

Determination of the Appeals Tribunal of Chartered Accountants Australia and New Zealand 24 April 2019

Case Number:	A-182
Member:	Ian Robinson Harris FCA of Victoria
Hearing Date:	10 April 2019
Tribunal:	Jan West AM FCA (Chair) Richard Bobb FCA Anna Hebron, lay member of the Tribunal
Tribunal Legal Adviser:	Jamesina McLeod
Representation:	Michael Bradley for the Professional Conduct Committee (PCC) The Member appeared via videoconference
Case description:	Member bankrupt
Appeal:	Member appeal of sanctions

1. BACKGROUND TO THE APPEAL

At a Disciplinary Tribunal hearing held on 6 February 2019, the Member admitted that he had suffered an insolvency event and the Disciplinary Tribunal was satisfied that the allegation was established. The Disciplinary Tribunal determined that the Member should be suspended from membership for the duration of his bankruptcy and that he should pay a contribution towards the costs of the proceedings in the amount of \$2,500.

The Member appealed the sanctions imposed by the Disciplinary Tribunal.

2. DECISIONS

2.1 DECISION ABOUT THE APPEAL

At a hearing of the Appeals Tribunal (the **Tribunal**), which the Member attended by way of videoconference, the Tribunal determined to:

- affirm the sanction imposed by the Disciplinary Tribunal to suspend the Member from membership of Chartered Accountants ANZ for the remaining period of his bankruptcy, and to remove the Member's name from the Registers on which it appears and advise NZICA of that suspension and removal
- affirm the cost sanction imposed by the Disciplinary Tribunal that the Member be required to pay the sum of \$2,500 towards the costs and expenses of the proceedings up to and including the Disciplinary Tribunal hearing.

2.2 DECISION ABOUT COSTS SANCTION

The Tribunal determined that the Member pay to Chartered Accountants ANZ the sum of \$10,175 for the full costs and expenses of the Appeals Tribunal hearing (By-Law 40(10.12)(l)). No GST is payable.

2.3 DECISION ABOUT PUBLICATION

In accordance with By-Laws 40(12.3) and 40(12.4) the Tribunal directed that, there being no exceptional circumstances:

- its decision with reasons, mentioning the Member's name and locality, be published on the website of Chartered Accountants ANZ (the **Published Decision**)
- a notice mentioning the Member's name and locality with a web address for the Published Decision be published in the Chartered Accountants ANZ digital and print magazine "Acuity".

2.4 NOTIFICATION TO OTHER BODIES

The Member advised that he is a member of / holds a statutory registration administered by, the Tax Practitioners Board, who will be notified of this decision.

3. REASONS FOR DECISIONS ON SANCTION

- The Tribunal affirmed the sanction imposed by the Disciplinary Tribunal suspending the Member from membership of Chartered Accountants ANZ for the remaining period of his bankruptcy, removing the Member's name from the Registers on which it appears and advising NZICA of that suspension and removal.
- The Member submitted that he should not be subject to any sanction. In support of his appeal against the decision of the Disciplinary Tribunal, the Member made the following submissions:
 - there was nothing in the rules and By-Laws of Chartered Accountants ANZ preventing a bankrupt from continuing to be a member, and that if it was inappropriate then there would be a rule to that effect such as there is with the legal profession. The application of a 'normal' or 'usual' sanction to suspend membership in the event of bankruptcy was ultra vires. The sanction was only 'normal' as a result of previous decisions of the Disciplinary Tribunal regarding sanctions to be imposed on bankrupt members
 - the decision to suspend his membership for the period of bankruptcy was biased
 - the decision to suspend his membership for the period of bankruptcy was unreasonable or inappropriate
 - allowing his membership to continue would not harm the public nor harm the reputation of Chartered Accountants ANZ. The Member submitted that he has made a considerable contribution to the community throughout his career, and has been a member of Chartered Accountants ANZ for more than 40 years
 - the PCC submitted untruthful, false and misleading information to the Disciplinary Tribunal
 - the PCC was negligent in allowing unverified information to be submitted to the Disciplinary Tribunal and should not have relied on unverified material sourced from the internet regarding his client, which was included in the PCC's submissions to the Disciplinary Tribunal
 - the PCC impugned the reputation of his client and associated organisations in its submissions to the Disciplinary Tribunal
 - by letter dated 17 December 2018, the PCC noted the Member's 'unusual circumstances' and advised that it was appropriate for the Disciplinary Tribunal to consider whether to vary the usual sanction. The PCC failed to carry through with this request as it had advised it would by instead submitting that the Disciplinary Tribunal apply the 'usual' or 'normal' sanction.
- In response to the Member's grounds for appeal and supporting submissions, the PCC confirmed that it continued to rely on its submissions made to the Disciplinary Tribunal. In maintaining that suspension of membership for the duration of the Member's bankruptcy was an appropriate sanction, the PCC further submitted that:
 - whilst the By-Laws do not mandate suspension as a sanction in the event of bankruptcy, such an event is a breach of the By-Laws and as such warrants consideration as to the appropriate sanction. The Disciplinary Tribunal was acting within its powers when imposing the suspension
 - suspension was the sanction applied in most cases for good reasons, including that:
 - suspension served a protective function for the good of members of the public and was not imposed to criticise or punish the member regarding their bankruptcy

- as there was no other breach of the By-Laws, other sanctions that are punitive in nature were not appropriate
 - no exceptional circumstances applied so as to warrant a departure from the 'usual' sanction regarding bankruptcy. The Disciplinary Tribunal considers each case on its merits and is guided by and is permitted to adopt a 'usual course' in determining sanction. This supports the expectation that the sanction imposed on a member should be fair and consistent when the conduct subject to the sanction is similar to that of other members unless there are unusual circumstances for the Tribunal to consider
 - to continue to be held out as a member of Chartered Accountants ANZ whilst bankrupt would tarnish the reputation of the organisation and the profession of accountancy. It was appropriate for Chartered Accountants ANZ to withdraw the imprimatur of membership in these circumstances
- the Member's oral submissions in relation to bias were misconceived
- the circumstances of the Member's client were not relevant to the question of whether his membership should be suspended as a consequence of bankruptcy or whether the sanction imposed by the Disciplinary Tribunal was appropriate
- the PCC has an ethical obligation not to mislead the Tribunal, and did not do so.
- The Tribunal considered the submissions made by the Member and the PCC and ultimately accepted the submissions made by the PCC. In determining to affirm the sanction of suspension imposed by the Disciplinary Tribunal, the Tribunal:
 - considered and accepted the submission made by the PCC that:

"In the ordinary course where a member has been made a bankrupt, the Tribunal would order that the member's membership be suspended for the duration of the bankruptcy. That's the usual outcome in cases of this nature. This is seen as an appropriate measure for the protection of the interests of Chartered Accountants and the public on the basis that it's generally inappropriate that a person should continue to be held out to the public as a chartered accountant and carry the imprimatur of Chartered Accountants ANZ in circumstances where they are personally insolvent and their personal affairs are being externally managed, as is the case with a personal bankruptcy.

There is no punitive element to that determination and the imposition of that sanction. It's essentially a protective measure."
 - considered whether there were any aggravating or mitigating factors regarding the Member's bankruptcy and the effect of imposing a sanction of suspension on the Member
 - invited the Member to provide reasons to support a finding of exceptional circumstances which would warrant a variation to the usual sanction applied in the case of a bankruptcy. The Tribunal considered the responses provided by the Member, including the Member's submissions that he would soon be in receipt of funds that would enable him to annul the bankruptcy. The Tribunal ultimately determined that the Member's responses were not persuasive and that the potential for any future annulment of the bankruptcy was not a relevant matter to the question of whether the current sanction imposed by the Disciplinary Tribunal was appropriate
 - formed the view that, in the absence of any exceptional circumstances, or aggravating or mitigating factors, suspension for the remaining period of the Member's bankruptcy was the appropriate sanction, reflecting the need to provide consistency and fairness to members in similar circumstances and to maintain public confidence in the designation of Chartered Accountant

- considered the submissions made by the Member and the PCC relating to the Member's client and his business relationship with the client. The Tribunal determined that this information was not relevant to the matter of the Member's bankruptcy or any sanction which might be imposed.

4. ADDITIONAL EVIDENCE BEFORE THE TRIBUNAL

- The function of the Tribunal is to rehear the disciplinary proceeding but, unless the Tribunal directs otherwise, it shall not allow new evidence to be introduced (By-Law 40(11.5)).
- On the application of the Member, the Tribunal decided in this case to exercise its discretion to allow the Member to introduce new evidence supporting his grounds of appeal that:
 - the Disciplinary Tribunal's decision to suspend his membership was biased
 - the PCC submitted untruthful, false and misleading information to the Disciplinary Tribunal with respect to his client
 - the PCC was negligent in allowing unverified information about his client to be submitted to the Disciplinary Tribunal.

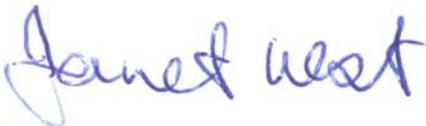
In doing so, the Tribunal accepted the Member's submission that he had not had the opportunity prior to the Disciplinary Tribunal hearing to refute information concerning his client which had been included in the PCC's submissions to the Disciplinary Tribunal.

- The PCC did not oppose the application.
- Ultimately, the Tribunal found that the Member's new evidence was not relevant to the decision to be made by the Tribunal regarding whether:
 - it was appropriate that the Member's membership be suspended for the duration of his bankruptcy
 - the costs determined by the Disciplinary Tribunal were appropriate.

5. REASONS FOR DECISIONS ON COSTS SANCTION

- The Tribunal determined:
 - to affirm the cost sanction imposed by the Disciplinary Tribunal that the Member be required to pay the sum of \$2,500 towards the costs and expenses of the proceedings up to and including the Disciplinary Tribunal hearing
 - that the Member be required to pay \$10,175 for the full costs and expenses of the Appeals Tribunal hearing.
- The Member submitted that there should be no costs sanction.
- The PCC submitted that the Member should pay the full costs of the proceedings in the amount of \$12,675 because:
 - the Disciplinary Tribunal proceedings were an automatic consequence of bankruptcy
 - the Member elected to appeal the decision, as was his right, but if unsuccessful he should bear the full cost of the exercise
 - the costs incurred were reasonable, given that the Member "raised a large number of grounds of appeal, some quite complex, with a heavy legal content".

- The Tribunal, in determining the amount of costs that should be borne by the Member, considered the guidelines in Regulation CR8.12 Costs awards, in particular that:
 - the complaint against the Member had merit and the Tribunal ultimately made a finding against the Member
 - the Member admitted that he had suffered an insolvency event in breach of By-Law 40(2.1)(j)
 - the final sanctions determined by the Tribunal did not differ from those determined by the Disciplinary Tribunal on 6 February 2019
 - the PCC on 21 December 2018 had offered the Member an opportunity to enter into a written undertaking which included terms that his membership would be suspended for the duration of his bankruptcy and that he pay \$500 towards the costs and expenses of the disciplinary action
 - it was reasonable that the costs of the Member's unsuccessful appeal be borne by the Member and not the membership as a whole.



**Chair
Appeals Tribunal**

SCHEDULE 1A - DECISION OF THE DISCIPLINARY TRIBUNAL



Determination of the Disciplinary Tribunal of Chartered Accountants Australia and New Zealand 20 February 2019

Case Number:	D-1194
Member:	Ian Robinson Harris FCA of Victoria
Hearing Date:	6 February 2019
Tribunal:	David Fairlie (Chair and lay member of the Tribunal) Simon Wallace-Smith FCA Richard Rassi FCA
Representation:	Michael Bradley for the Professional Conduct Committee (PCC) The Member appeared via videoconference
Case description:	Member bankrupt

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Members of CA ANZ are not liable for the debts and liabilities of CA ANZ.



1. DECISIONS

1.1 DECISION ABOUT THE PCC'S ALLEGATION WHICH IS SET OUT IN FULL IN SCHEDULE 1

At a hearing of the Disciplinary Tribunal the Member admitted the allegation and the Tribunal was satisfied it was established.

1.2 DECISION ABOUT SANCTIONS

The Tribunal considered that the appropriate sanction in these circumstances was to suspend the Member from membership of Chartered Accountants ANZ for the period of his bankruptcy, and to remove the Member's name from the Registers on which it appears and advise NZICA of that suspension and removal.

1.3 DECISION ABOUT COSTS SANCTION

The Tribunal determined that the Member pay to Chartered Accountants ANZ the sum of \$2,500 towards the costs and expenses of the proceedings (paragraph 10.12(l) of By-Law 40). No GST is payable.

1.4 DECISION ABOUT PUBLICATION

This decision will not take effect while the Member remains entitled to appeal.

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

- its decision with reasons, mentioning the Member's name and locality, be published on the website of Chartered Accountants ANZ (the **Published Decision**)
- a notice mentioning the Member's name and locality with a web address for the Published Decision be published in the Chartered Accountants ANZ digital and print magazine "Acuity".

1.5 NOTIFICATION TO OTHER BODIES

The Member advised that he is a member of / holds a statutory registration administered by, the Tax Practitioners Board, who will be notified of this decision.

2. RIGHT 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 Appeals Tribunal of Chartered Accountants ANZ against the decision (paragraph 11.1 of By-Law 40).

While the Member remains entitled to appeal, or while any such appeal by the Member awaits determination by the Appeals Tribunal, the following decisions shall not take effect:

- Decision about the PCC's allegations
- Decision about sanctions
- Decision about costs sanction.

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 Appeals Tribunal of Chartered Accountants ANZ against the decision (paragraph 11.2 of By-Law 40).

3. BACKGROUND

On 4 September 2018 a Federal Court sequestration order was made against the Member declaring him bankrupt.

4. REASONS FOR DECISION ON BREACH OF BY-LAWS

- The Member admitted the allegation.
- The Tribunal was provided with a Federal Circuit Court sequestration order dated 4 September 2018 and an extract from the National Personal Insolvency Index which showed that the Member's date of bankruptcy was 4 September 2018.
- The Tribunal was satisfied that the allegation was established because the Member had suffered an insolvency event pursuant to By-Law 40(2.1)(j).

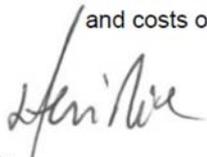
5. REASONS FOR SANCTIONS

- The PCC submitted that:
 - in the ordinary course the sanction for bankruptcy was suspension for the duration of the Member's bankruptcy
 - the sanction was not punitive but to protect the public and the reputation of Chartered Accountants ANZ
 - notwithstanding that the Member said there were exceptional circumstances in his case, there were no compelling reasons why an exception should be made. There were no matters in relation to the Member's own bankruptcy, nor in relation to the proposed funding arrangements which the Member had with an overseas client, which should alter the normal sanction
 - the credibility of the overseas client and the proposed arrangements with the Member had an "element of improbability".
- The Member submitted that a reprimand rather than suspension from membership was appropriate because:
 - the PCC's submissions with respect to his client's reputation and credibility were incorrect
 - his bankruptcy did not involve any complaints about misbehaviour by the Member and entailed self-reporting of an insolvency event to Chartered Accountants ANZ
 - he had not brought Chartered Accountants ANZ into disrepute or diminished the public's or any regulator's confidence in it and this was an isolated event
 - delays in the approval of funding arrangements from his client had been outside of his control. Upon receipt of the initial funds from the client his bankruptcy would be annulled
 - his involvement as a member of Chartered Accountants ANZ in his client's global humanitarian aid project was on balance likely to enhance the reputation of, and confidence in, the profession and Chartered Accountants ANZ
 - due to the "unusual and unique circumstances", he should be allowed to continue as a member for the duration of his bankruptcy.

- The Tribunal determined that suspension from membership for the duration of the Member's bankruptcy was appropriate because the Member's submissions concerning his client and the proposed business arrangement between them, even if accepted by the Tribunal, did not amount to exceptional circumstances justifying a lesser sanction.
- The Tribunal was of the view that a reprimand was not an appropriate sanction in circumstances of bankruptcy, where there was no allegation of misbehaviour by the Member.

6. REASONS FOR COSTS SANCTION

- The PCC submitted that the Member should pay \$2,500 towards the costs of the proceedings.
- The Member made no submissions with respect to costs.
- The Tribunal determined that the Member should pay costs of \$2,500, having regard to *Regulation CR8 - Disciplinary Procedures*.
- The Tribunal took into account that the Member had been given the opportunity to enter into a consent agreement prior to the hearing which included suspension of membership and costs of \$500 but the Member rejected that offer (Regulation CR8.12(d)).


Chair
Disciplinary Tribunal

SCHEDULE 1 - 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 By-Law 40(2.1)(j), in that on 4 September 2018 he became bankrupt.

SCHEDULE 2 - RELEVANT BY-LAWS

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

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

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

...

40(2) Disciplinary action

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

...

- (j) suffers an Insolvency Event;

...

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 By-Law 40(2.1)(j), in that on 4 September 2018 he became bankrupt.

SCHEDULE 2 - RELEVANT BY-LAWS

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

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

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

...

40(2) Disciplinary action

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

...

- (j) suffers an Insolvency Event;

...

40(11) Appeals Tribunal

40(11.1) Any Member in respect of whom any determination has been made by the Disciplinary Tribunal or upon whom any sanction has been imposed by the Disciplinary Tribunal may, subject to paragraph 9.4, within 21 days after notice of the written reasons for such determination or sanction is given to that Member, give notice of appeal in the form prescribed by the Regulations to the Appeals Tribunal against any such determination or sanction or both. At the discretion of the Appeals Tribunal later notice may be accepted.

...

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

...

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

...