



Disciplinary Tribunal of Chartered Accountants Australia and New Zealand (CA ANZ) Written decision dated 15 July 2020

- Case Number:** D-1114
- Member:** David George Peter Burmingham CA of Queensland
- Hearing Date:** 24 June 2020
- Tribunal:** David Fairlie (Chair and lay member of the Tribunal)
Richard Rassi FCA
Ross Gavin FCA
- Tribunal Legal Adviser:** Jamesina McLeod
- Representation:** Michael Bradley for the Professional Conduct Committee (PCC)
The Member neither appeared nor was represented
- Decisions:**
1. The Tribunal determined that the Member:
 - (a) had been the subject of adverse or unfavourable findings by the Federal Magistrates Court of Australia in relation to his professional and business conduct and integrity;
 - (b) failed to comply with reasonable and lawful directions of CA ANZ concerning the good order and management of CA ANZ; and
 - (c) had suffered an insolvency event.
 2. The Tribunal determined that the Member be suspended from membership of CA ANZ for a period of five years and his name removed from the Registers on which it appears.
 3. The Tribunal imposed a cost sanction in the sum of \$15,130 for the full costs and expenses of the proceedings.
 4. The Tribunal made the following directions regarding the conduct of the hearing and the publication of its reasons for decision:
 - (a) the hearing proceed in the absence of the Member;
 - (b) the Member's adjournment request not be granted;
 - (c) pursuant to By-Law 40(10.3)(a), to consent to the PCC amending its Amended Notice of Disciplinary Action less than 35 days before the hearing;

- (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) 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;
- (g) the decision regarding confidentiality takes effect immediately on 24 June 2020.

The date of effect of this decision is 6 August 2020 (By-Law 40(10.18)).



1. Introduction

- (a) In early 2013 CA ANZ (at the time known as the Institute of Chartered Accountants in Australia) became aware of the Federal Circuit Court of Australia (at the time known as the Federal Magistrates Court of Australia) decisions in *Burmingham v Moloney* [2011] FMCA 475 dated 19 May 2011 (the **2011 Judgment**) and *Burmingham v Moloney (No. 3)* [2013] FMCA 47 dated 30 January 2013 (the **2013 Judgment**) (collectively, the **O'Dwyer Judgments**).
- (b) On 22 February 2013 CA ANZ wrote to the Member seeking further information in relation to the 2013 Judgment and in particular:
- (i) O'Dwyer FM's adverse findings about the Member at [22], [31], [38], [39], [40], [41], [42] and [42]; and
 - (ii) the disclosure that the Member had been declared bankrupt;
- (the **Complaints**).
- (c) By email sent 26 March 2013, the Member advised that:
- (i) the 2013 Judgment *"is being appealed to the Federal Court. I will keep you apprised of any progress in this regard"*;
 - (ii) he *"vehemently reject[ed] all of the comments made by Federal Magistrate O'Dwyer"* in the identified paragraphs of the 2013 Judgment;
- and requested *"that all investigations and other actions against me, be placed on hold pending final resolution of such matters"*.
- (d) By letter dated 17 May 2013 CA ANZ replied to the Member noting his comment that he had appealed the 2013 Judgment to the Federal Court and advising that in the circumstances CA ANZ's investigation would be suspended pending finalisation of the Member's appeal. The Member was requested to keep the writer updated as to the status of his appeal.
- (e) By email dated 22 February 2015 the Member advised, amongst other things:
- (i) *"I am still in the process of attempting to further my appeal against"* the 2013 Judgment and the underlying proceedings; and
 - (ii) *"I am attempting to resolve all ... the issues as quickly as I can within the parameters of my situation, and will keep you abreast of any developments"*.
- (f) By letter dated 7 December 2015 CA ANZ advised the Member that a hearing for the matter had been scheduled for April 2016 before the Disciplinary Tribunal (then known as the Professional Conduct Tribunal) *"on the basis of the available information"*. This letter was re-sent to the Member on 1 March 2016 and the Member responded on 7 March 2016 by email which included the statement *"I advise that your latest email was discovered in my junk mail"*.
- (g) By emails sent 19 April 2016 the Member requested an adjournment of the 22 April 2016 hearing date and on 22 April the Tribunal determined to adjourn the hearing to a date to be fixed because the Member had provided evidence that he had a medical appointment at the time scheduled for the hearing.
- (h) By letter dated 8 August 2016 sent by email, the Member was advised that the hearing of his matter had been scheduled for 22 November 2016. After receiving advice from the Member

that he was filing formal judicial complaints related to the substance of the Complaints, the Member was notified by email sent 5 October 2016 that his hearing date had been vacated.

- (i) By letter dated 29 October 2019 sent by email, the PCC:
 - (i) noted that it had been six years since the commencement of the Complaints and the Member was “*yet to respond to the substance*” of the Complaints and had “*not provided any evidence in support of [his] position that these matters are subject to appeal*”;
 - (ii) advised that it intended to have the matter relisted for hearing; and
 - (iii) repeated previous requests for information and documents.

This letter was re-sent by email to the Member on 5 December 2019.
- (j) By email sent 10 December 2019, the Member advised:
 - (i) he “*was lucky to see [the PCC’s] latest correspondence which I found in my junk mail*”; and
 - (ii) he would attempt to respond by the due date of 19 December 2019.
- (k) By letter dated 23 January 2020 sent by email, the PCC advised the Member:
 - (i) it had not received his required response;
 - (ii) if he did not respond then the PCC would consider amending its Notice of Disciplinary Action (the **Original NDA**) to include an allegation that the Member had failed to comply with reasonable and lawful directions;
 - (iii) it would seek to have the matter relisted for hearing by the Tribunal; and
 - (iv) he would be required to attend the Tribunal hearing.
- (l) Following a telephone conversation between the Member and the PCC on 11 February 2020, the PCC agreed to give the Member an extension of time within which to respond, to 18 February 2020.
- (m) By letter dated 23 March 2020 sent by email, the Member was advised that his matter had been relisted for hearing on 7 May 2020. Due to the COVID-19 pandemic this hearing date was vacated on 21 April 2020.
- (n) The PCC issued an Amended Notice of Disciplinary Action dated 24 March 2020 (set out in full in Schedule 1) (the **Amended NDA**) which in summary alleged that:
 1. the Federal Magistrates Court of Australia made adverse findings in relation to the Member’s professional or business conduct or competence as recorded in the O’Dwyer Judgments;
 2. the Member failed to comply with a reasonable and lawful direction of CA ANZ, by failing to:
 - i) respond/respond in a reasonably timely manner to numerous correspondence; and
 - ii) provide information and/or documentation requested of him; and
 3. the Member became a bankrupt in 2011.

- (o) By letter dated 19 May 2020 sent by email the Member was advised that his matter had been scheduled for a hearing on 24 June 2020 to be conducted via video/teleconference.
- (p) On 23 June 2020 at 4.39pm the Member emailed the PCC advising that he could not attend the hearing scheduled for 24 June 2020 at 10am and requested an adjournment.

2. The issues for determination

- (a) Should the hearing proceed in the absence of the Member?
- (b) If the answer to (a) was yes, should the hearing be adjourned?
- (c) If the answer to (b) was no:
 - (i) had the Member been the subject of adverse or unfavourable findings in relation to his professional or business conduct, competence or integrity by the Federal Magistrates Court in Australia, in breach of By-Law 40(2.1)(e)? (allegation 1)
 - (ii) did the Member fail to comply with reasonable and lawful directions of an officer of CA ANZ in breach of By-Law 40(2.1)(i)? (allegation 2)
 - (iii) had the Member suffered an insolvency event in breach of By-Law 40(2.1)(j)? (allegation 3)
- (d) If the answer to (c)(i), (ii) or (iii) was yes, what sanctions should be imposed on the Member?
- (e) Should the Member be required to pay costs and if so, in what amount?
- (f) Was there any reason to suppress the Member's name from the published decision?
- (g) Should any confidentiality orders be made?
- (h) Should consent be given to the PCC to amend the Amended NDA?

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

- (a) The PCC submitted that the Member had received proper notice of the hearing and drew the Tribunal's attention to the following:
 - (i) the Member had corresponded with CA ANZ from the same hotmail email address recorded for him on the General Register since 2013 and as recently as 24 June 2020, and no bounce-back or undeliverable messages had been received by CA ANZ when sending correspondence to the Member at that hotmail email address (the **Member's Email Address**);
 - (ii) letter dated 19 May 2020 sent to the Member's Email Address which notified the Member that his matter had been scheduled for hearing to be conducted by video/teleconference from 10am Wednesday 24 June 2020;
 - (iii) 10 June 2020 follow-up email sent to the Member's Email Address;
 - (iv) letter dated 12 June 2020 sent by prepaid Express Post to the Member's residential and mailing addresses recorded on the General Register, both of which had been delivered and not returned to sender;
 - (v) file note of 15 June 2020 telephone conversation between the Tribunal Secretary and the Member's mother, where the Member was requested to contact CA ANZ;

- (vi) 15 June 2020 email sent to the Member's Email Address and corresponding text messages sent to:
 - (1) the Member's mobile phone number recorded on the General Register; and
 - (2) the mobile phone number quoted in the footer of an email sent by the Member to CA ANZ on 10 December 2019, which the Member advised on 24 June 2020 was his current phone number (the **Member's New Phone Number**);
 - (vii) 17 June 2020 email sent to the Member's Email Address advising telephone and videoconference connection details for the hearing;
 - (viii) letter dated 22 June 2020 regarding possible sanctions, sent to the Member's Email Address;
 - (ix) evidence from the CA ANZ Membership Record which showed that the Member had received and opened an email sent on 12 June 2020 to the Member's Email Address with the subject "*Important: Membership Renewal Information*";
 - (x) it was the PCC's understanding that email account owners control their Spam/Junk settings; and
 - (xi) the By-Laws oblige members to notify CA ANZ of any change of principal place of business or, if the member does not have a principal place of business, their place of residence (**Registered Address**).
- (b) The Member submitted:
- (i) in an email sent to the PCC on 23 June 2020 at 4.36pm, amongst other things:
 - (1) *"I have no knowledge of any adjourned hearing tomorrow. Nobody has contacted me personally to advise or ensure I had received such advices";*
 - (2) *"I also cannot find any communications regarding my actual membership for many years";* and
 - (3) *"I also confirm that I am in any event unavailable for any hearing tomorrow";*
 (the **Member's 23 June Response**); and
 - (ii) in an email sent to the Tribunal Secretary on 24 June 2020 at 9.16am, amongst other things:
 - (1) *"I note that I discovered your [23 June 2020] email in my Junk Mail, (which i took a photo of), following an email received from [the PCC] at 638pm confirming [they] forwarded my email to you. [The PCC] had said that you allegedly sent me emails? I therefore presume Junk is where your previous communications went (along with the 100-200 others I regularly get)";*
 - (2) *"I am unaware of what details are actually recorded on the Members Register. I have advised [CA ANZ] multiple times of my correct details, which I note are included in all my communications. I stated that if the details on the Members Registrar are inconsistent with what I have previously advised, then [CA ANZ] has failed to update my correct details despite being notified of same";*
 - (3) *"I note your statement regarding "(my) late notice of (my) inability to attend". I again advise that i contacted [CA ANZ] as soon as I received ... correspondence sent late at night 22 June that referred to a hearing scheduled for 1000am 23 June. The "late notice" is therefore as a direct result of*

[CA ANZ] *failing to properly advise me of such hearing, despite having my current contact details at all material times. I again reiterate that, at no time whatsoever, have I ever received any phone calls, or texts, on my current mobile phone number ([the Member's New Phone Number]) advising of any hearing tomorrow, or notifying of any correspondence sent by you relating to any hearing tomorrow, despite me having this phone number for many years, and despite further multiple people from [CA ANZ] (including specifically [the PCC]) contacting me direct on this phone number multiple times over many years";*

- (4) *"My request for an adjournment is quite simple:*
- *I had not received notice of any hearing until today (I presume any previous documents went into my Junk Mail). This was confirmed in my conversation with [the PCC] and email;*
 - *I have not received any documentation relating to the actual hearing (as opposed to advice of it proceeding tomorrow) as of today. I note that, despite being previously advised that I had not received any such documents, you again did not provide such documents in your latest email;*
 - *I received no telephone advices on my mobile phone to advise that any important / legal documents had been sent to my email;...";*
- (5) *"I am unavailable to attend any hearing tomorrow. This therefore includes by telephone to discuss the adjournment request, which in itself ought be self apparent, including the grounds for same";*
- (6) *"I ought not be discriminated against, and significantly prejudiced, as a result of dilatory conduct by [CA ANZ] (and the failures of others as noted) in the above regard"; and*
- (7) *"For the record, once again, my current contact details are as follows:*
- a. *email address - [the Member's Email Address] (as noted previously, and as is believed to be common knowledge, emails received from previously unknown email addresses usually end up in Junk Mail). PLEASE NOTE: I take no responsibility for any correspondence (in particular important / legal documents) that are sent via this email address without previously advising by phone that they are to be sent, or subsequently advising soon thereafter that they have done so...";*

(the Member's 24 June Response).

- (c) The Tribunal determined the Member had received proper notice of the hearing and that the hearing should proceed in the absence of the Member. The Tribunal was satisfied that the Member had been notified of the hearing date and time because:
- (i) he had only ever used the Member's Email Address since at least 2013 and the PCC had communicated with the Member on this email address at various times since that date;
 - (ii) no bounce-back or undeliverable messages were received to indicate that the Member's Email Address was not live;
 - (iii) the Tribunal is of the opinion that email account owners are responsible for managing their Spam/Junk email folders. The Tribunal did not accept that an email going to a Spam/Junk email folder had not been delivered;

- (iv) the relevant emails were:
- (1) 25 March 2020 which served the Amended NDA; and
 - (2) 19 May 2020 which gave notice of the hearing date and time;
- and the Tribunal was comfortably satisfied that those were delivered in light of (i), (ii) and (iii) above.

In addition, the Tribunal noted that:

- (v) a letter dated 12 June 2020 was sent to the Member at the residential and postal addresses recorded for him on the General Register and the Express Post tracking for that letter reported it was successfully delivered to both addresses and not returned. Members are obliged under By-Law 144 to notify any change of Registered Address and if the Member's address had changed, he should have notified CA ANZ. There was no evidence before the Tribunal supporting the Member's assertion that he had notified CA ANZ of a new principal place of business or new place of residence;
- (vi) a password to access the hearing documents had been sent to the Member's New Phone Number and a call in response was subsequently received by the password generator;
- (vii) a CA ANZ membership subscription email sent to the Member's Email Address on 12 June 2020 was opened and this established that the Member's Email Address appeared to be operational on that date.

4. Should the hearing be adjourned?

- (a) In the Member's 23 June Response he advised the PCC:

"I note that I had updated [CA ANZ] that the situation (as previously advised) had not changed i.e. including that despite my multiple ongoing requests, the Supreme court of Victoria has not yet provided all documents to me to enable me to progress my judicial complaint against the judge ...

My inability to progress my formal judicial complaint against the Victorian Supreme Court judge is also preventing me from appealing such wrongful decision. As my appeal is long out of time, I have been advised that the judicial complaint need to be completed first to include findings in this in my application for leave to proceed with my appeal out of time.

This in turn is preventing me from progressing my appeals/requests for rehearing/judicial complaints in the various bankruptcy matters in the Federal Magistrates Court (now Federal Circuit Court) and Victorian Magistrates Courts, as I need to finalise the Victorian Supreme Court matter prior to the other matters.

My former Trustee ... was complicit in preventing these matters being rightly determined ...

I had previously been advised that (for obvious reasons) any hearing in this matter would be adjourned until after all such matters had been completed? My complaint against [my former Trustee] was also therefore relevant to these proceedings...".

(b) In the Member's 24 June Response he advised the Tribunal Secretary:

"...My request for an adjournment is quite simple:

...

- I have not had any response from [CA ANZ] as to who instigated the actual complaint against me - i.e. a third party or [CA ANZ] of its own volition (as referred to in my email below), which is critical to any documents I may need to file in relation to said hearing. I cannot attach documents I have not received;*
- The hearing in any event cannot proceed until it is rightfully known whether I ought to have been made bankrupt to begin with. This cannot be known until:

 - The outcome of my complaint against the Trustee in my bankruptcy. I have not had any confirmation (or indeed response) from [CA ANZ] as to the progress of my complaint against the Trustee who handled my bankruptcy (and/or his employees or agents) with respect to his failures to act competently, failures to properly identify legitimate creditors, acting with conflict of interest, including with respect to other legal matters referred to below. This is again critical to my case;*
 - The outcome of my Judicial Complaint against the trial judge in the Supreme Court of Victoria (in which I was ordered to pay costs of approx \$300,000, and which was the main creditor listed in my bankruptcy, and which was clearly stated to be "in dispute");*
 - The outcome of my Appeal in the Supreme Court of Victoria, and Application for leave to appeal out of time, which will be dependant on my Judicial Complaint;*
 - The outcome of my Judicial Complaints and/or appeals in the Victorian Magistrates Court, and Federal Circuit Court (formerly Federal Magistrates Court), with respect to the Default Judgment, Sequestration Orders, Bankruptcy, which cannot be commenced until following the outcome of my appeal in the Victorian Supreme Court matter.**

...

- I am unavailable to attend any hearing tomorrow. This therefore includes by telephone to discuss the adjournment request, which in itself ought be self apparent, including the grounds for same. I have previously advised [CA ANZ] of my medical conditions, including again today during my discussion with [the PCC] wherein I was required to be on an oxygen concentrator machine. Attending to this email (which i ought not have had to do - including as I was unwell as mentioned in my previous email today, but have been forced to do) has now further exacerbated my neurological conditions, required further oxygen and medication, and further decrease my ability to attend any hearing tomorrow. I also have care of [minors] tomorrow, and I therefore need to rest as much as possible to be able to do so. My ability to do so will be further reduced as a result of this, and therefore now require even more rest beforehand. [CA ANZ] is fully aware of my medical conditions, and have been since my health collapsed in 1992.*

...

If any hearing is to proceed against me, I believe I have the right to all of the above, and for all of the above to be taken into consideration in any such hearing, and to have sufficient time to prepare within the parameters of my actual medical conditions. Failing which I will suffer significant and demonstrable prejudice..."

(c) The PCC submitted that the Member had displayed a pattern of conduct where he claimed at a very late stage that he had not received correspondence sent to him and that he required an adjournment. The PCC referred the Tribunal back to the numerous communications from the Member, sent from the Member's Email Address, and the correspondence from CA ANZ sent to the Member's Email Address.

- (d) In relation to the Member's submission that he was seeking various remedies arising from the original proceedings and that the CA ANZ disciplinary action should be suspended until those remedies were resolved the PCC submitted:
- (i) the Member had provided no documentary evidence supporting his claims that he was progressing those remedies;
 - (ii) the Member had acknowledged with respect to one of the remedies that he was out of time and would have to seek leave to appeal;
 - (iii) the Tribunal could comfortably conclude that nothing had happened and could infer that nothing was going to happen.
- (e) At the Member's request, the PCC provided a copy of the Member's 23 June Response to the Tribunal Secretary. The Tribunal Secretary responded by email to the Member's Email Address:
- "...Given the late notice of your inability to attend, please provide copies all relevant documentation in support of your request for an adjournment. This can be provided by email to me and I will distribute the documentation to the members of the Tribunal and the Professional Conduct Committee ... The Tribunal also requests that you join the hearing by telephone to discuss the adjournment request, so that it can make a decision with the benefit of all relevant information from you and the PCC on whether to grant the adjournment or continue the hearing. Please note that if a Member fails to attend their hearing the Tribunal may decide to continue in their absence (Notes for guidance attached for your assistance)..."*
- (f) The Tribunal determined to not grant the Member's adjournment request because:
- (i) there was nothing new in the Member's 23 June Response or the Member's 24 June Response justifying a further adjournment. In particular, there was no evidence the Member had progressed his judicial complaints and his complaint to CA ANZ regarding his Trustee in Bankruptcy;
 - (ii) the Member had been granted more than sufficient time and opportunity to respond to the allegations contained in the Original NDA, even taking into account the need to work within the "parameters of [the Member's] medical conditions". The Member had been put on notice of the allegations since service of the Amended NDA on him on 24 March 2020;
 - (iii) the Tribunal also noted that there was substantial overlap between the allegations made in the Amended NDA and the Original NDA dated 16 March 2016;
 - (iv) any decision by CA ANZ in relation to the conduct of the Member's Trustee in Bankruptcy would not have had the effect of annulling the bankruptcy in any event and so the Member's reliance on progressing that complaint was premised on a misunderstanding of its relevance;
 - (v) the complaint against the Victorian Supreme Court Judge appeared to be irrelevant to these proceedings. That judicial complaint relates to a debt not associated with the debt which led to the bankruptcy proceedings;
 - (vi) the Member's 24 June Response submitted that the adjournment request "in itself ought to be self-apparent, including the grounds for same". The Tribunal:

- (1) acknowledged that the Member's 23 June Response and the Member's 24 June Response referred generally to a number of ongoing matters that the Member submitted took up significant amounts of his time and energy, including that:
 - A. he had medical conditions and made general references to his ongoing health conditions, supported in 2016 by medical evidence;
 - B. he had ongoing responsibilities as carer for his children and elderly relatives; and
 - C. he was still involved in various litigation;
 - (2) noted that the Member had repeatedly raised these matters in his previous correspondence with CA ANZ dated 25 March 2013, 22 February 2015, 19 April 2016, 29 September 2016, 10 December 2016, 27 February 2017 and 10 December 2019 (the **Member's Previous Correspondence**);
 - (3) ultimately found that the Member had not submitted any medical or other evidence to support his submission that he would not be able to attend the hearing on 24 June 2020 or given any reason other than he was "unavailable" to attend. Although the Tribunal acknowledged that the matters referred to in the Member's 23 June Response, the Member's 24 June Response and the Member's Previous Correspondence may impact the Member's availability generally, the Member had not specified how any of those matters prevented him from specifically attending the hearing or on 24 June 2020, even by telephone;
- (vii) the Member did not indicate when he would be in a position to discuss the adjournment request with the Tribunal;
 - (viii) the Tribunal Secretary attempted to call the Member at 9.22am on the Member's New Phone Number but the call was unanswered and went to voicemail. The Tribunal attempted to call the Member at 10.14am and again at 10.59am on the Member's New Phone Number to discuss his adjournment request, and prior to determining the adjournment application, but the calls went to voicemail without answer on both occasions.

5. Had the Member been the subject of adverse or unfavourable findings in relation to his professional or business conduct, competence or integrity by the Federal Magistrates Court in Australia, in breach of By-Law 40(2.1)(e)? (allegation 1)

5.1 PCC submissions

- (a) The PCC submitted that:
 - (i) the Member was the subject of nine adverse or unfavourable findings in the O'Dwyer Judgments in respect of the Member's integrity and his creditworthiness as a witness;
 - (ii) all of those findings were adverse or unfavourable to the Member in relation to his professional or business conduct or competence or integrity;
 - (iii) each of those findings was a "*clear adverse finding on credit*" and would meet the standard for a breach of the By-Law. The nine findings taken together had a compounding effect.

- (b) In making this submission, the PCC referred to the following excerpt from the 2011 Judgment:

[12] *...I can have no confidence in what [the Member] tells me about these things...*

and the following excerpts from the 2013 Judgment:

[22] *I find the [Member's] credibility questionable and his complaints in this regard dubious...*

[31] *In respect of the [Member's] contention ... I say that is preposterous and it reflects, as many other matters also do, on the creditworthiness of the [Member].*

[38] *[The Member's] claimed activities to the world belie the nature of his complaints about incapacity to litigate, to travel and prepare appropriate Court documentation. It is also contradictory to the nature of the medical reports provided...*

[39] *...I note the capacity of the [Member] to do what he likes if he is so minded, even though it contradicts positions held by him about his incapacity.*

[40] *It is also to be noted that the [Member] seems to be able to prosecute his own applications diligently and in a timely manner where it is to his advantage to do so...*

[41] *...[the Member's] explanations for purportedly not receiving documentation were dubious, but he was given the benefit of the doubt.*

[42] *In my view, [the Member's] contention that he has a fax machine that is incapable of receiving faxes, only sending them, is implausible...*

[43] *Having regard to my personal experience in dealing with the [Member] and having regard to those matters set out above which are contradictory to the general position concerning his claimed ill-health and incapacity projected by the [Member], I am of the view that he is not a person in whom I could have much confidence about his creditworthiness.*

5.2 Member submissions

- (a) In the Member's 23 June Response and the Member's 24 June Response, consistent with the Member's Previous Correspondence, he submitted that:
- (i) despite multiple ongoing requests, the Supreme Court of Victoria had not yet provided the Member with all documents to enable him to progress his judicial complaint against the judge who, the Member submitted:
 - (1) wrongly determined that he was liable to pay a sum of around \$200,000, and therefore wrongly imposed a costs order of approximately \$300,000, "*which formed the majority of [the Member's] listed creditors*";
 - (2) acted inappropriately numerous times during the trial;
 - (3) refused to apply various higher court precedents, "*which unequivocally confirmed [the Member's] success*";
 - (ii) his inability to progress his judicial complaint against the Victorian Supreme Court judge was also preventing the Member from appealing the decision and that, as his appeal was "*long out of time*", the Member had been advised that the judicial complaint needed to be completed first to include findings in his application for leave to proceed with an appeal out of time;

- (iii) this in turn was preventing the Member from progressing his appeals/requests for rehearing/judicial complaints in the various bankruptcy matters, as the Member needed to finalise the Victorian Supreme Court matter prior to the other matters.
- (b) Given the Member was not present, the Tribunal noted that the Member had “vehemently reject[ed]” all of the adverse findings in the O’Dwyer Judgments in his email sent to CA ANZ on 26 March 2013.
- (c) The Member provided no documentary evidence in support of his submissions that he was seeking to progress a judicial complaint in respect of, or that he would otherwise appeal, the O’Dwyer Judgments.

5.3 Tribunal decision and reasons

The Tribunal determined that the allegation was established because:

- (a) the nine findings collectively amounted to adverse or unfavourable findings;
- (b) it was not the Tribunal’s function to determine whether the findings were inaccurate. The Tribunal notes that the fact of an adverse finding is sufficient to establish a breach of the By-Law, regardless of whether or not that finding is later overturned;
- (c) in any event the Tribunal was not satisfied the Member was progressing any steps which might ultimately have the effect of having the bankruptcy set aside;
- (d) the Member had been asked by the PCC on 29 October 2019, 23 January 2020 and 12 February 2020 to provide documentation in support of his claims but had not done so.

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

6.1 PCC submissions

- (a) The PCC submitted that although the Member had made sporadic contact and occasionally told CA ANZ of his intentions and plans, he had serially failed to provide substantive responses to multiple lawful and reasonable directions from CA ANZ. Those reasonable and lawful directions all had the intention and purpose of progressing the CA ANZ disciplinary process and the Member’s failures to comply held that back.
- (b) In making this submission, the PCC referred to the following evidence:
 - (i) directions to provide updates as to the status of the appeal proceedings that the Member was reportedly pursuing, sent on 17 May 2013, 24 February 2014, 7 August 2014, 10 November 2014 and 30 January 2015;
 - (ii) directions to provide copies of documents which the Member had alleged were omitted from the PCC’s casefile, sent on 8 August 2016 and 29 October 2019;
 - (iii) direction to respond to the Original NDA dated 16 March 2016 and to provide supporting documentation, sent 29 October 2019;
 - (iv) direction to provide information, correspondence or documentation in support of the Member’s claim that he was appealing the O’Dwyer Judgments, contesting the sequestration order and making judicial complaints, sent 29 October 2019 and 23 January 2020.

6.2 Member submissions

- (a) The Member submitted:
- (i) on 7 October 2016 that he would *“try to keep [CA ANZ] as informed as possible as before. However if I get distracted by all the things I have to attend to can you please send me a reminder to update you, and I will do my best to provide whatever updates/if any i can”*;
 - (ii) again on 10 December 2016 that he would *“continue to try to keep [CA ANZ] as informed as possible. However if I get distracted by all the things I have to attend to can you please send me a reminder to update you, and I will do my best to provide whatever updates/if any i can”*;
 - (iii) on 27 February 2017 that as he obtained further updates he would *“try and keep [CA ANZ] informed as previously undertaken”*;
 - (iv) in the Member’s 23 June Response that he had not received a response from CA ANZ as to:
 - “a. whether the action being taken against me is as a result of someone actually filing a formal complaint against me, or whether the Institute instigated such action of its own volition? and*
 - b. if it was triggered by a complaint by another party, who such party was?*
 - c. the progress of my complaint against the Trustee of my bankruptcy, and all employees of his firm that were engaged in my bankruptcy, that were members of [CA ANZ]. I note that the last response I received was that whether [CA ANZ] elected to take any action was entirely private & confidential? I am unsure on what basis i would not be entitled to know the progress of a complaint I made against a member? I note you advised that you would check and confirm the progress of my complaint against the trustee ... and his employees/agents that were also members, and to send me "a new" complaint form to fill out and file again to compensate”*;
 - (v) in the Member’s 24 June Response:
 - (1) that he had not received a response from CA ANZ as to who instigated the actual complaint against him, which was critical to any documents the Member may need to file with CA ANZ and that *“I cannot attach documents I have not received”*;
 - (2) that he had previously provided documents to CA ANZ in relation to the various remedies he was seeking.
- (b) The Member provided no documentary evidence in support of his submissions, however the Tribunal noted and considered the Member’s Previous Correspondence.

6.3 Tribunal decision and reasons

The Tribunal determined that the allegation was established because:

- (a) the requests were reasonable and lawful;
- (b) the specific requests for supporting documentation from the PCC dated 29 October 2019, 23 January 2020 and 12 February 2020 were not adequately addressed by the Member;

- (c) the justifications put forward by the Member for not responding were not accepted by the Tribunal, in particular that the Member should be entitled to await the outcome of the alleged complaint he made into the conduct of his Trustee in Bankruptcy;
- (d) it was irrelevant whether the complaint was instigated by the PCC or a third party;
- (e) the medical evidence did not support the Member's assertion that he was unable to provide reasonably timely responses to the PCC;
- (f) the Member's failure to comply with reasonable and lawful directions from CA ANZ undermined the maintenance of proper standards and public confidence in the accountancy profession.

7. Had the Member suffered an insolvency event in breach of By-Law 40(2.1)(j)? (allegation 3)

7.1 Tribunal decision and reasons

- (a) The Tribunal determined that the allegation was established.
- (b) A member is liable to disciplinary sanctions pursuant to By-Law 40(2.1)(j) if that member:
 - suffers an Insolvency Event

and By-Law 39(m)(i) defines Insolvency Event in relation to a natural person as meaning that person:

(1) becoming bankrupt under the Bankruptcy Act;

- (c) The 3 December 2015 extract from the Australian Financial Security Authority's National Personal Insolvency Index provided to the Tribunal recorded the following information for the Member:

<i>"Type</i>	<i>BANKRUPTCY - Sequestration Order"</i>
<i>"Date of Bankruptcy</i>	<i>07-Feb-2011"</i>
<i>"Summary</i>	<i>This individual is no longer bankrupt under this administration"</i>

and this confirmed that the Member had suffered an Insolvency Event, in breach of By-Law 40(2.1)(j).

8. What sanctions should be imposed on the Member?

- (a) Regulation 8.11, *Guidelines for the imposition of sanctions (Guidelines)* sets out the matters that may be considered by the Tribunal in deciding what sanctions to impose. In this regard the Guidelines refer to:
 - (a) ... (i) the seriousness of the conduct;
 - (ii) whether the conduct has occurred before and, if so, the nature, extent and frequency of the conduct;
 - (iii) the Member's responsibility and accountability for the conduct in the context of that Member's Practice Entity ...
 - (iv) whether the Member has failed to comply with any undertaking or agreement to remedy the conduct;
 - (v) any aggravating or mitigating factors raised which are relevant to the conduct in question;
 - (vi) the personal circumstances of the Member to the extent they are raised and relevant to the conduct;

- (vii) any character and/or other references provided in writing in support of the good standing of the Member;
 - (viii) the maintenance of public confidence in the profession;
 - (ix) the maintenance of proper standards of professional conduct;
 - (x) deterrence; and
 - (xi) any other circumstances relevant to the practice of the Member and the profession.
- (b) However, the Guidelines are not an exhaustive list of the matters that may be considered when deciding what sanction to impose and the Tribunal may have regard to any other relevant matters that are before it.
- (c) The PCC submitted that, because of the Member's behaviour and in particular the continuous and ongoing delays to this matter caused by him, the appropriate sanction was a suspension of the Member's membership for the maximum period of five years. The PCC submitted that the Tribunal should have regard to the following matters:
- (i) it was a serious case of misconduct and the matter had now been running for seven years because of delays caused by the Member;
 - (ii) the length and consistency of the Member's failure to comply with the By-Laws over an extended period of time;
 - (iii) the originating breach, which was the very serious adverse findings made against the Member in relation to his creditworthiness and integrity;
 - (iv) the Member's failure to notify CA ANZ of his bankruptcy;
 - (v) it is important that CA ANZ is able to regulate its own members and a strong signal should be sent to all members as a deterrent not to ignore reasonable directions from CA ANZ in its pursuit of compliance matters;
 - (vi) the Member had not practiced since 1992 and there was no practical consequence of a suspension;
 - (vii) but should not have regard to the Member's bankruptcy in relation to what was the appropriate sanction.
- (d) In response to the PCC's notice that it would seek a five year suspension of the Member's membership, in the Member's 23 July Response he:
- (i) submitted he could not find any communications regarding his actual membership for many years;
 - (ii) requested confirmation:
 - "d. if I am still an actual member of the Institute, and if so*
 - e. what class of membership I currently hold?*
 - f. provide my membership number and a copy of the last correspondence sent to me regarding my membership";*
 - (iii) submitted *"I have not practiced or been employed as a Chartered Accountant since my health collapsed in 1992"*.
- (e) The Tribunal noted the Member's Previous Correspondence, in particular the Member's 29 September 2016 email to CA ANZ which relevantly submitted that:
- (i) the disciplinary action was not instigated by complaint against the Member but by CA ANZ itself, and so "[n]o prejudice or damage was suffered by [CA ANZ] or the public with respect to any alleged wrongdoing by [the Member]";

- (ii) the Member held being regarded as a member of CA ANZ in high esteem; and
 - (iii) ignoring the impact of his ongoing medical conditions and personal circumstances would amount to a breach of Australian human rights laws.
- (f) The Tribunal determined to suspend the Member from membership of CA ANZ for a period of five years and remove the Member's name from the Registers on which it appears. In reaching this determination the Tribunal considered all of the written material before it and the oral submissions from the PCC and in particular:
- (i) it was the appropriate sanction given the nature of the adverse findings made in the O'Dwyer Judgments;
 - (ii) had the matter been dealt with soon after the O'Dwyer Judgments, it may be that a lesser sanction would have been appropriate. However the length of time that had passed and the Member's failure to respond to reasonable and lawful directions was an aggravating factor with the result that a suspension of five years was the appropriate sanction;
 - (iii) the Tribunal also considered:
 - (1) whether termination of the Member's membership was the more appropriate sanction, but came to the view that this was not warranted because the adverse findings in the O'Dwyer Judgments, although serious, were not so serious as to justify termination;
 - (2) whether a censure and a fine were appropriate in addition to a suspension, but came to the view that these sanctions were not warranted because the Member was no longer practising as a Chartered Accountant; and
 - (3) a suspension of membership entitled the Member to reapply directly to CA ANZ, rather than to the Disciplinary Tribunal which would be necessary if his membership were terminated, though he would still need to satisfy the fit and proper person requirement in that application;
 - (iv) the Member's failure to comply with reasonable and lawful directions from CA ANZ undermined the maintenance of proper standards and public confidence in the accountancy profession.
- (g) The Tribunal did not regard the Member's bankruptcy to be relevant to sanctions.

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

- (a) Regulation 8.12, *Costs awards* states that when determining whether or not to require a Member to pay Costs, and the amount of such Costs, the Tribunal:
- ...must require the Member to pay all of the Costs claimed by CA ANZ unless it determines that, having regard to the following matters, it is appropriate that the Member be required to pay only part or none of the claimed Costs:
- (a) whether and to what extent the complaint against the Member is found to have merit and whether or not there is ultimately a finding in favour of the Member;
 - (b) the substance or seriousness of the complaint;
 - (c) the conduct of the Member in relation to the investigation and disciplinary process, including whether the Member was open, honest and timely in the Member's dealings with the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal in relation to the complaint and whether the Member complied with the provisions of Section 5 of the By-Laws and any applicable Regulations during the conduct of the disciplinary process;

- (d) the extent to which the final sanctions determined differ from those that the Professional Conduct Committee or Disciplinary Tribunal gave the Member the opportunity to agree by consent;
 - (e) whether to do so is reasonable in the circumstances;
 - (f) the amount of the Costs incurred by CA ANZ in the conduct of the investigation and proceedings;
 - (g) whether and to what extent the Member has previously been required to pay Costs to CA ANZ in respect of the complaint, its investigation, hearing and determination; and
 - (h) whether the amount is reasonable in the circumstances.
- (b) The PCC submitted that Regulation 8.12 required the Tribunal to order that the Member pay all the costs unless there were reasons not to. The PCC sought the full costs of the proceedings in the amount of \$15,130 and submitted that there were no reasons to depart from the requirements of Regulation 8.12 because:
- (i) all allegations were established and those breaches were serious;
 - (ii) the Member's conduct in relation to the investigative process and disciplinary process was far from helpful and in fact dragged it out for a very long period and made it a more expensive process than it needed to be;
 - (iii) in response to a question from the Tribunal, the PCC also submitted that the costs should include the costs of the adjourned hearing in 2016 because the Member's written request to adjourn the 22 April hearing date was not made until 19 April.
- (c) The Member provided no submissions in relation to potential costs.
- (d) The Tribunal determined that the Member should pay the full costs of the proceedings in the sum of \$15,130 because:
- (i) there was nothing in this matter which would warrant a departure from the standard position that it should be the Member who bore the costs, and not the membership as a whole. None of the Regulation 8.12 criteria justified a reduction in the amount of costs payable by the Member;
 - (ii) the Member had been put on notice in 2016 that the question of costs for the adjourned hearing would be considered at the final determination of the matter. These costs were an amount of \$3,660 for legal costs. These costs were reasonable and incurred because the adjournment request was made at the last-minute.

10. 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.

11. 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.

12. Should consent be given to the PCC to amend the Amended NDA?

- (a) The PCC sought the Tribunal's consent to make a typographical correction to the third allegation in its Amended NDA from:
- By-Law 40(2.10)(j), in that on 7 February 2011 the Member became a bankrupt.*
- to:
- By-Law 40(2.1)(j), in that on 7 February 2011 the Member became a bankrupt.*
- (b) The Tribunal was empowered to consent to the amendment, at its discretion, pursuant to By-Law 40(10.3) which provides:
- The Professional Conduct Committee may amend a Notice of Disciplinary Action at any time, provided that it may not do so ... less than 35 days before the hearing, without:
- (a) the consent of the Disciplinary Tribunal
- and agreed to the PCC's request. In making this decision the Tribunal considered:
- (i) the amendment was minor and did not affect the substance of the allegation. Allegations 1 and 2 contained the correct reference to By-Law 40(2.1) and only allegation 3 referred to By-Law 40(2.10);
- (ii) the Original NDA contained the correct reference to the relevant 2016 By-Law and the typographical error related to the Amended NDA conversion to the 2019 By-Law references;
- (iii) there was no procedural unfairness to the Member in granting the PCC's request.

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)).

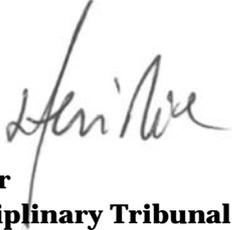
The PCC may, within 21 days after notification of the written decision with reasons to the PCC of this Tribunal's decision, appeal in writing to the CA ANZ Appeals Tribunal against the decision (By-Law 40(11.2)).

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: PCC'S AMENDED NOTICE OF DISCIPLINARY ACTION

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

1. By-law 40(2.1)(e), in that on 7 August 2012 the Federal Magistrates Court of Australia made adverse findings in relation to the Member's professional or business conduct or competence as recorded in *Birmingham v Moloney (No.3)* [2013] FMCA 47 and on 19 May 2011 as recorded in *Birmingham v Moloney* [2011] FMCA 475.
2. By-law 40(~~e~~)(2.1)(i), in that the Member failed to comply with a reasonable and lawful direction of an officer or organ of ~~the organisation CA ANZ~~ acting within the powers conferred by the ~~Chartered Accountants CA ANZ~~ By-laws, by failing to:
 - i) ~~respond to the correspondence sent to him by Professional Conduct and Complaints CA ANZ on 17 May 2013, 24 February 2014, 7 August 2014 and 10 November 2014 and 23 January 2020 and/or failing to respond to the correspondence sent to the Member by Professional Conduct and Complaints CA ANZ on 17 May 2013, 24 February 2014, 7 August 2014, 10 November 2014 and 30 January 2015, 8 August 2016 and 29 October 2019 in a reasonably timely manner; and~~
 - ii) ~~provide information and /or documentation requested of him by CA ANZ in their correspondence dated 8 August 2016 and 29 October 2019.~~
3. By-law 40(~~h~~)(2.1~~h~~)(j), in that on 7 February 2011 the Member became a bankrupt.

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(2) Disciplinary action

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

...

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

...

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

...

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:

...

- (b) suspend the Member from membership of CA ANZ for a period not exceeding 5 years and remove the Member's name from the Registers on which it appears

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

...

- 40(10.18) 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.

...

Section 10 - Management

...

Registers

142. (a) The General, Regional and Overseas Regional Registers shall be maintained under the control of the CEO ...

- (b) There shall be entered in the General Register the names, addresses and classes of Membership of all Individual Members...

Registered Address

- 143.** The Registered Address of a Member to be entered in the General Register ... shall be the Member's place or principal place of business for the time being or, if a Member has no place of business, his or her place of residence for the time being or such other place as the Member may advise.

Change of Address

- 144.** Every Member of CA ANZ shall forthwith notify the CEO of any change required to be made in his or her Registered Address for the purpose of the preceding By-Law.

SCHEDULE 3: REGULATION CR8 - DISCIPLINARY PROCEDURES

Issued 8 October 2019

8.1 Purpose

This Regulation supplements the professional conduct and disciplinary process provisions of Section 5 of the By-Laws.

8.2 Definitions

Unless expressly defined in this Regulation, capitalised terms used in this Regulation are defined in By-Law 2 and Section 5 of the By-Laws. The definitions in By-Law 39 shall prevail to the extent of any inconsistency between this Regulation and the By-Laws or between By-Law 2 and By-Law 39.

8.3 By-Laws

Refer to Section 5 of the By-Laws for provisions relating to Professional Conduct.

8.4 Charter

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

8.5 Disclosure Events (By-Laws 40(3.1) and 40(3.2))

- (a) It is a Member's responsibility to give notice to the Professional Conduct Committee within 7 days of the occurrence of a Disclosure Event.
- (b) When required, such notice should be in writing in the [form prescribed](#).
- (c) Within 21 days of a Disclosure Event, a Member is also required to send a statement to the Professional Conduct Committee setting out the reasons why that Member considers that the Member's membership should not be affected, including suspended (whether or not on an interim basis) or terminated and that Member's name removed from the Registers. The time period is longer for the statement than the notice to allow a Member to gather evidence, including from referees, to explain any mitigating or extenuating circumstances.

8.6 Notification Event (By-Laws 40(3.3) and 40(3.4))

- (a) It is a Member's responsibility to give notice to the Professional Conduct Committee within 7 days of the occurrence of a Notification Event.
- (b) When required, such notice should be in writing in the [form prescribed](#).

8.7 Form of complaints (By-Law 40(4.1(a)))

- (a) Complaints made about a Member to CA ANZ pursuant to By-Law 40(4.1)(a) should be made using, and in the manner prescribed by, the [Complaint Form](#).

- (b) Anonymous complaints, or those made without adequately disclosing the identity of the person(s) making the complaint, will not be processed by CA ANZ.

8.8 Applications to the Professional Conduct Committee for legal representation (By-Laws 40(5.4) and 40(7.2))

Applications for the consent of the Professional Conduct Committee for legal representation should be made using, and in the manner prescribed by, the [Consent Form](#).

8.9 Application to the Reviewer (By-Law 40(8))

- (a) An application made to CA ANZ to request the review of a Final Decision in accordance with By-Law 40(8.2) can be made by the original complainant or the relevant Member and must be made:
 - (i) within 21 days of notification of the Final Decision;
 - (ii) using and in the manner prescribed by the [Final Decision Review Form](#); and
 - (iii) accompanied by:
 - A. payment of the Application Fee (which is AU\$500) in a manner prescribed by the Final Decision Review Form; and
 - B. the [Costs Agreement](#) duly executed by the applicant.
- (b) Every Reviewer appointed will be an independent Australian legal practitioner.
- (c) When lodged, the Final Decision Review Form must include all matters the complainant wishes to be considered by the Reviewer.
- (d) The Application Fee is non-refundable, but the Reviewer may recommend that CA ANZ refund the Application Fee to the applicant, where the Reviewer considers this to be appropriate.

8.10 Appeals Tribunal (By-Law 40(11))

- (a) An appeal of a determination of the Disciplinary Tribunal may be made by the Member the subject of the determination or the Professional Conduct Committee in accordance with By-Law 40(11.1).
- (b) Notice of appeal should be given using, and in the manner prescribed by, the [Appeal Form](#) and must detail all grounds of appeal.
- (c) Pursuant to By-Law 40(11.4) the Appeals Tribunal has a discretion to require the Member to pay to CA ANZ such amount as it determines as security against the anticipated Costs which CA ANZ may incur in the conduct and hearing of the appeal.

8.11 Guidelines for the imposition of sanctions (By-Law 40(13.6))

- (a) When the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal determines that it is appropriate to sanction a Member, in deciding what sanction(s) to impose and without limiting the matters it may consider, it may consider the following matters:
 - (i) the seriousness of the conduct;
 - (ii) whether the conduct has occurred before and, if so, the nature, extent and frequency of the conduct;

- (iii) the Member's responsibility and accountability for the conduct in the context of that Member's Practice Entity, including without limitation:
 - A. whether the conduct was systemic;
 - B. whether the Practice Entity's leadership were aware of or complicit in the conduct;
 - C. whether it forms part of a pattern of conduct; and
 - D. the Member's role, position and seniority in the Practice Entity;
 - (iv) whether the Member has failed to comply with any undertaking or agreement to remedy the conduct;
 - (v) any aggravating or mitigating factors raised which are relevant to the conduct in question;
 - (vi) the personal circumstances of the Member to the extent they are raised and relevant to the conduct;
 - (vii) any character and/or other references provided in writing in support of the good standing of the Member;
 - (viii) the maintenance of public confidence in the profession;
 - (ix) the maintenance of proper standards of professional conduct;
 - (x) deterrence; and
 - (xi) any other circumstances relevant to the practice of the Member and the profession.
- (b) The Professional Conduct Committee, the Disciplinary Tribunal and the Appeals Tribunal must balance the interests of the Member against the public interest, the reputation of CA ANZ, and the need to support the integrity of the profession of accounting and those of CA ANZ in determining what are appropriate and sufficient sanctions.

8.12 Costs awards (By-Law 40(13.7))

When the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal determines whether or not to require a Member to pay Costs under Section 5 of the By-Laws, and the amount of such Costs a Member is required to pay, it must require the Member to pay all of the Costs claimed by CA ANZ unless it determines that, having regard to the following matters, it is appropriate that the Member be required to pay only part or none of the claimed Costs:

- (a) whether and to what extent the complaint against the Member is found to have merit and whether or not there is ultimately a finding in favour of the Member;
- (b) the substance or seriousness of the complaint;
- (c) the conduct of the Member in relation to the investigation and disciplinary process, including whether the Member was open, honest and timely in the Member's dealings with the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal in relation to the complaint and whether the Member complied with the provisions of Section 5 of the By-Laws and any applicable Regulations during the conduct of the disciplinary process;
- (d) the extent to which the final sanctions determined differ from those that the Professional Conduct Committee or Disciplinary Tribunal gave the Member the opportunity to agree by consent;

- (e) whether to do so is reasonable in the circumstances;
- (f) the amount of the Costs incurred by CA ANZ in the conduct of the investigation and proceedings;
- (g) whether and to what extent the Member has previously been required to pay Costs to CA ANZ in respect of the complaint, its investigation, hearing and determination; and
- (h) whether the amount is reasonable in the circumstances.

8.13 Former Professional Conduct By-Laws (By-Law 42)

- (a) A copy of the By-Laws as at 28 July 2016 may be found [here](#).
- (b) A copy of the By-Laws as at 26 November 2014 may be found [here](#).

8.14 Confidentiality Obligations

- (a) Members must comply with the requirements set out in subparagraphs (b) – (d) below to ensure that any complaints made, investigations, reviews and disciplinary hearings carried out pursuant to Section 5 of the By-Laws are confidential;
- (b) Subject to subparagraph (c) below:
 - (i) all information, correspondence and other documentation sent and/or received by CA ANZ or disclosed or made available to you in connection with a complaint, its investigation and outcome, any review of that outcome (including the Reviewer's report, recommendation and/or any directions) and any disciplinary hearing (including disciplinary decisions) is confidential (Confidential Information);
 - (ii) Members must:
 - A. keep the Confidential Information confidential;
 - B. securely store and not disclose or permit disclosure of the Confidential Information;
 - C. comply with CA ANZ's directions regarding the Confidential Information;
 - D. do all other things prudent or desirable to safeguard the confidentiality of the Confidential Information; and
 - E. not publish or make a public announcement or statement in relation to the Confidential Information;
 - (iii) this clause does not apply to:
 - A. information that is already in the public domain (unless it is in the public domain because of a breach of this Regulation); or
 - B. details of complaints, investigations and/or decisions that CA ANZ has published or made available to the public in accordance with the By-Laws and Regulations;
- (c) The obligations contained in subparagraph (b) above do not prevent the disclosure of Confidential Information:
 - (i) that is required to be disclosed to comply with applicable law;

- (ii) to the Member's advisers and/or representatives (including business partners and staff of those advisers and/or representatives) for the provision of advice in relation to the complaint, its investigation, any review and any disciplinary hearings;
 - (iii) to the Member's current employer and business partners, including staff of the Member and/or that employer, to assist with responding to the complaint and any disciplinary hearings and/or to comply with any disclosure obligations;
 - (iv) to the Member's insurer or the insurer of the Member's current and/or former employer, to comply with any disclosure obligations; or
 - (v) if required, and with the consent of CA ANZ, for the purpose of the complaint, investigation and any disciplinary hearings pursuant to Section 5 of the By-Laws.
- (d) Any disclosure of Confidential Information pursuant to subparagraphs (c)(ii) – (v) above can only be made by Members if the person to whom disclosure is made is subject to the same confidentiality obligations as Members set out in this paragraph 8.14.

Commentary

The obligations set out above are in addition to the obligations of confidentiality contained in APES 110, Code of Ethics for Professional Accountants. More details about managing your confidentiality obligations are available as part of the complaint process and on request.