



# Disciplinary Tribunal of Chartered Accountants Australia and New Zealand (CA ANZ) Written decision dated 31 July 2020

- Case Number:** D-1218
- Member:** Noel Peter Anderson CA of Western Australia
- Hearing Date:** 28 May and 25 June 2020
- Tribunal:** David Fairlie (Chair and lay member of the Tribunal)  
Bronwyn Morris AM FCA  
Kathryn Brown CA
- Tribunal Legal Adviser:** Jamesina McLeod
- Representation:** Paul Forbes for the Professional Conduct Committee (PCC)  
Patrick Holmes for the Member
- Decisions:**
1. The Tribunal determined that the Member:
    - (a) committed:
      - (i) breaches of APES 110 *Code of Ethics for Professional Accountants* in relation to confidentiality, objectivity and independence; and
      - (ii) a breach of APES 305 *Terms of Engagement*;
    - (b) committed breaches of APES 110 *Code of Ethics for Professional Accountants* in relation to professional behaviour;
    - (c) brought or may bring discredit on himself, CA ANZ and the profession of accountancy; and
    - (d) failed to observe a proper standard of professional care and diligence in the course of carrying out his professional duties and obligations.
  2. The Tribunal imposed the following sanctions:
    - (a) a censure;
    - (b) a fine in the amount of \$5,000;
    - (c) that the Member and the Member's firm, at the Member's expense, submit to a quality review under the CA ANZ Regulations with:
      - (i) particular emphasis on client acceptance and engagement procedures, management of conflicts of interest and confidentiality, compliance with auditing standards,

independence and communication with Those Charged with Governance;

- (ii) the results of the quality review to be made available to the PCC; and
- (d) that the Member, at the Member's own expense, complete within 12 months any Australian professional development course or courses (having regard to the Formal CPD criteria in Regulation CR7 *Continuing Professional Development* Schedule 1, 11(a) and (b)(i)-(vi)) that include:
  - (i) client acceptance and engagement procedures;
  - (ii) management of conflicts of interest and confidentiality;
  - (iii) compliance with auditing standards; and
  - (iv) independence and communication with Those Charged With Governance;

and that the Member provide to CA ANZ within 14 days of completion, confirmation from the course provider that the above topics have been successfully completed by the Member.

3. The Tribunal imposed a cost sanction in the sum of \$70,415.25 towards the 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) to accept the Member's late written submissions, which was consented to by the PCC;
  - (b) to request the Member to produce further evidence prior to resuming the adjourned hearing on 25 June 2020;
  - (c) following its decision on breach, that the parties provide submissions in writing on the remaining issues, including sanctions;
  - (d) its decision with reasons, mentioning the Member's name and locality, be published on the CA ANZ website (the **Published Decision**);
  - (e) 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*;
  - (f) the Australian Securities and Investments Commission and Self Managed Super Fund Association be notified of this decision;
  - (g) 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;
  - (h) the decision regarding confidentiality takes effect immediately on 31 July 2020.

The date of effect of this decision is 22 August 2020 (By-Law 40(10.18)).



## 1. Introduction

- (a) In December 2017 CA ANZ received a complaint on behalf of Gascoyne Water Co-operative Limited (**GW**C) and Gascoyne Water Asset Mutual Co-operative Limited (**GWAMCO**) (together, **Gascoyne Water**) (the **Complainants**) which:
- (i) advised that the Member had been the external auditor for Gascoyne Water;
  - (ii) stated that the Member had:
    - *failed to observe a proper standard of professional care, skill, competence or diligence in the course of carrying out his professional duties and obligations; and*
    - *committed a breach of standards set by the Accounting Professional and Ethical Standards Board, Australian Accounting Standards Board and Auditing and Assurance Standards Board*
- (the **Complaint**).
- (b) After investigating the Complaint, including conducting a Case Conference in several parts, on 17 December 2019 the PCC offered to enter into a Consent Agreement with the Member. The Member did not accept or decline the offer to enter into a Consent Agreement by the 10 February 2020 deadline and the PCC referred the Member to the Tribunal by way of Notice of Disciplinary Action (set out in full in Schedule 1) (the **NDA**) which in summary alleged that the Member:
1. breached several sections of APES 110, *Code of Ethics for Professional Accountants (APES 110)* with respect to confidentiality, objectivity, conflicts of interest, self interest, self review and advocacy threats, independence and management responsibilities, and a breach of APES 305, *Terms of Engagement (APES 305)* by failing to provide a terms of engagement;
  2. breached APES 110 with respect to his professional behaviour;
  3. brought or may bring discredit on himself, CA ANZ or the profession of accountancy; and
  4. failed to observe a proper standard of professional care, competence or diligence in the course of carrying out his professional duties and obligations.
- (c) In response to the Member's request for particulars, the PCC further particularised the allegations set out in the NDA by letter dated 14 May 2020.
- (d) The Member denied all the PCC's allegations until the first day of hearing, when he admitted he could not produce a terms of engagement document but otherwise still denied the remaining allegations.

## 2. The issues for determination

- (a) Did the Member commit breaches of various sections of APES 110 and a section of APES 305, in breach of By-Law 40(2.1)(h)? (allegation 1)
- (b) If any part of allegation 1 was established, did those acts, omissions or defaults of the Member breach sections 100.5(e) and 150.1 of APES 110, in breach of By-Law 40(2.1)(h)? (allegation 2)
- (c) If any part of allegation 1 was established, did those acts, omissions or defaults of the Member bring or potentially bring discredit on him, CA ANZ or the profession of accountancy, in breach of By-Law 40(2.1)(k)? (allegation 3)
- (d) If any part of allegation 1 was established, did those acts, omissions or defaults of the Member amount to a failure by him to observe a proper standard of professional care, competence or diligence, in breach of By-Law 40(2.1)(a)? (allegation 4)
- (e) If the answer to (a), (b), (c) or (d) was yes, what sanctions should be imposed on the Member?
- (f) Should the Member be required to pay costs and if so, in what amount?
- (g) Was there any reason to suppress the Member's name from the published decision?
- (h) Should other parties be notified of the Tribunal's decision?
- (i) Should any confidentiality orders be made?
- (j) Other matters.

### 3. Did the Member commit breaches of various sections of APES 110 and a section of APES 305, in breach of By-Law 40(2.1)(h)? (allegation 1)

#### 3.1 ALLEGATION 1(a)

*It [was] alleged that ... the Member is liable to disciplinary action in accordance with ... By-law 40(2.1)(h), in that the Member has committed ... a breach of sections 100.5(d), 140.1, 140.4 and 140.6 of APES 110 ... in circumstances where, without the consent of his clients, the Member:*

- (i) disclosed confidential information acquired as a result of his engagement and what the Member referred to as a "preliminary review" to the members of ... Gascoyne Water and [the Former External Accountant]; and*
- (ii) disclosed confidential information concerning the cessation of his engagement with Gascoyne Water and the GWC's Board's response to the cessation of the Member's engagement to members of Gascoyne Water and [the Former External Accountant].*

#### 3.1.1 Overview and preliminary matters

- (a) **Registrar of Co-operatives:** The *Co-operatives Act 2009* (WA) (**Co-operatives Act**) provides a legislative framework for the formation, registration and management of co-operatives and for related purposes, and is administered by the Registrar of Co-operatives (the **Registrar of Co-operatives**). GWC and GWAMCO were cooperatives in accordance with the Co-operatives Act.
- (b) **Fundamental principle of confidentiality:** APES 110 s 100.5 sets out fundamental principles with which members shall comply, including:
  - (d) *Confidentiality* – to respect the confidentiality of information acquired as a result of professional and business relationships and, therefore, not disclose any such information to third parties without proper and specific authority, unless there is a legal or professional right or duty to disclose, nor use the information for the personal advantage of the Member or third parties (the **Fundamental Principle of Confidentiality**).
- (c) **Parties involved in the Member's conduct underlying allegation 1(a):** the individuals and organisations relevant to the Member's conduct included:
  - (i) the former external accounting firm for Gascoyne Water (the **Former External Accounting Firm**);
  - (ii) a partner at the Former External Accounting Firm and previously the external accountant for Gascoyne Water (the **Former External Accountant**);
  - (iii) the Member's two partner accounting and auditing firm (the **Member's Firm**);
  - (iv) the Chair of GWAMCO at the time, who was also a client of the Member's Firm at the relevant times (the **GWAMCO Chair/Client**);
  - (v) the Chair of GWC at the time (the **GWC Chair**);
  - (vi) the General Manager of GWC at the time (the **GWC GM**).
- (d) **Relevant disclosures:**
  - (i) The PCC submitted that:
    - A. the Member had failed to maintain the Fundamental Principle of Confidentiality in making various disclosures to members of Gascoyne Water and to the Former External Accountant of confidential information;

- B. there were three relevant disclosures, each of which involved information acquired as a result of the Member's engagement which the Member disclosed without the relevant consent or authority. Each instance accordingly resulted in a failure to maintain confidentiality and a breach of APES 110. The disclosures were in:
- (1) a discussion with the Former External Accountant<sup>(12.29)</sup> where the Member disclosed to the Former External Accountant his 6 September 2017 conversation with the GWAMCO Chair/Client<sup>(12.26)</sup>;
  - (2) an email dated 26 October 2017 from the Member to the Former External Accountant<sup>(12.56)</sup>;
  - (3) an email dated 8 December 2017 from the Member to Gascoyne Water's members<sup>(12.69)</sup>.
- (ii) Each of those disclosures and corresponding allegations of a failure to maintain the Fundamental Principle of Confidentiality is dealt with in turn below.
- (e) Meaning of "**confidential information**": Regarding what information should be regarded as "confidential information" for the purpose of APES 110:
- (i) the PCC submitted that APES 110 does not include a definition for "confidential information" but the Tribunal should infer from the Fundamental Principle of Confidentiality that confidential information is any and all information acquired as a result of the relevant professional or business relationship. However, the PCC submitted that in any event each of the three communications was confidential in nature;
  - (ii) the Member submitted that the Tribunal should prefer a narrower reading of the definition of "confidential information". It was not enough for the relevant information to have been acquired as a result of the professional or business relationship; the information also needed to be qualified by the "necessary quality of confidence";
  - (iii) the Tribunal noted the PCC's submissions in favour of a wider application of the definition of confidential information but ultimately accepted the Member's submission that not all information acquired or communicated in the course of a business relationship was "confidential information" and proceeded on that basis.

### **3.1.2 Disclosure to the Former External Accountant of Member's conversation with the GWAMCO Chair/Client**<sup>(12.29)</sup>

#### **(a) PCC submissions**

- (i) The PCC submitted that:
- A. the Member disclosed confidential information received from the GWAMCO Chair/Client during a telephone call on 6 September 2017, in a subsequent conversation the Member had with the Former External Accountant. The content of that telephone conversation included adverse remarks and concerns raised about the Former External Accountant by the GWAMCO Chair/Client. Shortly after the telephone call between the Member and the GWAMCO Chair/Client, the Former External Accountant contacted the GWAMCO Chair/Client in relation to what the Former External Accountant saw as defamatory accusations made against him;

- B. the GWAMCO Chair/Client made these remarks about the Former External Accountant in his capacity as Chair, to the Member in his capacity as the auditor of Gascoyne Water;
- C. the GWAMCO Chair/Client clearly intended that the conversation was confidential, as evidenced by an email he sent on 12 September 2017 to the Member upon finding out that the Former External Accountant had been made aware of his comments<sup>(12.30)</sup>;
- D. the Member did not obtain the permission or consent of the GWAMCO Chair/Client prior to conveying the GWAMCO Chair/Client's remarks to the Former External Accountant.
- (ii) In making this submission, the PCC particularly referred to the following evidence:
- A. the email from the GWAMCO Chair/Client to the Member sent 12 September 2017<sup>(12.30)</sup> in which he wrote:
- “...I would like an explanation to address my concerns over the lack of confidentiality and how our discussion could lead to [the Former External Accountant] thinking that defamatory accusations had been made?... There must be confidentiality when discussing these and other issues, I asked those questions of you to ascertain your view as our auditor and to try and get an understanding from your perspective of why the Co Operatives and [the Former External Accountant] have had these ongoing issues...”*
- B. its cross-examination of the Member on 28 May 2020<sup>(12.160)</sup> where, the PCC submitted, the Member confirmed he knew the GWAMCO Chair/Client did not want his remarks repeated:
- “Q. Did you know if [the GWAMCO Chair/Client] was one of those people that had made those public comments?*
- A. Did I know he had? Not until he said them to me, no.*
- Q. You say in paragraph (d) that you encouraged [the GWAMCO Chair/Client] to speak with [the Former External Accountant] about that. What did he say when you suggested that to him?*
- A. Minus the expletives - there was no co-operation on his part in that regard. He didn't want to contact [the Former External Accountant].*
- Q. You took it that he had no intention of speaking to [the Former External Accountant] about that?*
- A. I took it that way, yes.*
- Q. Why then did you go and tell [the Former External Accountant] exactly that, which you knew [the GWAMCO Chair/Client] didn't want conveyed? Because what appears to have happened next, in paragraph 16 you say you had a conversation with [the Former External Accountant] in which you referred to the fact of your conversation with [the GWAMCO Chair/Client] and you outlined his opinions about [the Former External Accountant]'s conduct.*
- A. And your question?*
- Q. Why did you think that that was a good idea in circumstances where you had suggested to [the GWAMCO Chair/Client] that he speak directly with [the Former External Accountant] and he told you where to go?*
- A. I thought it was a good idea at the time because [the Former External Accountant] and [the GWAMCO Chair/Client] were good friends a year earlier and had a common interest in GWC and they had expressed that*

*friendship. [The GWAMCO Chair/Client] had even come to [the Former External Accountant]'s office on various matters. So, he was - it was a relationship that was affecting GWC because it was the accountant and the Chairman of GWAMCO and it needed to be repaired or there needed to be some action taken to fix the disconnect between all parties here. So, [the Former External Accountant] was - I thought it was a good idea at the time to let him know that people were saying that about him, to suggest he speaks direct with [the GWAMCO Chair/Client] and to solve the misconception" (page 62 [1]-[34]);*

- C. the Member's statement on 28 May 2020<sup>(12.160)</sup> where, the PCC submitted, the member accepted that the disclosure of what had been said by the GWAMCO Chair/Client to the Former External Accountant was the wrong thing to do:

*"...I was protecting a fellow chartered accountant who was having misleading statements said about him and I believed there was a solution because of the relationship they previously had. I perceived it as just a silly misunderstanding between two people that had previously been on the same page.*

*I do regret that and in any sense, I would never do that again, but I had the hope and the, you know, I was hoping that something good would come out of that, but I was wrong about that" (page 70 [35] - page 71 [2]).*

**(b) Member submissions**

- (i) The Member did not dispute the fact of the conversation between him and the GWAMCO Chair/Client, nor that he subsequently had a conversation with the Former External Accountant regarding the adverse remarks expressed by the GWAMCO Chair/Client about the Former External Accountant. However, the Member submitted that:
- A. the contents of his conversation with the GWAMCO Chair/Client that took place on or around 7 September 2017, which the Member disclosed to the Former External Accountant, were not confidential either in nature or in respect of the circumstances in which the information was imparted. The Member gave evidence under cross examination that he had:
- (1) only disclosed to the Former External Accountant general opinions about the Former External Accountant that had otherwise been expressed in public;
  - (2) not been told and did not otherwise understand the GWAMCO Chair/Client's remarks to have been given to him in confidence, or that the GWAMCO Chair/Client did not want the Member to convey the remarks to the Former External Accountant directly;
  - (3) disclosed the remarks to the Former External Accountant in an effort to "*patch a relationship*"<sup>(12.53)</sup> between the GWAMCO Chair/Client and the Former External Accountant;
- B. the Member was told the remarks in his personal capacity and passed them on to the Former External Accountant in kind. The remarks did not concern the audit the Member was engaged to perform and the Member had not received the remarks in his capacity as auditor of Gascoyne Water;
- C. he felt obliged to report remarks which he considered were defamatory to the person he believed was defamed.

(ii) In making this submission, the Member particularly referred to the following evidence:

A. the Member's 19 September 2017 email<sup>(12.32)</sup> to the GWC Chair/Client dated in which he wrote:

*"My position on the issue of confidentiality is as follows:*

- *[the GWAMCO Chair/Client] called me and we had a frank discussion in which he expressed his views on certain matters*
  - *[the GWAMCO Chair/Client] expressed views about [the Former External Accountant] as being the concerns of others*
  - *I took from the conversation he did not take ownership of those views but was influenced by them*
  - *The views [the GWAMCO Chair/Client] expressed were consistent with comments being made about [the Former External Accountant] by others in Carnarvon*
  - *I encouraged [the GWAMCO Chair/Client] to talk to [the Former External Accountant] to discuss these misconceptions that were damaging to both [the Former External Accountant] and to the Co-operative*
  - *I explained to [the Former External Accountant] that [the GWAMCO Chair/Client]'s views were consistent with other comments being made in public*
  - *[the Former External Accountant] waited 2 days in the hope that [the GWAMCO Chair/Client] would call*
  - *[the Former External Accountant] then sent an email to [the GWAMCO Chair/Client] only – I have confirmed this with [the Former External Accountant]*
  - *[the GWAMCO Chair/Client] chose to circulate these emails to the Board*
- I do not resile for (sic) what I said to [the Former External Accountant] and I am adamant that by any legal or ethical definition I did not breach confidentiality"*

B. the Member's 25 October 2017 email<sup>(12.53)</sup> to the GWC Chair, 'GWC' and the GWC GM, in which he stated:

*"...The concept of breach of confidentiality is ridiculous. General comments made of this manner cannot be confidential. The minor comments I passed to [the Former External Accountant] were in effort to patch a relationship that had been tainted by false information. If [the GWAMCO Chair/Client] and [the Former External Accountant] had of talked this would have been made clear. I have received legal opinion to confirm this concept..."*

**(c) Tribunal decision and reasons**

Having considered each party's submissions and the available evidence, the Tribunal did not find the Member's disclosure to the Former External Accountant of his conversation with the GWAMCO Chair/Client established allegations 1(a)(i) or (ii) because:

- (i) the Tribunal did not regard the 12 September 2017 email from the GWAMCO Chair/Client as sufficiently persuasive evidence that the conversation was intended to be confidential or that such intent was communicated to the Member at the time the remarks were made;
- (ii) in the absence of further evidence and in light of the Member's responses under cross-examination, the Tribunal could not be comfortably satisfied that what the GWAMCO Chair/Client said to the Member was, or was intended to be, confidential. The Tribunal particularly gave weight to the Member's responses at the 28 May 2020 hearing, where the Member expressly denied that he knew the GWAMCO Chair/Client's remarks were given to

him in confidence in his capacity as auditor or that he knew the GWAMCO Chair/Client did not want him to convey those views to the Former External Accountant;

- (iii) in the absence of further evidence and in light of the Member's responses under cross-examination, the Tribunal could not be satisfied of the extent to which the Member disclosed the GWAMCO Chair/Client's actual remarks to the Former External Accountant or rather only disclosed general opinions about the Former External Accountant that had otherwise been expressed in public;
- (iv) the disclosure of the conversation did not relate to the cessation of the Member's engagement so allegation 1(a)(ii) was not applicable.

### **3.1.3 26 October 2017 email from the Member to the Former External Accountant**<sup>(12.56)</sup>

#### **(a) PCC submissions**

- (i) The PCC submitted that:
  - A. on 10 October 2017, the Member sent an email to the GWC Chair that contained confidential information regarding issues and concerns the Member had identified following his "preliminary review" of various complaints brought to his attention by members of Gascoyne Water (the **Preliminary Review**)<sup>(12.39)</sup>;
  - B. on 26 October 2017, the Member forwarded to the Former External Accountant an email (the **26 October Email to the Former External Accountant**)<sup>(12.56)</sup> that the Member had sent to the GWC Chair dated 26 October 2017 (the **26 October Email to the GWC Chair**)<sup>(12.55)</sup>;
  - C. the Member's statements in the 26 October Email to the GWC Chair contained confidential information in that the statements referred to:
    - (1) confidential matters from the Preliminary Review;
    - (2) the circumstances of the Member's resignation (including that the Member's resignation was in dispute); and
    - (3) the related actions and opinions of the board of GWC;
  - D. forwarding to the Former External Accountant the 26 October Email to the GWC Chair was therefore a breach of the Member's obligation to maintain the Fundamental Principle of Confidentiality;
  - E. the Member should have understood that the contents of the Preliminary Review as summarised in the 26 October Email to the GWC Chair were confidential, particularly where he sought to assert that he was still engaged as auditor;
  - F. none of the information contained in the Preliminary Review or the 26 October Email to the GWC Chair was known to the general public at the time the Member sent the 26 October Email to the Former External Accountant;
  - G. although at this point in time there was a dispute as to whether the Member was still engaged as the auditor of Gascoyne Water, the Member's employment status was irrelevant because s 140.6 of APES 110 provides that the obligation of confidentiality extends after the cessation of the engagement;

- H. for the purposes of APES 110, the fact some of that information had been generated by the Member himself did not prevent the characterisation of that information as confidential where the Member acquired it in his capacity as auditor;
- I. by using the expression “FYI” in the 26 October Email to the Former External Accountant, the Member had indicated to the Former External Accountant that he should circulate the 26 October Email to the GWC Chair even more widely to inform his clients that the Member had not resigned as auditor (and the Former External Accountant did so).
- (ii) In making this submission, the PCC particularly referred to the following evidence:
- A. the Preliminary Review<sup>(12.39)</sup>;
- B. the 26 October Email to the GWC Chair<sup>(12.55)</sup> which contained the following statements:
- “I confirm that I am still the auditor of both GWC and GWAMCO  
To clarify once again I did not resign as the auditor of GWC or GWAMCO.  
You have relied on the following comments in a personal email to [GWC Chair] ...  
...it was clear that my resignation would only happen “once I had finalised my decision” ...  
...[GWC Chair] you clearly know I did not resign in that email.  
Your motivation for accepting this resignation is absolutely because year (sic) fear what I will say, yet you are not willing to meet informally to discuss. Now you view destroying my reputation and credibility as a means of suppressing this information. You keep constantly reminding me about confidential information. You really don't understand what is confidential and what is not...  
Let me make these points absolutely crystal clear:  
- I did not resign ...  
- If you continue with the assertion ... I will take legal action.  
- If you announce in any public forum ... I will take legal action  
- If you suggest the audit was not complete then I will take legal action  
- If you do not pay me for the audits I will take legal action.  
...I will make it clear to the members...”*
- C. the 26 October Email to the Former External Accountant<sup>(12.56)</sup> which forwarded the email in B above;
- D. the 27 October 2017 email from the Former External Accountant to his clients in which he wrote *“Hi Gents, The current auditor of GWC has asked me to make it clear to my clients that he has not resigned as auditor of GWC. Please see [the Member’s] email below...”*<sup>(12.57)</sup>;
- E. the statements made by the Member during the PCC’s Case Conference meeting held 23 August 2019 (the **Case Conference August meeting**)<sup>(12.123)</sup>:
- “In terms of my scope, I had every right to talk to members and anyone else that approached me in regard to that ...”* (page 15 [34]-[36])
- and
- PCC: ...why do you think you had the right to address those issues to members individually?  
THE MEMBER: To members individually, in what sense did I do that?*

*PCC: You say you think you had an obligation under your--*

*THE MEMBER: I didn't talk to the members individually or anything about any of these aspects until after the audit ceased, after the audit engagement. Before that, it was them approaching me, it wasn't the other way around.*

*PCC: After the audit ceased, so the confidentiality extends beyond the terms of the--*

*THE MEMBER: I understand the confidentiality aspect of it, but these things were out there in the public arena, there was no confidentiality of these issues. They were being bandied around and being debated and I was being victimised as an auditor, terminated. I had every right to defend that position, and I've had that verified by lawyers and other parties" (page 27 [7]-[31])*

- F. the Member's 9 August 2019 response<sup>(12.119)</sup> to the PCC's question "What was the Member's involvement (if any) in the circulation of his email to GWC and the [GWAMCO Chair/Client] sent on 26 October 2017 by [the Former External Accountant] to third parties?":

*"I was not involved in the distribution of any such email. I asked [the Former External Accountant] to let his clients know I had not resigned. This was post termination and I had the right to let members know I had been removed illegally".*

**(b) Member submissions**

- (i) The Member submitted that:
- A. the PCC had failed to identify what information contained in the 26 October Email to the GWC Chair was alleged to constitute "confidential information" or to whom any such confidentiality was owed. Objectively viewed, it did not contain any such confidential information but instead consisted of:
- (1) general references to the Preliminary Review and arguments as to why statements included in the Preliminary Review did not constitute a resignation;
  - (2) assertions by the Member about the motivations of the directors of Gascoyne Water characterising his statements made in his Preliminary Review as a resignation;
  - (3) rhetorical questions addressed to the GWC Chair; and
  - (4) statements as to what the Member would do if GWC continued to assert and/or publicly announce that the Member had resigned or that the audit was not complete, or if Gascoyne Water would not pay him for the audits;
- B. the Member's rejection of the cessation of his engagement was not confidential;
- C. as the Member denied any part of the Preliminary Review contained confidential information, there was no failure to maintain confidentiality in respect of the 26 October Email to the GWC Chair disclosing the contents of the Preliminary Review to third parties;
- D. the Gascoyne Water directors might have taken umbrage at the Member's opinions, questions and statements as expressed in the 26 October Email to the GWC Chair but that did not mean that such opinions, questions and statements were, or disclosed, confidential information;

E. the reference to “FYI” in his 26 October Email to the Former External Accountant did not amount to a request by the Member for the Former External Accountant to circulate the email more widely.

(ii) In making this submission, the Member particularly referred to the following evidence:

A. the Preliminary Review<sup>(12.39)</sup> in which the Member wrote:

*“...The personal attack made on me in correspondence by [a GWC non-member director] has resulted in my decision to resign as auditor. I cannot work with a board dominated by [a GWC non-member director] knowing the lengths he is prepared to go to protect his own self-interest. I will approach the [Registrar of Co-operatives] in due course once I have finalised my decision. At this stage, I will cite personal reasons to the [Registrar of Co-operatives] for resigning as auditor...”*

B. the 26 October Email to the GWC Chair<sup>(12.55)</sup>, in which the Member wrote:

*“To clarify once again I did not resign as the auditor of GWC or GWAMCO. ...I did not notify either GWC or GWAMCO, and even in the comments in the personal email it was clear that my resignation would only happen “once I had finalised my decision”. The decision was contingent on the board making positive moves to address the issues outlined in the email of which you refused to discuss. I have received legal opinion that those comments do not constitute a resignation. Even the most unskilled of boards would realise I cannot ethically quit in the middle of an audit. To suggest I have done so is defamatory...  
...Your motivation for accepting this resignation is absolutely because year (sic) fear what I will say, yet you are not willing to meet informally to discuss. Now you view destroying my reputation and credibility as a means of suppressing this information...  
...Tell me now, how will you justify to your members the additional expense attempting to appointment (sic) another auditor...”*

C. the 26 October Email to the Former External Accountant<sup>(12.56)</sup> in which he wrote “FYI”.

**(c) Tribunal decision and reasons**

- (i) Having considered each party’s submissions and the available evidence, the Tribunal did not consider that the references to the Member’s purported resignation in the Preliminary Review contained anything of a confidential nature even though other aspects of that email relating to the GWC General Manager recruitment process may well have contained confidential information.
- (ii) Accordingly the Tribunal could not be satisfied that the 26 October Email to the Former External Accountant, including to the extent that it contained a summary of the Member’s remarks in the Preliminary Review in relation to his purported resignation, contained anything of a confidential nature and therefore there was no breach of the By-Laws as alleged in paragraphs 1(a)(i) and (ii) of the NDA.
- (iii) The Tribunal accepted the Member’s submissions that there was nothing inherently confidential in the Member’s opinions on the validity of the termination of his engagement, as set out in the 26 October Email to the GWC Chair.
- (iv) The Tribunal was not satisfied by the PCC’s submission that the Tribunal could infer that, by forwarding to the Former External Accountant the 26 October Email to the GWC Chair, the Member intended the Former External Accountant to distribute it more widely.

### 3.1.4 **The Member's 8 December 2017 email**<sup>(12.69)</sup>

#### (a) **PCC submissions**

- (i) The PCC submitted that:
- A. the Member sent an email with the subject line *"The GWC and GWAMCO auditor did not resign"* on 8 December 2017 to certain members of Gascoyne Water (the **8 December Email to Members**)<sup>(12.69)</sup> which contained confidential information, being:
    - (1) the circumstances of the Member's resignation and related actions and opinions of Gascoyne Water directors;
    - (2) statements in the Preliminary Review<sup>(12.39)</sup>, including statements which referred to the probity of the GWC General Manager recruitment process;
  - B. statements in the 8 December Email to Members repeated, in substance, the nature of the dispute regarding the cessation of the Member's engagement, private communications that had taken place between the Member and the Gascoyne Water directors in relation to the conduct of the audit, other matters which the Member became aware of solely due to his position as auditor, and the opinions and responses of the Gascoyne Water directors to all of these confidential matters;
  - C. the 8 December Email to Members was a disclosure of confidential information which should not have taken place even if the Member was no longer the auditor. Where the Member had concerns, they should have been reported to the Registrar of Co-operatives rather than publicly disclosing confidential matters by way of *"mass communication"*.
- (ii) The PCC also drew the Tribunal's attention to the following:
- A. a letter from the GWC directors to the Member dated 25 October 2017 (that is, after the disputed termination of the Member's engagement as auditor) which reminded the Member of his obligation to keep information that he had accessed in his role as auditor, confidential<sup>(12.54)</sup>; and
  - B. a cease and desist demand sent by GWC directors to the Member on 27 October 2017 that demanded the Member cease various conduct including representing that he was still the auditor of GWC<sup>(12.59)</sup>.
- (iii) In making this submission, the PCC particularly referred to the following evidence:
- A. the letters set out in (ii)A and B above;
  - B. the 8 December Email to Members<sup>(12.69)</sup> in which the Member wrote:
 

*"To the members of GWC and GWAMCO*  
***The GWC and GWAMCO Auditor did not resign***  
*I am Noel Anderson and I have been your auditor as elected by members since 2009.*

***The directors of GWC and GWAMCO removed me as auditor and barred me from attending the AGM.***  
*They have told you I resigned, that I had not finalised the audit. They told you that I chose not to attend the AGM.*  
*The completed financial statements were sent to the directors on 18 October 2017 for their review.*

*The financial statements and audit could have been finalised that day with the co-operation of the directors.*

*The directors subsequently refused to provide the information requested. The directors twisted my words from a personal email 10 days prior written to the then Chairman into a resignation.*

*Understand that my email was not a resignation. It was a preliminary report into my investigation of certain matters.*

*These matters were concerns raised directly to me by members. The directors would not respond to the members on these concerns and thus the members came to me as the auditor. Listed are some of the genuine questions asked by members which were only partially addressed in this preliminary review:*

- *Why was a placement agency used to appoint the CEO/GM at significant cost*
- *Was this process tainted when resulting in the caretaker CEO/GM becoming the CEO/GM*
- *Why was a highly qualified applicant ignored during that process*
- *Was this a sham process to secure a grant*
- *Why do directors refuse to prove commerciality of additional payments to directors*
- *Why have office holders become secretive and refuse to talk to members*
- *Why have they insisted on non-disclosure agreements with all parties they deal with including their accountant*

*In this report I made directors aware of the concerns of members, I made them aware of certain findings, I encouraged them to further investigate and I encouraged them to meet with members prior to the AGM to address their fears. The board resisted all calls for a meeting of members to discuss these issues.*

*The directors did not like the findings of my preliminary report and responded by removing me as auditor.*

*They issued a cease and desist notice insisting that I was not to represent that I was still the auditor I was not to represent that the financial statements were complete.*

*GWC have also removed their accountant [the Former External Accounting Firm] and offered no explanation.*

*The Co-operatives Act 2009 gives directors an onerous responsibility to act in the best interests of members.*

*For you as members to be aware that officeholders have acted in your best interests, there must be an environment of transparency and accountability.*

*If these boards will not respond to direct to the genuine concerns of members, if they will not promote free and open discussion with members, if they will not be held accountable for how they spend your money, if they take away your powers to appoint and dismiss the auditor then should they have your support?*

*The directors need to justify why they are insisting I have resigned when clearly I am representing that I have not. They need to justify why they were willing to incur additional costs to remove me. These additional costs are very significant and include unnecessary legal, accounting and auditing fees. You are paying for these costs.*

*It is my genuine hope that that GWC will attain the credibility it needs to become the single water provider in Carnarvon.*

*This will require a mature board with reputable officeholders of credible diverse skills acting in the interests of members in an environment of transparency and accountability.*

*I wish you all the best for the future success of GWC”.*

**(b) Member submissions**

- (i) The Member submitted that:
- A. the 8 December Email to Members asserted that the Gascoyne Water directors had removed the Member as auditor and barred him from attending the AGM, denied that he had resigned, identified a series of questions asked of him by members, recounted other conduct by the board towards the Member, and expressed various opinions about the motives of the directors. None of this information had the necessary quality of confidence to make it confidential from members of co-operatives;
  - B. the statements in his 8 December Email to Members were questions about his view of the directors’ conduct, all of which the Member submitted was not confidential information obtained in the course of his engagement as auditor of Gascoyne Water;
  - C. his primary motivation in sending the 8 December Email to Members was that he believed the Gascoyne Water members had a right to know about those matters because:
    - (1) the measure of what was confidential between a co-operative’s board and its members was much broader than what would usually be confidential between a company board and its shareholders. This conclusion was based on the Member’s interpretation of the Co-operatives Act<sup>(12.5)(12.159.1)</sup> and his understanding that the relationship between a co-operative and its members was uniquely based on democracy and accountability;
    - (2) the Member’s interpretation of his rights and obligations as the auditor of Gascoyne Water under the Co-operatives Act and the *Corporations Act 2001* (Cth) (**Corporations Act**) further meant that the Member was entitled, in his capacity as auditor, to address the members of Gascoyne Water and to answer their questions. The Member did not regard his audit engagement to have ceased because he had been appointed auditor by the members at a general meeting rather than appointed by the board;
  - D. he was also motivated to defend his reputation against what he perceived to be an attack on his professionalism by the Gascoyne Water directors holding out that he had resigned as auditor in the middle of an audit<sup>(12.151)</sup>;
  - E. at all times he maintained he was the auditor of Gascoyne Water, that he had not resigned and that Gascoyne Water could not appoint another auditor without the approval of the Registrar of Co-operatives and without the approval of the members of the co-operatives<sup>(12.60)(12.65)</sup>;
  - F. he held legitimate concerns that a board director was acting in his own self-interest (particularly with regard to remuneration) rather than in the best interest of the co-operative, and that this was a matter of importance for the members of the co-operative to be made aware of<sup>(12.53)</sup>;
  - G. he had obtained advice from the Registrar of Co-operatives that there was no legal impediment to him giving factual statements to, amongst others, members of the co-operatives and the media and there was nothing improper in him doing so<sup>(12.60)</sup>;
  - H. even if it was conceded that the information disclosed in his 8 December Email to Members<sup>(12.69)</sup> was confidential, it had not been disclosed outside of the employing

organisation for the purpose of s 140.1 of APES 110, as the co-operative members were also the co-operative owners.

(ii) In making this submission, the Member particularly referred to the following evidence:

- A. the letters set out in 3.1.4(a)(ii)A and B above;
- B. the 8 December Email to Members<sup>(12.69)</sup>;
- C. the Member's Written Statement<sup>(12.151)</sup> in which he stated at [17]:
  - "I was motivated by two things in sending that email and making the statements in it (including those in the paragraph starting "Listed are some of the genuine questions asked by members"):*
    - (a) My primary motivation was to inform members of matters that [I] considered they had a right to know as members of the Co-operatives. That consideration was informed by the fact that my appointment as auditor had been made by the members of the Cooperatives at a general meeting rather than the board, as well as by the fact that one of the "co-operative principles" enshrined in section 6 of the Co-operatives Act is the principle of "Democratic member control". That principle provides in part (as I was generally aware at the time) that "A co-operative is a democratic organisation controlled by its members, who actively participate in setting policies and making decisions. Members serving as elected representatives are accountable to the membership."*
    - (b) A second motivation was to defend my reputation against what I perceived to be an attack on my professionalism by the boards of the Co-operatives in holding out that I had resigned as auditor in the middle of an audit".*

**(c) Tribunal decision and reasons**

- (i) Having considered each party's submissions and the available evidence, the Tribunal determined that the 8 December Email to Members established allegation 1(a) (i) because:
  - A. part of the contents of the 8 December Email to Members did contain confidential information in relation to the directors' dealings with the GWC General Manager recruitment process, in particular the questions in that email: "[w]hy was a placement agency used to appoint the CEO/GM at significant cost", "[w]as this process tainted when resulting in the caretaker CEO/GM becoming the CEO/GM", and "[w]hy was a highly qualified applicant ignored during that process";
  - B. the Member's obligation to maintain the confidentiality of this information continued after the cessation of his engagement with Gascoyne Water;
  - C. the Member was not entitled to pass on this information to the members of Gascoyne Water. The expression "employing organisation" in APES 110 s 140.1 is relevantly intended to refer to the board and employees of Gascoyne Water but not to its members;
  - D. the Tribunal noted the Member's submission that he had obtained advice from the Registrar of Co-operatives that there was no issue with the Member communicating with the members of Gascoyne Water however the Tribunal did not accept that the members of the co-operative had a right to know about the board's consideration of the GWC General Manager recruitment process.
- (ii) The 8 December Email to Members did not relate to the cessation of the Member's engagement with Gascoyne Water so that 1(a)(ii) was not applicable.

### 3.2 **ALLEGATION 1(b)**

*It [was] alleged that ... the Member is liable to disciplinary action in accordance with ... By-law 40(2.1)(h), in that the Member has committed ... a breach of sections 100.5(b), 120.1, 220 and 290.124 of APES 110 ... in circumstances where:*

- (i) clients of his practice were also members of Gascoyne Water and/or clients of [the Former External Accounting Firm];*
- (ii) he lodged a complaint to the Registrar of Co-operatives against Gascoyne Water for a client of the Member's practice;*
- (iii) he acted as auditor for an entity "which has common membership" with Gascoyne Water;*
- (iv) he implemented insufficient safeguards to reduce to an acceptable level the threat to the fundamental principle objectivity.*

#### 3.2.1 **Overview and preliminary matters**

- (a) APES 110 s 100.5 sets out fundamental principles with which members shall comply, including:

(b) *Objectivity* – to not allow bias, conflict of interest or undue influence of others to override professional or business judgments

(the **Fundamental Principle of Objectivity**).

- (b) APES 110 s 2 defines certain terms including:

**Acceptable Level** means a level at which a reasonable and informed third party would be likely to conclude, weighing all the specific facts and circumstances available to the Member at that time, that compliance with the fundamental principles is not compromised.

(**Acceptable Level**).

- (c) The PCC submitted that the Member had failed to discharge his obligation to remain objective in the face of a number of "threats" (including conflict of interest and "self-review") as well as an overall failure to remain objective, in respect of four matters that broadly fell within the category of actual or potential conflicts of interest. Each of those four matters is dealt with below.

#### 3.2.2 **Clients of the Member's practice were also members of Gascoyne Water and/or clients of the Former External Accounting Firm (allegation 1(b)(i))**

##### (a) **Agreed facts**

- (i) The GWAMCO Chair/Client, and another co-operative member (**Client 2**), were both accounting clients of the Member's Firm.
- (ii) The Member had completed audit work for clients of the Former External Accounting Firm.

##### (b) **PCC submissions**

- (i) The PCC submitted that:
  - A. the Member had audited Gascoyne Water for a long period, during which time the Member's firm also provided accountancy services to the GWAMCO Chair/Client and Client 2;
  - B. the Member was also providing audit services to a number of the clients of the Former External Accounting Firm in circumstances where the Former External Accountant and Gascoyne Water "were in a state of some disconnect" (as identified by the

Member in his 2016 audit observations<sup>(12.13)</sup>. That disconnect became significantly more acute in the 2017 year;

- C. these matters gave rise to a potential conflict of interest in that:
- (1) members and directors of the co-operatives for whom the Member performed audit work, being the GWAMCO Chair/Client and Client 2, were also clients of the Member's Firm (**Accounting Clients**); and
  - (2) the Member was providing audit services to clients of the Former External Accounting Firm (**Audit Clients**);
- D. even though the Member's position was that the Member did not personally work on those matters for the Accounting Clients, the potential conflict arose from the mere fact that they were clients of his firm and it was his firm that was engaged by Gascoyne Water;
- E. the Member had acknowledged that two of the Accounting Clients were "at loggerheads".

(ii) In making this submission, the PCC particularly referred to the following evidence:

- A. the Member's 22 November 2016 email<sup>(12.13)</sup> to the GWC GM in which he advised:
- "...I have completed the audits and have issued an unqualified audit report for both entities..."*

and then set out 2016 audit observations including:

***"Observation 2 – Disconnect with accountant***

*The board and CEO have a disconnect with [the Former External Accountant]. From an outsider looking in, this disconnect commenced when [the Former External Accountant] challenged amongst other things...*

*This disconnect is highly visible and failure to address the issues raised by the accountant for GWC causes immense audit concerns. [The Former External Accounting Firm]'s terms of engagement with GWC specifically demands full and open disclosure by the board. This is particular necessary under tax agent legislation and the engagement rules for Chartered Accountants. When communication between the board and the accountant is dysfunctional this adds to the audit risk and even more so when that dysfunction comes from the accountant challenging the board's actions.*

*Given that neither the board or the CEO have financial expertise you are fully reliant on [the Former External Accountant]'s significant knowledge and credibility to move forward. The unwillingness to respond to his concerns or to provide full appropriate disclosure of his fees in the financial statements was a further indication of that disconnect.*

*I make these observations to point out that when auditing I address the synergy and internal controls of an organisation. This synergy must be visible and must be recognised by all vested parties or the credibility of GWC itself is at stake. I understand at this point the credibility of the board is critical to the prospect of being the single water provider. I therefore suggest practical steps moving forward are..."*

(the **2016 Management Letter**);

- B. the Member's Firm 2017 engagement letters to the GWAMCO Chair/Client and Client 2, signed by the Member's Firm Partner, which did not state who would perform the work;

- C. the statement made by the Member during the Case Conference August meeting<sup>(12.123)</sup> *“...in fact, the two clients are protagonists - [the GWAMCO Chair/Client] and [Client 2], they’re at loggerheads. One has now left our firm because of this saga”* (page 32 [4]-[6]).

**(c) Member submissions**

- (i) The Member submitted that:
- A. neither the GWAMCO Chair/Client nor Client 2 were his particular clients. Rather, they were clients of the Member’s Firm and the accounting work completed for them was done by the Member’s Firm Partner<sup>(12.151)</sup>;
  - B. the PCC had not shown how the Accounting Clients and the Audit Clients allowed his business or professional judgment to be compromised. The mere fact that Client 2 and the GWAMCO Chair/Client were clients of the Member’s Firm was not of itself a circumstance that created a conflict of interest or evidenced any lack of objectivity on the part of the Member;
  - C. section 220.2 of APES 110, which sets out an extensive (albeit non-exhaustive) list of situations in which a conflict of interest “may arise” does not list any situation of that kind (nor the analogous situation of providing services to a company as well as one of its shareholders);
  - D. the Member was in no sense representing Client 2 or the GWAMCO Chair/Client on the one hand, and Gascoyne Water on the other, “regarding the same matter”, let alone when those parties were in a legal dispute with each other;
  - E. the suggestion that the Member preferred the interests of Client 2 or the GWAMCO Chair/Client as private clients over those of Gascoyne Water was “fanciful” because the Member would objectively have had greater incentive to prefer the interests of his own larger audit client, Gascoyne Water, over the interests of minor accounting clients of the Member’s Firm. Further, it could not be said that the Member preferred the interests of the GWAMCO Chair/Client, who was a director of GWAMCO and therefore potentially implicated in the allegations against the Gascoyne Water boards that the Member investigated in the Preliminary Review;
  - F. the audit work completed through the firm of the external accountant used by GWC represented “less than 3% of [the Member’s] practice”<sup>(12.119)</sup>. The fact that many of the Former External Accounting Firm clients were growers (ie members of GWC) did not represent a conflict.
- (ii) In making this submission, the Member particularly referred to the following evidence:
- A. the Member’s Firm engagement letter to Client 2 dated 3 March 2017, which was signed by the Member’s Firm Partner and not by the Member<sup>(12.151.1)</sup>;
  - B. the Member’s Firm engagement letter to the GWAMCO Chair/Client dated 13 March 2017, which was signed by the Member’s Firm Partner and not by the Member<sup>(12.151.3)</sup>;
  - C. the Member’s 9 August 2019 email<sup>(12.119)</sup> to the PCC in which he responded to questions raised in the course of their investigation:
 

*“...17. What safeguards have been established in relation to clients of the Member’s firm who are also members of Gascoyne Water? Have any relevant disclosures been made to Gascoyne Water?”*

*I had no personal relationships with these clients of our firm. My audit plan, as a matter of procedure, addressed self-review, advocacy, familiarity and intimidation threats. That is born out in the position I took with [the GWAMCO Chair/Client] and my thorough investigation into any claims made by [Client 2]. All members have equal rights, they are minor client to our firm, I always made conclusions based on my own investigations, and did not advocate for them. The suggestion I was influenced in any manner by either client, other than in a professional and clinical manor, is speculation without support...”*

D. the Member’s Written Statement<sup>(12.151)</sup> in which he stated:

*“3. Since 2010, I have been in partnership with [the Member’s Firm Partner] ...*

*8. In relation to [the Member’s Firm]’s work for [Client 2], [the Member’s Firm]’s records show that he became a tax and accounting client of the firm in 2004. Those services have always been provided to him by [the Member’s Firm Partner]...*

*12. I note that allegations have also been made against me suggesting that the fact that [the GWAMCO Chair/Client] was a client of my firm in 2017 affected my objectivity with respect to conduct involving him and GWC. Like Client 2, [the GWAMCO Chair/Client] was a client of [the Member’s Firm Partner], not me personally...”*

**(d) Tribunal decision and reasons**

Having considered the parties’ submissions and the available evidence, the Tribunal determined that allegation 1(b)(i) was established with respect to the Accounting Clients but not with respect to the Audit Clients.

(i) With respect to the Accounting Clients:

A. there was a potential conflict in relation to any matter that affected both Gascoyne Water and either of the Accounting Clients, and the Member should have had regard to the safeguards in APES 110 (see paragraph 3.2.5(b)(iii)C below).

(ii) With respect to the Audit Clients:

- A. the Audit Clients were not members of Gascoyne Water and there did not appear to be a potential conflict of interest in relation to the Member acting for them as well as for Gascoyne Water;
- B. accordingly, the Tribunal did not consider that the Member was required to implement any of the safeguards in APES 110 and in particular to advise them that he acted for Gascoyne Water.

### **3.2.3 Complaint to the Registrar of Co-operatives against Gascoyne Water for a client of the Member's practice (allegation 1(b)(ii))**

#### **(a) Agreed facts**

The Member lodged a complaint on behalf of Client 2 to the Registrar of Co-operatives against the Member's former client, Gascoyne Water.

#### **(b) PCC submissions**

- (i) The PCC submitted that:
- A. the complaint was lodged expressly on behalf of Client 2, a GWC member who was also a client of the Member's firm. The complaint related to Client 2's relationship with GWC. The Member had conceded that the basis of the complaint was that GWC was attempting to expel Client 2 from membership of the Co-operative;
  - B. the Member had decided that he would make that complaint on Client 2's behalf in circumstances where Client 2 was a continuing client and Gascoyne Water was a former client, and the issues were related to Client 2's relationship with Gascoyne Water and this was a breach of APES 110.
- (ii) In making this submission, the PCC particularly referred to the following evidence:
- A. the statement made by the Member during the Case Conference August meeting<sup>(12.123)</sup> *"So, I followed trying to help [Client 2] with the [Registrar of Co-operatives, to try and get attention to them ... I set about protecting him..."* (page 20 [15]-[20]);
  - B. the Member's 4 October 2019 response to the PCC's request for documents, in which he confirmed he had lodged a complaint for Client 2<sup>(12.131)</sup>:
    - "...• It was at the point that they were attempting to expel [Client 2], and realising members could never wrest control of the cooperatives from the oppressive boards, I again decided to approach the [Registrar of Co-operatives] in November 2018.*
    - This time I made my approach by formalising seven complaints in expanded detail with full support as follows:*
      - FC1 Regarding attempt to expel [Client 2]...*
    - What I received was a laughable response that basically said no breaches and no evidence has been provided. In the case of [Client 2] they wanted his complaint to come from him. He endorsed my complaint and they still would not accept, ignoring the fact that [Client 2]'s entire livelihood was at stake and he was therefore not in a position to make such a complaint personally, knowing that he faced further retribution..."*

#### **(c) Member submissions**

The Member submitted that:

- (i) he had lodged this complaint with the Registrar of Co-operatives in November 2018, over a year after his audit services to Gascoyne Water had terminated;
- (ii) the fact that the Member had lodged the complaint after his audit engagement had terminated was entirely irrelevant to the question of whether the Member had conducted himself with independence and objectivity during his audit engagement;
- (iii) the PCC had not provided any evidence of how the alleged conflict of interest had any bearing on his professional judgment at the time of his audit engagement.

**(d) Tribunal decision and reasons**

Having considered the parties' submissions and the supporting evidence, the Tribunal determined that allegation 1(b)(ii) was not established because:

- (i) given the time that had elapsed between the Member ceasing to be auditor of Gascoyne Water and his lodgement of the complaint to the Registrar of Co-operatives, there was no actual or potential conflict;
- (ii) the Tribunal was not satisfied that there was any evidence to suggest that the Member had used information he had obtained in his role as auditor in assisting Client 2 with the complaint which might give rise to a potential conflict of interest. Therefore the Member did not need to have regard to any of the safeguards in APES 110.

**3.2.4 Acted as auditor for an entity “which has common membership” with Gascoyne Water (allegation 1(b)(iii))****(a) Agreed facts**

The Member had also acted as auditor for a local growers association (CGA), which had a common membership with GWC.

**(b) PCC submissions**

- (i) The PCC acknowledged that it was not able to identify any particular actual conflict. However the Member should have recognised a potential for conflict and identified safeguards but he did not.
- (ii) In making this submission, the PCC particularly referred to the Member's 9 August 2019 response<sup>(12.119)</sup> to the PCC's question “*Is there any conflict in relation to the Member acting as auditor for CGA ... (‘which has common membership’ with Gascoyne Water) and ‘many of [the Former Accounting Firm’s] clients?’*”:

*“...The fact that many of [the Former Accounting Firm] clients are growers does not represent a conflict. My audit work through [the Former Accounting Firm] represents less than 3% of my practice...”*

**(c) Member submissions**

The Member submitted that auditing two entities with common shareholders would not, in itself, present a conflict of interest and the PCC had not articulated why or how this could constitute or evidence a conflict of interest.

**(d) Tribunal decision and reasons**

Having considered the parties' submissions and the supporting evidence, the Tribunal determined that allegation 1(b)(iii) was not established because it did not regard acting as auditor for CGA as well as Gascoyne Water gave rise to either an actual or potential conflict of interest.

### **3.2.5 The Member implemented insufficient safeguards to reduce to an Acceptable Level the threat to the Fundamental Principle of Objectivity (allegation 1(b)(iv))**

#### **(a) PCC submissions**

- (i) The PCC submitted that:
- A. APES 110 s 200.13 contains examples of safeguards that the Member should have implemented:
- Examples of engagement-specific safeguards in the work environment include:...
- Having a Member who was not a member of the Assurance Team review the assurance work performed or otherwise advise as necessary...
  - Discussing ethical issues with Those Charged with Governance of the client...
  - Rotating senior Assurance Team personnel
- B. the safeguards identified by the Member in written and oral submissions (including evidence given under cross examination) could not eliminate the conflicts or potential conflicts or reduce them to an Acceptable Level and so the Member had failed to implement sufficient safeguards to manage the threat to the Fundamental Principle of Objectivity.
- (ii) In making this submission, the PCC particularly referred to the following evidence:
- A. statements made by the Member during the Case Conference August meeting<sup>(12.123)</sup>:
- “PCC: Can I ask then, in your firm, I imagine there are a lot of connections within a community, do you have formal processes to deal with conflicts?  
THE MEMBER: We do, we have all the natural safeguards within an audit and we see somebody else. I have six chartered accountants in our firm and we make sure if there is any conflict of any type that we address those and certainly identify any safeguards. If there’s a concern - in this case, I did have my partner review aspects of this when I was doing it and she was more than happy with my approach...”* (page 30 [36]-[47]);
- B. its cross-examination of the Member on 28 May 2020<sup>(12.160)</sup> where, the PCC submitted, the Member *“agreed ... that the profits of his firm are pooled and therefore [he] has a financial interest in the profits of the [Member’s Firm Partner]’s clients”*:
- “Q. Are the profits of the partnership pooled or is there a formula which identifies how much profit you each take from the partnership? Just in broad terms, how does it work?  
A. They’re pooled with a discretionary wage that we negotiate each year”* (page 44 [34]-[38]).

#### **(b) Member submissions**

- (i) The Member submitted that no safeguards were required where there was no conflict of interest but that, in any event, the following safeguards were in place and were sufficient to manage the threat to the Fundamental Principle of Objectivity:
- A. it was the Member’s practice to complete an *“Existing engagement - Continuance”* form (**Audit Checklist**) before each audit, which required the Member to *“consider engagement risk, independence, threats to independence and, for each threat identified, the safeguards in place to reduce the threat to an acceptable level”*. The Member provided a copy of the Audit Checklist he completed in respect of the 2017 audits of Gascoyne Water as evidence that he had considered these matters and had not identified any unacceptable threats to the Fundamental Principle of Objectivity;

- B. it was a “routine” part of the Member’s firm’s practice to maintain a structural separation between accounting work and audit work that occurred at a partner and staff level;
  - C. the Member consulted with his partner from time to time in relation to safeguards.
- (ii) Under cross-examination, the Member gave further evidence regarding existing safeguards the Member or the Member’s firm had implemented to manage threats to the Fundamental Principle of Objectivity (see paragraph 3.3(c)(i)D below).
- (iii) In making this submission, the Member particularly referred to the following evidence:
- A. the Member’s Written Statement<sup>(12.151)</sup> in which he stated:
 

***“G. Safeguards in place regarding audit independence***  
*18. At all times that I was the auditor for the Co-operatives, it was my practice before each audit to complete an “Existing engagement - continuance” form of the kind mandated by CA ANZ. Annexure NA-4 to this statement is a copy of the “Existing engagement - continuance” form that I filled out in respect of the Co-operatives in June 2017 before my 2017 audit of them, which I recently retrieved from our offsite archives”*
  - B. the Member’s Audit Checklist dated 28 June 2017<sup>(12.151.4)</sup> in which, the Member submitted<sup>(12.154)</sup>, he had considered:
    - (1) engagement risk, independence and threats to independence;
    - (2) that no unacceptable threats to fundamental principles had been identified;
  - C. Statutory Declaration of the Member’s Firm Partner dated 22 June 2020<sup>(12.163.2)</sup>.

**(c) Tribunal decision and reasons**

- (i) Given that the Tribunal determined that allegations 1(b)(ii) and 1(b)(iii) had not been established, the Tribunal was only required to consider allegation 1(b)(iv) in respect of allegation 1(b)(i). That is, the Tribunal was only required to consider whether the Member had implemented sufficient safeguards in respect of the conflict of interest relating to the Accounting Clients to reduce the threat to the Fundamental Principle of Objectivity to an Acceptable Level.
- (ii) Having considered the parties’ submissions and the supporting evidence, the Tribunal determined that allegation 1(b)(iv) was established in relation to allegation 1(b)(i), because:
  - A. the Member had not complied with his obligations in s 220 of APES 110, which require the Member to identify and evaluate interests and relationships which may create a conflict of interest and implement safeguards to reduce any threat to compliance with the fundamental principles to an Acceptable Level;
  - B. the interests and relationships of the Accounting Clients and Gascoyne Water created a potential conflict of interest because both Accounting Clients were members of Gascoyne Water and additionally the Member was aware that the Accounting Clients were “at loggerheads” with each other in relation to the affairs of Gascoyne Water;
  - C. the Tribunal was not satisfied there was sufficient evidence that the Member discharged his obligation to consider and apply the required safeguards. The Tribunal noted that:
    - (1) the Member’s initial response to the PCC was that he did not believe that any safeguards were warranted because he did not regard there to be any conflicts of

interest: “...*There is no conflict demonstrated nor even possible ... My auditor impudence (sic) has never been compromised and there are no possible conflicts of interest...*”<sup>(12.102)</sup>;

- (2) it had specifically invited the Member by its letter to the Member dated 5 June 2020 and again at the hearing to provide evidence of any safeguards that had been implemented by the Member’s firm;
  - (3) in response to the Tribunal’s invitation, the Member then submitted that sufficient safeguards were in place where:
    - a. the Member’s Firm Partner was responsible for the Accounting Clients;
    - b. the Member or the Member’s Firm conducted an annual review in the form of the Audit Checklist as to whether there was any reason to cease acting for a client;
    - c. the Member consulted the Member’s Firm Partner from time to time regarding the safeguards to be applied;
- D. it did not regard these safeguards to be sufficient to reduce to an Acceptable Level the threat that the conflict of interest posed to the Fundamental Principle of Objectivity because:
- (1) separate partners acting for Gascoyne Water and the Accounting Clients was not, without more, sufficient to prevent the possibility of a conflict of interest occurring. The Tribunal noted from the Member’s evidence (including that of the Member’s Firm Partner) that separate teams were used for Audit Clients and Accounting Clients. Despite the Member’s references to compliance manuals and the “routine” firm policy of separation, the Member had not provided copies of such documents to show that such a separation was in place, evaluated or enforced and by what methods. For example, no evidence was provided that demonstrated the Member’s Firm had in place clear policies and procedures on maintaining confidentiality, limiting access to client files, the use of confidentiality agreements for partners and employees, or the separation of confidential information of Accounting Clients from Audit Clients. The Tribunal was of the opinion that such procedures should have at least been considered by the Member when the potential for conflict between Gascoyne Water and/or the GWAMCO Chair/Client and Client 2 became clear. The potential for disclosure of confidential information of Audit Clients to partners or staff who dealt with Accounting Clients was not negligible, having regard to the Member’s oral evidence that there were only two partners and four other Chartered Accountants in the Member’s Firm;
  - (2) the Audit Checklist conducted by the Member’s Firm annually was capable of operating as a safeguard, though not a sufficient one by itself. However the June 2017 Audit Checklist did not, in the Tribunal’s opinion, appear to have been completed by the Member in a considered manner but rather treated as a proforma document. In particular the Audit Checklist did not refer to the fact that the Member’s Firm also acted for the Accounting Clients and that they were “at loggerheads” (ie that they were in conflict with each other);
  - (3) the Tribunal does not regard consultation between partners from time to time in relation to safeguards, to be a safeguard in itself.

- (iii) The Tribunal had regard to ss 220.9, 220.10 and 220.11 of APES 110. Although not mandatory, given the small size of the Member's Firm the Tribunal was of the view that the Member should have additionally:
- A. formally, and preferably in writing:
    - (1) sought consent from Gascoyne Water for the Member's Firm to provide professional services to two of its members;
    - (2) advised the Accounting Clients that the Member's Firm could not provide any services to them in relation to Gascoyne Water;
  - B. fully documented his evaluation of the conflict of interest threat and appropriate safeguards to reduce threats to an Acceptable Level in particular providing clear policies and procedures as to how confidentiality could be maintained between Gascoyne Water and the Accounting Clients;
  - C. contacted the Chartered Accountants Advisory Group (CAAG) to obtain advice in relation to that matter, if uncertain how to deal with the potential conflicts.
- (iv) The Tribunal noted that the Member and the PCC agreed that, by referring to multiple sections of APES 110 in the NDA, the Tribunal was not being asked to determine whether multiple separate breaches had occurred. The Tribunal accepted this submission and considered that the Member's failure to consider and implement the matters referred to in ss 220.9, 220.10 and 220.11 of APES 110, when taken together, constituted a breach of the Fundamental Principle of Objectivity.

### 3.3 **ALLEGATION 1(c)**

*It [was] alleged that ... the Member is liable to disciplinary action in accordance with ... By-law 40(2.1)(h), in that the Member has committed ... a breach of sections 100.5(b) and 120.1 of APES 110 ... in circumstances where he failed to impose sufficient safeguards to reduce the advocacy and self-interest threat to an acceptable level in relation to the preliminary review and the cessation of the Member's engagement with Gascoyne Water.*

#### **(a) Preliminary matters**

APES 100 s 100.12 includes the following definitions:

- (a) Self-interest threat - the threat that a financial or other interest will inappropriately influence the Member's judgment or behaviour;

**(Self-Interest Threat); and**

- (c) Advocacy threat - the threat that a Member will promote a client's or employer's position to the point that the Member's objectivity is compromised;

**(Advocacy Threat).**

#### **(b) PCC submissions**

- (i) The PCC submitted that:

- A. the conflicts of interest identified for the purpose of allegations 1(b)(i), (ii) and (iii) (ie that at least two of the Member's Accounting Clients were also members of Gascoyne Water, that the Member lodged a complaint to the Registrar of Co-operatives on behalf of one of the Accounting Clients in relation to Gascoyne Water, and that he acted as auditor for an entity "which has common membership" with Gascoyne Water) also posed both an Advocacy Threat and a Self-Interest Threat;
- B. the Member failed to implement sufficient safeguards to reduce the Advocacy Threat and Self-Interest Threat to an Acceptable Level;
- C. the Member should have considered and applied some of the safeguards referred to in ss 220.3, 220.4 and 220.12-15 of APES 110, including:
  - (1) notifying and obtaining consent from Gascoyne Water in respect of the accounting work the Member's firm undertook for the Accounting Clients and the audit work the Member had previously undertaken for the Audit Clients and CGA;
  - (2) having a member who was not part of the assurance team review the assurance work performed or otherwise advise as necessary;
  - (3) ensuring the ability to discuss ethical issues with Those Charged With Governance of the client;
  - (4) rotating senior assurance team personnel;
  - (5) the use of separate engagement teams, procedures to prevent access to information, secure data filing, clear guidelines for memberships of the engagement team on issues of security and confidentiality, confidentiality agreements signed by employees and partners, and a regular review of the application of safeguards by senior individuals not involved in any of the relevant client engagements;

- D. the safeguards the Member had identified to have been in place were inadequate where:
- (1) the Member worked largely alone on assurance work (except when occasionally assisted by a junior team member);
  - (2) the Member had audited Gascoyne Water for many consecutive years;
  - (3) there was no evidence of safeguards in place at the Member's firm other than those identified by the Member's submissions regarding allegation 1(b)(iv).
- (ii) In making this submission, the PCC particularly referred to the following evidence:
- A. the Member's 19 September 2017 email to the GWC Chair<sup>(12.32)</sup> in which he wrote
- “...If the board has lost confidence in the auditor then by all means seek my resignation. Bear in mind, however, that I was appointed by the growers and I will defend my position to the growers...  
Personally I view the attacks on [the Former External Accountant] as being unwarranted and unjustified based on my knowledge of the issues and events of the past few years. I am fully aware of the current issues, and over many years, and I am not aware of one single action or comment by [the Former External Accountant] that could be construed as not being made with the best interest of growers as his sole motivation...  
I make no accusations against the board or management but I do express grave concerns if these issues are not addressed...  
...I would suggest you need to open up communications and defend the actions of the board...”*
- B. the Member's 22 November 2017 email to the GWC Board and GWAMCO Board<sup>(12.60)</sup> in which he wrote
- “Please confirm whether you intend to recognise myself as auditor and complete the 2017 financial statements and audits.  
If so please provide the information previously requested.  
If you intend to continue with your claim that I have resigned in the middle of an audit, thus following the path of defamation, then I will proceed to enforce my legal rights as auditor and to prepare formal statements to all relevant parties...”*

**(c) Member submissions**

- (i) The Member submitted that:
- A. the application of safeguards only needed to be considered where there was an actual threat to compliance with the fundamental principles and that threat was not at an Acceptable Level;
  - B. the Member was conscious of the fact that the Accounting Clients were also members of Gascoyne Water. However, none of the matters referred to in allegations 1(b)(i), (ii) or (iii) posed any genuine Advocacy Threat or Self-Interest Threat where:
    - (1) the Member had assessed that there was no conflict of interest because Gascoyne Water was a “unique entity” in that it was a “*utility co-operative ... providing water to the same people at the same price and the same volume*” with no return on capital for members who leave;

- (2) accordingly, the Member did not have the capacity to influence the directors or members of Gascoyne Water other than by making recommendations to management through the audit process;
  - (3) similarly, the Accounting Clients did not have the capacity to influence the Member's conduct in light of the structural separation between accounting clients and audit clients adopted by the Member's firm;
  - (4) there was no suggestion that the specific interests of any of the Audit Clients or the Accounting Clients were any different from the general interests of the members of Gascoyne Water;
- C. even if the matters set out at allegations 1(b)(i), (ii) and (iii) posed a Self-Interest Threat or an Advocacy Threat, those threats were of an Acceptable Level. The PCC had failed to identify the safeguards which it said the Member should have applied (at least until the resumption of the hearing on 25 June 2020);
- D. in any event, the Member submitted the following safeguards were in place at the Member's firm in addition to those he referred to in his submissions regarding allegation 1(b)(iv) (see paragraph 3.2.5(b)(i) above):
- (1) Chartered Accountants working at the Member's firm were able to discuss ethics issues with each other;
  - (2) the Member's firm had in place a compliance manual and work papers, and held regular meetings to address issues of concern;
  - (3) multiple staff worked on the Gascoyne Water engagement with the Member;
  - (4) the Former External Accounting Firm reviewed the presentation of the Member's work, and all final decisions in respect of the presentation of the accounts of Gascoyne Water were made by the Former External Accounting Firm and the directors of Gascoyne Water;
  - (5) the Member was provided with the accounts of Gascoyne Water in a zipped up file and the Member did not have access to the Former External Accounting Firm's system so as to be able to make journal entries or changes to the system;
- E. although rotating auditors after a long period of responsibility for the audit of a particular client made good sense, this was not a compulsory requirement and was unnecessary where there were no concerns about changes to the audit pattern or process and the Member had the relevant skills and knowledge.
- (ii) In making this submission, the Member particularly referred to the following evidence:
- A. Statutory Declaration of the Member's Firm Partner dated 22 June 2020<sup>(12.163.2)</sup> in which she declared:
- "...8. [The Member's Firm] currently has approximately 1373 clients. Our client base is broad and ranges from individuals to large family groups as well as trusts, companies and super funds...*
- 12. We have five chartered accountants at [the Member's Firm], being the two partners (including my self and [the Member]), and three staff members. We have a further three staff members who are degree-qualified in accounting, and another one who holds an advanced diploma. In addition, we employ three staff for administrative matters and support.*

13. *[The Member's Firm] accountants (both partners and staff) who work in tax and accounting only work on engagements in these areas. Generally, it is solely [the Member] that works on audit engagements. This has been the case since I joined [the Member's Firm] in 2010.*
14. *It is our firm 's practice that [the Member's]'s audit clients are kept separate to my clients. This has been the case since I joined [the Member's Firm].*
15. *Since I joined [the Member's Firm] it has been my experience that [the Member] generally works on audit engagements by himself. However, when necessary, [the Member] uses support staff independent from the tax and accounting practice areas to maintain this separation.*
16. *Accountants at [the Member's Firm] consult with our Public Practice file when required, which contains our firm's Quality Control Manual. We are currently in the process of preparing an updated Quality Control Manual. This has been the case since I joined [the Member's Firm].*
17. *Partners and staff at [the Member's Firm] undertake mandated Continuing Professional Development training to meet our ongoing CPD requirements. We have regular staff meetings and checkins for training purposes..."*

- B. the Member's Written Statement<sup>(12.151)</sup> (see paragraph 3.2.5(b)(iii)A above);
- C. the Member's Audit Checklist<sup>(12.151.4)</sup> (see paragraph 3.2.5(b)(iii)B above).

**(d) Tribunal decision and reasons**

Having considered the parties' submissions and the available evidence, the Tribunal determined that this allegation was established in relation to the cessation of the Member's engagement with Gascoyne Water but not in relation to the Preliminary Review because:

- (i) forwarding to the Former External Accountant the 26 October Email to the GWC Chair, although it contained nothing confidential in nature, illustrated a failure by the Member to impose sufficient, or in fact any, safeguards to reduce the Advocacy Threat to an Acceptable Level. The Member was entitled to raise the issue of the cessation of his engagement in robust terms with members of the Board, as he did for example in his emails of 20 October<sup>(12.50)</sup> and 25 October 2017<sup>(12.53)</sup>, but forwarding this email to the Former External Accountant was evidence of the Member seeking to promote his own or his firm's position to the point that his objectivity was compromised. An example of this realisation of the Advocacy Threat and the compromise of the Member's objectivity is the statement in the 26 October Email to the GWC Chair that "[y]ou as directors are a collective disgrace that you seek to impugn peoples reputations in your own self-interest";
- (ii) the 8 December Email to Members where the Member wrote "[t]he directors twisted my words from a personal email 10 days prior written to the then Chairman into a resignation" also illustrated that the Member's objectivity had been compromised due to a failure by him to impose sufficient, or in fact any, safeguards to reduce the Advocacy Threat to an Acceptable Level;
- (iii) the Tribunal considered that where a member practices on his own account or in partnership, the expression "employer's position" in the definition of Advocacy Threat includes his own or his firm's position;
- (iv) these emails also constituted a failure by him to impose sufficient safeguards to reduce the Self-Interest Threat to an Acceptable Level. When raising the issue of the cessation of his employment with the Former External Accountant and the members of Gascoyne Water, the Member failed to balance his responsibilities to his client with his concern for his own

reputation as a Chartered Accountant. The Tribunal considered that the Member's concern for his reputation was a concern of the kind contemplated by the expression "other interest" in the definition of Self-Interest Threat;

- (v) in relation to the Preliminary Review, the Tribunal could not be satisfied that the evidence supported a finding that the Member's conduct involved the promotion of his firm's client, Client 2. Rather, the evidence supported the view that the Member was responding directly to the email he had received from an unsuccessful candidate in the GWC General Manager recruitment process (the **Unsuccessful Candidate**). Thus there could be no breach of the Advocacy Threat in relation to this matter (however the Tribunal did find that the Member's conduct in relation to the Preliminary Review constituted a breach of the general objectivity standard - see the Tribunal's reasons in relation to allegation 1(d)(i) (paragraph 3.4.1(c) below));
- (vi) in relation to the Preliminary Review, the Tribunal could also not be satisfied that there was any evidence of any financial or other interest influencing the Member's judgment or behaviour to constitute a failure to address the Self-Interest Threat;
- (vii) the Tribunal noted the PCC's submissions and the Member's submissions in response, focussed on the Member's purported conflicts of interest and the need to impose safeguards in relation to those purported conflicts of interest, which the Tribunal had considered in relation to allegation 1(b) above. However the Tribunal also noted that paragraph 1(c) of the NDA referred only to the Member's conduct in relation to the Preliminary Review and the cessation of the Member's engagement with Gascoyne Water. The Tribunal did not accept that the Member's purported conflicts of interest referred in to in the PCC's submissions above posed either an Advocacy Threat or a Self-Interest Threat. Accordingly in relation to the Member's clients, no additional safeguards for those threats were required. The Tribunal also noted that the Member's purported conflict of interest was not specifically referred to by the PCC in allegation 1(c) of the NDA in any event.

### 3.4 **ALLEGATION 1(d)**

*It [was] alleged that ... the Member is liable to disciplinary action in accordance with ... By-law 40(2.1)(h), in that the Member has committed ... a breach of sections 100.5(b), 120.1, 120.2, 290.161, 290.165 and 290.168 of APES 110 ... in circumstances where he (or his practice):*

- (i) proposed for resolution of the matters the subject of the Member's "preliminary review" by adjudication of those matters at an informal meeting between the board of GWC and other parties rather than by reporting these matters directly to the Registrar of Co-Operatives;*
- (ii) prepared the accounts for Gascoyne Water and then audited those accounts without evaluating the self-review threat and applying safeguards to eliminate the threat or reduce it to an Acceptable Level; and*
- (iii) communicated with an unsuccessful candidate for a management position at Gascoyne Water and an individual who had indicated that they may wish to bring legal proceedings against Gascoyne Water.*

#### **3.4.1 Whether the Member proposed for resolution of the matters the subject of the Preliminary Review by adjudication of those matters at an informal meeting between the board of GWC and other parties rather than by reporting these matters directly to the Registrar of Co-operatives (allegation 1(d)(i))**

##### **(a) PCC submissions**

(i) The PCC submitted that:

- A. the Member issued the Preliminary Review<sup>(12.39)</sup> following investigation of various complaints brought to his attention by members of Gascoyne Water. The Preliminary Review set out the Member's view of issues that required further consideration by the directors of Gascoyne Water;
- B. the Member sent numerous emails to the GWC Chair proposing an informal meeting of directors of Gascoyne Water and other parties to discuss the issues, including:
  - (1) email dated 8 September 2017<sup>(12.27)</sup> that stated:

*"...If practical I would like to meet with perhaps yourself and [the GWAMCO Chair/Client] informally in Carnarvon to discuss. I see no need to meet with the full board as this is a preliminary review of issues ... I think it is in yours and [the GWAMCO Chair/Client]'s interest that I bring [the Former External Accountant] with me as you have only recently come onto the board ... Please note that I have no social association with [the Former External Accountant]. My association is solely as auditor of many of [the Former External Accounting Firm's] clients. In the absence of a meeting I will address my concerns more formally to the board. Please let me know if a meeting of this nature is possible ..."*

- (2) email dated 19 September 2017<sup>(12.32)</sup> that stated:

*"...I agree that a meeting is required. The exact form of this meeting and who attends should be considered further.*

*It appears the board has made the decision to only speak to me in a formal minuted and possibly recorded board meeting...*

*I spoke with [the Unsuccessful Candidate] and it appears he has a very strong case in suggesting GWC intervened in the recruitment process...*

*I make no accusations against the board or management but I do express grave concerns if these issues are not addressed ...*

*I suggest the optimum solution to address these issues without publically damaging perceptions of the co-operative is an informal meeting where all can have their say objectively. If you are unwilling to have an informal meeting, then the AGM may end up being the forum for these discussions. That would be damaging ...”*

(3) the Preliminary Review<sup>(12.39)</sup> which stated:

*“...It is now up to the board to react to these perceptions and allay the concerns of members. This may well be best achieved in an informal and open discussion with members rather than at the AGM.*

*[GWC Chair] I provide this for information purposes only and I do not expect a formal response. I would hope you take these comments on board in the spirit intended and act accordingly ...”*

(together, the **Invitation Emails**);

- C. the Invitation Emails referred to the strength of a legal claim the Unsuccessful Candidate might have against Gascoyne Water regarding the GWC General Manager recruitment process, and made serious allegations regarding the motivations of certain board directors;
- D. the Invitation Emails contained a “veiled threat” by the Member as to the next steps he would take if the directors of Gascoyne Water did not take action to the Member’s satisfaction or the satisfaction of the Member Firm’s Accounting Client (Client 2). The Member’s intention was to “leverage the threat to go public to force the board to act in accordance with his wishes and with the wishes of his other clients”;
- E. the consequences threatened by the Member included communicating the issues to the members of Gascoyne Water, discussing the issues at the AGM and embarrassing the directors and Gascoyne Water in the process;
- F. the Member had attempted to influence the resolution of those issues by the directors of Gascoyne Water by:
  - (1) insisting on informal meetings to “adjudicate” the issues;
  - (2) refusing to attend a formal minuted meeting as was the directors’ preference;
  - (3) sending subsequent emails to the directors of Gascoyne Water on 25 October 2017<sup>(12.53)</sup> and 26 October 2017<sup>(12.55)</sup> setting out “ultimatums” and threatening to disclose information about the issues to the members of Gascoyne Water;
- G. in doing so, the Member attempted to assume management responsibility for an audit client in breach of s 290.161 of APES 110;
- H. the resulting threat to the Fundamental Principle of Objectivity was so significant that no safeguards could reduce those threats to an Acceptable Level;
- I. the appropriate course of conduct would have been for the Member to report the issues directly to the Registrar of Co-operatives.

- (ii) In making this submission, the PCC particularly referred to the following evidence:
- A. the Invitation Emails ((i)B above);
  - B. emails the Member sent which, the PCC submitted, had threatened the disclosures subsequently made in his 8 December Email to Members<sup>(12.69)</sup>:
    - (1) the 26 October Email to the GWC Chair<sup>(12.55)</sup> in which he wrote:
 

*“...I will make it clear to the members amongst other things...  
A statement from me as auditor will be presented at any meeting of members that you choose to make the declaration that I have resigned as auditor, or any other statement that suggests I did not complete my duties as auditor...  
Please confirm the new AGM date. I make it clear now that I will be attending the AGM...”*
    - (2) his 22 November 2017 email sent to the GWC Board and GWAMCO Board<sup>(12.60)</sup> in which he wrote:
 

*“...If you intend to continue with your claim that I have resigned in the middle of an audit, thus following the path of defamation, then I will proceed to enforce my legal rights as auditor and to prepare formal statements to all relevant parties.  
I have legally verified that there is no legal impediment to the auditor giving formal factual statements to any of the following:  
- Members of the Co-operatives  
- Public media  
- Registrar  
- [a WA Legislative Council member]...”*

**(b) Member submissions**

- (i) The Member submitted that:
- A. the Member’s purpose in sending the Invitation Emails had been mischaracterised. Although the Member had proposed an informal meeting to discuss the issues, there was no suggestion that the Member would “adjudicate” the issues (or that he considered that it was his role to do so);
  - B. the Member received multiple emails between June and August 2017 from members of Gascoyne Water raising concerns about, in particular, the probity of the GWC General Manager recruitment process;
  - C. if true, those concerns amounted to potential breaches of the Co-operatives Act relating to directors’ obligations to use care and diligence and good faith, and to refrain from using their position to gain advantage or cause detriment to Gascoyne Water;
  - D. as the auditor of Gascoyne Water, the Member was obliged to comply with the requirements of auditors set out in the Corporations Act as well as the Co-operatives Act. The Corporations Act required the Member to report to the Registrar of Co-operatives upon becoming aware of any circumstances that he had reasonable grounds to suspect amounted to a significant contravention of the Corporations Act or the Co-operatives Act (or otherwise one that could not be dealt with by way of comment in the auditor’s report or raising them with directors of Gascoyne Water);

- E. it was entirely proper for the Member to conduct the Preliminary Review and to report the issues to the directors of Gascoyne Water (which he sufficiently did by communicating with the GWC Chair);
- F. it was also entirely proper for the Member to propose an informal meeting with the relevant parties in order to confirm whether there were reasonable grounds to suspect that such a breach had in fact occurred. The criticism that the Member should have reported the issues to the Registrar of Co-operatives rather than proposed an informal meeting to discuss the issues misunderstood the Member's statutory obligations which did not require him to report to the Registrar of Co-operatives unless reasonable grounds to suspect a breach existed were established;
- G. the Member did not refuse to attend a formal meeting of the board. Rather, his 19 September 2017 email<sup>(12.32)</sup> suggested that "[t]he exact form of this meeting and who attends should be considered further" and noted that "[i]t appears the board has made the decision to only speak to me in a formal minuted and possibly recorded board meeting". The Member's engagement was then purportedly terminated before any meeting (formal or informal) could be arranged;
- H. prior to his purported termination, rather than exhibiting a lack of objectivity or independence, the Member in fact demonstrated caution and independence in attempting to ascertain whether he had reasonable grounds to suspect contraventions of the Co-operatives Act and how best to proceed in relation to concerns he had received from members of Gascoyne Water;
- I. the references to raising the issues for discussion at the AGM were not "veiled threats" but notes of caution to the directors where the Member sought an outcome in the best interests of Gascoyne Water. The recommendations set out in the Invitation Emails fell into the classic situation of an auditor providing advice and recommendations to management, which s 290.161 of APES 110 recognises as permissible conduct;
- J. the Member acknowledged that some of the language he used in the emails he sent to the directors and members of Gascoyne Water was "occasionally intemperate"<sup>(12.154)</sup>, but that this only occurred after the cessation of his audit services. This was due to the mounting pressure on the Member to have the issues addressed, as well as anger at his treatment after the purported termination of his engagement. Neither of those things was evidence of a lack of objectivity or independence while the Member was providing audit services to Gascoyne Water;
- K. the Member's references to the GWC GM as a "mechanic" rather than by his title were merely factual and should not be taken as evidence that the Member had lost objectivity regarding the GWC General Manager recruitment process. The GWC GM's profile on the Gascoyne Water website showed that "*he did own a mechanic business before he undertook that role*"<sup>(12.160[94])</sup>.
- (ii) In making this submission, the Member particularly referred to the following evidence:
- A. emails the Member had received in June to August 2017 "*from members of Gascoyne Water*" raising concerns about, in particular, the probity of the Gascoyne Water General Manager recruitment process, from:
- (1) Client 2 to a GWC non-member director (copied to the Member and GWC Chair) dated 25 June 2017<sup>(12.17)</sup>;
  - (2) a former GWC Chair dated 27 June 2017<sup>(12.19)</sup>;

- (3) Client 2 dated 4 July 2017<sup>(12.21)</sup>;
  - (4) Client 2 to the GWC Chair and GWAMCO Chair/Client (copied to the Member) dated 7 August 2017<sup>(12.22)</sup>;
- B. the Member's 8 September 2017 email to<sup>(12.27)</sup> the GWC Chair in which he wrote:
- "...If practical I would like to meet with perhaps yourself and [the GWAMCO Chair/Client] informally in Carnarvon to discuss. I see no need to meet with the full board as this is a preliminary review of issues..."*
- C. the Member's 19 September 2017 email to<sup>(12.32)</sup> the GWC Chair in which he wrote:
- "...I suggest the optimum solution to address these issues without publically damaging perceptions of the co-operative is an informal meeting where all can have their say objectively...  
In the interim I will continue with the audit. As part of the audit I need to look into the process that was followed in appointing the [GWC GM], due to the controversy that has ensued..."*
- D. undated printout of Gascoyne Water website - staff page<sup>(12.153.11)</sup> which included "[the GWC GM] ... started his own Mechanical business".

**(c) Tribunal decision and reasons**

The Tribunal determined that allegation 1(d)(i) was established except in respect of s 290.161 of APES 110. Having considered each party's submissions and the available evidence, the Tribunal reached this determination because:

- (i) the Tribunal was persuaded by the PCC's submissions that the Invitation Emails constituted an attempt by the Member to reach a resolution of the GWC General Manager recruitment process and not merely an attempt to raise these matters for discussion. The Tribunal considered that the Invitation Emails fell short of "assuming a management responsibility" for the purpose of s 290.161 of APES 110, but regarded the Member's decision to continue requesting informal meetings as inappropriate and a breach of ss 100.5 and 120.1 of APES 110, being a failure to comply with the Fundamental Principle of Objectivity;
- (ii) although the Member was entitled to request an informal meeting in order to clarify certain issues that he was concerned about, it was inappropriate for the Member to continue to insist on an informal meeting, given that the Member perceived these issues to be serious and had indicated they could result in an audit qualification, and that the board indicated a formal meeting would be more acceptable. At all relevant times the Member should have had regard to Auditing Standard ASA 260 *Communication With Those Charged With Governance (ASA 260)*<sup>(12.3)</sup> and pursued alternatives that were more appropriate in the circumstances. In particular, the Member also had the option:
  - A. to discuss his concerns with the Company Secretary and to request that the Company Secretary approach the board to arrange a formal meeting with the full board;
  - B. to issue his draft management letter to the board referring to the serious issues he was seeking to clarify and seek their response to the issue;
  - C. to consider, if the Member considered the response received to A or B was inadequate:
    - (1) taking independent advice on how he should proceed (for example legal advice or advice from the Chartered Accountants Advisory Group);
    - (2) referring to the issue in his audit opinion;

- (3) reporting the issue to the Registrar of Co-operatives;
- (iii) the Tribunal did not accept the Member's submission that the Co-operatives Act did not require him to report to the Registrar of Co-operatives until he had reasonable grounds to suspect a breach as justification for continually recommending, in what the Tribunal considered to be an inappropriately forceful manner, an informal meeting to establish whether there were reasonable grounds necessitating a report to the Registrar of Co-operatives;
- (iv) the Tribunal did not regard the Member's explanation for the language he used in relation to the GWC General Manager recruitment process to be acceptable and specifically did not regard the fact that the language was justified because of his anger at the board's treatment of him in relation to the disputed termination of his audit engagement. The Tribunal regarded this language as not only professionally inappropriate but a failure to meet the general standard of objectivity. Examples of the Member's inappropriate language in these emails are set out below:
- A. the Member's 28 November 2017 email<sup>(12.64)</sup> to the Gascoyne Water incoming auditor in which he wrote:
- "...They appointed a mechanic to the CEO role and pushed aside qualified applicants ...paying a mechanic \$130k plus a car..."*
- B. the Member's 8 December 2017 email<sup>(12.69)</sup> to the members of Gascoyne Water (later copied to the Gascoyne Water incoming auditor) in which he wrote:
- "...This will require a mature board with reputable officeholders of credible diverse skills..."*
- C. the Member's 9 October 2019 email<sup>(12.133)</sup> to "the Registrar of Cooperatives WA and the Attorney General" in which he wrote:
- "...For example, when the deception was pointed out that existing officeholders abused position to exclude highly qualified applicants to the CEO role and appointed a diesel mechanic, the reaction from your staff was **well is he doing a good job now**. It didn't matter that demonstration of a credible process was linked to grant funding, nor that they lied to members and government about the process...  
... Two Chartered Accountants are telling you these are breaches, yet your staff simply dismissed them or refused to investigate..."*
- (v) the Tribunal accepted the PCC's submission that, in his email to the GWC Chair dated 19 September 2017 where the Member stated that "...[the Unsuccessful Candidate] has confirmed he will take legal action in the absence of a satisfactory explanation of why he was removed from the selection process. I do not believe the board can provide a credible explanation of this given his credentials and the sequence of events", the Member had clearly taken a side in support of the Unsuccessful Candidate (see also the Member's statement in the Preliminary Review<sup>(12.39)</sup> "I believe [the Unsuccessful Candidate] has a significant case for discrimination");
- (vi) the Tribunal also accepted that the emails referred to below demonstrated a failure to meet the general standard of objectivity, as the Member had threatened to disclose the matters set out in the Preliminary Review to members of Gascoyne Water, the media and to a member of parliament:

A. email from Member to Gascoyne Water dated 22 November 2017<sup>(12.60)</sup>:

*"I have legally verified that there is no legal impediment to the auditor giving formal factual statements to any of the following: - Members of the Co-operatives - Public media - Registrar - [a WA Legislative Council member]"*

B. email from Member to Gascoyne Water dated 29 November 2017<sup>(12.65)</sup>:

*"This is the last chance to recognise myself as auditor and complete the 2017 audit before I take this dispute to the next level. Please acknowledge I am still the auditor by close of business Friday 29 November. If the response is absent or in the negative, then I will respond to the ABC's request for an interview as a first step"*

(vii) additionally, although not referred to specifically in relation to allegation 1(d)(i) in the NDA, the Tribunal regarded the Member's conduct in relation to his communications with the incoming auditor to not only be unprofessional but also a failure to meet the general standard of objectivity. For example the Member's emails to the Gascoyne Water incoming auditor sent:

A. 28 November 2017<sup>(12.64)</sup> which included:

*"...There is a big pot of money in GWC that seems to attract bad behaviour..."*

*As a fellow Chartered Accountant I must warn you that this is about to become a media circus as the ABC are investigating along with the [Registrar of Co-operatives], and the [Former External Accountant] and I are arranging further direct contact with [a WA Legislative Council member] on these matters..."*

B. 11 January 2018<sup>(12.74)</sup> which included:

*"...So to be clear:*

*The boards are hoping that by paying me, an obligation they could never have avoided, that I will then give ethical clearance..."*

***Please note I will only give ethical clearance if the directors acknowledge that they terminated my services...***

*As previous stated you are welcome to the audit in 2018 with member approval, but I will not have my reputation damaged by their illegal actions with respect to the audit of 2017.*

*You must ask the question why they would pay me for the audit only to have it re audited and pay again? I still am at a loss how they can possibly explain that to members..."*

(viii) the Tribunal did not regard the Member's general conduct in relation to the Preliminary Review (including the sending of the Invitation Emails) as the Member involving himself in the management and governance of Gascoyne Water and therefore it did not amount to a breach of s 290.161 of APES 110.

**3.4.2 Whether the Member prepared the accounts for Gascoyne Water and then audited those accounts without evaluating the self-review threat and applying safeguards to eliminate the threat or reduce it to an Acceptable Level (allegation 1(d)(ii))**

**(a) Preliminary matter**

APES 100 s 100.12 includes the following definition:

- (b) Self-review threat - the threat that a Member will not appropriately evaluate the results of a previous judgement made or service performed by the Member, or by another individual within the Member's Firm or employing organisation, on which the Member will rely when forming a judgement as part of providing a current service;

**(Self-Review Threat).**

**(b) PCC submissions**

- (i) The PCC referred to ss 290.165 and 290.168 of APES 110 and submitted that:
- A. in breach of s 290.165, the Member had failed to manage the Self-Review Threat created by the Member's involvement in the preparation of the accounts for Gascoyne Water, which he subsequently audited;
  - B. in his Preliminary Review the Member stated "*...I am currently finalising the financial statements for review...*";
  - C. the Gascoyne Water co-operatives were public interest entities for the purpose of APES 110, and as such the Member was not permitted to provide even "routine" or "mechanical" services to a public interest entity in relation to the preparation of accounting records while Gascoyne Water remained the Member's audit client;
  - D. the Member had failed to appreciate the Self-Review Threat and apply any adequate safeguards to eliminate the threat or reduce it to an Acceptable Level. The fact that the Former External Accounting Firm was asked to review the reformatted accounts could not be considered a safeguard where the Member would ultimately be reviewing the same decisions for the purpose of the audit.
- (ii) In making this submission, the PCC particularly referred to the following evidence:
- A. the Member's 10 October 2017 email to the GWC GM and Gascoyne Water Secretary in which the Member stated:
 

*"...I am currently finalising the financial statements for review but I was suffering from the flu most of last week. I am aiming now to have drafts for review by the end of the week.*

*...I need your side of the accounts to integrate.*

*At this stage I see the only changes to the numbers in the Zero accounts at 30/6/17 to be the adoption of tax effect accounting, cash flows and consolidation entries.*

*I will get them to you ASAP"*
  - B. the Preliminary Review (also sent 10 October 2017) in which the Member stated to the GWC Chair "*...I am currently finalising the financial statements for review but I was suffering from the flu most of last week. I am aiming now to have drafts for review by the end of the week*";
  - C. the GWC GM's emails sent 20 October 2017 to the Former External Accounting Firm<sup>(12.48)(12.49)</sup> requesting:

*“(a) an income and expenditure statement that sets out appropriately classified individual sources of income and individual expenses ...  
 (b) a balance sheet ...  
 (c) a statement of changes in equity  
 (d) a cash flow statement”*

and

*“...Please do not communicate with [the Member] any further on matters regarding the GWC and GWAMCO...”*

and the response from the Former External Accounting Firm to the GWC GM on 20 October 2017<sup>(12.49)</sup>:

*“...I won't communicate with Noel ... I am now not sure how you will get the financials per below then. They are not prepared here, they are prepared by the auditor. We just give the auditor access to the Xero file and prepare working papers and support for the balances. All of the requested financial statements (below) are prepared by the auditor”*

- D. its cross-examination of the Principal of the Former External Accounting Firm on 28 May 2020<sup>(12.160)</sup> where, the PCC submitted, the witness acknowledged that the Member “did much more work than formatting the accounts”:

*“Q. ...I suggest there's a bit more work in it than that, isn't there?”*

*A. Well, he obviously checks any, you know, like accruals that we might not have thought of, so he does - he doesn't just get them and put it into a format, he checks what we've done and sees if anything further is required or something we have missed. So, he doesn't just take it obviously and put it straight into that format. He obviously does his procedures” (page 78 [7]-[15]).*

**(c) Member submissions**

- (i) The Member submitted that:

- A. he strongly rejected the allegation that he had prepared the accounts for Gascoyne Water, or made any changes to the accounts prepared by the Former External Accounting Firm. The PCC had misunderstood the statements made in correspondence from the Former External Accounting Firm to Gascoyne Water;
- B. he merely reformatted the accounts prepared by the Former External Accounting Firm in statutory form using software that was available to the Member's firm (but not to the Former External Accounting Firm). At times, this exercise involved selecting draft or proposed accounting policies from options available in the formatting software, which was necessary because there were no pro forma statutory accounts for a co-operative. However, the Member requested the Former External Accounting Firm confirm whether the correct selections had been made<sup>(12.44)</sup>;
- C. the Tribunal should have regard to:
- (1) the statutory declaration of the Principal of the Former External Accounting Firm dated 27 May 2020<sup>(12.152)</sup>, which stated that the Former External Accounting Firm prepared the accounts rather than the Member; and
  - (2) the 2017 statutory financial reports and the Former External Accounting Firm's working papers in respect of the 2016 and 2017 accounts provided by the Member<sup>(12.163)</sup> in response to the Tribunal's written request for further information dated 1 July 2020, which showed the extensive amounts of work

completed by the Former External Accounting Firm in relation to preparation of the 2017 accounts for Gascoyne Water;

- D. using software to reformat accounts prepared by the Former External Accounting Firm into statutory form did not pose a Self-Review Threat. The Member did not review the accounts himself when placing them in statutory form, and submitted the reformatted accounts back to both the Former External Accounting Firm and to Gascoyne Water to review and approve;
- E. accordingly no safeguards were needed to address a non-existent Self-Review Threat. In any event, the reformatting of the statutory accounts was reviewed by the Former External Accounting Firm. If at the time of undertaking his audit, the Member had not agreed with the final form or content of those statutory accounts once they had been reviewed by the Former External Accounting Firm, he would have provided an adverse audit opinion or a qualified audit report.
- (ii) In making this submission, the Member particularly referred to the following evidence:
- A. the Statutory Declaration of the Principal of the Former External Accounting Firm made on 27 May 2020<sup>(12.152)</sup> in which he declared:
- “...12. We asked [the Member’s Firm] to assist in formatting the accounts from our general profit and loss or balance sheet format into the statutory format required for audit and AGM purposes, as [the Member’s Firm] had a software program available to do this.*
- 13. [The Member’s Firm] was given access by [the Former External Accounting Firm] to the Xero system that [the Former External Accounting Firm] used to complete the GWC and GWAMCO accounts in order to put them into statutory form. [The Member’s Firm] did not prepare the unaudited accounts or make any changes in Xero to the accounts prepared by [the Former External Accounting Firm]...”*
- B. the Former External Accounting Firm’s 2016 and 2017 working papers <sup>(12.163.3.4)</sup> which, the Member submitted, illustrated:
- (1) *“from the volume of this material alone and just a quick flick through it, that it’s obvious ... that it was [the Former External Accountant] that prepared the accounts”*
- (2) in their engagement letter that they saw themselves engaged to prepare the accounts, not the Member:
- “...The primary assignment is that using the information supplied by you, we will use our professional skills to compile annual financial statements and an income tax return for the period ended 30 June 2016...*
- We will provide a compilation report with all financial statements that include a profit and loss report...*
- We will not audit review or otherwise attempt to verify...”*
- (3) they had prepared a profit and loss and a balance sheet and a ledger.

**(d) Tribunal decision and reasons**

Having considered the parties' submissions and the available evidence, the Tribunal determined that allegation 1(d)(ii) was established. The Tribunal reached this determination because the Tribunal was not satisfied there was sufficient evidence that the Member evaluated or considered the Self-Review Threat, let alone to reduce it to an Acceptable Level, given:

- (i) there is no standard model for statutory financial statements for co-operatives and the Gascoyne Water statements were relatively complex. The Member was therefore required to apply, and did apply, professional judgment in converting the 2017 management accounts into statutory format by selecting draft notes from two separate financial statements models from the "XYZ Model Financial Accounts Generator";
- (ii) the emails the Member sent on 18 October 2017 to the Gascoyne Water Company Secretary, copied to the Former External Accounting Firm<sup>(12.43)(12.44)</sup> *"Please find attached draft accounts for your review..."* did not constitute a safeguard which sufficiently reduced the Self-Review Threat to an Acceptable Level;
- (iii) the Tribunal did not consider that the Member's reference to both the Former External Accounting Firm and Gascoyne Water as reviewers of his work represented adequate safeguards to reduce the Self-Review Threat;
- (iv) the 6 December 2017 email from the Former External Accounting Firm to the Gascoyne Water incoming accountant<sup>(12.67)</sup> in which the Principal of the Former External Accounting Firm wrote:

*"...we can't provide the deferred tax workings, these are held by [the Member]..."*

further suggested to the Tribunal that the Member was performing work in relation to the preparation of the accounts and then auditing that work (ie self-reviewing work) and the Tribunal could not be comfortably satisfied that the Member's work, at least in respect of the "deferred tax workings" was being reviewed by the Former External Accounting Firm or Gascoyne Water where neither of those parties had a copy of the workings;

- (v) the Tribunal noted that the Member submitted copies of the Former External Accounting Firm's working papers and invoices, together with the Member's own invoices, in support of his submission that the Formal External Accounting Firm was responsible for preparing the accounts of Gascoyne Water rather than the Member. He also gave evidence to this effect under cross-examination, as did the Principal of the Former External Accounting Firm. While the Tribunal accepted that the material provided showed that the Former External Accounting Firm was responsible for compilation of the management accounts for Gascoyne Water, this material did not satisfy the Tribunal that the Member was not responsible for the preparation of the statutory accounts such that a Self-Review Threat was created in respect of the matters referred to in sub-paragraphs (i)-(iv) above.

**3.4.3 Whether the Member communicated with an unsuccessful candidate for a management position at Gascoyne Water, an individual who had indicated that they may wish to bring legal proceedings against Gascoyne Water (allegation 1(d)(iii))**

**(a) Preliminary matter**

The PCC qualified its allegation noting that the word "and" was a typographical error and should be replaced with a comma. The "unsuccessful candidate" was the same person as the "individual who had indicated that they may wish to bring legal proceedings against Gascoyne Water".

**(b) PCC submissions**

- (i) The PCC submitted that:
- A. the Preliminary Review<sup>(12.39)</sup> included the Member's consideration of complaints received from one of the Member's Accounting Clients, Client 2, about the probity of the GWC General Manager recruitment process;
  - B. the Member had communicated about the GWC General Manager recruitment process with the Unsuccessful Candidate who had indicated he wished to bring legal proceedings against Gascoyne Water, in particular:
    - (1) the Member had received an email from the Unsuccessful Candidate on 4 September 2017<sup>(12.24)</sup> which stated he was considering "raising a legal discrimination complaint";
    - (2) the Member then wrote to the GWC Chair on 19 September 2017<sup>(12.32)</sup> stating it appeared that the Unsuccessful Candidate had "a very strong case";
  - C. the tone and introductory paragraphs of the 4 September 2017 email suggested that previous conversations between the Member and the Unsuccessful Candidate had occurred;
  - D. contrary to the assertion in the Member's 19 September 2017 email that he had spoken with the Unsuccessful Candidate, the PCC acknowledged that the Unsuccessful Candidate and the Member had subsequently denied speaking with each other. However, the Tribunal should infer from the informal tone and greeting of the 4 September 2017 email that it was highly likely that there had been additional communications between the Member and the Unsuccessful Candidate beyond that email;
  - E. the Member was aware that the Unsuccessful Candidate was friends with Client 2<sup>(12.17)</sup>, who was both a member of Gascoyne Water and an Accounting Client of the Member's Firm.
- (ii) In making this submission, the PCC particularly referred to the following evidence:
- A. email from Client 2 to a GWC non-member director sent 25 June 2017, copied to the GWC Chair and the Member<sup>(12.17)</sup>, in which Client 2 wrote:
 

*"Subject: GM employment*  
*...I have a few more questions which I hope you can help me with.*  
*Before I do I want to declare an interest as I'm friends with [the Unsuccessful Candidate]..."*
  - B. email from the Unsuccessful Candidate to the Member dated 4 September 2017<sup>(12.24)</sup> in which the Unsuccessful Candidate wrote:
 

*"Hey Noel I don't have my diary with me at the moment but this is the rough version..."*  
*...I am still considering raising a legal discrimination complaint as I believe the process was a 'sham' I would not have minded if the successful applicant was more qualified and/or better suited to the position's criteria however I believe GWC think I will not lodge a complaint for fear of repercussions from my current employer.*  
*I trust this assists as I believe GWC members are being grossly misled..."*

- C. email from the Member to the GWC Chair on 19 September 2017<sup>(12.32)</sup> in which he wrote:

*“...I spoke with [the Unsuccessful Candidate] and it appears he has a very strong case in suggesting GWC intervened in the recruitment process...”*

- D. its cross-examination of the Member on 28 May 2020<sup>(12.160)</sup> where, the PCC submitted, the Member confirmed he knew that Client 2 and the Unsuccessful Candidate were friends:

*“Q. This is in June 2017. This is just before you had started the audit and you presumably started conducting what appears to be quite an extensive investigation of all the circumstances. You did know at the time [Client 2] was a friend of [the Unsuccessful Candidate], didn't you?”*

*A. I did, I guess, know at that time”.*

**(c) Member submissions**

- (i) The Member submitted that:

- A. he did not communicate with the Unsuccessful Candidate except in the sense that he received the 4 September 2017 email from the Unsuccessful Candidate<sup>(12.24)</sup>. He did not instigate that, or any other, contact with the Unsuccessful Candidate and denied speaking with the Unsuccessful Candidate prior to (as well as after) receiving the 4 September 2017 email. The Member's use of the word “spoke” in his 19 September 2017 email to the GWC Chair<sup>(12.32)</sup> was intended to refer to the 4 September 2017 email the Member received from the Unsuccessful Candidate rather than any other communications between himself and the Unsuccessful Candidate;
- B. he had never had a professional or personal relationship with the Unsuccessful Candidate. The Tribunal should reject any inference that the tone and introductory paragraphs of the 4 September 2017 email were proof of familiarity or any pre-existing relationship between the Member and the Unsuccessful Candidate. The Member understood the introductory paragraphs referred to a conversation that the Unsuccessful Candidate had been having with the Former External Accountant, who had encouraged the Unsuccessful Candidate to contact the Member;
- C. the Member's denial of any relationship or communications with the Unsuccessful Candidate other than the 4 September 2017 email has been corroborated by an open letter from the Unsuccessful Candidate dated 24 October 2018<sup>(12.95)</sup> in which the Unsuccessful Candidate stated that apart from brief conversations at GWC's Annual General Meeting in 2013, he had never met with or contacted the Member (including in respect of the GWC General Manager recruitment process);
- D. he understood that Client 2 was concerned about the GWC General Manager recruitment process but could not speak to the nature of Client 2's relationship with the Unsuccessful Candidate. The Member himself had no relationship with Client 2 prior to Client 2 becoming an Accounting Client of the Member's Firm. He could not recollect if he knew at the time whether Client 2 and the Unsuccessful Candidate were “friends”.

- (ii) In making this submission, the Member particularly referred to the following evidence:

- A. the Unsuccessful Candidate's open letter dated 24 October 2018<sup>(12.95)</sup> in which the Unsuccessful Candidate wrote:

*“...It has now come to my attention that according to GWC I have an apparent close relationship with [the Member]. In clarification of this statement I make the following points for consideration:*

- *I first met [the Member] at the GWC Annual General Meeting (AGM) of 2013 if memory serves – a meeting that I was invited to by GWC and subsequently attended*
- *We briefly spoke at that meeting for about two minutes after being introduced*
- *I attended a second AGM for GWC the following year (I believe) and although I assume [the Member] attended, I cannot recall him being present and did not speak to him then or any time prior to this post our first meeting*
- *I have never met with [the Member] post our first meeting and do not to this day even know where his office is; assumedly in Western Australia*
- *I have never contacted [the Member] in relation to GWC’s recruitment process for a General Manager/CEO and at the time was completely unaware (sic) that the auditor could do anything about a cooperative’s recruitment process – I was only made aware of this after being advised by my then Director that this was the case and that [the GWC GM] had accused me of acting in a conflict of interest and was further accusing me of contacting the auditor to investigate the recruitment process...”*

- B. the Member’s 9 August 2019 email<sup>(12.119)</sup> to the PCC in which he responded to questions raised in the course of their investigation:

*“(g) Why did the Member canvas [the Unsuccessful Candidate]? If as a result of information from a third party, please identify the party, that party’s relationship with the Member and the information conveyed. I did not canvas [the Unsuccessful Candidate]. He approached me ... I had no interest in him...”*

- C. the Member’s Written Statement<sup>(12.151)</sup> in which he stated at [6] *“I did not solicit”* the 4 September 2017 email from the Unsuccessful Candidate<sup>(12.24)</sup> and at [13] stated:

*“...At the time I received that email, I had never spoken with [the Unsuccessful Candidate], but understood from [the Former External Accountant], the Co-operatives’ external accountant at the time, that he had applied for the position of CEO/General Manager of GWC and was later informed by [the Former External Accountant] that he had asked [the Unsuccessful Candidate] to explain his position to me”.*

#### **(d) Tribunal decision and reasons**

The Tribunal determined, having considered the parties’ submissions and the available evidence, that allegation 1(d) (iii) was not established because:

- (i) it could not be satisfied there was sufficient evidence to establish that:
- A. the Member had initiated the 4 September 2017 email communication with the Unsuccessful Candidate and did not just receive the email from that individual;
  - B. the Member had a professional or personal relationship with the Unsuccessful Candidate; or
  - C. the Unsuccessful Candidate had ever met with or contacted the Member in respect of the GWC General Manager recruitment process;

- (ii) the Member's evidence at the hearing satisfied the Tribunal that the statements in the email from the Member to the GWC Chair dated 19 September 2017<sup>(12.32)</sup> did not constitute evidence of other contact between the Member and the unsuccessful candidate;
- (iii) there was no other evidence provided by the PCC to support the allegation.

### 3.5 **ALLEGATION 1(e)**

*It [was] alleged that ... the Member is liable to disciplinary action in accordance with ... By-law 40(2.1)(h), in that the Member has committed ... a breach of section 3.1 of APES 305 ... in circumstances where he failed to provide terms of engagement to Gascoyne Water.*

#### **(a) Preliminary matter**

APES 305<sup>(12.2)</sup> provides:

3. Terms of Engagement for Professional Services
  - 3.1 A Member in Public Practice shall document and communicate to the Client the Terms of Engagement.

#### **(b) Tribunal decision and reasons**

- (i) The Member admitted this allegation at the commencement of the hearing. The Member submitted that although it was his practice to issue an engagement letter to his clients (and that he did in fact issue an engagement letter to Gascoyne Water in 2009) he conceded that he could not locate a copy of that engagement letter. The Tribunal noted the Member had submitted that a copy of the engagement letter was kept on an electronic file that was lost due to a computer virus attack in 2016.
- (ii) The Tribunal noted the reasons provided by the Member for being unable to produce the 2009 engagement letter, but was of the opinion that it would be out of date even if it had been located given that:
  - A. engagement letters should be reissued regularly;
  - B. there had been significant changes in both auditing standards and accounting standards during the period 2009 to 2016 and new engagement letters should have been issued at those times;
  - C. the relevant co-operatives legislation changed on 1 January 2017 and an updated letter should have been issued at that time for that reason also.
- (iii) Accordingly, the Tribunal found that allegation 1(e) was established.

**4. If any part of allegation 1 was established, did those acts, omissions or defaults of the Member: breach sections 100.5(e) and 150.1 of APES 110, in breach of By-Law 40(2.1)(h)? (allegation 2) or bring or potentially bring discredit on him, CA ANZ or the profession of accountancy, in breach of By-Law 40(2.1)(k)? (allegation 3)**

**4.1 Preliminary matter**

APES 110 s 100.5 sets out fundamental principles with which members shall comply, including:

- (e) *Professional behaviour* – to comply with relevant laws and regulations and avoid any [action/conduct] that discredits the profession

(the **Fundamental Principle of Professional Behaviour**).

**4.2 PCC submissions**

In relation to allegations 2 and 3, the PCC submitted that where the Tribunal established breach in respect of allegation 1, it followed that the Member had breached By-Law 40(2.1)(h), which required the Member to comply with APES 110. The same conduct that constituted a breach of allegation 1 and 2 had also brought discredit to the Member, CA ANZ and the profession of accountancy in breach of ss 100.5(e) and 150.1 of APES 110, By-Law 40(2.1)(h) and By-Law 40(2.1)(k).

**4.3 Member submissions**

In relation to allegations 2 and 3, the Member submitted that:

- (a) where the Member had admitted allegation 1(e), a simple failure to provide engagement terms is not sufficient to attract “opprobrium” or to be discreditable, incompetent or lacking in professionalism or diligence;
- (b) no finding of breach in relation to the remaining allegations in paragraph 1 of the NDA should be found to be established, in which case the Member could not be held to have discredited the profession.

**4.4 Tribunal decision and reasons**

- (a) In relation to allegation 2, the Tribunal had regard to the parties’ submissions and the available evidence and ultimately determined the allegation was established because a breach of APES standards constitutes a breach of By-Law 40(2.1)(h) and the Tribunal had found that the Member breached provisions of:
  - (i) APES 110 in relation to allegations 1(a), (b), (c) and (d); and
  - (ii) APES 305 in relation to allegation 1(e).
- (b) In relation to allegation 3, the Tribunal determined that the allegation was established. In reaching this determination the Tribunal had regard to:
  - (i) the findings in allegation 1, taken together, were serious;
  - (ii) the fact that the Member had threatened to involve the media and a member of parliament in relation to the cessation of his employment and the Preliminary Review;
  - (iii) the Member’s conduct had received publicity;

- (iv) the Member is the founder and senior partner of the Member's Firm which, on the Member's evidence, has two partners and 12 staff, six of which are Chartered Accountants. The Member should lead his staff by example;
- (v) that at all relevant times the Member was a member of CA ANZ. The established breaches of the By-Laws bring discredit to the Member, CA ANZ and the profession of accountancy.

**5. If any part of allegation 1 was established, did those acts, omissions or defaults of the Member amount to a failure by him to observe a proper standard of professional care, competence or diligence, in breach of By-Law 40(2.1)(a)? (allegation 4)**

**5.1 PCC submissions**

The PCC submitted that each instance of the Member's conduct referred to in allegation 1 amounted to a failure by the Member to observe a proper standard of professional care, competence or diligence in the course of carrying out his professional duties and obligations.

**5.2 Member submissions**

The Member submitted that:

- (a) if the Tribunal was not satisfied that the allegations of breach in paragraph 1 of the NDA were established, then it followed that this allegation must fail. By contrast, a finding that some or all of the allegations of breach in paragraph 1 of the NDA were established did not automatically mean that there was a breach of By-Law 40(2.1)(a). There must be conduct that was discreditable, incompetent or lacking in professionalism or diligence sustained by the breaches established in paragraph 1 of the NDA;
- (b) the only allegation admitted by the Member - a simple failure to provide engagement terms - alone was not enough to constitute a breach of By-Law 40(2.1)(a);
- (c) even if the other allegations against the Member were to be established, his conduct when viewed in context, could not be described as lacking in professional care or competence or diligence. The Member was not negligent and was not accused of not doing his job properly, going outside the scope of the audit or incompetence in the way that he prepared the audited accounts or provided the audit documents.

**5.3 Tribunal decision and reasons**

- (a) The By-Laws state at 40(2.1):

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

(a) has failed to observe a proper standard of professional care, skill, competence or diligence in the course of carrying out that Member's professional duties and obligations;

...

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

- (b) The Tribunal had regard to the parties' submissions and the available evidence, and determined that the allegation was established because the matters the Tribunal had found established in allegations 1(a), (b), (c), (d) and (e) were matters which related directly to the Member's professional care and diligence and in which he had failed to observe a proper standard in relation to his professional duties and obligations. As noted above, the Tribunal regarded the breaches established in allegation 1, taken together, were serious matters and accordingly constitute a failure by the Member to observe the proper standards of

professional care and diligence in the course of carrying out his professional duties and obligations. In particular the Member:

- (i) did not recognise or comprehend all the confidentiality, conflicts, advocacy, self-interest and objectivity threats set out in the various APES 110 sections that might have arisen in relation to the cessation of his employment and the Preliminary Review;
  - (ii) failed to identify or implement sufficient, or in fact any, safeguards in relation to those threats;
  - (iii) provided no evidence that he had regularly, or recently in the engagement period, updated his client engagement letter.
- (c) The evidence did not satisfy the Tribunal that the Member's conduct revealed a lack of competence by the Member in the course of carrying out his professional duties and obligations except in relation to his understanding of certain auditing standards with respect to client communication and engagement.

## 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 and the Member agreed that:
- (i) the Member held a position of trust and seniority as a partner of his firm and that he was solely responsible for the relevant conduct in respect of the established breaches as he was the only senior audit professional within his firm;
  - (ii) it was appropriate to impose sanctions against the Member to the extent that he was found to have breached his obligations in order to maintain public confidence in the profession and proper professional standards;
  - (iii) the appropriate sanctions in light of the Tribunal's finding that breaches had been established were to:
    - (1) censure the Member;
    - (2) fine the Member an amount of \$5,000;
    - (3) require the Member and his firm to have a quality review under the CA ANZ Regulations, at the Member's expense, with emphasis on client acceptance and engagement procedures, management of conflicts of interest and confidentiality, compliance with audit standards, independence and communication with Those Charged with Governance, with the results of the quality review to be made available to the PCC; and
    - (4) require the Member to complete a professional development course at his own expense regarding:
      - A. client acceptance and engagement procedures, management of conflicts of interest and confidentiality; and

- B. compliance with audit standards, independence and communication with Those Charged with Governance; and
  - C. require the Member to provide to CA ANZ within 14 days of completion of the Course such details and information in respect of the Course that CA ANZ may satisfy itself that the Member has completed the Course.
- (iv) except in respect of costs to be paid by the Member, the sanctions proposed by the PCC were proportionate to the gravity of the Member's contraventions as found.
- (d) In support of the sanctions sought, the PCC submitted that the following matters were relevant for the Tribunal to take into account in respect of Regulation 8.11 and the allegations that had been established:
- (i) the Member's conduct in respect of the established allegations was "serious conduct for an accountant" and amounted to a fundamental loss of objectivity, and a failure of the fundamental obligation to maintain confidentiality;
  - (ii) the Complaint had a direct, public and long running impact on Gascoyne Water as the Member's breach of confidentiality resulted in media and parliamentary discussion as well as threats to sue Gascoyne Water for defamation, and otherwise significantly delayed and increased the cost of producing the financial statements for that year;
  - (iii) although there was no evidence the Member has previously engaged in similar conduct, the Member's conduct for the purpose of the established allegations had been extant for at least a year;
  - (iv) as the only senior audit professional at his firm and in recognition of the position of trust and seniority he held as a partner of his firm, the Member was solely responsible and accountable for the relevant conduct;
  - (v) it was an aggravating factor that the conduct appeared to be either deliberate or, if not deliberate, due to the Member's failure to properly understand his fundamental obligations;
  - (vi) it was a mitigating factor that the Member's beliefs as to his obligations, although misguided, appeared to have been genuinely held
  - (vii) the Member breached more than one of the fundamental obligations of an accountant. Public confidence in the profession could only be maintained if a proportionate sanction was imposed to reflect the gravity of the Member's actions;
  - (viii) the proposed sanctions appropriately balanced the interests of each of the Member, the public, and CA ANZ and its other members because:
    - (1) by not imposing a suspension or termination the Member could continue in practice;
    - (2) the sanctions provided a deterrent to other accountants engaging in the same conduct as well as a constructive review of the Member's practice and professional development; and
    - (3) the Member, rather than the other members of CA ANZ, would be required to bear the "not insubstantial" costs incurred by CA ANZ in investigating this matter and in conducting these disciplinary proceedings.

- (e) The Member agreed that the sanctions proposed by the PCC were appropriate but nevertheless submitted:
- (i) the conduct relevant to the established breaches was substantially less serious than the PCC contended, as there was objectively no deliberate wrongdoing or dishonesty on the Member's part so as to have breached, for instance, the fundamental obligation of integrity. The Member was not shown to have been motivated by selfishness or self-interest;
  - (ii) the fact that Gascoyne Water considered the Member's conduct to be significant or serious enough to lodge a complaint with CA ANZ was irrelevant to an objective assessment of the seriousness of the Member's conduct, especially where the focus of the Complaint differed significantly from the established breaches;
  - (iii) to the extent that objectivity and confidentiality transgressions had been established, those breaches arose from "charged", "peculiar and difficult" circumstances. The Member was sorry for and regretted those breaches which resulted from his misunderstanding of his obligations in respect of those matters;
  - (iv) the Tribunal should have regard to the mitigating factor identified by the PCC and treat that mitigating factor as being substantial;
  - (v) there were no aggravating factors in respect of the Member's conduct. The Tribunal should disregard the PCC's contention that the Member's "conduct appeared to be either deliberate or, if not deliberate, due to the Member's failure to properly understand his fundamental obligations". No allegation that the Member's conduct had been deliberate was put to the Member, and the Member denied there was any deliberateness on his part;
  - (vi) the Tribunal should reject the assertion that the Member's conduct resulted in "attendant publicity" and litigation threats for defamation where:
    - (1) the "publicity" referred to by the PCC was aired on 1 November 2017 and could not be said to result from the established breach of confidentiality that was found to be the 8 December Email to Members;
    - (2) there was no evidence that the discussion of matters in the Western Australian Parliament resulted from the 8 December Email to Members;
    - (3) the alleged breach of confidentiality that could relevantly be suggested to have resulted in litigation threats for defamation, being the Member's disclosure of the contents of a conversation with the GWAMCO Chair/Client to the Former External Accountant, was not ultimately established;
  - (vii) the Tribunal should disregard the assertion that delays in completing the financial statements resulted from the Member's conduct (ie the cessation of the Member's services, the surrounding circumstances of which remained in dispute). It had not been established that the delay in completing the financial statements was a consequence of the established breaches;
  - (viii) the Tribunal should accept that the Member's conduct in respect of the allegations had not occurred previously. The PCC has not provided any evidence to the contrary and the suggestion "that some of the issues surrounding the relevant conduct had been extant for at least a year and possibly longer" should be disregarded;

- (ix) the Member had never previously been the subject of any professional complaint in his 25 years of practice;
  - (x) there was no suggestion of any systemic conduct, or any intention to breach relevant obligations, let alone complicity in that regard;
  - (xi) the Member could not be said to have failed to comply with any undertaking or agreement to remedy the conduct as none existed;
  - (xii) deterrence was not a relevant factor and should not be taken into account where there was no suggestion that the Member's conduct was habitual or recurring and no reason to think that the Member would engage in similar conduct again.
- (f) Having considered the parties' submissions and the available evidence, the Tribunal determined that the appropriate sanctions were:
- (i) a censure;
  - (ii) a fine in the amount of \$5,000;
  - (iii) that the Member and the Member's firm, at the Member's expense, submit to a quality review under the CA ANZ Regulations with:
    - (1) particular emphasis on:
      - A. client acceptance and engagement procedures;
      - B. management of conflicts of interest and confidentiality;
      - C. compliance with auditing standards; and
      - D. independence and communication with Those Charged with Governance;
    - (2) the results of the quality review to be made available to the PCC; and
  - (iv) that the Member, at the Member's own expense, complete within 12 months any Australian professional development course or courses (having regard to the Formal CPD criteria in Regulation CR7 *Continuing Professional Development* Schedule 1, 11(a) and (b)(i)-(vi)) that include:
    - (1) client acceptance and engagement procedures;
    - (2) management of conflicts of interest and confidentiality;
    - (3) compliance with auditing standards; and
    - (4) independence and communication with Those Charged with Governance;
 and that the Member provide to CA ANZ within 14 days of completion, confirmation from the course provider that the above topics have been successfully completed by the Member.
- (g) The Tribunal came to the view that these were the appropriate sanctions to impose on the Member because:
- (i) the Tribunal regarded the allegations that were established to be serious. For this reason it was appropriate that the Member receive a fine in addition to a censure;
  - (ii) the Tribunal did not regard there to be any aggravating factors justifying the imposition of a more serious sanction;

- (iii) the Tribunal accepted that the Member's belief as to his obligations as auditor, although misguided in part, appeared to have been genuinely held;
- (iv) ASA 260<sup>(12.3)</sup> deals with an auditor's responsibility to communicate with those charged with governance in an audit of a financial report and includes the following definition in paragraph 10:
  - (a) Those charged with governance – The person(s) or organisation(s) (e.g., a corporate trustee) with responsibility for overseeing the strategic direction of the entity and obligations related to the accountability of the entity. This includes overseeing the financial reporting process. For some entities in some jurisdictions, those charged with governance may include management personnel, for example, executive members of a governance board of a private or public sector entity, or an owner-manager. For discussion of the diversity of governance structures, see paragraphs A1–A8 of this Auditing Standard

**(Those Charged With Governance)** and the Tribunal was of the opinion that the Member would benefit from training in independence and communication with Those Charged with Governance;
- (v) the Member agreed that the sanctions proposed by the PCC were appropriate in the circumstances.

## 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 and the Member agreed that:

- (i) the Member's dealings in relation to the PCC's investigation were open, honest and timely;
- (ii) the Member had not previously been required to pay costs to CA ANZ in respect of the complaint, its investigation, and determination.

- (c) The PCC sought costs and expenses amounting to \$93,887 pursuant to paragraph 10.12(k) of By-Law 40. The PCC included a final costs schedule in support of its submissions.

- (d) In support of this request, the PCC referred to the mandatory requirements for consideration in Regulation 8.12 and submitted that an award against the Member of the full costs incurred was fair and reasonable in this case given that:

- (i) the substance of the complaint against the Member was serious and had merit and was established, even where not all of the subparagraphs of the NDA were found to have been established;
- (ii) there would have been no substantive cost saving even if the PCC had not pursued the allegations which the Tribunal determined were not established as all of the allegations had common underlying factual circumstances which needed to be canvassed in the material put before the Tribunal and in the evidence and submissions;
- (iii) the large costs figure was not due to any fault of the PCC. There was *"no other way that the matter could have been properly investigated and pursued by the PCC at less costs and the PCC should not be disadvantaged (through a discounted costs award)"*;
- (iv) even though the Member had been open honest and timely in relation to the investigation and disciplinary process, the costs of the PCC's investigation and the disciplinary proceedings were very substantially increased by the volume of material

and extensive correspondence that the PCC had to consider in its investigation, including the large volume of “irrelevant, repetitive and unresponsive submissions” which the Member provided to the PCC;

- (v) the Member fought “tooth and nail” all the way through the investigation and hearing process and admitted almost none of the complaints made against him;
  - (vi) the sanctions sought by the PCC were the same as those that the PCC gave the Member the opportunity to agree by consent;
  - (vii) CA ANZ had borne the entirety of the costs of this investigation thus far.
- (e) The Member submitted that:
- (i) there was no presumption in favour of awarding costs against a Member in the By-Laws;
  - (ii) the PCC’s figure for costs was “out of all proportion” to the nature and seriousness of the contraventions found and as reflected in the substantive sanctions sought by the PCC. The Member did not dispute that it was reasonable for him to be required to pay a proportion of CA ANZ’s costs, but that costs figure should be reduced to a more appropriate figure of \$30,906;
  - (iii) even if the Tribunal did not accept the Member’s proposed figure for costs, the costs claimed should still be reduced in a holistic manner in light of the following matters:
    - (1) numerous elements of the allegations in the NDA were not established against the Member. Some of the allegations defended by the Member were important to his reputation and the Member was justified in resisting those allegations;
    - (2) the allegations that were ultimately established were not as serious the PCC submitted;
    - (3) requiring the Member to pay the full costs sought by the PCC would be place an “enormous burden” on the Member;
    - (4) the PCC had failed to demonstrated how the volume of material provided by the Member “very substantially increased” the costs of the investigation and the disciplinary proceedings. The Member was responding to “prolix and repetitive” complaints made by Gascoyne Water and did the best he could to interpret the nature of the case against him despite being unsure of the precise content of the allegations made against him. The Member also produced significant material in response to the additional requests for documents from the PCC;
    - (5) the Member should not be required to pay the Tribunal legal adviser’s fees (which formed a significant part of the total costs figure claimed by the PCC). To do so would be a denial of procedural fairness as the Tribunal was being asked to be a “judge in its own cause” and the Member was not in a position to assess or make submissions about whether the fees were appropriate, reasonable or connected to legal services obtained by the Tribunal specifically in relation to matters raised in the proceedings. Moreover, such fees were more properly characterised as items of overheard rather than “Costs” of the kind that should be awarded against the Member;
    - (6) the agreement by consent offered to the Member was based on findings made by the PCC that were substantially different from the matters ultimately put before

the Tribunal for determination and established. The Member was therefore justified in resisting those allegations that were established in the PCC's findings but not the findings of the Tribunal;

- (7) it was not reasonable for the Member to bear all the costs of the “ever changing and morphing” contentions against him even if it was reasonable and appropriate for the PCC to first investigate all the complaints made against the Member and then pursue only those that it considered relevant;
- (8) it is part of CA ANZ's function to investigate complaints. The costs of doing so are an overhead that members of the profession as a whole rightly bear through their payment of membership fees (noting that the Member had paid those membership fees for the past 25 years). That CA ANZ had borne “the entirety of the costs of the investigation thus far” was not relevant to whether it was fair and reasonable for the Member to ultimately bear the entirety of those costs.

(f) By-Law 39 states:

- (h) **Costs** means any costs and expenses incurred by or on behalf of CA ANZ in relation to the investigation and determination of a complaint (whether through the Professional Conduct Committee, Disciplinary Tribunal, Appeals Tribunal or otherwise) and any other taxes, fees and charges, paid or payable on them, including, without limitation:
  - (i) fees and disbursements of professionals, advisors or consultants employed, engaged or retained to investigate, represent, appear (as expert witnesses or otherwise), hear, or determine the complaint or advise on the same; and
  - (ii) other outgoings and disbursements including, without limitation, couriers, any transport, travel, accommodation, search fees, transcription services, outsourced photocopying, publication fees, room hire, video-conferencing, telephone conferencing and meals;

and By-Law 40(10.8) provides:

The Disciplinary Tribunal may appoint a legal adviser who is an Australian legal practitioner to advise (attending the hearing as necessary) the Disciplinary Tribunal on matters of law, procedure and evidence.

and the Costs Guidelines include the following information:

- 6.7 While the Costs will vary in each case, as an approximate guide for Members the Costs of:
- (a) an initial meeting of the PCC will typically be no more than A\$500 based on standard costing;
  - (b) a Case Conference held by the PCC will typically be at least A\$1,300 per hour based on standard costing;
  - (c) a hearing by the Disciplinary Tribunal will typically be at least A\$12,400 per ½ day based on standard costing;
  - (d) a hearing by the Appeals Tribunal will typically be at least A\$12,400 per ½ day based on standard costing.

- (g) The Tribunal determined that, contrary to the Member's submission, the costs of the Tribunal Legal Adviser are recoverable. The definition of costs in the By-Laws includes “*fees and disbursements of professionals, advisors or consultants employed, engaged or retained to investigate, represent, appear (as expert witnesses or otherwise), hear, or determine the complaint or advise on the same*”.
- (h) The Member was put on notice that the Tribunal may engage a Legal Adviser when the PCC sent the Notes for Guidance and Costs Guidelines to him.
- (i) The Tribunal noted the submission from the Member, that not being provided with the details of the costs of the Tribunal Legal Adviser may amount to a denial of procedural

fairness. No submissions were received from the PCC on this point. The Tribunal did not make any finding with respect to this submission.

- (j) The Tribunal considered that the total costs of the proceedings, although large, were reasonable given that this was a complex matter and that the written material, including submissions, amounted to more than 2,900 pages. The costs were also consistent with the Costs Guidelines.
- (k) Nevertheless the Tribunal determined, having regard to Regulation CR8.12, that the Member should not have to pay all of the costs but should be required to pay 75% of the total costs, amounting to \$70,415.25, because in particular:
  - (i) as to CR8.12(a): not all of the allegations contained in the NDA were established. The Tribunal considered whether a greater discount was warranted but considered this was not appropriate given that the established allegations were serious matters;
  - (ii) as to CR8.12(c): the Tribunal was of the view that the Member was open, honest and timely in responding to the Complaint;
  - (iii) as to CR8.12(d): the Tribunal accepted that it was reasonable for the Member to have not accepted the Consent Agreement offered to him in December 2019 because the terms were more onerous than the sanctions ultimately imposed on him;
  - (iv) as to CR8.12(e): the Tribunal had regard to the fact that the Member would have incurred legal costs:
    - (1) in defending himself against those allegations in the NDA which were not established;
    - (2) because the Complaint focussed on the Member allegedly acting outside the scope of his authority as auditor. The PCC's correspondence with the Member prior to, during and after the Case Conference, and up to the date the Member was offered a Consent Agreement, also focussed on this allegation. The PCC did not include this allegation in the NDA. The PCC was entitled to investigate this matter but the Member should not be required to pay all of the costs incurred as a consequence. The Tribunal noted that the costs incurred in relation to the matter prior to the issuing of the NDA amounted to \$10,000.

## 8. Should the Member's name be suppressed?

- (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 was informed by the PCC that the Member holds registrations and/or memberships with the Australian Securities and Investments Commission and Self Managed Super Fund Association. The Member did not dispute this information.
- (c) The Tribunal determined that, due to the Member's association with those bodies, the Australian Securities and Investments Commission and Self Managed Super Fund Association were interested parties and should be notified of this decision.

## 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. Other matters

- (a) The PCC submitted that the Tribunal was not required to make a determination on the following as matters of fact:
- (i) whether the Member resigned as auditor of Gascoyne Water or whether he was removed, which occurred at around the same time as the events the subject of the allegations;
  - (ii) whether Gascoyne Water's conduct in relation to the GWC General Manager recruitment process was improper;
  - (iii) whether it was within the scope of the audit engagement for the Member to investigate the Gascoyne Water General Manager recruitment process;
  - (iv) whether the Member's primary duty was to the members of Gascoyne Water or to the board of Gascoyne Water;
  - (v) whether the Registrar of Co-operatives properly dealt with the Member's complaint.
- (b) The Tribunal accepted the PCC's submission and did not make any determination on these matters but noted that they were referred to by both parties as context in their submissions on the allegations contained in the NDA, and in relation to sanctions and costs.

## 12. Evidence and authorities

No.	Date	Description
12.1		APES 110 Code of Ethics for Professional Accountants
12.2		APES 305 Terms of Engagement
12.3		Auditing Standard ASA 260 <i>Communication With Those Charged With Governance</i> [DT1257-1283]
12.4		<i>Corporations Act 2001</i> (Cth) [including excerpt at DT1487-1491]
12.5		<i>Co-operatives Act 2009</i> (WA) [including excerpts at DT247, DT772, DT1467-1486]
12.6	19 May 2009	Letter from the Member to the GWC Board [DT450, DT497]
12.7	19 May 2009	Letter from the Member to the GWAMCO Board [DT451, DT498]
12.8	19 May 2009	Letter (second) from the Member to the GWC Board with handwritten note [DT499]
12.9	November 2012	Department of Commerce Consumer Protection (WA Govt) consultation discussion paper - Proposals to align the Co-operatives Act 2009 with the Co-operatives National Law 2012 [DT349-423]
12.10	March 2016	Cooperative, mutual and member-owned firms, submission 28 <i>Legislating for co-operative identity: The new co-operatives national law in Australia</i> (2016) 34 C&SLC 6 [DT424-447]
12.11	21 October 2016	Properties of "Word" version of GWC Board Minutes of Meeting 190 [DT252, DT777]
12.12	23 October 2016	10:51 - 13:01 emails between the Former External Accountant and the Member, copied to [redacted] and the Gascoyne Water Secretary, with subject <i>GWC Disclosures Re External Directors Remuneration</i> [DT490-488]
12.13	22 November 2016	13:40 email from the Member to 'General Manager', copied to the Gascoyne Water Secretary, with subject <i>Re: Completion of audits - GWAMCO and GWC 2016</i> (defined in this decision as the <b>2016 Management Letter</b> ) [DT484-487, DT649-652]
12.14	22-23 November 2016	15:43 22 Nov - 12:55 23 Nov emails between the GWC GM and the Member with subject <i>RE: Completion of audits - GWAMCO and GWC 2016</i> [DT484-483, - DT649-648]
12.15	24 November 2016	6:29 email from the Member to 'General Manager', addressed "Hi [GWC GM]", with subject <i>RE: Completion of audits - GWAMCO and GWC 2016</i> [DT482, DT647-648]
12.16	24 November 2016	Gascoyne Water Co-operative Limited Minutes of the Fourteenth Annual General Meeting [DT99-105, DT259-265, DT784-790]
12.17	25 June 2017	10:27 Client 2 email to [redacted], copied to the GWC Chair and the Member, addressed "TO Director of GWC" with subject <i>GM employment</i> [DT494]

<b>No.</b>	<b>Date</b>	<b>Description</b>
12.18	25 June 2017	14:35 Client 2 email to 'General Manager', addressed "Hi [GWC GM]", with subject <i>FW: GM employment</i> [DT494]
12.19	27 June 2017	9:26 email from a former GWC Chair to the Member with subject <i>GWC/GWAMCO matters</i> [DT456-457]
12.20		Extracts from Gascoyne Water 2017 Annual Report [DT272-275, DT797-800]
12.21	4 July 2017	10:52 email from Client 2 to the Member with subject <i>GWC interview</i> [DT455]
12.22	7 August 2017	10:57 email from Client 2 to the GWC Chair, copied to the Member, with subject <i>GWC and GWAMCO complaint</i> [DT478-479]
12.23	1 September 2017	9:24 - 12:38 emails between the Former External Accountant and the GWC Chair with subject <i>Directors Confidentiality and [Client 2]</i> [DT477-475]
12.24	4 September 2017	09:40 email from the Unsuccessful Candidate to the Member with subject <i>Interview process</i> [DT448-449, DT653-654]
12.25	5 September 2017	9:54 - 18:17 emails between the Former External Accountant and the GWC Chair with subject <i>Re[Client 2] / Process</i> [DT481-480]
12.26	~7 September 2017	Discussion between the Member and the GWAMCO Chair/Client, where the Former External Accountant was discussed
12.27	8 September 2017	9:10 email from the Member to the GWC Chair with subject <i>RE: Audit Issues GWC</i> [DT46-44, DT57-59, DT801-803, DT807-809]
12.28	8 September 2017	9:46-10:50 emails between the GWC Chair and the Member with subject <i>RE: Audit Issues GWC</i> [DT44, DT57, DT801, DT807]
12.29	~10 September 2017	Discussion between the Member and the Former External Accountant, where the Member disclosed his conversation with the GWAMCO Chair/Client to the Former External Accountant
12.30	12 September 2017	14:32 GWAMCO Chair/Client email to the Member with no subject [DT54-55, DT804-805]
12.31	14 September 2017	7:28 email from the GWC Chair to the Member with subject <i>RE: Audit Issues GWC</i> [DT56-57, DT806-807]
12.32	19 September 2017	15:49 email from Member to the GWC Chair with subject <i>FW: Audit Issues GWC</i> [DT60-61, DT810-811]
12.33	21-22 September 2017	14:50 21 Sep-12:21 22 Sep emails between the GWC Chair and the Member with subject <i>[Recruitment agent] contact details</i> [DT53-52, DT821-820]
12.34	22 September 2017	11:04 - 12:32 emails between the Member and Recruitment agent with subject <i>FW: Recruitment Issues - GWC - Audit</i> [DT493-491, DT814-812]
12.35	27-28 September 2017	14:22 27 Sep- 2:40 28 Sep emails between the GWC GM and the Member with subject <i>Re: Request for information</i> [DT72, DT815]
12.36	September-October 2017	<i>FOI application to Ministers offices 2017</i> [DT500-506]

<b>No.</b>	<b>Date</b>	<b>Description</b>
12.37	4 October 2017	8:16-11:32 emails between the Gascoyne Water Secretary and the Member with subject <i>Draft Financials Timeline</i> [DT43-42, DT817-816]
12.38	10 October 2017	15:17-15:46 emails between the GWC GM and the Member, copied to the Gascoyne Water Secretary, with subject <i>Audited accounts</i> [DT268-267, DT793-792]
12.39	10 October 2017	16:04 email from the Member to the GWC Chair with subject <i>Re: Audit Issues - Preliminary Review</i> (defined in this decision as the <b>Preliminary Review</b> ) [DT50-52, DT818-820]
12.40	13 October 2017	16:04 email from the GWC GM to the Member, copied to the Gascoyne Water Secretary, with subject <i>RE: Audited accounts</i> [DT267, DT792]
12.41	15 October 2017	18:09 email from the Former External Accountant to the GWC Chair, copied to the Member, with subject <i>Disappointing but supports my view on the influence of one</i> [DT495-496]
12.42	16 October 2017	7:19 email from the GWC Chair to 'General Manager', a GWC non-member director and [redacted], copied to [not reproduced] and [redacted], with subject <i>RE: Strictly confidential. Auditor Role</i> [DT472, DT822]
12.43	18 October 2017	15:15 email from the Member to the Gascoyne Water Secretary, copied to the Former External Accounting Firm, with subject <i>FW: Re: Draft Accounts GWC and GWAMCO 2017</i> and attached 2017 draft accounts for GWAMCO [DT228-245, DT753-770]
12.44	18 October 2017	15:17 email from the Member to the Gascoyne Water Secretary, copied to the Former External Accounting Firm, with subject <i>FW: Re: Draft Accounts GWC and GWAMCO 2017</i> and attached 2017 draft accounts for GWC and controlled entities [DT207-227, DT732-752]
12.45	19 October 2017	13:07 email from the Member to 'General Manager', addressed "Hi GWC GM", with subject <i>RE: Re: Draft Accounts GWC and GWAMCO 2017</i> [DT270, DT795]
12.46	19 October 2017	GWAMCO letter to the Member with heading <i>ACCEPTANCE OF RESIGNATION AND ROLE AS AUDITOR</i> [DT62, DT823]
12.47	19 October 2017	GWC letter to the Member with heading <i>ACCEPTANCE OF RESIGNATION AND ROLE AS AUDITOR</i> [DT63-64, DT824-825]
12.48	20 October 2017	9:36 email from the GWC GM to the Former External Accounting Firm with subject <i>Financial reports for GWC and GWAMCO</i> [DT205, DT730]
12.49	20 October 2017	9:42 -16:21 emails between the GWC GM and the Former External Accounting Firm with subject <i>RE: Financial reports for GWC and GWAMCO</i> [DT205-202, DT729-727]
12.50	20 October 2017	17:28 email from the Member to 'GWC', copied to [redacted], the Gascoyne Water Secretary and 'General Manager', addressed "To the Boards of GWC and GWAMCO" with subject <i>FW: Acceptance of Auditor Resignations</i> [DT65, DT826]

No.	Date	Description
12.51	23 October 2017	10:28 email from the Former External Accounting Firm to 'General Manager', addressed "Hi [GWC GM]", with subject <i>RE: Financial reports for GWC and GWAMCO</i> [DT202, DT727]
12.52	23 October 2017	13:53 email from the Former External Accounting Firm to 'General Manager', addressed "Hi [GWC GM]", with subject <i>FW: Regs</i> [DT201, DT726]
12.53	25 October 2017	10:07 email from the Member to the GWC Chair, 'GWC' and 'General Manager', copied to the Gascoyne Water Secretary, with subject <i>Re: Finalization of GWC and GWAMCO Audit</i> [DT68-69, DT828-829]
12.54	25 October 2017	GWC letter to the Member [DT293, DT827]
12.55	26 October 2017	17:36 email from the Member to the GWC Chair, copied to 'GWC' and 'General Manager', with subject <i>I confirm that I am still the auditor of both GWC and GWAMCO</i> (defined in this decision as the <b>26 October Email to the GWC Chair</b> ) [DT70-71, DT830-831]
12.56	26 October 2017	17:39 email from the Member to the Former External Accountant with subject <i>FW: I confirm that I am still the auditor of both GWC and GWAMCO</i> (defined in this decision as the <b>26 October Email to the Former External Accountant</b> ) [DT255-257, DT780-782]
12.57	27 October 2017	14:39 email from the Former External Accountant to [redacted], copied to [redacted], a former GWC Chair and the Member, addressed "Hi Gents", with subject <i>FW: I confirm that I am still the auditor of both GWC and GWAMCO</i> [DT254-255, DT779-780]
12.58	27 October 2017	Incomplete record described [DT35] as " <i>27 October 2017: [the GWC GM] confirms with Regulator of Co-operatives staff that the Member's resignation provided on 10 October is effective</i> " [DT73]
12.59	27 October 2017	Gascoyne Water Cooperative Ltd letter (unsigned) to the Member with heading <i>Demand to Cease and Desist</i> [DT74-75, DT832-833]
12.60	22 November 2017	10:33 email from the Member to 'GWC', addressed "To The Boards GWC and GWAMCO", with subject <i>FW: Audits 2017</i> [DT66-67, DT834-835]
12.61	27 November 2017	19:51 email from GWAMCO Chair/Client to [not reproduced], copied to 'General Manager', a GWC non-member director, and others, addressed "Good evening gentlemen", with subject <i>Re: GWC former auditor issues - fee disclosure and estimate</i> [DT473-474]
12.62	28 November 2017	11:29 email from the Gascoyne Water incoming auditor to the Member with subject <i>Ethical Letter</i> [DT199, DT470, DT724, DT836]
12.63	28 November 2017	Gascoyne Water incoming auditor letter to the Member with heading <i>GASCOYNE WATER ASSET MUTUAL COOPERATIVE LIMITED AND GASCOYNE WATER COOPERATIVE LTD AND CONTROLLED ENTITIES</i> [DT471, DT837]
12.64	28 November 2017	13:07 email from the Member to the Gascoyne Water incoming auditor with subject <i>RE: Ethical Letter GWC and GWAMCO</i> [DT194-198, DT719-723]

<b>No.</b>	<b>Date</b>	<b>Description</b>
12.65	29 November 2017	8:02 email from the Member to 'GWC', addressed "Hi [GWC GM]", with subject <i>Re: Appointment of auditor GWC and GWAMCO 2017</i> [DT76-77, DT838-839]
12.66	29 November 2017	11:06-13:36 emails between 'General Manager' and Kingfisher Law with subject <i>FW: Appointment of auditor GWC and GWAMCO 2017</i> [DT76, DT838]
12.67	6 December 2017	13:49 email from the Former External Accounting Firm to the Gascoyne Water incoming accountant with subject <i>RE: Gascoyne Water Co-Operative Ltd - Ethical Letter</i> [DT468-469, DT840-841]
12.68	6 December 2017	13:52 email from the Gascoyne Water incoming accountant to the Member with subject <i>FW: Gascoyne Water Co-Operative Ltd - Ethical Letter</i> [DT468, DT840]
12.69	8 December 2017	12:04 email from the Member to blind copy recipients, addressed "To the members of GWC and GWAMCO", with subject <i>The GWC and GWAMCO Auditor did not resign</i> (defined in this decision as the <b>8 December Email to Members</b> ) [DT49-47, DT644-646 DT842-844]
12.70	15 December 2017	Gascoyne Water complaint to CA ANZ against the Member (defined in this decision as the <b>Complaint</b> ) [DT28-41, DT845-864]
12.71	15 December 2017	Parts of Complaint [DT638-643, DT1065-1069, DT1074-1075, DT1078-1079, DT1083-1084]
12.72	22 December 2017	16:02 email from the GWC GM to the Member with subject <i>FW: Outstanding Invoices - [the Member's Firm]</i> [DT466-467, DT851-850]
12.73	10 January 2018	10:20 email from incoming auditor to the Member with subject <i>RE: Ethical Letter GWC and GWAMCO</i> [DT193-194, DT718-719]
12.74	11 January 2018	9:54 email from the Member to Gascoyne Water incoming auditor with subject <i>RE: Ethical Letter GWC and GWAMCO</i> [DT188-193, DT713-718]
12.75	15 January 2018	12:45 email from Gascoyne Water incoming auditor to 'General Manager', addressed "Good afternoon Eddie", with subject <i>FW: Ethical Letter GWC and GWAMCO</i> [DT188, DT713]
12.76	25 January 2018	16:19 email from the Complainants to CA ANZ with subject <i>Complaint PC001672</i> [DT1070, DT1071-1072]
12.77	16 February 2018	14:42 email from the Complainants to CA ANZ with subject <i>RE: Case 00259432 - Complaint [the Member]</i> [DT1073-1074, DT1076-1077, DT1081-1082]
12.78	26 February 2018	13:33 email from the Complainants to the PCC investigator with subject <i>RE: Case 00259432 - Complaint [the Member]</i> [DT1088]
12.79	16 March 2018	10:18 email from the Member to the PCC investigator with subject <i>FW: PRIVATE &amp; CONFIDENTIAL: Our reference PC - 001672</i> [DT82-83]
12.80	20 March 2018	13:15 email from the Complainants to the PCC investigator with subject <i>GWC Letter to CA ANZ 20 March 2018</i> [DT1089-1090]
12.81	5 April 2018	Document titled <i>Response to Complaint Case # 00259432</i> [DT85-97]

<b>No.</b>	<b>Date</b>	<b>Description</b>
12.82	6 April 2018	15:14 email from Gascoyne Water Secretary to Client 2 with subject <i>RE: AGM meeting</i> [DT98]
12.83	11 May 2018	Gascoyne Water Cooperative Ltd letter to the Member [DT126, DT294]
12.84	11 May 2018	15:50 email from the Member to 'GWC', addressed "Hi [GWC GM]", with subject <i>RE: Communications with Gascoyne Water</i> [DT127, DT868]
12.85	14 May 2018	11:42 email from Complainants to the PCC investigator with subject <i>PC001672</i> attaching Complainants' letter to the PCC investigator [no redaction] [DT115-125]
12.86	14 May 2018	11:42 email from Complainants to the PCC investigator with subject <i>PC001672</i> and part of Complainants' letter to the PCC investigator [partially redacted] [DT865-867]
12.87	29 June 2018	16:41 email from the Complainants to the PCC investigator with subject <i>PC - 0016722 Complaint</i> [DT1098]
12.88	4 July 2018	Bennett & Co (acting for the Member) letter to the Board of Directors of Gascoyne Water Co-operative with heading <i>CONCERNS NOTICE pursuant to section 14(2) of the Defamation Act 2005 (WA)</i> [DT106-112, DT870-876]
12.89	5 July 2018	10:15 email from ABC Rural to 'GWC', addressed "Good morning [Gascoyne Water Secretary]", with subject <i>RE: Broadcast on or about 1 November 2017 on Country Hour</i> [DT186, DT711]
12.90	1 August 2018	18:54 email from the Complainants to the PCC investigator with subject <i>RE: PRIVATE &amp; CONFIDENTIAL: Our reference PC - 001672</i> [DT1104-1105]
12.91	3 August 2018	16:35 email from Government of Western Australia Department of Mines, Industry Regulation and Safety ( <b>DMIRS</b> ) to 'General Manager' addressed "Good Afternoon [GWC GM]", with subject <i>Request for information regarding GWC</i> [DT250, DT775]
12.92	6 August 2018	8:41 email from DMIRS to 'General Manager' addressed "Good morning [GWC GM]", with subject <i>FW: Request for information regarding GWC</i> [DT184, DT709]
12.93	10 September 2018	Bennett & Co letter to Kingfisher Law with heading <i>[The Member] - Concerns Notice pursuant to section 14(2) Defamation Act 2005 (WA)</i> [DT113-114, DT877-878]
12.94	28 September 2018	16:03 email from the Complainants to the PCC investigator with subject <i>Complaint against [the Member] CA Case # PC 001672</i> attaching the Complainants letter to the PCC investigator [DT130-182, DT655-707]
12.95	24 October 2018	Unsuccessful Candidate letter "To Whom It May Concern" with heading <i>RE: ASSERTION OF A CLOSE RELATIONSHIP WITH [THE MEMBER] - MADE BY GASCOYNE WATER COOPERATIVE ([THE GWC GM])</i> [DT452-453, DT879-880]
12.96	23 November 2018	The Member's response to the GWC GM's letter dated 28 September 2018 [DT277-279, DT881-883]

<b>No.</b>	<b>Date</b>	<b>Description</b>
12.97	3 December 2018	18:32 email from the Complainants to the PCC investigator with subject <i>RE: PRIVATE &amp; CONFIDENTIAL: Our reference PC - 001672</i> [DT1111]
12.98	4 February 2019	18:38 email from the Complainants to the PCC investigator with subject <i>Private and confidential. Letter regarding status of legal matters affecting matters PC-001672 &amp; PC-001855</i> [DT897-898, DT1114-1115]
12.99	8 March 2019	13:01 email from Complainant to the PCC investigator with subject <i>FW: PRIVATE &amp; CONFIDENTIAL: Our reference PC - 001672</i> [DT295-296]
12.100	11 March 2019	15:34 email from the Member to the PCC investigator with subject <i>RE: PRIVATE &amp; CONFIDENTIAL: Our reference PC - 001672 (Email 1 of 3)</i> [DT1124]
12.101	11 March 2019	19:58 email from the Member to the PCC investigator with subject <i>FW: PRIVATE &amp; CONFIDENTIAL: Our reference PC - 001672</i> [DT1127-1128]
12.102	18 March 2019	17:08 email from the Member to the PCC investigator with subject <i>FW: Complaint PC - 001672</i> [DT299-304, DT899-904]
12.103	25 March 2019	15:05 email from Complainants to the PCC investigator attaching 20 March 2019 Complainants letter to the PCC investigator advising no further submissions [DT305-306]
12.104	4 April 2019	13:24 email from the Member and the Former External Accountant to DMIRS, with subject <i>Re: Formal complaint against staff of [DMIRS]</i> [DT595-597, DT1024-1026]
12.105	16 May 2019	Extract from <i>Hansard p3525a-3526a Gascoyne Water Co-operative - Auditor, Grievance</i> [DT309-311]
12.106	4 June 2019	15:35 email from the Complainants to the PCC investigator with subject <i>WA Legislative Assembly grievance motion regarding Gascoyne Water</i> [DT307]
12.107	24 June 2019	12:39 email from the Member to the PCC investigator with subject <i>FW: [the Member] PC - 001672l - update</i> [DT312-327, DT905-920]
12.108	4 July 2019	11:03 email from the PCC investigator to the Member attaching PCC decision to refer matter to Case Conference and setting out matters for consideration at the Case Conference [DT328-334, DT921-927]
12.109	4 July 2019	11:04 email from the PCC investigator to the Member attaching PCC decision to refer matter to Case Conference and setting out matters for consideration at the Case Conference [DT1135-1140]
12.110	4 July 2019	20:01 email from the Member to the PCC investigator with subject <i>RE: PRIVATE &amp; CONFIDENTIAL: Our reference PC -001672</i> [DT1141]
12.111	5 July 2019	14:53 email from the Complainant to the PCC investigator with subject <i>RE: PRIVATE &amp; CONFIDENTIAL: Our reference PC -001672</i> [DT1144]
12.112	12 July 2019	14:37 email from the Complainant to the PCC investigator with subject <i>RE: PRIVATE &amp; CONFIDENTIAL: Our reference PC -001672 (Email 4 of 4)</i> [DT1154]

No.	Date	Description
12.113	12 July 2019	16:41 email from the Complainant to the PCC investigator with subject <i>RE: PRIVATE &amp; CONFIDENTIAL: Our reference PC -001672 (Email 4 of 4)</i> [DT1156]
12.114	17 July 2019	12:04 email from DMIRS to the Member and the Former External Accountant with subject <i>Gascoyne Water Co-operative</i> [DT593-594, DT1022-1023]
12.115	23 July 2019	12:34 email from the Member to the PCC investigator with subject <i>RE: PRIVATE &amp; CONFIDENTIAL: Our reference PC - 001672</i> [DT1164]
12.116	5 August 2019	19:13 email from the Complainants to the PCC investigator with subject <i>PRIVATE &amp; CONFIDENTIAL: Our reference PC - 001672</i> [DT1174]
12.117	9 August 2019	10:04 email from the Member to the PCC investigator with subject <i>RE: PRIVATE &amp; CONFIDENTIAL: Our reference PC - 001672</i> [DT1164]
12.118	9 August 2019	11:35 email from the Member to the PCC investigator with subject <i>RE: PRIVATE &amp; CONFIDENTIAL: Our reference PC - 001672</i> [DT1176]
12.119	9 August 2019	19:01 email from the Member to the PCC investigator with subject <i>RE: PRIVATE &amp; CONFIDENTIAL: Our reference PC - 001672</i> [DT335-347, DT928-940]
12.120	9 August 2019	19:01 email from the Member to the PCC investigator with subject <i>RE: PRIVATE &amp; CONFIDENTIAL: Our reference PC - 001672</i> attaching: 1. PCC EYES ONLY Client 2 email to Noel 13 7 17 re GWC issues.pdf 2. PCC EYES ONLY Rod Sweetman email to Noel 13 7 17 re GWC issues.pdf [DT454]
12.121	9 August 2019	19:32 email from the Complainants to the PCC investigator with subject <i>Email 1Additional evidence for Matter PC-001672</i> and attached index of additional evidence for Case Conference [DT458-465]
12.122	23 August 2019	10:07 and 10:08 emails from the PCC investigator to the Complainants and the Member with heading <i>Amended Supplemental Royal Charter and By-Laws</i> [DT1217-1218]
12.123	23 August 2019	Transcript of Case Conference meeting held 23 August 2019 (defined in this decision as the <b>Case Conference meeting</b> ) [DT517-578, DT942-1003]
12.124	27 August 2019	13:53 email from the Complainants to the PCC with subject <i>Follow up on matter PC-001672</i> [DT1231]
12.125	27 August 2019	15:18 email from the Member to the PCC investigator with subject <i>FW: Points about case conference</i> [DT507-513, DT1004-1010, DT1220-1226]
12.126	28 August 2019	18:14 email from the Member to the PCC investigator
12.127	13 September 2019	DMIRS letter to the Former External Accountant with heading <i>GASCOYNE WATER CO-OPERATIVE AND GASCOYNE WATER ASSET MUTUAL LTD</i> [DT590, 1020]
12.128	20 September 2019	14:41 email from PCC investigator to the Complainants attaching PCC interim decision [DT1228-1230]

<b>No.</b>	<b>Date</b>	<b>Description</b>
12.129	20 September 2019	14:45 email from PCC investigator to the Member attaching PCC interim decision [DT514-516, DT1011-1013]
12.130	24 September 2019	18:32 email from the Complainants attaching letter to the PCC investigator with heading <i>Re - Matter PC-001672</i> [DT579-581]
12.131	4 October 2019	14:01 email from the Member to the PCC investigator with subject <i>FW: Response to request</i> [DT584-589, DT1014-1019]
12.132	4 October 2019	13:13-16:20 emails between the PCC investigator and the Member with subject <i>PRIVATE &amp; CONFIDENTIAL: Our reference PC - 001672</i> [DT583-582] [DT591]
12.133	9 October 2019	11:04 email from the Member to DMIRS and Minister for Commerce with subject <i>FW: Complaint lodged 4/8/19 acknowledged 8/4/19 - re Gascoyne Water Cooperative</i> [DT592-593, DT1021-1022]
12.134	9 October 2019	14:37 email from the Member to the PCC investigator with subject <i>RE: PC - 001672 - Your request to write to Registrar of Cooperatives (WA)</i> [DT592, DT1021]
12.135	14 October 2019	15:12 email from PCC investigator to the Complainants attaching PCC interim decision [DT1233-1235]
12.136	14 October 2019	15:13 email from PCC investigator to the Member attaching PCC interim decision [DT598-600, DT1027-1029]
12.137	28 October 2019	22:45 email from the Complainants to the PCC investigator attaching Complainants' letter to the PCC investigator with heading <i>Re - Matter PC-001672</i> [DT601-603, DT1030-1032]
12.138	15 November 2019	16:08 email from the Member to the PCC investigator with subject <i>FW: PRIVATE &amp; CONFIDENTIAL: Our reference PC - 001672</i> [DT604-606, DT1033-1035]
12.139	17 December 2019	PCC decision under By-Law 40(7.3)(g) and attached Deed of Consent - Member Sanctions [DT608-629, DT1037-1058]
12.140	5 February 2020	19:59 email from Sparke Helmore (acting for the Member) to the Member with subject <i>RE: Your ref: PC:001672 Complaint against [the Member] by [the Complainant]...</i> attaching letter [DT630-631, DT1059-1060]
12.141	7 February 2020	9:46 - 12:02 emails between the PCC investigator and Sparke Helmore with subject <i>PRIVATE &amp; CONFIDENTIAL: Our reference PC - 001672</i> [DT634-633] [DT636-635, DT1063-1062] [DT632, DT1061]
12.142	10 February 2020	20:10 email from Sparke Helmore to the PCC investigator with subject <i>RE: PRIVATE &amp; CONFIDENTIAL: Our reference PC - 001672...</i> [DT635, DT1061]
12.143	19 March 2020	16:18 email from the PCC investigator to Sparke Helmore with subject <i>PRIVATE &amp; CONFIDENTIAL: Our reference PC - 001672...</i> [DT637, DT1064, DT1255-1256]
12.144	19 March 2020	20:58 email from Sparke Helmore to the PCC investigator with subject <i>RE: PRIVATE &amp; CONFIDENTIAL: Our reference PC - 001672...</i> [DT1255]

<b>No.</b>	<b>Date</b>	<b>Description</b>
12.145	16 April 2020	PCC's Timeline-Chronology [DT22-27]
12.146	4 May 2020	Sparke Helmore letter requesting particulars [DT1303-1305]
12.147	13 May 2020	Member's By-Law 40(10.4) questionnaire response [DT1289-1291]
12.148	14 May 2020	Baker & McKenzie (acting on behalf of PCC) letter responding to request for particulars [DT1306-1312]
12.149	18 May 2020	Amended particulars in support of NDA [DT18-20, DT1292-1295]
12.150	19 May 2020	PCC's interim costs summary [DT1300]
12.151	27 May 2020	the Member's Written Statement [DT1325-1329] annexing: <ol style="list-style-type: none"> <li>1. 3 March 2017 the Member's Firm engagement letter to Client 2 (NA-1) [DT1330-1340]</li> <li>2. 29 May 2015 Carnarvon Ministerial Advisory Committee Final Report to the Minister for Water and the Minister for Agriculture and Food (extract only) (NA-2) [DT1341-1346]</li> <li>3. 13 March 2017 the Member's Firm engagement letter to GWAMCO Chair/Client (NA-3) [DT1347-1359]</li> <li>4. 28 June 2017 Existing engagement - Continuance (NA-4) [DT1360-1362]</li> </ol>
12.152	27 May 2020	Statutory declaration of the Principal of the Former External Accounting Firm [DT1363-1364] annexing: <ol style="list-style-type: none"> <li>1. his email to the GWC GM of 20 October 2017 [DT1365-1368, DT203]</li> </ol>
12.153	28 May 2020	Supplementary materials [DT1369]: <ol style="list-style-type: none"> <li>1. NA-1 [DT1330-1340, DT1370-1380]</li> <li>2. NA-2 [DT1341-1346, DT1381-1386]</li> <li>3. NA-3 [DT1347-1359, DT1387-1399]</li> <li>4. NA-4 [DT1360-1362, DT1400-1402]</li> <li>5. Unsuccessful Candidate application to GWC, dated 11 August 2016 [DT1403-1406]</li> <li>6. GWC rejection letter to Unsuccessful Candidate, dated 20 October 2016 [DT1407]</li> <li>7. Member's email to GWC, dated 20 October 2016 [DT1408-1409]</li> <li>8. GWC letter to Client 2, dated 4 August 2017 [DT1410-1411]</li> <li>9. Gascoyne Water website - homepage [DT1412-1413]</li> <li>10. Gascoyne Water website - boards of directors [DT1414-1417]</li> <li>11. Gascoyne Water website - staff [DT1418-1419]</li> <li>12. W A Parliament website - a former GWC Chair [DT1420-1421]</li> <li>13. GWC 2017-18 annual report - extracts [DT1422-1424]</li> <li>14. GWAMCO 2016-17 annual report - extracts [DT1425-1426]</li> <li>15. GWAMCO 2017-18 annual report - extracts [DT1427-1428]</li> </ol>
12.154	28 May 2020	Member's Outline of Submissions [DT1430]
12.155	28 May 2020	Member's Chronology of Events [DT1448]

<b>No.</b>	<b>Date</b>	<b>Description</b>
12.156	28 May 2020	10:37 email from Sparke Helmore to Tribunal Secretary serving [DT1324]: 1. Member's signed supplementary statement with annexures, dated 27 May 2020 <sup>(12.151)</sup> ; 2. statutory declaration of the Principal of the Former External Accounting Firm, dated 27 May 2020 <sup>(12.152)</sup> ; and 3. supplementary materials <sup>(12.153)</sup> .
12.157	28 May 2020	11:03 email from Sparke Helmore to Tribunal Secretary serving [DT1429]: 1. outline of submissions, dated 28 May 2020 <sup>(12.154)</sup> ; 2. chronology of events <sup>(12.155)</sup>
12.158	28 May 2020	14:22 email from Sparke Helmore to Tribunal Secretary serving [DT1465] Member's extracted authorities <sup>(12.159)</sup>
12.159	28 May 2020	Member's extracted authorities [DT1466]: 1. <i>Co-operatives Act 2009 (WA)</i> - current reprint - extracts [DT1467-1486] 2. " <i>Co-operatives Act 2009 (WA)</i> - current reprint - extracts" [DT1487-1491] 3. <i>Construction, Forestry, Mining and Energy Union and Another v Cahill (2010) 269 ALR 1; [2010] FCAFC 39</i> [DT1492-1507]
12.160	28 May 2020	Transcript of Disciplinary Tribunal hearing adjourned to 25 June 2020 [DT1508-1615]
12.161	19 June 2020	PCC's second interim costs summary [DT2897-2899]
12.162	22 June 2020	16:08 email from Sparke Helmore attaching letter and serving documents requested by the Tribunal [DT1619]
12.163	22 June 2020	Member's further supplementary materials provided in answer to request of Tribunal [DT1620-1622]: 1. Statutory Declaration of the Member made 22 June 2020 [DT1623-1625] annexing: 1.1 Screenshots from XYZ Software ( <b>NA-1</b> ) [DT1626-1628] 1.2 Email from the Former External Accounting Firm dated 31 August 2017 ( <b>NA-2</b> ) [DT1629] 1.3 Email exchange between the Member and the Former External Accounting Firm 10-16 October 2017 ( <b>NA-3</b> ) [DT1630-1631] 1.4 Email exchange between the Member and the Former External Accounting Firm on 17 October 2017 ( <b>NA-4</b> ) [DT1632-1634] 1.5 Email from the Member to GWC and the Former External Accounting Firm on 18 October 2017 ( <b>NA-5</b> ) [DT1635-1656] 1.6 Email exchange between the Member and the GWC GM on 19 October 2017 ( <b>NA-6</b> ) [DT1657-1658] 1.7 Email from the Former External Accounting Firm to the Member on 19 October 2017 ( <b>NA-7</b> ) [DT1659-1706] 1.8 Copy of GWC's Financial Reports for the Year Ended 30 June 2016 ( <b>NA-8</b> ) [DT1707-1728] 1.9 Copy of GWAMCO's Financial Reports for the Year Ended 30 June 2016 ( <b>NA-9</b> ) [DT1729-1746] 1.10 Copy of GWC's Financial Report for the Year Ended 30 June 2017 ( <b>NA-10</b> ) [DT1747-1170]

No.	Date	Description
		1.11 Copy of GWAMCO's Financial Report for the Year Ended 30 June 2017 ( <b>NA-11</b> ) [DT1771-1790]
		1.12 Copy of Member's firm's invoice number 26563 ( <b>NA-12</b> ) [DT1791]
		1.13 Copy of Member's firm's invoice number 26564 ( <b>NA-13</b> ) [DT1792]
		1.14 Copy of Member's firm's invoice number 28636 ( <b>NA-14</b> ) [DT1793]
		1.15 Copy of Member's firm's invoice number 28637 ( <b>NA-15</b> ) [DT1794]
		2. Statutory Declaration of the Member's Firm Partner made 22 June 2020 [DT1795-1797]
		3. Statutory Declaration of Leon McGrath, Sparke Helmore Lawyers, made 22 June 2020 [DT1798-1799] annexing:
		3.1 11 June 2020 email chain between Leon McGrath and the Principal of the Former External Accounting Firm ( <b>LM-1</b> ) [DT1800-1801]
		3.2 11 June 2020 14:22 email from the Principal of the Former External Accounting Firm with attachments ( <b>LM-2</b> ) [DT1802-2167]
		3.3 11 June 2020 15:49 email from the Principal of the Former External Accounting Firm with attachments ( <b>LM-3</b> ) [DT2168-2169]
		3.4 (i) Screenshot of 'Workpapers - GascoyneWater Cooperative - FY17.zip' folder tree [DT2170]
		(ii) the Former External Accounting Firm's FY17 workpapers [DT2173-2895]
		( <b>LM-4</b> )
12.164	23 June 2020	12:38 email from Sparke Helmore to Tribunal Secretary serving [DT2171-2172] consolidated version of workpapers <sup>(12.163.3.4(ii))</sup> and advising that not all documents relied on by Member
12.165	25 June 2020	Oral submissions made, and evidence adduced, during the resumed hearing
12.166	3 July 2020	PCC submissions on sanctions and other matters
12.167	7 July 2020	Member submissions on sanctions and other matters

### 13. 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)).

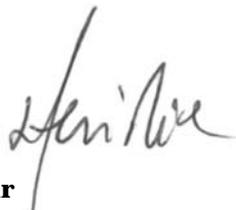
The PCC may, within 21 days after notification of the written decision with reasons to the PCC of this Tribunal's decision, appeal in writing to the CA ANZ Appeals Tribunal against the decision (By-Law 40(11.2)).

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)(h), in that the Member has committed:
  - a) a breach of sections 100.5(d), 140.1, 140.4 and 140.6 of APES 110, *Code of Ethics for Professional Accountants*, in circumstances where, without the consent of his clients, the Member:
    - (i) disclosed confidential information acquired as a result of his engagement and what the Member referred to as a "preliminary review" to the members of the Gascoyne Water Co-Operative (GWC) and/ or Gascoyne Water Asset Mutual Co-operative (collectively **Gascoyne Water**) and the former external accountant for Gascoyne Water; and
    - (ii) disclosed confidential information concerning the cessation of his engagement with Gascoyne Water and the GWC's Board's response to the cessation of the Member's engagement to members of Gascoyne Water and a former external accountant for Gascoyne Water.
  - b) a breach of sections 100.5(b), 120.1, 220 and 290.124 of APES 110, *Code of Ethics for Professional Accountants*, in circumstances where:
    - (i) clients of his practice were also members of Gascoyne Water and/or clients of Gascoyne Water's external accountant;
    - (ii) he lodged a complaint to the Registrar of Co-operatives against Gascoyne Water for a client of the Member's practice;
    - (iii) he acted as auditor for an entity "*which has common membership*" with Gascoyne Water;
    - (iv) he implemented insufficient safeguards to reduce to an acceptable level the threat to the fundamental principle objectivity.
  - c) a breach of sections 100.5(b) and 120.1 of APES 110, *Code of Ethics for Professional Accountants*, in circumstances where he failed to impose sufficient safeguards to reduce the advocacy and self-interest threat to an acceptable level in relation to the preliminary review and the cessation of the Member's engagement with Gascoyne Water.
  - d) a breach of sections 100.5(b), 120.1, 120.2, 290.161, 290.165 and 290.168 of APES 110, *Code of Ethics for Professional Accountants*, in circumstances where he (or his practice):
    - (i) proposed for resolution of the matters the subject of the Member's "preliminary review" by adjudication of those matters at an informal meeting between the board of GWC and other parties rather than by reporting these matters directly to the Registrar of Co-Operatives;
    - (ii) prepared the accounts for Gascoyne Water and then audited those accounts without evaluating the self-review threat and applying safeguards to eliminate the threat or reduce it to an Acceptable Level; and
    - (iii) communicated with an unsuccessful candidate for a management position at Gascoyne Water and an individual who had indicated that they may wish to bring legal proceedings against Gascoyne Water.

- e) a breach of section 3.1 of APES 305, *Terms of Engagement* in circumstances where he failed to provide terms of engagement to Gascoyne Water.
- 2. By-law 40(2.1)(h), in that the Member has committed a breach of sections 100.5 (e) and 150.1 of APES 110 in relation to the acts, omissions and defaults referred to in paragraph 1 above.
- 3. By-law 40(2.1)(k), in that the acts, omissions and defaults referred to in paragraph 1 above bring, or may bring, discredit on the Member, CA ANZ or the profession of accountancy.
- 4. By-law 40(2.1)(a), in that the Member failed to observe a proper standard of professional care, competence or diligence in the course of carrying out his professional duties and obligations, in relation to the acts, omissions and defaults referred to in paragraph 1 above.

## **SCHEDULE 2: RELEVANT BY-LAWS**

### **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(1) Committees and Tribunals**

...

40(1.3) Subject to these By-Laws, the Regulations and the Charters, each committee and tribunal shall regulate its own affairs and may delegate any of its functions.

#### **40(2) Disciplinary action**

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

- (a) has failed to observe a proper standard of professional care, skill, competence or diligence in the course of carrying out that Member's professional duties and obligations;

...

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

...

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

...

#### **40(10) Disciplinary Tribunal**

...

40(10.4) The Member receiving a Notice of Disciplinary Action or an amended Notice of Disciplinary Action shall, unless the Professional Conduct Committee otherwise

consents, not less than 14 days before the date of the hearing, state in writing to the Professional Conduct Committee:

...

- (d) any relevant fact or circumstance the Member wishes to bring to the attention of the Disciplinary Tribunal and the reasons for doing so.

...

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:

...

- (f) fine that Member an amount not exceeding \$50,000
- (g) censure the Member
- (h) require the Member, at the Member's own expense, to complete any professional development courses prescribed by the Disciplinary Tribunal within the time period and on the terms stipulated by the Disciplinary Tribunal

...

- (j) require the Member or the Member's Practice Entity, at the Member's expense, to submit to an investigation or review or reviews, on such matters and on such terms as specified by the Disciplinary Tribunal, such terms to include that the results of such investigation or reviews are made available to the Professional Conduct Committee
- (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 CR7 - CONTINUING PROFESSIONAL DEVELOPMENT**

Issued 8 October 2019

...

### **Schedule 1 to CR 7 – CPD Requirements for CA ANZ Members not resident in New Zealand**

...

#### **11. Formal CPD**

(a) Formal CPD should maintain and/or expand your capacity to discharge your professional obligations and should have the following characteristics:

- (i) an organised, orderly framework developed from a clear set of objectives;
- (ii) a structure for imparting knowledge of an educational or technical nature; and
- (iii) a requirement for involvement by the participant.

As a general guide, relevant formal CPD is more likely to have interactive learning, sometimes have an assessment component and involve teaching by competent specialists.

(b) As a guide, formal CPD would normally include the following activities:

- (i) Congresses, Business Forums and conventions presented by CA ANZ or other professional accounting body. National and State Congresses presented by a professional accounting body alone or in conjunction with other professional bodies, and designed to cater for a broad spectrum of Member interests including those in particular occupational groupings, such as public accountants or government accountants;
- (ii) Courses, seminars, workshops, lectures and other professional educational activities presented by CA ANZ or other professional accounting body (1 hour or more). Any of the range of technical activities organised by either body, alone or in conjunction with other organisations, regardless of whether arranged at National, State or other level;
- (iii) Meetings of CA ANZ or other professional accounting body technical discussion groups (1 hour or more). Formal meetings of CA ANZ or other professional accounting body discussion groups which provide a structured forum for exchange of technical information relevant to individual and Affiliate Members with a common interest;
- (iv) Appropriate educational activities provided by the individual or Affiliate Member's employer or Practice Entity. "In-house" courses, schools or similar activity arranged by the Member's employer and presented either by that employer's staff, by individuals or organisations engaged by the employer, or a combination of these. Training activities provided by employers are acceptable CPD providing they relate to the development, maintenance or expansion of professional competence. However, training involving purely administrative tasks of essentially a nonprofessional nature such as completing employer time sheets would not count towards CPD;
- (v) Tertiary courses presented by educational institutions. Courses conducted by tertiary institutions leading to a Degree, Diploma, or Post Graduate qualification, other than those undertaken as a pre-requisite for admission as a Member of CA ANZ. Contact time (lectures, exams and tutorials) may be claimed, as well as time spent in the research and writing of essays; and

- (vi) Appropriate educational and developmental activities presented under the auspices of academic institutions, commercial establishments or other professional bodies (1 hour or more). Extramural courses presented by tertiary institutions, seminars, courses, lectures, residential schools, conventions or other technical activities presented independently or jointly by tertiary institutions, commercial educational establishments or professional bodies.

...

## **SCHEDULE 4: 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.*