



Disciplinary Tribunal of Chartered Accountants Australia and New Zealand (CA ANZ)

Written decision dated 21 September 2021

- Case Number:** DT-1266
- Member:** Raymond John Clarke FCA of Victoria
- Hearing Date:** 31 August 2021
- Tribunal:** Simon Wallace-Smith FCA (Chair)
Kathryn Brown CA
Nigel Phair, lay member of the Tribunal
- Tribunal Legal Adviser:** Joshua Kangisser
- Representation:** Paul Forbes for the Professional Conduct Committee (PCC)
The Member represented himself
- Decisions:**
1. The Tribunal determined that the Member had breached By-Law 40(2.1)(h) because he:
 - (a) failed to respond to an ethical clearance letter, in breach of Regulation CR 3.8;
 - (b) failed to make available books and records, in breach of Regulation CR 3.9;
 - (c) failed to respond to enquiries from CA ANZ in the timeframe required, in breach of By-Law 40(13.3).
 2. The Tribunal determined to censure the Member and impose a fine in the amount of \$5,000.
 3. The Tribunal imposed a cost sanction in the sum of \$19,042 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) its written decision with reasons, mentioning the Member's name and location, be published on the CA ANZ website (the **Published Decision**);
 - (b) a summary of the Published Decision mentioning the Member's name and location with a web address for the Published Decision be published in the CA ANZ official publication, *Acuity*;
 - (c) the Tax Practitioners Board be notified of this decision;

- (d) 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;
- (e) the decision regarding confidentiality takes effect immediately from 31 August 2021.

The date of effect of this decision is 13 October 2021 (By-Law 40(10.18)).



1. Introduction

- (a) In May 2019, CA ANZ received a complaint from another accountant (the **Complainant**) which stated that he had been requested to accept an appointment as the new accountant of one of the Member's clients and that he had also requested relevant books and records from the Member. The Complainant alleged the Member failed to respond to his correspondence and did not provide the requested books and records which he needed to initiate work on behalf of his client (the **Complaint**).
- (b) CA ANZ wrote to the Member on five occasions seeking a response to the Complaint. On 12 June 2020 the PCC advised the Member that he was required to attend a Case Conference on 10 September 2020 as no substantive response had been received. The Member subsequently provided a written response to the Complaint on 8 February 2021 and an oral response during the Case Conference that had been rescheduled a number of times until held on 19 May 2021.
- (c) After investigating the Complaint, the PCC referred the Member to the Tribunal by way of Notice of Disciplinary Action (set out in full in Schedule 1) (the **NDA**) which in summary alleged that the Member failed to:
 1. respond to an ethical clearance letter;
 2. provide books and records; and
 3. respond to enquiries by CA ANZ regarding the Complaint in the required timeframe.

2. The issues for determination

- (a) Did the Member fail to respond to an ethical clearance letter, in breach of Regulation CR 3.8? (allegation 1(a))
- (b) Did the Member fail to provide books and records, in breach of Regulation CR 3.9? (allegation 1(b))
- (c) Did the Member fail to respond to enquiries by CA ANZ regarding the Complaint in the timeframe required, in breach of By-Law 40(13.3)? (allegation 1(c))
- (d) If the answer to (a), (b) or (c) 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) Should notice of the Tribunal's decision be published?
- (g) Should other parties be notified of the Tribunal's decision?
- (h) Should any confidentiality orders be made?

3. Did the Member fail to respond to an ethical clearance letter, in breach of Regulation CR 3.8? (allegation 1(a))

3.1 PCC submissions

- (a) The PCC submitted that:
 - (i) an ethical letter was submitted to the Member on 27 March 2019 requesting ethical clearance, specifically that the Member provide the client's books and records if there

was no ethical or professional reason why the Complainant should not accept the appointment;

- (ii) the Complainant followed up with a phone call;
 - (iii) the Member did not respond to the Complainant regarding the letter of 27 March 2019 or the follow-up phone call which led to him making the Complaint, until 23 May 2019 when he said he would provide the information requested;
 - (iv) at the Case Conference on 19 March 2021, the Member agreed that he had not cooperated with the Complainant because of his view of the ethics of the way the Complainant had been appointed;
 - (v) Regulation CR 3 *Public Practice Regulations* applies to members with a certificate of public practice which the Member had at all relevant times. That Regulation at 3.8 obliges members to “reply to professional correspondence and enquiries expeditiously”.
- (b) In making this submission, the PCC referred to the following evidence:
- (i) the ethical clearance letter sent from the Complainant on 27 March 2019;
 - (ii) the Member’s response sent on 23 May 2019;
 - (iii) transcript of the Case Conference held on 19 May 2021 (the **Case Conference transcript**).

3.2 Member submissions

The Member made no submissions however he admitted the allegation as set out in the NDA.

3.3 Tribunal decision and reasons

The Tribunal determined that the allegation was established because:

- (a) Regulation CR 3 applies to Members in Public Practice, which for the purposes of Regulation CR 3, includes members who hold or ought to hold a Certificate of Public Practice. At all relevant times the Member held a Certificate of Public Practice. Therefore, Regulation CR 3 applied to the Member;
- (b) Regulation CR 3.8 states:
 - 3.8 Attention to Correspondence and Enquiries**
 - Members must reply to professional correspondence and enquiries expeditiously.
- (c) the Complainant’s request of 27 March 2019 was professional correspondence. The Member did not respond to the ethical clearance letter at all until 23 May 2019 and then only said that he would provide books and records at a later date. The Tribunal was not satisfied that he ever responded directly to the implicit question being whether there was any ethical or professional reason why the Complainant should not accept the appointment. The failure to respond at all by 23 May 2019 and never to the implicit question was a failure to respond expeditiously;
- (d) the Member said he did not properly respond to the ethical clearance letter due to his own view of a family dispute and an unsustainable allegation. The Tribunal was of the view that this was no excuse not to comply with Regulation CR 3.8. Whether or not the Member had a legitimate reason to object to the appointment of the Complainant as the new accountant was

not relevant to this allegation, the issue was that the Member failed to express any objection he may have had by responding expeditiously to the Complainant's request;

- (e) committing a breach of the Regulations is a breach of By-Law 40(2.1)(h) and renders the Member liable to disciplinary sanctions.

4. Did the Member fail to provide books and records, in breach of Regulation CR 3.9? (allegation 1(b))

4.1 PCC submissions

- (a) The PCC submitted that:
- (i) an ethical letter was sent to the Member on 27 March 2019 requesting ethical clearance, specifically to provide the trust's books and records if there was no ethical or professional reason why the Complainant should not accept that appointment;
 - (ii) on 23 May 2019 the Member sent correspondence to the Complainant saying the earliest he could provide a response was 27 May 2019 and on 26 August and 9 September 2019 also said he would supply the requested information;
 - (iii) the Member did not supply any of the requested information;
 - (iv) at the Case Conference held on 19 May 2021, the Member:
 - (1) agreed that, even though the Complainant might have been appointed by the client reluctantly, in fact the appointment was valid and the Member failed to give the records;
 - (2) had nothing to say in response to the suggestion that he had given an undertaking to provide the books and records but did not do so;
 - (3) agreed that, if he had acted in accordance with his professional duties, he would have handed over the books and records;
 - (v) Regulation CR 3 *Public Practice Regulations* applies to members with a certificate of public practice which the Member had at all relevant times. That Regulation at 3.9 obliges members to make available all books, papers, documents and other records belonging to the client after a change in appointment has been effected.
- (b) In making this submission, the PCC referred to the following evidence:
- (i) the ethical clearance letter sent from the Complainant on 27 March 2019;
 - (ii) emails from the Member to the Complainant sent 23 May 2019, 26 August 2019 and 9 September 2019;
 - (iii) the Case Conference transcript.

4.2 Member submissions

The Member made no submissions however he admitted the allegation as set out in the NDA.

4.3 Tribunal decision and reasons

The Tribunal determined that the allegation was established because:

- (a) as stated at paragraph 3.3(a) above, Regulation CR 3 applied to the Member;

- (b) Regulation CR 3.9 states:
- 3.9 Books and Records**
Subject to any legal right of lien, a Member in Public Practice must, after a change in appointment has been effected, promptly make available for collection all books, papers, documents and other records belonging to the client.
- (c) the ethical clearance letter from the Complainant dated 27 March 2019 requested the following books and records:
- (i) copies of Income Tax Returns including all worksheets and depreciation schedules for the years 2015 - 2018;
 - (ii) copies of Financial Statements and Trial Balances for the years 2015 - 2018; and
 - (iii) Corporate Secretarial Records together with any Permanent File information;
- (d) the new accountant was instructed by the Trustee of the Trust and therefore the books and records requested by the Complainant from the Member belonged to the Complainant's client. The Member was advised of this appointment in the ethical clearance letter sent by the Complainant on 27 March 2019. The Member admitted the fact that the Complainant was appointed as the new accountant for the Trustee in a confidential submission made to the PCC on 8 February 2021;
- (e) the Member did not properly respond to the Complainant's ethical clearance letter and correspondence and did not make available for collection the requested books and records. This was confirmed by the Member in his confidential response to the PCC on 8 February 2021 in which he stated he had not supplied the books and records to the Complainant. The Member also at the Case Conference on 19 May 2021 reiterated that none of the books and records had been provided by him to the Complainant;
- (f) the Member did not provide the books and records and provided no valid reason for not doing so. The Tribunal noted that the Member referred to a number of issues, none of which was a valid reason for not making available the books and records to the Complainant and none of which he communicated to the Complainant;
- (g) committing a breach of the Regulations is a breach of By-Law 40(2.1)(h) and renders the Member liable to disciplinary sanctions.

5. Did the Member fail to respond to enquiries by CA ANZ regarding the Complaint in the timeframe required, in breach of By-Law 40(13.3)? (allegation 1(c))

5.1 PCC submissions

- (a) The PCC submitted that:
- (i) on five occasions the PCC wrote to the Member requesting a response to the Complaint;
 - (ii) the Member did not provide a response until 8 February 2021 and ultimately attended a Case Conference on 19 May 2021, which had been adjourned six times for various reasons, being two years after the Complaint was first lodged;
 - (iii) the detailed response from the Member received on 8 February 2021 was 'a year and about seven months' after the first correspondence to the Member that sought a response to the Complaint.

- (b) In making this submission, the PCC referred to the following evidence:
- (i) its correspondences to the Member dated 26 August 2019, 26 September 2019, 18 December 2019, 24 February 2020 and 3 June 2020;
 - (ii) the Member's confidential response dated 8 February 2021.

5.2 Member submissions

The Member made no submissions however he admitted the allegation as set out in the NDA.

5.3 Tribunal decision and reasons

The Tribunal determined that the allegation was established because:

- (a) By-Law 40(13.3) states:

40(13.3) Conduct and provision of information

Members must be open and honest in their dealings with the Professional Conduct Committee, Disciplinary Tribunal and Appeals Tribunal. Members must provide such information as is required of them by CA ANZ, the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal in connection with an investigation, a complaint or any matters arising from or in relation to it, in a timely fashion and in any event within the time prescribed in this Section 5 and any applicable Regulations...

- (b) the PCC is a committee of CA ANZ;
- (c) under By-Law 40(5.2)(b), the PCC may require any member to whom the PCC investigation relates, to provide to the PCC within the time specified by the PCC any documents, things or information that are in the possession or under the control of the Member related to the subject matter of the investigation;
- (d) to establish a breach of By-Law 40(13.3), it was necessary prove that the Member failed to comply with a 'requirement' of the PCC in connection with the investigation. A mere invitation from the PCC would not amount to a 'requirement';
- (e) in this case the PCC called for the Member to respond to the Complaint and was given 14 days to respond in all the correspondence from the PCC except for a longer period over the Christmas break in the letter of 18 December 2019 and a period of two days in the correspondence of 3 June 2020;
- (f) four of the five pieces of correspondence referred to by the PCC contained a requirement that the Member respond by a specified date, that is either by containing an express request that a response to the Complaint be provided or, in the context of following-up the Member for a response to the Complaint, by referring back to earlier correspondence containing such an express request. The Tribunal noted that the correspondence dated 3 June 2020 may not have contained a specific requirement to respond but rather an invitation, as it said "should you wish to provide a response, please do so by no later than 5 June 2020, otherwise the matter will proceed to be determined based on the evidence at hand";
- (g) the Member clearly did not respond to the five requests from the PCC. The Tribunal noted that the Member's confidential submission dated 8 February 2021 was provided almost 18 months after the first request. The Tribunal was satisfied that the Member breached By-Law 40(13.3) by not responding to at least the four pieces of correspondence that clearly contained requirements to respond;

- (h) committing a breach of the By-Laws is a breach of By-Law 40(2.1)(h) and renders the Member liable to disciplinary sanctions.

6. What sanctions should be imposed on the Member?

- (a) Regulation CR 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 a censure and \$5,000 fine were the appropriate sanctions and that the Tribunal should have regard to the following matters:
- (i) the Member's conduct was serious in that it impacted:
 - (1) the ability of the Complainant's client to comply with its tax and accounting obligations;
 - (2) the Complainant's ability to carry out his requirements;
 - (3) the amount of time spent by CA ANZ in investigating the Complaint;
 - (ii) it was not clear if the Member had accepted responsibility or accountability for his actions. The Member's comments in the Case Conference indicated he thought he was justified in deliberately breaching the relevant Regulations by withholding information due to his own view of the ethics of the situation;
 - (iii) an aggravating factor was that the Member became too personally involved with his client, to the point he might have lost his objectivity;
 - (iv) a contributing factor to the Member's conduct could have been the Member's personal situation including that brought on by the COVID-19 pandemic;
 - (v) notwithstanding the lack of response and delays it was noted that a large part of this period of time was before the current pandemic;

- (vi) relevant to the maintenance of the public confidence in the profession of accountancy, sanctions should address conduct that appears to have been deliberate and knowingly in breach of the Regulations. In this regard, the Member appeared to be unrepentant.
- (d) The Member submitted that:
 - (i) he intended to retire in the next 12 to 24 months;
 - (ii) he had been a member of CA ANZ for a long time;
 - (iii) he was surprised the matter had gone to the Tribunal as he had been under the impression the PCC were going to offer to enter into a Consent Agreement;
 - (iv) he regretted the whole process;
 - (v) he had made a mistake in:
 - (1) standing by a client of 30 years in a family dispute;
 - (2) not responding to the ethical clearance letter and to the PCC investigation.
- (e) In balancing the interest of the Member against the public interest, reputation of CA ANZ and the need to support the integrity of the profession of accounting and those of CA ANZ, the Tribunal determined to censure the Member and impose a fine in the amount of \$5,000 because:
 - (i) members need to respond quickly to ethical letters and supply books and records to ensure clients are properly serviced;
 - (ii) it was an aggravating factor that the Member had informed the Complainant he would hand over the client's books and records when he had made a conscious decision not to do so. This included an undertaking given by the Member to provide the requested documents which he failed to fulfil;
 - (iii) it is unsatisfactory for a member of CA ANZ not to take seriously any investigation by the PCC and not to give total cooperation to the investigation process. This conduct undermines CA ANZ's authority and its ability to regulate its members;
 - (iv) in light of the matters raised above, the Tribunal was satisfied the Member's breaches were serious and sustained over a lengthy period, being from March 2019 until February 2021;
 - (v) the Member became personally vested in the interests of one of the family members (who was not a director of the Trustee at the relevant time) and lost his objectivity. It is important for the maintenance of public confidence in the profession that Chartered Accountants remain objective in their professional dealings;
 - (vi) the Tribunal was not convinced the Member was remorseful or repentant.

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

- (a) Regulation CR 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 considered the mandatory issues in Regulation CR 8.12 and submitted there were no factors to reduce the full costs that had been incurred. Relevantly:
- (i) 8.12(a): the complaint against the Member had merit in that he admitted the allegations and they had been established;
 - (ii) 8.12(b): the complaint against the Member was serious;
 - (iii) 8.12(c): the Member had not been open and honest with the PCC as he did not respond promptly;
 - (iv) 8.12(e): the costs were reasonable in these circumstances as a number of these costs could have been avoided had the Member responded to the PCC's investigation;
 - (v) 8.12(h): it was reasonable in these circumstances to award full costs of \$19,042.
- (c) The Member submitted that:
- (i) he intended to retire in the next 12 to 24 months;
 - (ii) he had been a member of CA ANZ for a long time;
 - (iii) he was surprised the matter had gone to the Tribunal as he had been under the impression the PCC were going to offer to enter into a Consent Agreement;
 - (iv) he regretted the whole process;
 - (v) he had made a mistake in:
 - (1) standing by a client of 30 years in a family dispute;
 - (2) not responding to the ethical clearance letter and to the PCC investigation.
- (d) The Tribunal determined that the Member should pay \$19,042 for the full costs of the proceedings because:
- (i) Regulation CR 8.12 states that the Member must pay the full costs claimed unless any of the matters set out in paragraphs (a) to (h) justify a reduction;
 - (ii) none of the factors set out in paragraphs (a) to (h) provide any reason why the Tribunal should not require the Member to pay the full costs in this matter. Relevantly:
 - (1) the allegations were established;

- (2) the Member's conduct was serious, for the reasons set out in paragraphs 6(e)(i) to 6(e)(iv) above;
- (3) the Member had not cooperated with the PCC's investigation for approximately 18 months. Had the Member done so earlier, some of the costs associated with the Case Conference and the Tribunal hearing may not have been incurred;
- (4) while the Member admitted the allegations, such admission was not received until shortly before the Tribunal hearing at which time the PCC would have substantially prepared the matter for hearing;
- (5) given the extended nature of the investigation, the amount of costs was reasonable.

8. Should notice of the Tribunal's decision be published?

- (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) As the complaint was established and sanctions adverse to the Member were imposed, pursuant to By-Law 40(12.3) the Tribunal must direct that a notice of its decision and sanctions imposed be published by CA ANZ.
- (c) Neither the Member nor the PCC submitted that there were any exceptional circumstances for not publishing the Member's name in CA ANZ's publication of the notice of this decision and the sanctions imposed. The Tribunal was not satisfied that there were any such exceptional circumstances. Therefore the Member's name is to be disclosed in the notice of the Tribunal's decision and the sanctions imposed.
- (d) The Tribunal further determined that it was appropriate that:
- (i) this written decision with reasons mentioning the Member's name and location be published on the CA ANZ website (the **Published Decision**); and
 - (ii) a summary of the Published Decision mentioning the Member's name and location with a web address for the Published Decision be published in the CA ANZ official publication, *Acuity*.

9. Should other parties be notified of the Tribunal decision?

- (a) By-Law 40(10.16) states:

The Disciplinary Tribunal may notify interested parties including other professional bodies, regulatory authorities, the Member's current and/or former employers, partners, clients of the Member or the Member's Practice Entity who are or may be affected by the Member's conduct to which the disciplinary action relates, of so much of a decision ..., the reasons for it and/or the sanctions imposed, as it thinks fit ...

- (b) The Member advised the Tribunal that he is a registered tax agent.

- (c) The Tribunal determined that, due to the Member's association with that body, the Tax Practitioners Board was an interested party and should be notified of this decision.

10. 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.

11. Rights of appeal

The Member and the PCC may give notice of appeal against any determination made or sanction imposed by the Tribunal, within 21 days after notice of the written reasons for such determination or sanction is given to them. Any such notice of appeal must be given using the form prescribed by the Regulations (By-Laws 40(11.1) and 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 decision as to confidentiality took effect immediately.



Chair
Disciplinary Tribunal

SCHEDULE 1: THE PCC'S ALLEGATIONS

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)(h) in that he has committed a breach of the By-Laws and Regulations of CA ANZ by:
 - a. failing to advise whether there was any ethical or professional reason why another accountant should not accept an appointment in breach of CA ANZ Regulation CR3.8;
 - b. failing to provide books and records in breach of CA ANZ Regulation CR3.9; and
 - c. failing to respond to enquiries by CA ANZ in the timeframe required regarding the complaint in breach of By-Law 40(13.3).

SCHEDULE 2: RELEVANT BY-LAWS

...

Section 4 – Rights and Obligations of Members

...

Compliance Obligations

38A. A Member must at all times comply with the Supplemental Charter, these By-Laws and:

- (a) for all Members who are not subject to the NZICA Rules, the Regulations, any pronouncements issued by the Accounting Professional and Ethical Standards Board, Australian Accounting Standards Board and Auditing and Assurance Standards Board (or their successor entities) including the Code of Ethics, and any applicable pronouncements, instruments, technical or professional standards or guidance issued by any similar body whether in Australia or in a foreign jurisdiction;

...

Section 5 - Professional Conduct

39. In this Section 5 unless the context requires otherwise:

...

- (c) **Case Conference** means a meeting of the Professional Conduct Committee in respect of a complaint which has been notified to a Member in accordance with By-Law 40(7.1);

...

- (h) **Costs** means any costs and expenses incurred by or on behalf of CA ANZ in relation to the investigation and determination of a complaint (whether through the Professional Conduct Committee, Disciplinary Tribunal, Appeals Tribunal or otherwise) and any other taxes, fees and charges, paid or payable on them, including, without limitation:
 - (i) fees and disbursements of professionals, advisors or consultants employed, engaged or retained to investigate, represent, appear (as expert witnesses or otherwise), hear, or determine the complaint or advise on the same; and
 - (ii) other outgoings and disbursements including, without limitation, couriers, any transport, travel, accommodation, search fees, transcription services, outsourced photocopying, publication fees, room hire, video-conferencing, telephone conferencing and meals;

...

- (o) **Notice of Disciplinary Action** has the meaning given to it in By-Law 40(10.1);

...

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(1) Committees and Tribunals

40(1.1) For the implementation of the procedures referred to in this Section 5, there shall be the following committees and tribunals:

...

- (b) a Professional Conduct Committee which shall receive, initiate, investigate, determine and refer complaints;
- (c) a Disciplinary Tribunal which shall hear and determine complaints made to it by the Professional Conduct Committee; and

...

40(1.3) Subject to these By-Laws, the Regulations and the Charters, each committee and tribunal shall regulate its own affairs and may delegate any of its functions.

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:

...

- (h) has committed any breach of the Supplemental Charter, these By-Laws or the Regulations, any pronouncements issued by the Accounting Professional and Ethical Standards Board, Australian Accounting Standards Board and Auditing and Assurance Standards Board (or their successor entities) including the Code of Ethics, or any applicable pronouncements, instruments, technical or professional standards or guidance issued by any similar body whether in Australia or in a foreign jurisdiction;

...

40(5) Investigation

...

40(5.2) For the purposes of any investigation, the Professional Conduct Committee may:

...

- (b) require any Member to whom the investigation relates to provide the Professional Conduct Committee, within such period of time as the Professional Conduct Committee specifies in its notification, any documents, things or information that are in the possession or under the control of that Member that may relate to the subject matter of the investigation;

...

40(10) Disciplinary Tribunal

40(10.1) Subject to By-Laws 40(9.3)(a) and 40(9.3)(b), when a complaint is referred by the Professional Conduct Committee to the Disciplinary Tribunal, the Professional Conduct Committee must, unless the Member otherwise consents, give to the Member concerned a notice (**Notice of Disciplinary Action**) no less than 35 days before the Disciplinary Tribunal hearing setting out:

- (a) details of the complaint made against the Member and any particulars and information in support;
- (b) the date, time and place of the hearing before the Disciplinary Tribunal; and
- (c) where the Professional Conduct Committee's case against the Member will be presented at the Disciplinary Tribunal hearing by an independent Australian legal practitioner, a statement to that effect and, if known, the legal practitioner's name and firm, organisation or chambers.

...

40(10.4) The Member receiving a Notice of Disciplinary Action or an amended Notice of Disciplinary Action shall, unless the Professional Conduct Committee otherwise consents, not less than 14 days before the date of the hearing, state in writing to the Professional Conduct Committee:

- (a) whether the Member will attend the hearing and, if represented, by whom (including details of that representative's name and firm, organisation or chambers);
- (b) the matters the Member admits or disputes in the Notice of Disciplinary Action;
- (c) whether the Member intends to adduce any evidence at the hearing, and the names, qualifications and organisations of any witnesses the Member intends to call; and
- (d) any relevant fact or circumstance the Member wishes to bring to the attention of the Disciplinary Tribunal and the reasons for doing so.

...

40(10.7) Failure by the Member to comply with any or all of the above requirements (or to attend) shall not preclude the Disciplinary Tribunal from proceeding to hear and determine a Notice of Disciplinary Action at the appointed time.

40(10.8) The Disciplinary Tribunal may appoint a legal adviser who is an Australian legal practitioner to advise (attending the hearing as necessary) the Disciplinary Tribunal on matters of law, procedure and evidence.

40(10.9) At every hearing before the Disciplinary Tribunal, the Professional Conduct Committee shall be responsible for the presentation of the case against the Member. The Professional Conduct Committee may appoint an independent Australian legal practitioner to present the case on its behalf.

40(10.10) The Disciplinary Tribunal shall give the Member concerned or that Member's representative a reasonable opportunity of being heard and shall give due consideration to any material that Member may submit.

40(10.11) The Disciplinary Tribunal shall determine whether or not the complaint contained in the Notice of Disciplinary Action, or any part thereof, is established.

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:

...

(f) fine that Member an amount not exceeding \$50,000

(g) censure the Member

...

40(10.15) Written notice of every decision of the Disciplinary Tribunal, including reasons for the decision and any sanctions imposed, must be given by the Disciplinary Tribunal to the relevant Member, the Professional Conduct Committee and to the Professional Conduct Oversight Committee, subject to By-Law 40(9.3)(d), within 21 days of the Disciplinary Tribunal's decision.

40(10.16) The Disciplinary Tribunal may notify interested parties including other professional bodies, regulatory authorities, the Member's current and/or former employers, partners, clients of the Member or the Member's Practice Entity who are or may be affected by the Member's conduct to which the disciplinary action relates, of so much of a decision (including a decision to suspend on an interim basis), the reasons for it and/or the sanctions imposed, as it thinks fit. The Disciplinary Tribunal will not do so until the day following the last date on which an appeal may be notified in accordance with paragraph 11.1. If an appeal is notified in accordance with paragraphs 11.1 or 11.2, the Disciplinary Tribunal will not make such a notification until that appeal is heard or otherwise determined.

...

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(11.3) A notice of appeal must state the grounds of appeal in full and the grounds so stated shall not thereafter be amended except with the approval of the Appeals Tribunal.

40(11.4) The Appeals Tribunal may, at its discretion, require the Member to pay such amount as it determines to CA ANZ as security against the anticipated Costs which CA ANZ may incur in the conduct and hearing of the appeal.

40(11.5) The Appeals Tribunal may, at its discretion, stipulate a time period of not less than 28 days within which the Member must pay the amount referred to in By-Law 40(11.4)

and, if it does so and the Member has not paid that amount at the expiry of that period, the appeal will automatically lapse.

40(11.6) Subject to By-Law 40(9.4), as soon as practicable after receipt of a notice of appeal the Appeals Tribunal shall give to the Member and the Professional Conduct Committee not less than 28 days' notice of the date, time and place fixed for the hearing of the appeal.

40(11.7) 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(12) Publication of investigations and decisions

...

40(12.3) Where the Disciplinary 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 ... 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 ... 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.

40(12.5) No publication of a Disciplinary Tribunal decision or sanction will be made until the later of the day following the final date for its appeal under By-Law 40(11.1), and the determination of any appeal notified in accordance with By-Laws 40(11.1) to 40(11.3).

...

40(13) General

40(13.1) Expedition

The Professional Conduct Committee, Disciplinary Tribunal and Appeals Tribunal shall endeavour to investigate, hear and determine complaints in a timely and efficient manner.

40(13.2) Evidence

The rules of evidence do not apply to the processes and proceedings referred to in this Section 5.

40(13.3) Conduct and provision of information

Members must be open and honest in their dealings with the Professional Conduct Committee, Disciplinary Tribunal and Appeals Tribunal. Members must provide such information as is required of them by CA ANZ, the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal in connection with an investigation, a complaint or any matters arising from or in relation to it, in a timely fashion and in any event within the time prescribed in this Section 5 and any applicable Regulations.

Each of the Professional Conduct Committee, Disciplinary Tribunal and Appeals Tribunal may record its meetings, interviews, investigations, proceedings and hearings in any manner it decides, including by the use of stenography and sound recording technology.

...

40(13.6) Guidelines for the imposition of sanctions

In determining the sanctions to be imposed on a Member under this Section 5 (with or without the consent of that Member) the Professional Conduct Committee, Disciplinary Tribunal and Appeals Tribunal must have regard to the guidelines set out in any applicable Regulations.

40(13.7) Costs awards

When the Professional Conduct Committee, Disciplinary Tribunal or Appeals Tribunal determines whether or not to require a Member to pay Costs under this Section 5, and the amount of such Costs a Member is required to pay, it must have regard to the guidelines set out in any applicable Regulations.

40(13.9) Interest

If the ... the Disciplinary Tribunal ... has required a Member to pay Costs and/or a fine to CA ANZ by a specified date and such payment has not been received by CA ANZ by the due date, unless waived by CA ANZ, interest accrues and is payable on the amount due and outstanding from the due date to the date of final payment at the Default Rate.

...

40(13.12) Public and private hearings

...

- (b) Subject to By-Laws 40(13.12)(c) and 40(13.12)(d), and unless the Disciplinary Tribunal or Appeals Tribunal determine otherwise, each shall hold its hearings in public.
- (c) The Disciplinary Tribunal or Appeals Tribunal may determine to hear any part of a hearing in private.
- (d) The Disciplinary Tribunal or Appeals 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.

SCHEDULE 3: REGULATION CR3 - PUBLIC PRACTICE REGULATIONS

Issued 23 August 2018

3.1 Purpose

- (a) This Regulation sets out requirements for Members in Public Practice.
- (b) The Regulations relating to public practice for Members of CA ANZ who are resident in New Zealand and working in public practice in New Zealand are set out in the NZICA Rules and these Members will be regulated in accordance with the NZICA Rules.
- (c) For the purposes of this Regulation, a Member in Public Practice includes Chartered Accountants and Fellows who hold or ought to hold a Certificate of Public Practice, Affiliates and Practice Entity Members.
- (d) This Regulation applies to all Members in Public Practice regardless of whether the entity through which they practice is entitled to use the description “Chartered Accountant(s)”.

...

3.8 Attention to Correspondence and Enquiries

Members must reply to professional correspondence and enquiries expeditiously.

3.9 Books and Records

Subject to any legal right of lien, a Member in Public Practice must after a change in appointment has been effected, promptly make available for collection all books, papers, documents and other records belonging to the client.

Commentary

Following the appointment of another auditor, the outgoing auditor does not have any obligation to provide such information and advice to the incoming auditor as will enable the incoming auditor to substantiate the existence and value of assets and liabilities as at the end of the previous financial year. However, the outgoing auditor is encouraged to do so as a professional courtesy and with the knowledge and consent of the client. The audit working papers of the outgoing auditor are the property of that auditor and there is no obligation to make available any information contained therein.

Issued 8 October 2019

3.1 Purpose

- (a) This Regulation sets out requirements for Members in Public Practice.
- (b) The Regulations relating to public practice for Members of CA ANZ who are resident in New Zealand and working in public practice in New Zealand are set out in the NZICA Rules and these Members will be regulated in accordance with the NZICA Rules. Members not resident but practising in New Zealand may be subject to the NZICA Rules for the purposes of NZICA carrying out its regulatory or disciplinary functions.
- (c) For the purposes of this Regulation, a Member in Public Practice includes Chartered Accountants and Fellows who hold or ought to hold a Certificate of Public Practice, Affiliates and Practice Entity Members.

- (d) This Regulation applies to all Members in Public Practice regardless of whether the entity through which they practice is entitled to use the description “Chartered Accountant(s)”.

...

3.8 Attention to Correspondence and Enquiries

Members must reply to professional correspondence and enquiries expeditiously.

3.9 Books and Records

Subject to any legal right of lien, a Member in Public Practice must, after a change in appointment has been effected, promptly make available for collection all books, papers, documents and other records belonging to the client.

Commentary

Following the appointment of another auditor, the outgoing auditor does not have any obligation to provide such information and advice to the incoming auditor as will enable the incoming auditor to substantiate the existence and value of assets and liabilities as at the end of the previous financial year. However, the outgoing auditor is encouraged to do so as a professional courtesy and with the knowledge and consent of the client. The audit working papers of the outgoing auditor are the property of that auditor and there is no obligation to make available any information contained therein.

...

SCHEDULE 4: 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.