



Appeals Tribunal of Chartered Accountants Australia and New Zealand (CA ANZ)

Written decision dated 2 December 2020

- Case Number:** A-187
- Member:** Rowan Leigh McCabe CA of Victoria
- Hearing Date:** 19 November 2020
- Tribunal:** Harold Werksman (Chair and lay member of the Tribunal)
Lyn Cox FCA
John Gibson FCA
- Tribunal Legal Adviser:** Jamesina McLeod
- Representation:** Michael Bradley for the Professional Conduct Committee (PCC)
The Member represented himself
- Decisions:**
1. The Appeals Tribunal (the **Tribunal**) determined to:
 - (a) affirm the determination of the Disciplinary Tribunal that the Member was found guilty of a criminal offence by the County Court of Victoria which has not been set aside on appeal;
 - (b) affirm the determination of the Disciplinary Tribunal that the Member committed an act, omission or default which brings, or may bring, discredit upon that Member, CA ANZ and the profession of accountancy;
 - (c) affirm the sanction imposed by the Disciplinary Tribunal that the Member's membership be terminated and his name removed from the Registers on which it appears;
 - (d) affirm the cost sanction imposed by the Disciplinary Tribunal that the Member pay \$9,397 for the full costs and expenses of the proceedings.
 2. The Tribunal imposed a further cost sanction in the sum of \$11,184 for the full costs and expenses of the appeal.
 3. The Tribunal made the following directions regarding the conduct of the hearing and the publication of its reasons for decision:
 - (a) its decision with reasons, mentioning the Member's name and locality, be published on the CA ANZ website (the **Published Decision**);

- (b) 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 digital and print magazine *Acuity*;
- (c) except for the content of the written decision with reasons, all written and oral evidence and submissions related to this determination are to remain confidential.

The date of effect of this decision is 19 November 2020.



1. Introduction

- (a) In or around December 2019 CA ANZ became aware of His Honour Judge Dean's Reasons for Sentence dated 7 November 2019 in *DPP v McCabe* [2019] VCC 1808 (**Reasons for Sentence**) which included the following information:
- (i) the Member was found guilty by jury of one charge of trafficking in a large commercial quantity of a drug of dependence contrary to s 71(1) of the *Drugs, Poisons and Controlled Substances Act 1981*;
 - (ii) the Member was sentenced to 11 years' imprisonment with a minimum seven years non-parole period;
- and the PCC initiated a complaint pursuant to the powers conferred by By-Laws 40(4.1) and 40(5.1) (the **Complaint**).
- (b) After investigating the Complaint, the PCC referred the Member to the Tribunal by way of Notice of Disciplinary Action dated 7 July 2020 (set out in full in Schedule 1) (the **NDA**) which in summary alleged that the Member:
1. had been found guilty of a criminal offence in breach of By-Law 40(2.1)(b); and
 2. had brought, or could bring, discredit on himself, CA ANZ or the profession of accountancy in breach of By-Law 40(2.1)(k).
- (c) The Member admitted allegation 1 and partially admitted allegation 2 (in that he admitted that the criminal offence brought discredit upon himself personally but denied that it brought discredit upon CA ANZ or the profession of accountancy).
- (d) On 19 August 2020 the Disciplinary Tribunal determined:
- (i) that the allegations were established in full;
 - (ii) to terminate the Member's membership;
 - (iii) that the Member should pay the costs of the proceedings in the amount of \$9,397.
- (e) On 27 September 2020 the Member submitted a Notification of Appeal form appealing from the Disciplinary Tribunal decisions that:
- (i) he had brought discredit to CA ANZ and the profession of accountancy;
 - (ii) his membership be terminated;
 - (iii) he pay the full costs of the proceedings;
 - (iv) the Member also submitted that he had not been afforded procedural fairness on a number of points.

2. The issues for determination:

- (a) Should the Tribunal set aside, vary or affirm the decision of the Disciplinary Tribunal that allegation 1 was established?
- (b) Should the Tribunal set aside, vary or affirm the decision of the Disciplinary Tribunal that allegation 2 was established?
- (c) If the answer to (a) or (b) was yes, what sanctions should be imposed on the Member?

- (d) Should the Member be required to pay costs and if so, in what amount?
- (e) Was there any reason to suppress the Member's name from the published decision?
- (f) Should other parties be notified of the Tribunal's decision?
- (g) Should any confidentiality orders be made?
- (h) Had the Member been afforded procedural fairness?

3. Should the Tribunal set aside, vary or affirm the decision of the Disciplinary Tribunal that allegation 1 was established?

3.1 Determination

In relation to allegation 1, the Member admitted that he had been found guilty of a criminal offence by the County Court of Victoria which had not been set aside on appeal.

The Tribunal accordingly affirmed the Disciplinary Tribunal determination that the Member was found guilty of a criminal offence by the County Court of Victoria which has not been set aside on appeal.

4. Should the Tribunal set aside, vary or affirm the decision of the Disciplinary Tribunal that allegation 2 was established?

4.1 Determination

The Tribunal affirmed the Disciplinary Tribunal determination that the Member committed an act, omission or default which brings, or may bring, discredit upon that Member, CA ANZ and the profession of accountancy.

4.2 Member submissions

- (a) The Member admitted that he had brought discredit to himself but submitted that he had not brought discredit to CA ANZ or the profession of accountancy because:
 - (i) the offence had not been committed during the course of his conduct as an accountant;
 - (ii) the crime was not linked to professional conduct or the profession;
 - (iii) that between the time of his arrest and the time of his trial which was approximately two years, he had competently conducted himself as an accountant in employment;
 - (iv) prior to his conviction, he provided several references to the court which demonstrated that between the time of his arrest and the time of his trial, he had conducted himself professionally as an accountant;
 - (v) the punishment that he received for his offence did not of itself cause reputational damage and that punishment was not a reason to deploy further punishment. The fact that he was sentenced to 11 years in prison was not in itself a discredit to CA ANZ or to the profession;
 - (vi) although he was subject to ongoing incarceration, that did not itself discredit the reputation of CA ANZ or that of the accountancy profession;
 - (vii) the decision of the Disciplinary Tribunal to publish its decision would exacerbate the damage to CA ANZ and the profession and this was a contradiction;

- (viii) the fact that the Reasons for Sentence said he was a “*highly skilled chartered accountant*” was not intended to convey by those comments that he had conducted himself as an accountant in relation to the offence, but rather by those comments Dean J was being positive and complimentary;
 - (ix) it was irrelevant for the Disciplinary Tribunal to take into account the standard of a fit and proper person in circumstances where no reference had been made to that test prior to the Disciplinary Tribunal hearing.
- (b) In making this submission, the Member referred to the character references which were provided to the Disciplinary Tribunal and referred to in the Reasons for Sentence.

4.3 PCC submissions

- (a) The PCC submitted that the Member had brought discredit to CA ANZ and the profession of accountancy, in addition to himself, because:
- (i) the offence was a serious offence carrying a penalty of 11 years’ imprisonment following a trial of six days, involving possession of more than 14,000 MDMA tablets and a sum of \$250,000 in cash;
 - (ii) the Member was in business of drug trafficking for a profit and had access on a number of occasions to drugs, pill bags and cash kept in a storage locker he had rented and this amounted to flagrant offending which was reflected in the heavy sentence imposed by Dean J;
 - (iii) the Member did not appeal that decision;
 - (iv) the Member admitted that the conviction brought discredit to himself;
 - (v) it was not logical to distinguish between the Member being discredited and discredit to the profession and CA ANZ;
 - (vi) the fact that the Disciplinary Tribunal had found that the Member had brought discredit upon the profession and CA ANZ was not an additional punishment but was an important finding to protect the reputation of the profession and the public in the context in which CA ANZ held its membership out to the public as having a high standard;
 - (vii) if a member of the public became aware of Dean J’s comment that the Member was an accountant, this might well bring discredit to the profession;
 - (viii) the question of whether a person was a fit and proper person, was a matter to be determined when a person sought admission to CA ANZ. It was therefore a proper test to consider when taking into account whether a member had brought discredit to CA ANZ.
- (b) In making this submission, the PCC referred to the Reasons for Sentence.

4.4 Reasons for decision

- (a) The essential question was whether, in the opinion of the Tribunal, the Member had brought discredit upon CA ANZ and the profession of accountancy. The Tribunal was aware that it had to form that opinion acting reasonably and rationally and having had considered the submissions made by Member and the PCC.
- (b) In coming to that decision the Tribunal took into account the fact that the Member had been found guilty of “*trafficking in a large commercial quantity of a drug of dependence*” and

also that he had been in possession of “a large sum of money in the order of \$250,000” in cash.

- (c) In Dean J’s opinion set out in the Reasons for Sentence the Member’s moral culpability for the offending “*might properly be described as high*” and that he was “*a serious drug offender*” and had “*shown no remorse for his crime*” and “*the mitigatory effect of a plea of guilty was absent in his case*”.
- (d) Taking into account the serious and morally reprehensible nature of the offence, the Tribunal was of the opinion that the conduct of the Member which led to his conviction was not conduct which the public reasonably expected of the profession of accountants or members of CA ANZ.
- (e) The Tribunal took into account that CA ANZ holds out to the world that its members adopt a high standard of professional conduct and are fit and proper persons to act as accountants. The Tribunal was of the view that CA ANZ could not honestly hold out to the public that the Member, having committed the crime of which he had been found guilty, could reasonably be said to be a person who would conform to the standards expected of a member of CA ANZ.
- (f) Although the Member suggested that he had not conducted himself as a professional in relation to the matters of which he was convicted, the offence itself showed that he was not fit to be a member and that his conduct brought discredit to the profession and to CA ANZ.
- (g) The Tribunal also took into account the Member’s submission that Dean J’s comment that he was a “*highly skilled chartered accountant*” and had held a range of positions of responsibility, was not a reflection upon the moral culpability of the offence. However the fact that the Member was mentioned as an accountant in the Reasons for Sentence, would draw the attention of anyone reading the Reasons for Sentence to the fact that he was a member of the profession and it was likely to be taken as a reflection on the profession which would tend to bring it into discredit.
- (h) Additionally, the Tribunal noted that it was unlikely that CA ANZ could properly hold out to the world that the Member, having committed such a morally reprehensible crime, could be said to be a fit and proper person to be a member of CA ANZ as a result of his conviction. Regulation 1.5 *Fit and proper person requirements* sets out matters the Board may take into account in the context of whether to accept an application for admission or re-admission as a member of CA ANZ, including whether an “applicant [for admission or re-admission as a member of CA ANZ] has before any court of law ... been found guilty of, any criminal offence”. It was open to the Tribunal to consider similar matters in its consideration of whether discredit had been or was likely to be brought on the profession or CA ANZ.
- (i) For the above reasons the Tribunal determined that the allegation was established and that the Member had brought discredit to himself, CA ANZ and the profession of accountancy.

5. 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 Tribunal affirmed the sanction imposed by the Disciplinary Tribunal that the Member's membership be terminated and his name removed from the Registers on which it appears.
- (d) The Member submitted that his membership should be suspended for five years and not be terminated because:
- (i) he would not be practising as an accountant during his incarceration and he was intent on re-joining society as a productive member when he was released;
 - (ii) there was no nexus between his criminal offence and the profession of accountancy and therefore termination of membership was too severe a sanction;
 - (iii) to terminate his membership would be an additional punishment beyond the punishment that had already been given to him by the Court;
 - (iv) suspension of membership would already achieve a deterrent effect on himself and others and relying on termination to achieve that deterrent effect was excessive.

The Member relied on his oral and written submissions presented to the Disciplinary Tribunal and his written grounds for appeal in his notification of appeal.

- (e) The PCC submitted that the Member's membership should be terminated and that the Tribunal should have regard to the following matters:
- (i) no other outcome would be proper in the circumstances other than to terminate his membership;
 - (ii) that there are cases in which it is not tenable for a member to be held out as being a member and this was such a case;
 - (iii) public confidence in the profession and CA ANZ would be undermined if the Member's membership was not terminated. It would also send the wrong signal to members of the public and to the membership if he was allowed to continue on as a member;
 - (iv) extra-judicial punishment did not arise in circumstances where the By-Laws clearly allow the Disciplinary Tribunal and the Tribunal to impose a sanction of termination;
 - (v) it was not a case of adding punishment to another punishment, the sanction of membership termination was designed to protect the interests of CA ANZ, its membership as a whole, the integrity of the profession and the public.

- (f) The Tribunal determined that termination of membership was the appropriate sanction because:
- (i) the serious nature of the crime and its moral reprehensibility meant that it would not be appropriate for CA ANZ to continue to hold out to the public that the Member was fit to be a member;
 - (ii) termination was the highest indication of disapproval that the Tribunal could indicate and it believed that this was appropriate in this case;
 - (iii) it agreed with the Disciplinary Tribunal determination that public confidence in CA ANZ and in the profession would not be maintained if the Member were allowed to continue in membership with this criminal conviction.

6. Should the Member be required to pay costs and if so, in what amount?

- (a) Regulation CR 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 Tribunal affirmed the cost sanction imposed by the Disciplinary Tribunal that the Member pay \$9,397 for the full costs and expenses of the proceedings to that date.
- (c) The Member submitted that he should not pay costs because:
- (i) it was not reasonable to award costs against him in circumstances in which he did not have the means to pay those costs;
 - (ii) his financial circumstances were such that all of his assets had been removed and that he was earning \$30 a week and had no prospect of earning sufficient money to pay the costs;
 - (iii) the Disciplinary Tribunal had not taken into account that he had offered to pay \$730 towards the costs of the Disciplinary Tribunal proceedings;

- (iv) it was not relevant to consider who should pay the costs if he was not ordered to do so. The real question was whether it was reasonable that he be ordered to pay those costs. He submitted it was not reasonable given his circumstances.
- (d) The PCC submitted that the Member should bear the full costs of the proceedings including the Appeals Tribunal hearing because:
 - (i) the Member's personal circumstances were not relevant;
 - (ii) he should bear the costs given that the Member contested the allegation that he had brought discredit to CA ANZ and to the profession;
 - (iii) he had decided not to abide by the Disciplinary Tribunal decision and opted to go to the Tribunal. Although it was his right to do so, if the Member was not successful on his grounds of appeal then payment of the associated costs by the Member should follow.
- (e) The Tribunal determined that the Member should pay the costs of the proceedings before the Disciplinary Tribunal in the amount of \$9,397 and the costs of this appeal in the amount of \$11,184 because, having had regard to each of the considerations in Regulation CR 8.12 and the parties' submissions, it found that:
 - (i) the decision of the Disciplinary Tribunal regarding breach, sanctions and costs had been affirmed in full, and concerned criminal conduct of the utmost seriousness on the Member's part;
 - (ii) the Member embarked upon the activities which led to his conviction of his own volition and the fact that he now had no assets, on his evidence, was due to his own actions. In the circumstances the Tribunal was of the view that it was reasonable that he bear the costs of the disciplinary proceedings and his unsuccessful appeal;
 - (iii) the costs for both the Disciplinary Tribunal and Tribunal were comprised of out of pocket expenses necessarily incurred by CA ANZ in the conduct of the disciplinary procedures and hearings and accordingly were reasonable;
 - (iv) this was not a case where the Member had fallen upon hard times and as a result had lost his ability to pay costs, but was a result of his conviction for a crime he undertook deliberately.

7. Should the Member's name be suppressed?

- (a) By-Law 40 states:

12.3 Where the ... Appeals 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 ... Appeals 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 ... Appeals 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.

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

- (a) By-Law 40(11.15) states:
- The Appeals Tribunal ... may notify interested parties including other professional bodies, regulatory authorities, the Member's current and/or former employers, partners and 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..
- (b) The Tribunal was not advised of any registrations or memberships held by the Member and as a consequence no interested parties were identified by the Tribunal.

9. Should any details be kept confidential?

- (a) By-Law 40(13.12) states:
- (d) The ... 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.
- (b) The Tribunal directed that, except for the content of the written decision with reasons, all written and oral evidence and submissions related to this determination are to remain confidential.

10. Had the Member been afforded procedural fairness?

- (a) The Member submitted that he had not been afforded procedural fairness because:
- (i) it appeared that the Disciplinary Tribunal had made its decision very quickly and did not supply reasons for the decision on the day. The Member submitted that gave *"rise to the impression that the reasons were confected after the fact and that the result was in fact predetermined"*;
 - (ii) the decision was only signed by the Chair of a Tribunal of three *"which also gives rise to concern that they are not properly approved by the relevant parties... This process implies that justifications were engineered after the fact, rather than The Tribunal coming to the decisions based on the circumstances of the case"*;
 - (iii) he only had 12 days to prepare his appeal because:
 - (1) the Disciplinary Tribunal decision had been sent to the correctional facility from which he had been forcibly transferred;
 - (2) mail can be delayed in processing by correctional facilities.
- (b) As a preliminary point the PCC submitted that hearings of this Tribunal are by way of re-hearing and any procedural unfairness suffered by the Member at the Disciplinary Tribunal, which the PCC did not accept had occurred, would be cured by this re-hearing. With respect to the Member's other points the PCC submitted that:
- (i) there was no particular time required to make a decision and that the shortness of time complained of by the Member did not indicate any pre-determination of the issue;

- (ii) further, the fact that the determination was signed only by the Chair was consistent with the Disciplinary Tribunal's usual procedure and there was no requirement under the By-Laws for decisions to be signed by all members of the Disciplinary or Appeals Tribunals.
- (c) The Tribunal:
- (i) agreed with the PCC that the fact that the Disciplinary Tribunal had taken a short period of time to make its decision did not indicate that it had predetermined of the issue;
 - (ii) noted there was no requirement in the By-Laws that each member signed the decision. The usual practice is for the Chair to confirm with the other members that they agree with the written terms of the decision. There was nothing to indicate that this procedure had not been followed;
 - (iii) noted the Member's comment about having only 12 days to write an appeal but also took into account that this was a new hearing. The Tribunal gave the Member a further opportunity to orally supplement his appeal notice if he wished to do so. The Member did not add any further substantial point to the matters he had already raised. The Tribunal was satisfied that he had been given every opportunity to raise any matter he wished so as to afford him procedural fairness.



**Chair
Appeals Tribunal**

SCHEDULE 1: THE PCC'S ALLEGATIONS

It is alleged that while a member of Chartered Accountants Australia and New Zealand (CA ANZ) the Member is liable to disciplinary action in accordance with:

1. By-Law 40(2.1)(b), in that on 31 October 2019 the Member was found guilty of one charge pursuant to section 71(1) of the *Drugs, Poisons and Controlled Substances Act 1981 (Vic)*, which has not been set aside on appeal, being one charge of trafficking in a large commercial quantity of a drug of dependence.
2. By-Law 40(2.1)(k), in that the acts, omissions and defaults as set out in paragraph 1 above bring, or may bring, discredit on the Member, CA ANZ or the profession of accountancy.

SCHEDULE 2: RELEVANT BY-LAWS

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

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

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

...

40(2) Disciplinary action

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

...

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

...

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

...

40(10) Disciplinary Tribunal

...

40(10.12) If the Disciplinary Tribunal determines that the complaint contained in the Notice of Disciplinary Action or any part thereof is established it may, subject to By-Law 40(9.3)(c), and having given the Member a reasonable opportunity of being heard on the question of sanctions, impose any one or more of the sanctions in the table below identified as applicable to that class of Member:

...

- (a) terminate that Member's Membership and remove the Member's name from the Registers on which it appears

...

- (k) require the Member to pay to CA ANZ all or any portion of the Costs incurred by or on behalf of CA ANZ (including by or on behalf of the Professional Conduct Committee) in investigating and dealing with the original complaint and the matters the subject of the Notice of Disciplinary Action as the Disciplinary Tribunal determines

...

40(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 paragraph 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 paragraph 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 to the Appeals Tribunal against any such determination or sanction, or both.

...

40(11.5) Every appeal shall be by way of rehearing but, unless the Appeals Tribunal directs otherwise, it shall not allow witnesses to be recalled who gave evidence before the Disciplinary Tribunal or to introduce any new evidence.

...

40(11.10) On each appeal the Appeals Tribunal may affirm, vary or set aside any determination of the Disciplinary Tribunal and may affirm, increase, reduce or set aside any sanction imposed and may impose any additional or alternative sanction or sanctions from those permitted to the Disciplinary Tribunal by paragraphs 9.1, 10.12, 10.13, 12.3, 12.4 (as applicable) and 13.8.

...

40(11.12) A determination of the Appeals Tribunal shall take effect as from the date it is made.

40(11.13) The Appeals Tribunal:

- (a) must give notice of its decision with reasons to the Member, the Professional Conduct Committee and to the Professional Conduct Oversight Committee within 14 days of the decision; and
- (b) may give notice of its decision with reasons to such other professional bodies and regulatory authorities as it determines.

40(12) Publication of investigations and decisions

...

40(12.3) Where the Disciplinary Tribunal or Appeals Tribunal determines that a complaint is established or imposes a sanction adverse to the Member (including suspension on an interim basis, or one with the consent of a Member or a written undertaking under paragraph 13.8) 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 or Appeals Tribunal (as applicable) considers that there are exceptional circumstances for not doing so.

40(12.4) Publication under paragraphs 12.1 or 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 paragraphs 13.12(c) and 13.12(d), and unless the Disciplinary Tribunal or Appeals Tribunal determine otherwise, each shall hold its hearings in public.
- (c) The Disciplinary Tribunal or Appeals Tribunal may determine to hear any part of a hearing in private.
- (d) The Disciplinary Tribunal or Appeals Tribunal may require, including as a condition of admission to a hearing, any person present to undertake to keep all or any part of a hearing, the evidence adduced at it or other information disclosed (including the identity of any persons present at or otherwise connected with the hearing) confidential on such terms as it determines.

SCHEDULE 3: REGULATION CR8 - DISCIPLINARY PROCEDURES

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 Terms of Reference

- (a) For the implementation of the procedures referred to in Section 5 of the By-Laws the Board has approved the Terms of Reference for:
 - (i) the Professional Conduct Oversight Committee;
 - (ii) the Professional Conduct Committee;
 - (iii) the Disciplinary Tribunal; and
 - (iv) the Appeals Tribunal.
- (b) The Terms of Reference for each may be found [here](#).

8.5 Disclosure Events

(By-Law 40, paragraphs 3.1 and 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-Law 40, paragraphs 3.3 and 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, paragraph 4)

- (a) Complaints made about a Member to CA ANZ 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

(By-Law 40, paragraphs 5.4 and 7.2)

Applications for the consent of the Professional Conduct Committee should be made using, and in the manner prescribed by, the Consent Form.

8.9 Application to the Reviewer

(By-Law 40, paragraph 8)

- (a) An application made to CA ANZ to request the review of a Final Decision in accordance with paragraph 8 of By-Law 40 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, paragraph 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, paragraph 11.
- (b) Notice of appeal should be given using, and in the manner prescribed by, the Appeal Form and must detail all grounds of appeal.

8.11 Guidelines for the imposition of sanctions

(By-Law 40, paragraph 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, paragraph 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, without limiting the matters it may take into account, it must take into account the following:

- (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 copy of the Former Professional Conduct By-Laws may be found [here](#).

8.14 Confidentiality Obligations

- (a) Members must comply with the requirements set out in subparagraphs (b) – (e) 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 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;
 - (iv) 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) – (iv) 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.