

# Determination of the Appeals Tribunal of Chartered Accountants Australia and New Zealand 21 September 2016

<b>Case Number:</b>	A-174
<b>Member:</b>	Adrian Dean Kelly, FCA
<b>Hearing Date:</b>	21 September 2016
<b>Tribunal:</b>	Jan West AM, FCA (Chair) Graham Addison, FCA Barbara Kent, non accountant member of the Tribunal
<b>Legal Adviser:</b>	Lauren Stewart
<b>Counsel:</b>	Michael Bradley for the Professional Conduct Committee (PCC)
<b>Case description:</b>	<ol style="list-style-type: none"><li>1. Member failed to observe a proper standard of professional care, skill or competence</li><li>2. Member subject of adverse findings</li><li>3. Member's acts, omissions and defaults have brought discredit on the Member.</li></ol>
<b>Appeal:</b>	Determination and sanctions

## 1. NEW BY-LAWS

These proceedings were conducted under the new By-Laws of Chartered Accountants ANZ which came into force on 28 July 2016. By virtue of By-Law 42 the Appeals Tribunal (“**Tribunal**”) is empowered to deal with the matter although commenced under the Former Professional Conduct By-Laws (refer to Schedule 2 - Relevant By-Laws).

## 2. DECISIONS

### 2.1 DECISION ABOUT THE APPEAL

At a hearing of the Appeals Tribunal, the Tribunal determined to:

- affirm the determination of the Professional Conduct Tribunal that the allegations as set out in Schedule 1B have been established;
- affirm the sanctions imposed by the Professional Conduct Tribunal as follows:
  - the Member’s fellowship status be removed;
  - the Member receive a severe reprimand;
- affirm the decision of the Professional Conduct Tribunal that the Member be required to pay a contribution of \$5,000 plus GST towards the cost of the Professional Conduct Tribunal hearing.

This decision of the Appeals Tribunal takes effect immediately.

### 2.2 DECISION ABOUT COSTS SANCTION

The Tribunal determines that the Member pay to Chartered Accountants ANZ the sum of \$5,000 towards the costs of the hearing (paragraph 10.12(l) of By-Law 40), estimated to be approximately \$20,000. No GST is payable.

The Tribunal considers this to be fair and reasonable in all the circumstances.

### 2.3 DECISION ABOUT PUBLICATION

In accordance with paragraphs 12.3 and 12.4 of By-Law 40, the Tribunal directs that:

- its decision with full reasons, mentioning the Member’s name and locality, be published on the website of Chartered Accountants ANZ (the “**Published Decision**”); and
- a notice mentioning the Member’s name and locality with a link to the Published Decision be published in the journal of Chartered Accountants ANZ.

## 3. REASONS FOR DECISIONS

### 3.1 ALLEGATIONS

- It is a matter of public record that the Member’s registration as a tax agent was terminated by the Tax Practitioners Board (**TPB**) on 10 December 2014 and that this decision was affirmed by the Administrative Appeals Tribunal of Australia (**AATA**) on 15 September 2015.

- The Member submitted to the Tribunal that the TPB's decision relied on information from the Australian Taxation Office (ATO) that was unsound and should be disregarded in the claim against him.
- The Tribunal considered the evidence given by the Member concerning his dealings with the ATO and accepted that he was acting in accordance with his personal belief that he had been provided with a verbal extension for the lodgement of his personal and associated entities' tax returns.
- Notwithstanding these submissions, the Tribunal determined that:
  - the alleged breach of By-Law 40 paragraph 2.1(a) (Former Professional Conduct By-Law 40(a)) had been established in that the Member failed to meet the requirements of the *Tax Agent Services Act 2009* (Cth) Code of Professional Conduct. This failure was evidenced by the Member not lodging his personal and associated entities' returns in a timely manner;
  - the decision of the AATA, which affirmed the decision of the TPB to terminate the Member's registration as a tax agent, represents an adverse finding and establishes the breach of By-Law 40 paragraph 2.1(e) (Former Professional Conduct By-Law 40(e));
  - the facts and circumstances surrounding the breaches of By-Law 40 paragraphs 2.1(a) and (e) (Former Professional Conduct By-Laws 40(a) and 40(e)) set out above have brought discredit on the Member which establishes the breach of By-Law 40 paragraph 2.1(k) (Former Professional Conduct By-Law 40(j)).

### 3.2 DETERMINATION ON SANCTIONS

- It is important that the status of Fellow of Chartered Accountants ANZ continues to be recognised by the business community as representing a high level of recognition and reliance, which includes having an exemplary professional history.
- The Tribunal has determined that the Member does not meet the requirements for Fellowship status, as he no longer has an exemplary professional history.
- The facts and circumstances supporting the establishment of the breaches of By-Law 40 paragraphs 2.1(a), (e) and (k) (Former Professional Conduct By-Laws 40(a), (e) and (j)) are sufficiently serious to warrant a sanction but not to impact the Member's membership.
- The Tribunal has determined that a severe reprimand is the most appropriate sanction in these circumstances.

### 3.3 PUBLICATION

The Tribunal determined that the decision and reasons in full be published on the website of Chartered Accountants ANZ to uphold the highest level of professional standards and maintain public confidence in the disciplinary processes of the organisation.



Chair

Appeals Tribunal

## **SCHEDULE 1A - DECISION OF THE PROFESSIONAL CONDUCT TRIBUNAL**

The decisions of the Tribunal were that:

1. the allegations contained in the Notice of Disciplinary Action have been established;
2. the Member's fellowship status be removed;
3. the Member receive a severe reprimand.
4. The Tribunal made these decisions on the basis of the findings of the Tax Practitioners Board, confirmed by the Administrative Appeals Tribunal of Australia, that the Member is not a fit and proper person to be registered as a tax agent.
5. The Tribunal decided not to impose a fine but the Member is required to pay a contribution of \$5,000 plus GST towards the costs of the disciplinary action.
6. Notification of the Tribunal's decisions be given to the Taxation Institute of Australia.

## **SCHEDULE 1B - THE PCC'S ALLEGATIONS**

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

1. Former Professional Conduct By-Law\* 40(a), in that the Member failed to observe a proper standard of professional care, skill or competence in the course of carrying out his professional duties in that the Member's registration as a tax agent was terminated by the Tax Practitioners Board (TPB) for failure to meet one of the tax practitioner requirements in the circumstances recorded in the decision of the Administrative Appeals Tribunal of Australia (AATA) dated 15 September 2015 in the matter of *Kelly and Tax Practitioners Board* (AATA Decision), including in its finding that in accordance with Section 20-5(1)(a) of the Tax Agent Services Act 2009 (Cth) (Act), the Member is not a fit and proper person to be registered as a tax agent under the Act.
2. Former Professional Conduct By-Law\* 40(e), in that on 15 September 2015, the AATA made adverse findings in relation to the Member's professional or business conduct or competence as recorded in the AATA Decision, including:
  - a) the decision to confirm the decision of the TPB to terminate his registration as a tax agent; and
  - b) that he is not a fit and proper person to be registered as a tax agent under the Act.
3. Former Professional Conduct By-Law\* 40(j), in that the acts, omissions and defaults as set out in paragraphs 1 and 2 above bring, or are likely to bring, discredit on the Member, Chartered Accountants ANZ and/or the profession of accountancy.

\*As defined in By-Law 42

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

### **Former Professional Conduct By-Laws**

40. A Member, Non-Member Practice Entity or Provisional Member shall be liable to disciplinary action in any of the following events, whether occurring before or after the coming into operation of these By-laws:
- (a) if he, she or it has, in the opinion of either of the Tribunals referred to in By-law 41, failed to observe a proper standard of professional care, skill or competence in the course of carrying out his, her or its professional duties;
  - ...
  - (e) if he, she or it has been the subject of an adverse finding in relation to his, her or its professional or business conduct or competence 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;
  - ...
  - (j) if he, she or it has committed any act, omission or default which, in the opinion of either of the Tribunals referred to in By-law 41 brings, or is likely to bring, discredit upon himself, herself or itself, the Institute or the profession of accountancy.
- 41 (a) For the implementation of the procedures referred to in this Section, there shall be the following Tribunals:
- (i) a Professional Conduct Tribunal appointed by the Board as hereinafter provided; and
  - (ii) an Appeal Tribunal appointed by the Board as hereinafter provided.
  - ...

### **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.

...

## **2 Disciplinary action**

- 2.1 A Member is liable to disciplinary sanctions under these By-Laws if (whether before or after the date of adoption of this By-Law) that Member:
- (a) has failed to observe a proper standard of professional care, skill, competence or diligence in the course of carrying out that Member's professional duties and obligations;
  - ...
  - (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;

...

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

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