

## Professional Conduct Committee – 16 September 2021

### Conflict of Interest – Member A

At a meeting of the Professional Conduct Committee (PCC) of Chartered Accountants Australia and New Zealand held in private on 16 September 2021 by videoconference in respect of Member A, the PCC decided that the Disciplinary Tribunal would be likely to find that the Member's conduct did not comply with By-Law 40(2.1)(a), (h) and (k).

With the written consent of Member A, the Committee made the following determinations:

- the Member receive a reprimand;
- the Member and his Practice Entity be required to submit to a quality review pursuant to the CA ANZ Regulations, at the Member's cost, with particular attention to the audit of self-managed superannuation funds, with the results of such review to be made available to the PCC;
- the Member be required to successfully complete, at the Member's cost, the ethics module of the CA ANZ Public Practice Program by no later than 30 June 2022, and advise the CA ANZ Conduct & Discipline team (via [membercomplaints@charteredaccountantsanz](mailto:membercomplaints@charteredaccountantsanz)) when this has been completed;
- the Member pay to CA ANZ the sum of \$2,524 towards the costs of investigating and dealing with the matters the subject of the complaint and the Case Conference; and
- the PCC will publish:
  - details of these sanctions on the website of CA ANZ; and
  - a notice in the digital and print magazine "Acuity", with a link to the published decision, without disclosing the Member's name or locality.

The PCC considers that it is in the public interest for this sanction to be published in the terms set out in the proposed Consent Agreement but that there are no special circumstances which warrant disclosing the name or location of the Member.

#### Background

The Member was engaged by the Complainant and her then husband in or around 1997 to act for them individually, as well as for their self-managed superannuation fund (Fund), the trustee of the Fund (Trustee) and their Family Trust (Family Trust). The Member was also the auditor of the Fund.

The Complainant says that the Member was notified of her separation from her former husband in February 2019. The Complainant alleged that the Member failed to provide her with the Fund's FY2019 tax return, despite her entitlement to it as a director of the Trustee.

#### Reasons

##### *Issue 1 – Conflict of interest and application of safeguards*

The Complainant claimed that the Member acted in circumstances where there was a conflict of interest, in that he continued to act for her former husband, as well as the Fund and Trustee following their separation, and in particular that he preferred the interests of the Complainant's former husband to those of the Complainant.

In support of her complaint, the Complainant alleged that the Member:

- a. did not return the Complainant's call and advise her that he was no longer acting on her behalf despite the fact that the Complainant was still a director of the Trustee and member of the Fund;

- b. lodged a 2018-2019 tax return for the Fund without the Complainant's knowledge and approval;
- c. lodged ASIC forms removing the Complainant as a director and secretary of the Trustee prior to the time at which this was required pursuant to the relevant court orders;
- d. refused to provide documents to the Complainant regarding the operation of the Fund while she was a director of the Trustee.

The Member's evidence was as follows:

- a. once the parties separated, the Member was not able to act for the Complainant. In addition, on 2 May 2019 he received a professional letter from the Complainant's new accountant, so he took care not to act for the Complainant in any capacity from that day;
- b. he did continue to act for the Complainant's former husband, the Fund and the Trustee, on instructions from the Complainant's former husband;
- c. he lodged the Fund's 2019 income tax return on 10 October 2019;
- d. he considered that the Complainant was not entitled to copies of any documents relating to the Fund or Trustee once the Complainant had advised she would resign as director and shareholder of the Trustee. In addition, the Member was advised by the Complainant's former husband that as the Complainant would get \$525,000 in shares from the Fund, she would have no further claim on the Fund and that he should therefore not provide the requested information to the Complainant;
- e. on 28 October 2019, the Complainant's former husband asked him to remove the Complainant as a director and shareholder of the Trustee. The Member said he had to wait for the \$525,000 in shares to be transferred to the Complainant. On 29 October 2019, the Complainant's former husband told the Member that his solicitor would like the Complainant removed as a director and shareholder. Because of this and because the Complainant had advised that she would resign as a director and shareholder of the Trustee once she received \$525,000 from the Fund, he lodged the ASIC forms removing the Complainant as a director and shareholder on 29 October 2019, as by that date the Complainant's rollover from the Fund had been actioned.

Members are required to comply with the fundamental principle of objectivity set out at section 120 of APES 110, *Code of Ethics for Professional Accountants*. The obligation requires Members to take steps to prevent conflicts of interest from compromising professional or business judgment. Such steps include the disclosure of any real or potential conflicts of interest, the implementation of safeguards to reduce the threat of compromise (to the Member's judgment) to an acceptable level, and the obtaining of client consent to proceed notwithstanding.

The Member acknowledged that he was aware of the separation between the Complainant and her former husband in or around February 2019. Although the Member maintains that he did not face a conflict of interest as he had only acted for the former husband and discontinued acting for the Complainant once he had received the ethical letter from the Complainant's new accountant and tax agent, he was still the accountant for the Fund and Trustee. There is no evidence that the Member disclosed anything to the parties in relation to a conflict of interest in these circumstances. The Member confirmed that he did not advise the parties at the time of separation nor subsequently as to how he would proceed with the accounting affairs of the Fund, Trustee and Trust, as well as the Complainant's former husband, in circumstances where he knew of the separation and disputes between the Complainant and her former husband.

The Member noted that the Complainant and her former husband were legally represented, and the Complainant had a separate accountant/tax agent. However, these safeguards do not remove the threat to the Member's objectivity in relation to the Fund and Trustee. Moreover, there is evidence which to the PCC suggests that the Member's professional judgment was compromised including:

- a. at the request of the Complainant's former husband, the Member prematurely removed the Complainant as director and shareholder of the Trustee prior to her receipt of the shares from the Fund (noting the Complainant's submissions that she was removed on 29 October 2019 and received the shares on 31 October 2019);
- b. the Member lodged the 2018-2019 tax return for the Fund without the Complainant's knowledge and authorisation, and on the instruction of her former husband, despite the fact that the Complainant said she had always jointly signed all tax returns for the Fund and Trustee; and
- c. the Member's refusal to provide to the Complainant a copy of the 2018-2019 tax return for the Fund.

In the PCC's view, the Member should have disclosed to both the Complainant and her former husband that he was proposing to act for the former husband, Fund, Trustee and Trust following the separation and advised them that he would only act on joint instructions from the Complainant and her former husband regarding matters concerning the Fund, Trustee and Trust. The Member's failure to do so means that, in the PCC's view, he is in breach of his obligations under sections 100.5(b), 1201, 220.1, 220.5 and 220.11 of APES 110 and therefore of By-Law 40(2.1)(h).

#### *Issue 2 – Provision of books and records*

The Complainant alleged that the Member failed to provide copies of the 2018-2019 tax return and associated documents for the Fund and Trust in circumstances where she was still a member and Director of the Fund until late October 2019. She also noted that she advised the Member she was happy to receive copies by email.

The Member's evidence was as follows:

- a. the Complainant did not offer to pay for copies of those returns but notes that he never asked her to pay or indicated the amount of these costs;
- b. the Complainant's former husband advised him not to give the returns to the Complainant;
- c. the Complainant was not a member of the Fund at the relevant time; and
- d. although the Complainant ultimately received copies of the documents she was seeking, this was not from him. He thought she might have received them via the solicitor for her former husband.

The PCC notes the Complainant was still a member of the Fund at the time when the 2018-2019 tax return was prepared and lodged by the Member in June 2019. As such, the PCC considers that the Member failed to provide the relevant tax return to the Complainant and that he should have provided the Complainant with a copy of the 2018-2019 tax return at the time she requested it given she was a member of the Fund at the time. Accordingly, the PCC considers that the Member has not complied with the fundamental principle of professional behaviour (sections 100.5(e) and 150.1 of APES 110) nor his obligation to act with professional care or diligence in breach of By-Laws 40(2.1)(a) and (h).

#### *Issue 3 – Professional Behaviour*

The Complainant alleged that the Member is in breach of the fundamental principle of professional behaviour in that he:

- a. told her to “*get out of his office*”; and
- b. sent personal and threatening emails to the Complainant in relation to her disabilities and inappropriate emails in relation to the Complainant's separation, namely:

- i. *“Hi I am the sucker who emailed the returns to you for nothing when my invoice for \$1125 is outstanding...”*;
- ii. *“No don’t believe you”*;
- iii. *“You seem to be able to type these long emails so are you on disability benefits with Centrelink. I am going to keep a copy of all emails to show people if that happens what you threatened. Please don’t email me again, sort yourself with Mark re frozen bank accounts and move forward”*.

The Member advised as follows:

- a. the Complainant never arranged an appointment to meet him;
- b. it is inappropriate for the Complainant to come to his office without an appointment and *“demand things”*;
- c. he denies that he was saying that the Complainant was disabled; and
- d. he considers that his response to the Complainant saying not to email him was appropriate in the circumstances.

The PCC considers that the Member did not conduct himself, as noted in the above email exchanges, in an appropriate manner for a Chartered Accountant. As such, the PCC considers that the Member failed to comply with the principle of professional behaviour in breach of sections 100.5(e) and 150.1 of APES 110 and By-Law 40(2.1)(h).

#### *Issue 4 – Discredit*

The Member denies that the conduct noted above bring discredit on him, CA ANZ or the profession.

In consideration of these issues, the PCC considers that Member has brought discredit upon himself, given the manner in which he conducted himself.

#### *Issue 5 – Lack of independence*

The PCC also notes the Member’s admission that he was the auditor for the Fund, despite being ultimately responsible for the provision of the Fund’s financial statements. The PCC considers that this is a breach of the independence provisions contained in section 290 of APES 110 and therefore of By-Law 40(2.1)(e). In addition, the PCC notes that the Member was not forthcoming during the Case Conference in relation to the fact that he was the auditor. He spoke about the lack of qualification of the audit, but did not mention that he was the auditor until asked a direct question to that effect.

**Professional Conduct Committee**  
**Chartered Accountants Australia and New Zealand**  
**16 September 2021**