearing.
- The PCC commented that the Member had been honest, helpful and compliant in his interaction with the PCC during the investigation and had not attempted to frustrate the process.
- The Tribunal accepted the PCC's submissions. Further, the Tribunal considered the costs to be reasonable in circumstances in which, as at the time of the hearing, the Member had not formally admitted the allegations.

8. INFORMATION RECEIVED AFTER THE HEARING

- On 12 August 2019 the Tribunal Secretary received a letter sent by the Member from his correctional facility dated 31 July 2019.
- The Member's letter contained a completed questionnaire and some further material relevant to the allegations against him (**Late Submission**).
- Having considered the contents of the Late Submission, the Tribunal was of the opinion that the Member had not suffered any procedural injustice as a result of the hearing on 1 August 2019 proceeding in his absence, and that its decision made at the hearing should stand for the following reasons:
 - neither the Member's Response nor the Late Submission included a request for an adjournment or postponement of the hearing date of 1 August 2019, for example to

allow the Tribunal Secretary to attempt to arrange an audio or audio visual link with the Member at his correctional facility, or for any other reason

- the Late Submission did not in substance raise any additional matters that were not already set out in the Member's Response which the Tribunal considered at the time of the hearing
- the Member admitted the allegations
- the Member had been given sufficient time within which to provide a response to the questionnaire prior to the hearing but had not done so. In so determining, the Tribunal had regard to:
 - the Member's Late Submission which stated: *"I refer to your letter dated 26 July 2019, received today, with enclosures. I note that I am unable to respond by the time the Tribunal hearing is scheduled, and draw your attention to paragraph 2 on page 1 of my correspondence of 9 July 2019 regarding the receipt and distribution of correspondence within this centre. I now enclose the questionnaire completed in the context of my 9 July 2019 [sic] ... I have no recollection of having previously received this. That is not to say I didn't receive it, but given the disheveled [sic] state of voluminous correspondence is forwarded [sic] after having been opened and recorded, it may have been overlooked."*
 - paragraph 2 on page 1 of the Member's Response which stated *"There are no electronic means of communication such as emails, faxes etc allowed. Additionally all correspondence both inward and outward, is opened and recorded, including mail marked as Private & Confidential ... this further slows down the process"*
 - the PCC's letter to the Member dated 1 July 2019, delivered to the correctional facility within which the Member is housed on 2 July 2019, which contained the questionnaire form
 - the Tribunal Secretary's letter dated 26 July 2019 which included a further copy of the questionnaire form and a reminder of the due date
- the costs of the hearing were properly incurred, and the quantum of the costs and expenses determined for the Member's payment was reasonable and fair. In so determining, the Tribunal:
 - considered the Member's Late Submission which stated: *"I further draw your attention to my paragraph 5 on page 2 [of the Member's Response] ... wherein I agreed to submit to a termination of my membership without further material or cost. This will be relied on should CA ANZ levy costs on me as set out in the Interim Costs Summary provided"*
 - noted that, pursuant to the By-Laws and notwithstanding the Member's agreement to "submit to a termination ... without further material or cost", the Tribunal needed to satisfy itself at a hearing that the alleged breaches had occurred and the proposed sanctions were appropriate. The costs of proceeding to the Tribunal hearing were therefore properly incurred
 - further noted that the PCC had only sought a determination for payment of the actual costs incurred in the interim suspension hearing and the costs of the final determination hearing and decision writing on the basis of a quarter day estimate (ie the smallest available costs estimate)
- the Member did not put forward any further facts or make any further submissions, in the Late Submission or otherwise, which required the Tribunal to alter or amend its decision made on 1 August 2019.

- The Tribunal has forwarded a copy of the Late Submission to the PCC with these reasons.

9. 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.
- 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 18 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 relevantly stated:

"If the amended By-Laws are approved before your Disciplinary Tribunal hearing, the amended By-Laws will be the relevant By-Laws for the purpose of the hearing. With respect to notice requirements, the Professional Conduct Committee's position is 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 and, if necessary, will make that submission to the Disciplinary Tribunal at the hearing. Please advise if you intend to take issue with that position".

- As at the time of publication of this written decision, the Tribunal has not been provided with any communication from the Member which objects to the PCC's position. 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.
- The Tribunal notes that, at the hearing, the termination of the Member's membership was determined to be effective from 1 August 2019. The Tribunal is of the view that new By-Law 40(10.18) applies such that the termination date will be the date on which this decision takes effect, rather than 1 August 2019.



**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 3 May 2019 the Member was convicted of three counts of fraud pursuant to section 408C(1)(d) of the *Criminal Code 1899* (Qld), which have not been set aside on appeal;
2. By-Law 40(2.1)(e) in that the Member has been the subject of adverse or unfavourable findings in relation to his professional or business conduct, competence or integrity by a statutory authority, regulatory authority or statutory body, in circumstances where the Member's:
 - a) registration as a personal insolvency trustee was cancelled by the Disciplinary Committee of the Australian Financial Security Authority (AFSA) on 29 January 2019; and
 - b) registration as a liquidator was cancelled following a decision by the liquidator's Disciplinary Committee upon a referral by the Australian Securities and Investments Commission (ASIC) on 22 February 2019; and
3. By-law 40(2.1)(k), in that the acts, omissions and defaults associated with the matters described in paragraphs 1 and 2 above bring, or may bring, discredit on the Member, CA ANZ or the profession of accountancy.

SCHEDULE 2 - RELEVANT BY-LAWS

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;

...

- (e) has been the subject of an adverse or unfavourable finding in relation to that Member's professional or business conduct, competence or integrity by any court of law, professional body, royal commission, statutory authority, regulatory authority, statutory body, commission or inquiry in any jurisdiction in Australia or elsewhere;

...

- (k) has committed any act, omission or default which, in the opinion of the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal brings, or may bring, discredit upon that Member, CA ANZ or the profession of accountancy; or

...