

Determination of the Disciplinary Tribunal of Chartered Accountants Australia and New Zealand 9 July 2019

Case Number:	D-1200
Member:	Md (Mohammed) Zahidul Kabir CA of New South Wales
Hearing Date:	26 June 2019
Tribunal:	David Fairlie (Chair and lay member of Tribunal) Bronwyn Morris AM FCA Richard Rassi FCA
Representation:	Paul Forbes for the Professional Conduct Committee (PCC) The Member neither appeared nor was represented at the hearing
Case description:	<ol style="list-style-type: none">1. Member pleaded guilty to, and was convicted of, criminal offences which have not been set aside on appeal.2. Member committed an act, omission or default which brings discredit upon that Member, CA ANZ and the profession of accountancy.

1. CONTACT WITH THE 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 20 May 2019 which Corrective Services NSW advised they served on the Member on 27 May 2019 at the correctional facility where he is incarcerated.

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 the PCC had established allegations 1 and 2.

2.2 DECISION ABOUT SANCTIONS

The Tribunal considered that the appropriate sanction in these circumstances was to terminate the Member's membership, to remove the Member's name from the Registers on which it appears and to advise NZICA of that termination and removal.

2.3 DECISION ABOUT COSTS SANCTION

The Tribunal determined that the Member pay to Chartered Accountants ANZ the sum of \$6,874 for the full costs and expenses of the proceedings (By-Law 40(10.12)(I)). No GST is payable.

2.4 DECISION ABOUT PUBLICATION

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

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 determined to notify the Tax Practitioners Board and CPA Australia 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)).

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

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

The PCC may, within 21 days after notification of the written decision with reasons to the PCC of this Tribunal's decision, appeal in writing to the Appeals Tribunal of Chartered Accountants ANZ against the decision (By-Law 40(11.2)).

4. BACKGROUND EVIDENCE

- On 13 June 2017 the Member pleaded guilty to the following charges:
 - that between 29 November 2012 and 2 June 2014 in Sydney in the State of New South Wales, the [Member] did deal with money or property that was and that he believed to be proceeds of crime. At the time of the dealing, the value of the money or property was \$50,000 or more, namely \$51,692.97 in breach of s 400.5(1) of *The Criminal Code (Commonwealth)*
 - that between 7 March 2013 and 20 May 2014 at Sydney in the State of New South Wales the [Member] did by a deception dishonestly obtain a financial advantage from the Commonwealth by causing to be lodged with the ATO sixteen income tax returns for the tax period 1 July 2012 to 30 June 2013, which falsely claimed tax refunds in the total sum of \$22,475.18

(the **Offences**).

- Sentence and Remarks on Sentence of Wilson SC DCJ dated 12 November 2018 in *R v Kabir* [2018] NSWDC 495 in which:
 - the Member was sentenced to an aggregate sentence being a term of imprisonment of five years with a non-parole period of three years
 - a reparation order was made for the amount the Member defrauded from the Commonwealth, namely \$85,375.46

(the **Judgment**).

5. REASONS FOR DECISION

5.1 ALLEGATION 1

- The PCC drew the Tribunal's attention to the remarks of Wilson SC DCJ at [49] and [50] of the Judgment:
 - 49. In terms of the objective seriousness of the offending, I accept the submission by the Crown that the offending is objectively serious, given the level of planning and degree of effort undertaken by the [Member]. I consider in the range of offending, it would fall in the high end of the midrange.
 - 50. The Court may also have regard to any factors under s 16A(2) of the Commonwealth *Crimes Act* (1914) that are relevant to the offending and the [Member]. These include:

- (a) the nature and the circumstances of the offence being a sophisticated and planned enterprise. The enterprise developed by [the Member] was extremely sophisticated and involved a high degree of planning;
- (b) a course of criminal conduct which occurred over a 20 month period and had a single motive of financial gain. It was submitted that it could be found, and I so find that the [Member] had used considerable resources and time since becoming a qualified tax agent in systematically defrauding the Commonwealth. I note the [Member] became a registered tax agent in July 2012 and commenced offending almost immediately;
- (c) the personal circumstances of any victim of the offending with each of the taxpayers whose names and identity were used by the [Member] having to recover from the Income Tax Refund rightfully owed to them, having to apply for new Tax File Numbers and uncertainty in relation to their taxation affairs. The abuse of trust by the [Member] is abhorrent. Without their knowledge the personal information of a large number of otherwise law-abiding tax paying citizens was accessed and abused by the [Member]. In considering the victims of offending, I have also taken into account the Victim Impact Statement which was provided by Mr Lee. Whilst there is no evidence that he suffered any financial consequences as a result of the offending by the [Member], it is plain that he was used and their friendship abused in order to facilitate the opening and creation of a number of bank accounts to permit the offending to take place. Behind Tab 4 in exhibit A is a Victim Impact Statement in which Mr Lee describes in brief but effective detail, the effects that [the Member's] conduct had upon Mr Lee. I will quote a section of the Victim Impact Statement.

"I was in complete shock when the Federal Police came looking for me, following my interview with Federal Police I went into a deep depression, I locked myself in my room for four days without food, my family took me to see a doctor, then I was referred to see a psychologist for treatment. Up until today I cannot cope with the normal stresses of life, and must take antidepressant medication ... This crime has a huge impact on me, mentally and emotionally. There are days and nights that I feel angry, afraid, upset, shaking and have difficulty sleeping. I am unsettled and confused."

- (d) the [Member] plainly took advantage of Mr Lee in creating the complex scheme which permitted the theft from the Commonwealth engaged in by the [Member];
- (e) the financial loss resulting from the offence. In terms of the Commonwealth's revenue, the amount in question is not significant but the theft of money from the Government impacts on every tax paying individual. Although the amount in question of just in excess of \$85,000 is of itself not particularly significant, it is noteworthy that the offending continued until the [Member] was arrested and charged;
- (f) a plea of guilty;
- (g) contrition and remorse, having regard to the evidence to which I will refer in a moment, I do not accept that the [Member] is remorseful. His guilty plea was made in the face of a very well investigated and strong Crown case. I find he has no entitlement to leniency by reason of remorse;
- (h) his lack of cooperation with law enforcement agencies;
- (i) character, antecedents and background of the [Member]. [The Member] is not entitled to a finding of good character and any leniency which may otherwise flow from such a finding. I will return to that in a moment; and
- (j) the probable effects of sentence on the [Member's] family or dependents. Whilst this will no doubt be considerable it must be borne in mind that the sentence to be imposed flows directly from the opportunistic conduct of the [Member]. I will return in a moment to the hardship to his family.

- The PCC submitted that the Offences:
 - involved a serious case of fraud
 - involved the lodgement of false income tax returns to benefit the Member
 - involved misleading a number of clients
 - continued for a 20 month period and were committed purely for the financial benefit of the Member.
- The Tribunal found that the allegation was established, having regard to the Judgment.

5.2 ALLEGATION 2

- The PCC submitted that:
 - the conviction was widely reported, thereby bringing discredit to the Member, Chartered Accountants ANZ and the profession of accountancy
 - the Offences to which the Member pleaded guilty were matters of serious dishonesty. He lodged false tax returns deliberately and took the benefit for himself
 - a conviction of fraud is probably one of the greatest offences that could be brought against a chartered accountant in the context of their profession as an accountant
 - there is a public expectation that chartered accountants should be beyond reproach, particularly in relation to financial matters
 - in relation to the reputation of Chartered Accountants ANZ and the profession of accounting itself, the matter had been widely reported in the national press.
 - The Tribunal was satisfied that the allegation was established because:
 - the charges to which the Member had pleaded guilty were serious and involved a substantial breach of trust by the Member of his position as tax agent
 - the matter had been widely reported at sentencing
- and that these factors brought discredit on each of the Member, Chartered Accountants ANZ and the profession of accountancy, pursuant to By-Law 40(2.1)(k).

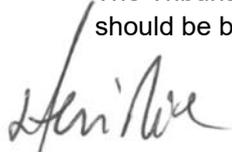
6. REASONS FOR SANCTIONS

- The PCC referred the Tribunal to Regulation CR8.11 - Guidelines for the imposition of sanctions, and submitted that the appropriate sanction was termination of membership because:
 - it is important to balance the interests of the Member with the membership as a whole
 - the Member acted alone so it was clear that he was responsible for the Offences
 - there were a number of aggravating factors in relation to the Offences:
 - fraud is the most serious form of misconduct for an accountant
 - the conduct was systematic and carried out over a lengthy period of time
 - the conduct eroded public confidence in the profession.
- The Tribunal accepted the reasons given by the PCC and determined that termination of membership was the appropriate sanction.

7. REASONS FOR COSTS SANCTION

- The PCC submitted that, having regard to By-Law 40(13.7) the Member should pay the full costs incurred because:
 - *whether and to what extent the complaint is found to have merit, whether or not there's ultimately a finding in favour of the member.* the complaint here is clearly established
 - *the substance or seriousness of the complaint.* the complaint in this case is one of the most serious breaches of the By-Laws

- *the conduct of the Member in relation to the investigation and disciplinary process, including whether the Member was open, honest and timely in his dealings with the PCC:* in this case, the PCC had not received any communication from the Member
 - *whether to do so is reasonable in the circumstances:* given the seriousness of the Member's conduct and the fact that everything has been established, an award of full costs is fair and reasonable in this case
 - *whether the amount is reasonable in the circumstances:* the amount is, by reference to many matters, reasonably modest and given the seriousness of the Offences, there is no circumstance in which this hearing could not have taken place.
- The Tribunal accepted the submissions of the PCC and determined that the full costs should be borne by the Member.



**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 12 November 2018 the Member pleaded guilty to and was convicted of two criminal offences pursuant to section 400.5(1) of the *Criminal Code Act 1995* (Cth), which have not been set aside on appeal, namely:
 - a) that between 29 November 2012 and June 2014 in Sydney in the State of New South Wales, the Member did deal with money or property that was and that he believed to be the proceeds of crime. At the time of the dealing, the value of the money or property was \$50,000 or more, namely \$51,692.97 in breach of s 400.5(1) of *The Criminal Code (Commonwealth)*; and
 - b) that between 7 March 2013 and 20 May 2014 at Sydney in the State of New South Wales the Member did by a deception dishonestly obtain a financial advantage from the Commonwealth by causing to be lodged with the ATO sixteen income tax returns for the tax period 1 July 2012 to 30 June 2013, which falsely claimed tax refunds in the total sum of \$22,475.18.
2. By-Law 40(2.1)(k), in that the acts, omissions and defaults as set out in paragraph 1 above bring, or may bring, discredit on the Member, CA ANZ and/or the profession of accountancy.

SCHEDULE 2 - RELEVANT BY-LAWS

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

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

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

...

40(2) Disciplinary action

40(2.1) A Member is liable to disciplinary sanctions under these By-Laws if (whether before or after the date of adoption of this By-Law) that Member:

...

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

...

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

...