

**NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS
NOTICE OF DECISION AND ORDER OF THE PROFESSIONAL CONDUCT COMMITTEE**

At meetings of the Professional Conduct Committee of the New Zealand Institute of Chartered Accountants (“the Committee”) held in private on 20 August 2019 and 24 April 2020, in respect of Member X (“the Member”), a Chartered Accountant in public practice, the Committee found that the following matters would otherwise warrant being referred to the Disciplinary Tribunal:

1. The Member’s identification and management of perceived, potential and/or actual conflicts of interest and threats to objectivity that arose when the Member, as professional trustee and existing accountant of the XYZ Trust (“the Trust”), participated in the decision regarding whether or not to appoint a new accountant for the Trust (Objectivity);
2. The Member’s preparation of the Trust’s financial statements and tax return for the year ending 31 March 2018 and subsequently raising an invoice for this work without express instruction and/or authorisation and/or agreement from the Member’s fellow trustees to undertake this work (Objectivity, Professional Competence and Due Care, Section 240.2 Code of Ethics)
3. The Member’s knowledge of and discharge of the duties and obligations incumbent on trustees including whether with these duties, specifically:
 - (a) Maintaining copies of minutes of trustees’ decisions at trustees’ meetings (Professional Competence and Due Care); and/or
 - (b) Providing copies of minutes of trustees’ decisions at trustees’ meetings to the co-trustees when requested (Professional Competence and Due Care); and/or
 - (c) Acting unanimously with the co-trustees in a professional manner (Professional Competence and Due Care);
4. The Member’s refusal to retire as trustee of the Trust despite having been requested to do so by the Member’s co-trustees on a number of occasions (Objectivity, Professional Behaviour).

COMMITTEE’S 20 AUGUST 2019 DECISION

The Committee was concerned with the matters raised in the complaint and that it appeared the Member had not accepted any of the issues before him.

The Committee was concerned the Member had refused to resign as a trustee of the Trust when it was clear that the other trustees wanted to appoint a new independent trustee. It appeared that the Member had been asked to resign on several occasions by the Complainants in their capacity as trustees and had been given a suitable replacement option for the trustee position but had refused to accept this.

The Committee was also concerned with the Member’s refusal to step down as accountant for the Trust when the fellow trustees wished to appoint a new accountant to the Trust. It was further concerned that the Member had continued to operate as the accountant without the authorisation or agreement of the other trustees. The Committee noted in situations involving disputing trustees, the trust deed outlined that the decision of the majority should be taken if that decision is recorded and dated in writing. This meant the majority of the Trustees could decide on the appointment of a new accountant which would be binding on all of the Trustees.

The Committee was troubled that the Member appeared to lack knowledge involving the duties and obligations incumbent on trustees, indicated by the absence of trustee meeting minutes.

It was also troubled that the Member's dealings with fellow trustees appeared to be less than professional and considered that the Member's objectivity may have become compromised through performing the roles as trustee and accountant for the Trust.

The Committee was particularly concerned that the Member had prepared the 2018 accounts and tax return for the Trust without instruction, authorisation or agreement from the fellow trustees, and that the Member had invoiced the Trust for this work and also time spent responding to the complaint. It noted that when questioned about this, the Member felt this invoicing was justified. The Committee considered this reflected poorly on the Member's professional judgment and further emphasised a lack of objectivity.

The Committee noted that while there did not appear to be a provision in the Trust Deed regarding the appointment of trustees following the death of the Settlor, it felt in this instance, as an independent professional trustee of the Trust, the Member could have facilitated the safe transition of the Trust into new management.

The Committee was disappointed that it appeared the Member was anchored in the past, focussing on the Settlor's Memorandum of Wishes, rather than evolving and changing with the times as the majority of the trustees wanted to take the Trust into the future, getting it ready for the next generation. The Committee considered that the Member lacked insight by refusing to come to an agreement for a way forward for the Trust and appeared to have lost objectivity in this regard.

The Committee was concerned that the Member's actions had resulted in a significant deterioration in the relationship between the Member and the fellow trustees. This appeared to have resulted in an impasse for the Trust which if not resolved, may end up with the matter being referred to the High Court which would be costly for all parties.

In light of the information before it, the Committee resolved to adjourn the case conference and instruct the parties to seek to resolve the dispute through an alternative dispute resolution method at their own cost. It also determined that if the matter could not be resolved within 60 days it will be reconvened with the Committee.

COMMITTEE'S 24 APRIL 2020 DECISION

Civil Issues

As a preliminary matter the Committee wished to clarify the nature of its jurisdiction relative to the Courts'. The Committee notes that its jurisdiction is to consider the Member's conduct as against NZICA's Code of Ethics and Rules. Its powers are disciplinary in nature and aimed at ensuring members maintain their professional and ethical obligations and standing such that they are fit to offer accounting services to clients, the public and others and that the good reputation of the profession is maintained.

The Committee's powers are not the same as the courts and it has no jurisdiction to exercise powers under the Trustee Act 1956 or incoming Trust Act 2019 regarding the removal of trustees or the resolution of substantive trustee duties disputes, or generally to make orders for damages or compensation. These matters are ultimately questions to be determined by the civil courts.

The Committee has powers to adjourn the complaint while the parties explore the option of resolving matters (including issues that might otherwise go to court) through an alternative dispute resolution method, as was the case here. The Committee notes that the parties were unable to resolve the substantive dispute regarding the Member's retirement as a trustee via this avenue.

In relation to the attempted resolution, the Committee noted that:

- The Complainants did not agree to the indemnity clause in the Member's proposals. While that is a matter for the parties, in the Committee's view the indemnity appeared to be a standard form of indemnity for such situations;
- The Member had offered to waive outstanding invoices and make a \$10,000 payment to the Complainants as a full and final settlement, but the Complainants did not consider this payment to be enough;
- The Complainants had refused all offers but did not appear to have put a counteroffer to the Member.

The Committee was of the view that the Member's attempts since the last Committee meeting on 19 August 2019 to resolve the issues appeared to have been genuine, although it was concerned with the Member's failure to transfer the accounting records, as outlined below. Ultimately it is the Complainants' prerogative not to accept the Member's offers to resolve the dispute. The substantive issues regarding the Member's ongoing role as a trustee and any compensation/damages claims must now be pursued by the parties via the High Court.

Professional and Ethical Issues

In respect of the Member's professional and ethical obligations, the Committee was concerned with the Member's conduct in acting as accountant and trustee of the Trust, and the Member's handling of the dispute with the Complainants prior to the adjournment of the complaint at the Committee's last meeting. Its concerns about the Member's conduct are detailed in its 20 August 2019 minute.

There is no question that members accepting professional trusteeships must be careful to comply with their duties as a trustee ensuring that they act in the best interest of beneficiaries, comply with the terms of the Trust Deed and their legal obligations. They must also comply with their fundamental ethical obligations including maintaining their objectivity and independence, managing conflicts of interest, and ensuring they act with due care, competence and professionalism. Where members' compliance with the Code of Ethics is compromised or threatened, they must take steps to resolve the issue. These obligations apply where the member is engaged as accountant and conflicts of interest and objectivity threats must be carefully managed when members are performing dual roles.

In addition to those concerns set out in the Committee's 20 August 2019 minute, the Committee was troubled that in the period since its last meeting the Member had still not facilitated the proper transfer of accounting records to the Trust's new accountant. The Committee was of the view that the Member continued to lack insight in relation to the handing over of the accounting records. It considered that there was no proper reason for the Member to retain the engagement as accountant when the fellow trustees had decided by majority to move the accounting work elsewhere and were empowered to do so. For the avoidance of doubt, the Committee notes that the question of the Member's replacement as trustee is distinct from the accounting engagement and as noted above, is a civil matter for the High Court to resolve in the absence of agreement between the parties.

While the Member has made some reasonable steps to resolve the outstanding issues since the adjournment, for which the Member deserves some credit, overall the Committee considers that the Member's conduct has breached the Code of Ethics and fallen well short of the standards expected of Chartered Accountants in public practice.

Although it can be challenging for members undertaking professional trusteeships to navigate disputes between trustees and beneficiaries, members must be careful to ensure their ethical obligations are not compromised. In this instance, the Committee considered that the Member had lost objectivity and had not managed the conflict of interest between the role as trustee

and that of accountant appropriately. It was concerned that the Member had throughout the complaints process lacked insight into the issues. Had the Member had more insight, the Member may have taken a more constructive and professional approach to resolving the impasse or dispute with the Complainants.

The Committee was also of the view that the Member should not have prepared the Trust's financial statements and tax returns for 2018 without authority from the Member's fellow trustees and that the Trust should not pay for the cost of the work undertaken. The Committee also considers it entirely unprofessional to charge the Complainants for time spent responding to the complaint or the engaging in the complaints process as the Member has a professional obligation to be subject to that process.

PENALTY

The Committee considered the matters raised in the complaint met the threshold to warrant referral to the Disciplinary Tribunal, however it was of the view that the complaint could appropriately be resolved by way of a consent order and undertaking being accepted from the Member.

The terms of the undertaking include:

- (1) That the Member give a written undertaking in accordance with Rule 13.81 that the Member transfer all client documents, files and records belonging to the Trust to the Trust's new accountants (being accountants as nominated by the Complainants), within 15 working days of signing the consent order. Such records must include all records that are the property of the Trust including a copy of the Trust's General Ledger and for the avoidance of doubt must also be sufficient to enable a new accountant to prepare financial statements and tax returns for the Trust.

On the basis of the undertaking being given, the Committee will make the following orders with the Member's consent in accordance with Rule 13.15(d). That the Member:

- (a) Pursuant to Rule 13.15(d)(i) shall waive the whole of any fee invoiced by the Member or the Member's practice in respect of:
 - i. the preparation of the 2018 financial statements and tax return of the Trust; and
 - ii. all charges which relate to responding to or otherwise dealing with the complaint to NZICA and responding to the Professional Conduct Committee;
- (b) Pursuant to Rule 13.15(d)(ii) shall return the whole of any fees paid by the Trust or the Complainants in respect of the matters identified in (a)(i) and (ii) above;
- (c) Pursuant to Rule 13.15(v) shall be severely reprimanded;
- (d) Pursuant to Rule 13.15(d)(vii) shall pay costs to NZICA in the sum of \$6,065.00; and
- (e) Pursuant to Rule 13.15(d)(x) shall comply with the terms of the written undertaking given in accordance with Rule 13.81 as set out above.

PUBLICATION

The Committee determined that it was in the public interest that notice of its decision and order made be published in CA ANZ's official publication *Acuity*, and on its website without mention of the Member's name and location. The Committee considered it would be of benefit to the public and wider membership to understand the types of shortcomings identified in the complaint particularly in the area of trusts given the new Trusts Act 2019 which comes into force at the end of January 2021.

In determining not to publish the Member's name and location the Committee had regard to the fact that although the Member was a trustee on a number of other trusts there was no evidence that the Member posed a risk to other clients and it was of the view that this matter seemed to be an isolated case. Therefore, there was no public interest in publishing the Member's identifying details.

Rob Pascoe FCA
Chairman
Professional Conduct Committee