NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS

IN THE APPEALS COUNCIL
OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS

UNDER	New Zealand Institute of Chartered Accountants Act 1996 and Rules made thereunder
IN THE MATTER	of an appeal from a decision of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants
BETWEEN	**BRUCE ALLAN BAILLIE,** Chartered Accountant, of Auckland
	Appellant
A N D	**THE PROFESSIONAL CONDUCT COMMITTEE OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS**
	Respondent

DECISION ON APPEAL AS TO PUBLICATION/NAME SUPPRESSION

Dated 13 December 2022

Members of Appeals Council
Les Taylor KC
Gary Leech FCA
Chrissie Murray CA
Aaron Walsh FCA

Counsel:
Richard Moon for the Professional Conduct Committee
David Jones KC and Russell Stewart for the Member

Appeals Council Secretariat:
Janene Hick
janene.hick.nzica@charteredaccountantsanz.com

Refer to decisions of the Appeals Council dated 21 September 2022 and the Disciplinary Tribunal dated 28 May 2021

The New Zealand Institute of Chartered Accountants regulates the conduct of members of Chartered Accountants Australia and New Zealand that reside in New Zealand in accordance with the New Zealand Institute of Chartered Accountants Act 1996 and other legislation regulating the profession of accountancy in New Zealand.

Introduction

1. The Member appeals the decision of the Disciplinary Tribunal (**Tribunal**) that its decision, including the Member's name and personal details, be published on the Institute's website and in its magazine *Acuity*.

2. The Member was the Engagement Quality Control Review partner (**EQCR**) in respect of an audit of a publicly listed company. The Tribunal found that the Member had breached audit standards in relation to independence. There was no appeal from that finding by the Tribunal.

3. The Professional Conduct Committee (**PCC**) appealed certain aspects of the Tribunal's decision as to liability. In our decision in respect of that appeal, we found that the Member had also breached audit standards in relation to judgements which the Member was required to make in his capacity as EQCR.

4. This decision is confined to the issue of whether, on the evidence before the Disciplinary Tribunal in relation to the Member, the presumption in favour of publication is displaced so as to justify suppression of the Member's name and details. We do not address, in this decision, whether there are other grounds which might justify the name of the Member being suppressed.

5. In short, the issue on this appeal is whether we are persuaded that the Tribunal was wrong, on the evidence before it, to order publication of the Member's name and details.

Evidence Before the Tribunal

6. The Member was the EQCR for the audit of Wynyard Group Limited for the year ended 31 December 2015. At the time of the audit, the Member had worked as an audit partner for PwC for 30 years.

7. The Member was a licensed auditor at the time of the audit but relinquished his auditor licence and retired as a partner of PwC in June 2017. Since retiring from PwC, the Member has undertaken various professional roles either as a consultant or member of an Independent Board of Directors for businesses in New Zealand. In carrying out those roles, the Member uses the undoubted knowledge and skills acquired by the Member over his many years in practise as a Chartered Accountant. Prior to the findings of breach in this proceeding, the Member had an unblemished record.

8. The Member stated in his affidavit evidence that the investigation processes and the lodging of disciplinary charges against him had a significant impact on him personally. He has suffered stress, anxiety and insomnia over the many years that the investigation and disciplinary processes have taken. He was also concerned that publication would have a disproportionately detrimental effect on his ability to retain and obtain Board and consulting engagements.

Submissions on behalf of the Member

9. The submissions in support of the appeal as to publication can be summarised as follows:

   (a) The Member has a previously unblemished audit career and is no longer practising as a licensed auditor. The matters in respect of which he was found to be in breach of the standards in this case are not so serious as to warrant publication in the interests of protecting the public.

   (b) Publication of the Member's name and details would have disproportionate effects, particularly on his ongoing career and the significant stress which Mr Baillie has had to endure as a result of the lengthy investigation and disciplinary process. It was argued that publication would be unduly punitive.

   (c) Publication of the Member's name would serve no useful purpose. There was no benefit to the public, the profession or anyone else for publication of the Member's name to occur.

Discussion

10. As has been recognised most recently in the High Court,[1] and in previous decisions of the Appeals Council, there is a strong presumption in favour of publication where a Member has been found guilty of disciplinary charges. That strong presumption is reflected in Rule 13.44 of the NZICA Rules which requires publication of the Member's name and details unless otherwise ordered.

11. The presumption in favour of publication reflects important public interests including open justice, transparency, accountability, protection of the public and, particularly in professional disciplinary bodies, the maintenance of professional standards. The weight to be given to those various interests will vary from case-to-case but, in order to cross the high threshold necessary to outweigh the public interest in publication, there must be evidence of highly prejudicial effects of publication which go beyond

[1] *J v The New Zealand Institute of Chartered Accountants Appeals Council* [2020] NZHC 1566.

the normal consequences of disciplinary proceedings and are sufficient to outweigh the strong presumption in favour of publication.

12. We accept that, in this case there is no need to publish the Member's name and details in order to protect the public from incompetence or conduct which is so serious in nature as to bring into question the fitness of the Member to practice. The breaches of the standards by the Member in this case, although serious, were at the lower end of the scale of seriousness. They were not at a level which would likely bring the profession into disrepute or call into question the Member's fitness to practice.

13. In our view, however, the prejudicial effects of publication on the Member are no more than the normal or foreseeable consequences associated with disciplinary proceedings and the reputational effects, on a previously unblemished record, of the findings of breach by the Member of the standards.

14. it is, perhaps, unfortunate that the charges and the findings of breach have come at the end of a long and previously unblemished audit career. That is not, however, a sufficient ground for ordering suppression of the Member's name and details. Although such publication may detrimentally affect the Member's prospects in his future career, that is an assessment for members of the public, who wish to engage the Member, to make on an informed basis.

15. The ability of the public to make their own assessment of the seriousness or impacts of the conduct which gave rise to the charges is, in our view, an important interest which the principles of open justice, transparency and accountability protect. In essence, the public has a right to know the name and details of a member found guilty of breaches of the standards unless there are strong reasons, which go beyond the normal consequences of publication, which mean that publication is not appropriate.

16. There is no risk of repetition of the conduct which gave rise to the charges in this case and the conduct is not so serious in nature as to warrant publication in order to protect the public. Those factors are not, however, sufficient to outweigh the public interest in publication in the absence of evidence sufficiently prejudicial effects of publication which go beyond the norm.

17. The Member's conduct, although at the lower end of the scale of seriousness, showed significant failings by the member in his role as EQCR. The breaches of the standards, including the further breaches which we found on appeal, were serious and not so trivial as to make the effects of publication disproportionate or unduly punitive.

Conclusion

18. The appeal is dismissed.

19. The decision of the Tribunal and the decisions of the Appeals Council as to liability and as to publication are to be published on the Institute's website and in *Acuity.*

Dated this 13th day of December 2022

_____
L J Taylor KC
Chairman
Appeals Council

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DECISION OF APPEALS COUNCIL

Dated 21 September 2022

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The Appeal

1. This is an appeal by the Professional Conduct Committee (**PCC**) of a decision by the Disciplinary Tribunal dated 28 May 2021.

2. In that decision, the Tribunal found that Particular 1 (a) of the charges against the Member was established. It therefore found that the Principle in s 130 of the Code of Ethics had not been met and that Charge 2 had been proved. Particular 1 (a) related to failure by the Member to objectively evaluate threats to independence arising out of a report prepared by the audit firm (the **TS report**). There is no appeal against that finding.

3. The Tribunal found, however, that Particulars 1 (b) and (c) and Particular 2 had not been established. It also found that Charge 1, which alleged negligence of such a degree as to tend to bring the profession into disrepute, was not established. The PCC appeals all of those findings.

4. We note that this decision relates only to the appeal in respect of liability of the Member. This decision should be read in conjunction with our decision in respect of charges brought against the Auditor which arose out of the same audit as the charges against the Member in this appeal.[1] Both appeals were heard sequentially and our decision in respect of each appeal is being released simultaneously.

The material facts

5. The charges against the Member arise from the audit of the Wynyard financial statements for the financial year ending 31 December 2015. The audit was completed on 21 March 2016.

6. There is considerable overlap in the evidence relating to this appeal and the evidence and findings of fact in our decision in the appeal brought by the PCC against the decision of the Disciplinary Tribunal in respect of charges brought against the Auditor.[2] The appeal in respect of the Auditor and this appeal were heard sequentially and arise out of the same audit. Our decision in respect of the Auditor's appeal contains a detailed assessment of the facts which we do not repeat in detail here.

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[1] PCC v A
[2] PCC v A

7. The Member was appointed, for the fifth time on this engagement, as the Engagement Quality Control Reviewer (**EQCR**). In carrying out that role, he was required to perform an objective evaluation of the significant judgements made by the engagement team, and the conclusions reached in formulating the Auditor's report.[3] It is common ground that one of the significant judgements the Member was required to evaluate was whether there was any material uncertainty about the ability of Wynyard to continue as a going concern for the period March 2016 to March 2017.[4]

8. In July 2015, Wynyard completed a capital raise of $42m.

9. In early August 2015, Wynyard was contemplating a further capital raise of up to $100m. The plans for that capital raise were progressed over the period to the end of January 2016 but were subsequently abandoned (primarily as a result of volatility in the market at that time).

10. Instead of the planned capital raise of up to $100m, Wynyard embarked on a less ambitious capital raise initially seeking further capital of $25m. That capital was needed to meet short term cash flow concerns which threatened the future of the company as a going concern.

11. As part of the preparation for the revised capital raise, Wynyard commissioned a limited scope due diligence assessment to be conducted by PwC on the FY16 budget as aspects of the budget might be disclosed to potential investors. The proposed due diligence was to be conducted over a very limited time frame of two and a half days and was expected to be "high-level".

12. On 20 February 2016, PwC contracted to provide the limited due diligence report (the TS report). It was that engagement, and provision of the TS report by a PwC Transaction Services team, which gave rise to the findings of the Tribunal that the Member had not adequately evaluated the Audit Team's evaluation of threats to independence arising from the TS report.

13. The draft TS report was submitted to the Wynyard Board on 21 February 2016.[5] The Auditor attended that meeting and reviewed both the draft and final TS reports. The final report was completed and presented on 24 February 2016.[6]

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3 ISA(NZ)220 paragraph 20.
4 ISA(NZ)570 Going Concern and IAS(NZ)1 Presentation of Financial Statements paragraphs 25 and 26.
5 Auditor brief of evidence, paragraph 101.
6 Auditor brief of evidence, paragraph 86 – Exhibit "DT-932".

14. On or before 23 February 2016, management and the Auditor were considering the release of the preliminary unaudited financial statements but had not made a final decision as to recognition of revenue from signed contracts with Bravo and Alpha in the FY15 year. Management, at that time, had drafted a material uncertainties disclosure in the draft financial statements (one draft excluding revenue from Bravo, and the other draft excluding revenue from both Bravo and Alpha). The draft note stated:

> The directors acknowledge that there are material uncertainties with the forecast assumptions required to meet its ongoing obligations. These uncertainties relate predominantly to market conditions at the time of the capital raising efforts and the ability of the Group to execute on its planned release program and to achieve the sales timing and quantum forecast. These uncertainties may cast doubt over the ability to continue as a going concern for the foreseeable future. Nevertheless, after considering the uncertainties described above, the directors have reasonable expectation that the Group will secure additional capital to allow the Group to continue to operate for the foreseeable future".[7]

15. In his advice to management dated 22 February 2016, the Auditor discussed the going concern assumption (that the Company and Group will continue to trade for at least the next 12 months) and noted that in reaching that conclusion:[8]

> The Directors acknowledged that there are material uncertainties with the forecast assumptions and in particular the ability to raise sufficient new capital within the time frame required – these uncertainties may cast significant doubt over the ability of the Company and Group to continue as a going concern for the foreseeable future …

16. On 23 February 2016, Wynyard released its preliminary unaudited financial statements to the market.[9] The accompanying explanatory notes to the financial statements included the following note:

> - The use of the going concern assumption assumes the Company and Group will continue to trade for at least the next 12 months.
>
> - In reaching this conclusion the Directors have a reasonable expectation that forecasts for the next 12 months are achievable and that the potential capital raising (announced on 23 February 2016) will be successful.
>
> - The Directors acknowledge that there are material uncertainties with the forecast assumptions and in particular the ability to raise sufficient new capital within the timeframe required.
>
> - These uncertainties may cast significant doubt over the ability of the Company and Group to continue as a going concern for the foreseeable future.

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7 Exhibit "DT-717 and "DT-657.
8 Exhibit "DT-647".
9 Exhibit "DT 766" to "DT 775".

17. The Auditor acknowledged in his evidence that, at the time of the issue of the preliminary unaudited financial statements, the Audit Team had not reached any final conclusions as to the reliability of the forecasts and forming a view as to whether any material uncertainty existed about Wynyard's ability to continue as a going concern.[10]

18. The Auditor also stated in his evidence that, at the time the material uncertainties disclosure was made in the preliminary unaudited financial statements, it was clear that Wynyard needed to generate $25m in cash to meet expenses in the next six to eight weeks and there was material uncertainty as to whether, "they could earn $25m in revenue if the capital raise failed".[11] The Auditor stated that he had not "even formed a conclusion at that date it was just obvious that the next six weeks were fairly critical".[12] The Auditor was adamant, however, that it was "not the directors view or his view that there were material uncertainties beyond that time".[13]

19. In the hearing before us, Counsel for the Auditor and the Member endeavoured to persuade us that the only material uncertainty at that time related to the success (or failure) of the capital raise. Whilst we accept that the success of the capital raise was critical to the going concern assumption (had it failed, the company would almost certainly have had to cease trading), we do not accept that it was the only material uncertainty at that time.

20. The draft note to the financial statements prepared by management indicated that there were material uncertainties in relation to forecast sales timing and quantum and the product release programme. The assumptions underlying the budget forecast for FY16 had not, at that time, been critically assessed by the Auditor and the TS report was at a draft stage (and, when finally issued, was heavily qualified). In addition, the period of the assessment of the going concern assumption was extended beyond the budget forecast period of 31 December 2016, to March 2017.

21. The proposed capital raise was announced on 24 February 2016.[14] By 2 March 2016, Wynyard had received firm commitments for $30m ($5m more than the expected capital raise of $25m).[15] The proceeds of the capital raise were not received until on or around 31 March 2016[16] but, by that time, the Audit Team had reviewed the

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[10] T383/4. There had been a discussion with the Wynyard CFO at a planning meeting held on 3 November 2015, which concluded with the note that "audit will reassess management's assumptions at year end".
[11] T383.
[12] T384.
[13] T384.
[14] Exhibit "DT-802".
[15] Exhibit "DT-804".
[16] Exhibit "DT-1342" and "DT-1347".

commitments and satisfied themselves that the capital raise proceeds would be received.

22. On 2 March 2016, having received firm commitments for the $30m, the Chief Financial Officer of Wynyard wrote to the Auditor stating:[17]

> … we have firm commitment for the full $30m …
>
> On this basis you would have to think that the "material uncertainty" drops away substantially. In which case we could look at finalising the Annual Report over the next few weeks, and not have to wait to the very last day.
>
> What are your thoughts?

23. The Auditor responded six days later, on 8 March 2016, advising that:

> … there doesn't appear to be any material uncertainties in relation to the capital raise with a view to completing the audit prior to 31 March …
>
> We also need to ensure there are no material uncertainties in relation to the forecast to March '17 so could you send through:
>
> - Updated forecast for the $30m and latest trading cash position
> - Your reasonable worst-case scenario so we can move away from the sensitivity that Russell had in his report.[18]
> - YTD results to end of Feb if available (or will be available over the next weekend).

24. The Auditor acknowledged in his evidence that the Audit Team "had not done much work on the forecast" at that stage.[19] The revised financial forecast for the period to March 2017 requested by the Auditor was received on 17 March 2016.[20]

25. On 21 March 2016, four days after receipt of the revised forecast, the Auditor issued the audit report,[21] and the audited financial statements for the year to 31 December 2015 were issued.[22]

26. In the audited financial statements, the material uncertainties disclosure contained in both the draft financial statements (excluding Alpha and Bravo revenue, or just excluding Bravo revenue) and the preliminary unaudited financial statements was not repeated. In the audited financial statements, the following notes to the accounts were recorded:

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17 Exhibit "DT-804".
18 The reference to the sensitivity in Russell's report is a reference to the TS report and their conducted scenario and sensitivity testing.
19 T396.
20 Auditor brief of evidence at [61] – Exhibits "DT-805" and "DT-1450".
21 Exhibit "DT-993".
22 Exhibit "DT-941".

1.4 **Significant accounting judgements and estimates**

In applying the Group's accounting policies management continually evaluates judgements, estimates and assumptions based on experience and other factors, including expectations of future events that may have an impact on the Group. All judgements, estimates and assumptions made are believed to be reasonable based on the most current set of circumstances available to the Group. Actual results may differ from the judgements, estimates and assumptions.

The significant judgements, estimates and assumptions made by management in the preparation of these financial statements are found in the following notes:

Note 1.5 Going Concern

Note 2.1 Revenue …

1.5 **Going Concern**

The financial statements have been prepared on the basis the Group is a going concern, able to meet its currently maturing obligations with a 12-month period from the date of the authorisation of these financial statements.

Key judgements, estimates and assumptions

Going Concern

…

The Directors have also considered the level of funds in place and the achievability of the FY16 financial performance and cash flow forecast, approved by the Board including the appropriateness of the assumptions underlying those forecasts.

The key assumptions in the FY16 forecast include the quantum and timing of sales and collection of cash from those sales, expenditure on operating expenses and the capitalised software development programme.

The Directors acknowledge that significant judgement has been applied in making the forecast assumptions. Those assumptions made relate predominantly to the ability of the Group to execute on its planned product release programme and to achieve the sales timing and quantum forecast. Nevertheless, after considering the inherent uncertainties described above, the Directors have a reasonable expectation that the Group will continue to operate for the foreseeable future.

27. Note 1.5 recognises the significance of the forecast and the assumptions underlying the forecast when assessing the going concern assumption. The note did not, however, disclose any material uncertainties about Wynyard's ability to continue as a going concern. Instead, it noted that, in assessing the key assumptions (in particular, as to the quantum and timing of sales and collection of cash from those sales) the Directors "after considering the inherent uncertainties described above had a reasonable expectation that the Group would continue to operate for the foreseeable future".

28. The issue of whether any material uncertainty existed about Wynyard's ability to continue as a going concern was considered by the Auditor and discussed with management. The minutes of the Audit and Risk Committee meeting of the Board held on 21 March 2016 (the date on which the audited financial statements were released) record that:

> (The auditor) noted that going concern considerations were a key area of focus following on from the preliminary PwC Report,[23] and that, having reviewed the commitments from shareholders to the $30 million capital raise and critically assessed the cash flow forecast prepared by management, PwC concurs with management's view that whilst there is inherent uncertainty in relation to the forecast, there is no material uncertainty that casts significant doubt in relation to the use of the going concern assumption.
>
> In particular, (the auditor) noted that PwC has not identified any month in the cash flow forecast where Wynyard is forecast to run out of cash, and assuming the total revenue target is met, there is an appropriate level of headroom that would allow for some revenue slippage and time to react by reducing costs. (The auditor) noted that '16 Q4 and '17 Q1 are the most sensitive to contract slippage, and the forecast will require close ongoing management and review.[24]

29. The audit file documents the Member's involvement in the audit as follows:

    (a) Review and sign-off of the EQCR planning[25] and completion[26] workpapers;

    (b) Review of eleven other workpapers: Wynyard Group 2015 HQ; Test unbilled revenue; Evaluate design of the entity's controls in response to significant risk and determine whether they have been implemented; Test impairment assessment – Goodwill and indefinite lived intangible assets; Test revenue transactions from sale of goods; Respond to risk of material misstatement due to fraud involving management override of controls; Group journal testing; UK journals testing; Revenue recognition – significant contracts around year end; Evaluating misstatements; Assess the reliability of the client to continue as a going concern;[27]

    (c) Participation in three meetings with the Audit Team, occurring in November and December 2015;[28]

    (d) Participation in extensive discussions with the auditor in relation to audit evidence and judgements around revenue recognition;[29]

    (e) Review of the draft financial statements;[30] and

    (f) Review of the auditor's preliminary and final reports to Wynyard's Audit and Risk Committee.[31]

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[23] This appears to be a reference to the 24 February TS report.
[24] Exhibit DT-923.
[25] DT1506.
[26] DT1508.
[27] DT1641, DT1649, DT1644, DT1653, DT1650, DT1645, DT1646, DT1647, DT1652, DT1643, and DT1648.
[28] DT1506.
[29] DT1556.
[30] DT1605.
[31] DT637 and 934.

30. The Member's submission and oral evidence to the Disciplinary Tribunal outlined further involvement he had in the audit beyond that documented on the audit file. This included a number of meetings and discussions with the Audit Team during the audit fieldwork (between late January and the date of the audit report, 21 March 2016), and questioning the Auditor on key matters that were relevant to going concern such as the capital raise, significant customer contracts, expected timing of revenues, and management's ability to control costs.[32]

31. No minutes, file notes or diary entries were kept of these other discussions. The evidence was entirely dependent on general assertions by the Member based on his vague memory of events.[33]

32. The Member recorded in his timesheet 7.5 hours of work on the audit, 6.5 hours of which was on or before 19 February 2016 and 1 hour of which was on 21 March 2016 (the date of the audit report). The FMA raised concerns in its Quality Review Assessment Report that the Member's timesheet indicated a level of EQCR involvement that was "very light considering the risk and complexity of the audit".

33. In response to this observation in the FMA report, PwC responded, "Accepted. As discussed, we identified concerns with the EQCR involvement following the audit and replaced him for the half year review in June 2016" .[34] At the Disciplinary Tribunal hearing, Counsel for the Member contended that the timesheet provided an incomplete record, and that the Member had actually spent significantly more time on the quality review of the audit than was recorded, as evidenced by some audit file entries by the Member on days other than those recorded on his timesheet.[35]

34. As with our decision in respect of the charges against the Auditor, our decision in this appeal requires a detailed focus on the period between receipt of management's revised financial forecasts on 17 March 2016 and issue of the audit report on 21 March 2016. The Member was required, at that time, to perform an objective evaluation of the Audit Team conclusion that there was no material uncertainty about the ability of Wynyard to continue as a going concern.

[32] Baillie BOE 49
[33] DT594
[34] DT1104
[35] T63

Particulars 1(b) and (c) – Alleged failure by the Member to evaluate adequately significant judgements made by the Audit Engagement Team and/or conclusions reached in formulating the audit report and/or failure to identify where such judgements were lacking, as required by ISA(NZ)220, in relation to:

…

(b) The Audit Team's conclusion that no material uncertainty existed in relation to Wynyard's ability to continue as a going concern; and/or

(c) The appropriateness of the audit report.

35. The allegations in Particulars 1(b) and (c) are to a large extent inter-related. They relate to the conclusions reached by management and the Audit team that no material uncertainty existed about Wynyard's ability to continue as a going concern and to whether Note 1.5 in the audited financial statements was appropriate in the circumstances.

36. It is plain from the evidence and from the submissions by the PCC, that these Particulars are aimed at alleged inadequate evaluation by the Member of the evidence and conclusions reached by the Audit Team in respect of the revised forecast received by the Audit Team on 17 March 2016 and the conclusion reached by management and the Auditor, on 21 March 2016, that no material uncertainty existed about Wynyard's ability to continue as a going concern. Review of the conclusion reached by the Audit Team as to whether any material uncertainty existed about Wynyard's ability to continue as a going concern necessarily required an objective evaluation by the Member of the adequacy of the evidence upon which the conclusions of the Audit Team were based at the time the audit opinion was issued on 21 March 2016.

Evaluation of the going concern assumption

37. As noted above, the preliminary unaudited financial statements released on 24 February 2016 contained material uncertainties disclosure in relation to the ability of Wynyard to continue as a going concern. In the audited financial statements, however, there was no material uncertainties disclosure. Instead, Note 1.5 was included which referred to "inherent" uncertainties in relation to significant judgements made by the directors (including as to the ability of Wynyard to continue as a going concern).

38. The most significant development in the period between the preliminary unaudited financial statements released on 24 February 2016 and the audited financial statements adopted on 21 March 2016 was the success of the capital raise, which raised approximately $30m, that was due to be received by Wynyard on or around

31 March 2016. The success of the capital raise removed a major uncertainty as to whether Wynyard could continue as a going concern at least in the short term.

39. The question, however, is whether there was sufficient appropriate audit evidence to justify a conclusion that no material uncertainties existed as to Wynyard's ability to continue as a going concern for the period to 31 March 2017 (that is, at least 12 months from the adoption of the financial statements). It is plain on the evidence that, although the $30m capital raise removed short term concerns regarding the ability of Wynyard to meet its commitments for the period to approximately July or August 2016, the ability of Wynyard to continue as a going concern was highly dependent upon sales and other revenues sufficient to meet the expected "cash burn" of $6m to $7.5m per month in the period to 31 March 2017.

40. The forecast revenue for the financial year ending December 2016 was approximately $72m. Cash on hand as at 1 March 2016 was approximately $7.1m,[36] and a further $30m was expected from the capital raise. Cash sufficient to meet the monthly cash burn for the period to March 2017 was forecast to come from a mixture of revenues (such as professional services and recurring maintenance fees) and, most importantly, term licence fees from new contracts.

41. The revenue from term licence fees was forecast to come from approximately $32m "small and medium" contracts and a further $18m from "large one-off deals". The revised cash flow forecast from "large one-off deals" forecast cash to be received in June (approximately $3m) in respect of the Bravo contract and $15m (in respect of Alpha) in three equal instalments of $5m in July, August and September.

42. The forecast in respect of new term licence revenue was very significantly greater than the revenues received in the 2015 year ($49m compared to $7m in FY 2015). Similarly, there was an increase in both forecast maintenance revenue ($16m compared to $15m) and forecast professional services and other revenue ($7m compared to $3m). Some of the forecast professional services revenue was dependent on increased revenue from new customers.[37]

43. A significant portion of the forecast term licence and related recurring revenues was expected to come from the sale of recently developed products and was, as acknowledged by management, crucial to the success of deals providing a material portion of planned revenues.[38] Both the Auditor and the Member accepted that receipt of cash from large contracts was a significant factor in assessing the ability

[36] DT 1453 at 28 February 2016.
[37] DT 1451,767 and 956.
[38] DT 822.

of Wynyard to continue as a going concern. That was particularly so in the critical third and fourth quarters of the FY16 year.

44. The Member accepted that, in the absence of other revenue, the Alpha and Bravo contracts were an important part of the forecast and would have become critical in the third quarter where the forecast showed that cashflow was tight.[39]

45. The Member, however, considered that management had been deliberately conservative in forecasting receipt of cash from Bravo in June and receipt of cash from Alpha over a three-month period from July to September.[40] The Member appeared to consider that the conservative approach by management was reasonable even though there had been no material developments in respect of those contracts between February 2016 (when the decision was made not to recognise revenue from those two contracts in FY15 because revenue recognition criteria were not yet met) and 21 March 2016.

46. As pointed out by counsel for the PCC, there is virtually no documentation on the audit file of any objective evaluation by the Member of the significant judgements made by the Audit Team in relation to whether there was any material uncertainty about Wynyard continuing as a going concern. That is particularly so in respect of the period between receipt of the revised forecast on 17 March and completion of the audited financial statements on 21 March 2016.

47. In the period between the release of the preliminary unaudited financial statements on 24 February 2016 and the audited financial statements on 21 March 2016, the audit file does not contain any documentation recording the date, content, and results of any discussions between the Member and the Audit Team in relation to whether there was any material uncertainty about Wynyard continuing as a going concern. The only reference to discussions between the Member and the Audit Team (including in particular the audit engagement partner) is reference in the completion work paper (prepared by a member of the Audit Team and reviewed by the Auditor and Member) that:

> QRP has been consulted on all judgements.
>
> QRP has reviewed audit work relating to significant risks.
>
> A number of discussions have been held with the QRP over the course of the audit in relation to the areas of audit focus and alleviated/significant risk.
>
> Of particular focus has been the revenue recognition associated with FD and Bravo, the capitalisation of development costs and their recoverability and the

[39] T585
[40] T584 and T585.

> use of the going concern assumption including approach, evidence obtained and judgements made.

48. The Member in his evidence and in cross-examination stated his firm view that he was not required to document his discussions with the Audit Team or the reviews which he carried out as part of his EQCR role.[41]

49. Mr Morris, who gave expert evidence on behalf of the Member, was also of the view that the EQCR did not need to keep a comprehensive record of his work. His opinion was that, where the reviewer concurs with the conclusions of the Audit Team, no further record other than signing off the work papers was required. Signing off the work papers was, in his view, sufficient evidence that the EQCR had objectively evaluated the significant matter in issue.[42]

50. We accept that the EQCR is not required to document every attendance on the Audit Team, or others, when carrying out the EQCR role. Nor is the EQCR required to keep accurate time records of every attendance in the course of carrying out that role.

51. We also accept that, in terms of the standards, the obligation is on the auditor to document discussions of significant matters with management, those charged with governance, and others, including the nature of the significant matters discussed and when and with whom the discussions took place. [43]

52. Similarly, ISA(NZ)220 paragraph 24 provides that the auditor shall include in the documentation:

> (a) the nature and scope of and conclusions resulting from, consultations undertaken during the course of the audit engagement.

53. Although the requirement to document such discussions, including discussions with the EQCR, is on the auditor, we note that part of the EQCR's role is to document, for the audit engagement review, that the procedures required by the firm's policies on engagement quality control review have been performed.[44]

54. The question of whether any material uncertainty existed about Wynyard's ability to continue as a going concern and the decision as to whether an emphasis of matter (**EOM**) or modified audit opinion was required, were clearly significant matters which the EQCR was required to discuss with the Audit Team and to objectively evaluate. Discussions relating to those issues, particularly in the period between the revised

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41 Baillie BOE at paragraphs 16, 17, 23, 25, 30 and T573 and T591.
42 Morris BOE paragraphs 63, 68, 71 and 77.
43 ISA(NZ) 230 paragraph 10.
44 ISA (NZ) 220 paragraph 25(a).

forecast and issue of the audit opinion, were required to be documented by the auditor "including the nature of the significant matters discussed and when and with whom the discussions took place".[45] So too were the nature, scope, and conclusions resulting from consultations undertaken during the course of the audit engagement.[46]

55. There were, however, no such records of any such discussions which took place between the EQCR and the Audit Team in the critical period between receipt of the revised forecast and completion of the audited financial statements on 21 March 2016. The general references to discussions contained in the completion work paper discussed above are, in our view, wholly inadequate in terms of complying with those documentation requirements.

56. Although the obligations to document such discussions are on the auditor, as opposed to the EQCR, we consider that the EQCR, when reviewing the work paper and discussing the significant matters contained in it with the Audit Team, should have identified that the consultation on going concern was a significant matter that the Auditor was required to document. The EQCR should have brought the lack of documentation to the attention of the Audit Team and ensured that the discussions were properly documented. Documentation of such discussions is an important part of the procedures which the auditor is required to perform and which the EQCR is charged with reviewing.

57. Documentation is also a critical part of the regulatory review of licensed auditors by the regulators and by the audit firm's own quality control procedures. Both the FMA and the Member's firm expressed concerns at the lack of documentation in relation to discussions between the EQCR and the Audit Team in relation to, in particular, consideration of the going concern assumption.[47]

58. We note that Explanatory Note A6 of ISA(NZ)230 provides in relation to documentation requirements that:

> The absence of a documentation requirement in any particular ISA(NZ) is not intended to suggest that there is no documentation that will be prepared as a result of complying with that ISA(NZ).

59. This provision indicates, in our view, a proper approach to documentation which we would expect of a careful and skilful audit practitioner. In our view, in the absence of sufficient documentation on the file provided by the Auditor, it would have been prudent for the EQCR to ensure that discussions, including the timing, nature, and

[45] ISA(NZ) 230 paragraph 10
[46] ISA(NZ) 220 paragraph 24(d)
[47] DT1104

results of the discussions in respect of the going concern assumption, were adequately documented for inclusion on the audit file.

60. The lack of adequate documentation has been a significant factor in leading to the extensive enquiries, both by the FMA and the PCC, which have resulted in these disciplinary proceedings. We consider that, at the least, the absence from the audit file of adequate documentation places an evidential onus on the EQCR to establish that, notwithstanding the lack of adequate documentation, the EQCR performed his obligations under the standards in a competent manner and with due care and diligence as required by the NZICA Code of Ethics.[48]

61. The Member's evidence in relation to his role as EQCR, in objectively evaluating whether any material uncertainty existed about Wynyard's ability to continue as a going concern, was of limited assistance. The Member's evidence was general in nature and characterised by a distinct lack of specificity.

62. The Member asserted that although he had had "regular conversations as the audit progressed" the primary evidence that he had performed his role was the sign off of the various work papers once the Member was satisfied that they had been documented sufficiently to capture the procedures performed, evidence obtained and conclusions reached.[49] He asserted that he had been involved "in discussions with the Audit Team" and that "significant work was done through the audit".[50]

63. The Member stated that the date stamps alone, reflecting time of review of the work papers, were not indicative of other reviews which he had carried out but not date stamped. The Member did not, however, provide any detailed evidence as to what other reviews were carried out by him in the course of the audit, or the extent and timing of any such reviews.

64. The Member asserted that during field work and completion phases he had "a number of meetings and discussions with the audit team".[51]

65. The Member gave evidence that he discussed the forecast with the Audit Team and understood why the Alpha and Bravo contracts were reasonably included in the FY16 forecast and that he had "discussed with the audit team how they had challenged the client and the evidence they obtained including the going concern work paper".[52] There was no evidence, however, (apart from discussions which took place in relation

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48 NZICA Code of Ethics effective 1 January 2014 to 14 July 2017 s130.1 to s130.4; PES 1 (revised) Code of Ethics for Assurance Practitioners s130.1 to s130.4.
49 Baillie BOE at paragraphs 23 and 24.
50 Baillie BOE at paragraphs 26 and 27.
51 Baillie BOE at paragraph 48.
52 Baillie BOE at paragraph 55.

to revenue recognition in respect of those contracts in FY15) of when those discussions took place in relation to the revised forecasts, what was discussed, and the conclusions reached as a result of those discussions. The Member also indicated that he had discussed reducing costs with the Audit Team but there is no evidence of what was discussed or the expected time period over which any such reductions in staff numbers could be expected to be achieved.[53]

66. In cross-examination, the Member asserted that he had had "numerous discussions in relation to the issue of material uncertainty in respect of the going concern assumption" but that those discussions had not been minuted and were "not required to be".[54] Given the very limited time period of four days between receipt of the revised forecasts and the audit report being signed, we do not accept that there were numerous discussions between the Member and the Audit Team of the going concern assumption at that time.

67. The Member gave evidence that audit "field work" associated with the pipeline contracts, which were a crucial aspect of the forecast, was going on right through February and certainly well into March but gave no evidence of precisely what that field work involved, by whom it had been undertaken, and the results of the field work done in relation to the pipeline contracts.[55]

68. The Member could not recall reviewing the TS report which was clearly a significant factor in the going concern work paper. There is no evidence that he did review it and counsel for the Member did not seek to assert that the Member had reviewed it. The Member sought, however, to minimise that failure by asserting that he was aware of the scope of the report and that it was a "very minor matter".[56]

69. The TS report is the only document which contains any assessment of forecast term revenue and was based on the FY16 budget forecast reviewed in February 2016 by a PwC Transaction Services team. It was also a very limited due diligence enquiry conducted for a different purpose.

70. In our decision regarding the charges brought against the Auditor, we are critical of the extent to which the Auditor appeared to rely upon the TS report and the pipeline of contracts contained in it to obtain comfort about the reliability of Wynyard's cashflow forecasts. The Auditor's reliance on the pipeline contracts instead of directly assessing the data and assumptions supporting the forecasts, was in our view a

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53 Baillie BOE at paragraph 64.
54 T573.
55 T587/588.
56 T577 and T578 and T583.

significant failing which ought to have been carefully scrutinised by the Member when carrying out his review.

71. We agree with the Member that the TS report was of limited value for audit purposes. We consider, however, that the Member's failure to review the TS report is indicative of failure by the Member to objectively evaluate the adequacy of the evidence supporting the Audit Team's conclusion that no material uncertainty existed about Wynyard's ability to continue as a going concern.

72. The audit working papers contained no evidence of any direct investigation by the Audit Team of the forecast revenue of approximately $32m from small and medium contracts for the FY16 year. Nor is there any evidence in the going concern workpaper, apart from sighting of an early draft contract and discussion with management, to support the Audit Team's assumption that two large potential contracts, Projects Echo and Foxtrot, might generate cash in the relevant period.

73. There is no evidence from the Member that, in carrying out his role as EQCR, he sought or obtained any audit evidence in relation to those matters, both of which were important in assessing whether any material uncertainty existed about Wynyard's ability to continue as a going concern. Nor is there evidence that the Member challenged the Auditor's approach of using the TS report and the sales pipeline as a proxy for directly assessing the data and assumptions supporting the forecasts.

74. The Member did give evidence that he had discussed the Bravo and Alpha contracts with the audit engagement partner and satisfied himself that the way in which they had been provided for in the forecast was reasonable (i.e. deferral of cash receipts in the forecast until June, July, August and September). The Member asserted that he considered that there was sufficient conservatism in the forecast for Alpha and Bravo contracts,[57] and that no further "stress testing" of the forecasts was necessary in light of that conservatism.

75. We remain unclear, however, whether that evidence was a view which had been discussed at the time of the audit or a view that reflected the Member's opinion at the time he gave evidence. We assume it was the former but are in some doubt given the absence of any contemporary documentary evidence on the audit file in relation to that assessment.

[57] T579 and T585.

76. At paragraph 56 of his evidence, the Member stated that he was satisfied that the Audit Team's conclusion on going concern was appropriate because:

(a) There was no external debt and Wynyard had cash on hand at the end of February of $7.1m.

(b) That $30m in new capital provided sufficient head room in the forecast cash flow.

(c) That his evaluation was that Wynyard required cash of $70m to $84m for the next 12 months and that with the $7.1m and new secured capital of $30m "there was a reasonable expectation of $23m from other service revenues based on the earnings in the current year. That provided $60m in cash resources".

(d) That Wynyard needed another $12m to $24m to cover the cash burn rate of $6m to $7m per month, or $72 to $84m for the next 12 months.

(e) That securing $12m to $24m from the pipeline of $72.8m seemed reasonable.

(f) That Wynyard had a facility of $10m from Juliett in place should that need to be called on.

77. We make the following comments in respect of those factors:

(a) Whilst there was cash on hand of $7.1m at the end of February, that cash would likely have been used in March to cover the expected cash burn of $6m to $7m per month.

(b) The $30m capital raise, although removing uncertainty in the short term, would, in the absence of income from other sources, have been exhausted by the end of July. Although there was an expectation of approximately $23m from other service revenues based on the earnings in the current year (average $2m per month) a significant portion of those revenues were expected to come from new contracts including some the "pipeline" contracts.

(c) Although expressing the view that it seemed reasonable that an additional $12m to $24m to cover the cash burn of $72m to $84m for the next 12 months might be secured "from the pipeline of $72.8m" there is no evidence that any enquiry was made by the Member to satisfy himself that that assumption was reasonable. In essence, approximately $35.6m of the

$72.8m pipeline contracts was already incorporated into the forecast. The remaining revenue from large contracts in the pipeline of $37.5m was based on Projects Echo ($22.5m) and Foxtrot ($15m) coming to fruition. Neither of those two contracts had been signed and revenue from those two contracts had not been included by management in the revised forecasts. Nor, as noted above, is there any evidence that sufficient investigation or enquiry was made as to the likely timing of receipt of revenues from those two possible contracts.

(d) Although relying on a facility of $10m from Juliett

(e) in satisfying himself that the Audit Team's conclusion as to going concern was appropriate, that facility would expire once the capital raise had been completed. That was acknowledged by the Member in cross-examination.[58]

78. There is no evidence that the Member made any enquiry as to the assumptions underlying the approximately $32m forecast to come from small and medium contracts in the forecast. Nor is there any evidence that, other than the Bravo and Alpha contract, the Member had made any enquiry as to what work the Audit Team had performed in order to assess the likelihood and timing of the pipeline contracts including, in particular, the Project Echo and Project Foxtrot potential contracts.

79. Given the significance of the projected revenues from small and medium contracts and the reliance placed by the Audit Team on possible revenues from projects Echo and Foxtrot in "filling the gap", the failure by the Member to test and challenge the adequacy of the audit evidence in respect of those matters was in our view in breach of ISA (NZ) paragraphs 20 and 21 (c) of the Standards. In our view, evaluation of those important aspects of the cashflow forecast and the going concern assumption required the Member to at least satisfy himself as to the assumptions underlying the forecast and that sufficient and appropriate evidence had been obtained by the Audit Team in respect of those matters.

80. Finally, we note that the expert evidence for the PCC in respect of Particulars 1(b) and (c) appear to stem largely from their view that the conclusion by the Audit Team that there was no material uncertainty was wrong or, at least, that the EQCR had not reviewed sufficient material to objectively evaluate whether any material uncertainty existed about Wynyard's ability to continue as a going concern.

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58 T584.

81. Mr Westworth in particular stated his view that it followed from his findings in relation to the conclusions reached by the Auditor that the EQCR "should have challenged the audit opinion and advocated use of an emphasis of matter (EOM)".[59] Both Mr Westworth and Mr Moison, who gave evidence for the PCC, were highly critical of the lack of sufficient documentation in relation to discussions between the EQCR and the Audit Team in relation to evaluation of material uncertainties and the appropriateness of Note 1.5 in the audited financial statements.

82. The experts called by the Member placed reliance on the absence of any specific obligation on the EQCR to record or document discussions relating to the going concern assumption, or form of the audit opinion. They were also of the view that, based on the materials reviewed by the EQCR including, in particular, the going concern work paper, it was reasonable for the Auditor to conclude that the successful capital raise had removed all of the material uncertainties that had been disclosed at the time of the release of the preliminary unaudited financial statements.

83. In reaching our decision as to whether Particulars 1(b) and (c) are established, we have not placed any significant weight on the different opinions expressed by the experts as to whether the conclusions reached by the Audit Team were open to them or "right or wrong". It will be apparent, however, that we do not agree with the view expressed by the Member's experts that it was reasonable to conclude that the successful capital raising was sufficient to remove any material uncertainty about Wynyard's ability to continue as a going concern. Although the successful capital raise was a major factor in reducing the risks in the short term, it was not sufficient to remove the material uncertainties which existed in respect of the forecast revenues (and associated cash flows) and the going concern assumption over the 12-month period to 31 March 2017.

84. Management forecast very significantly increased earnings which were dependent in large measure upon the sale of newly developed products and significantly increasing the number of new customers, and therefore revenues, from term licence fees and related professional services revenues. In order to form a conclusion that the forecasts were reasonable, and that there were no material uncertainties in relation to them, the Audit Team and the EQCR needed to have sufficient appropriate audit evidence to satisfy themselves both as to the reasonableness of the assumptions underlying the forecasts and, in respect of the pipeline contracts, the prospects and timing of revenues within the forecast period to March 2017. In our view, that necessitated, at least, proper enquiry into the assumptions underlying the cashflow

[59] Westward BOE at 50/5.

forecast of approximately $32m from small and medium contracts and proper enquiry as to the likely timing and receipt of revenue from the pipeline contracts.

85. The going concern work paper reviewed by the EQCR places considerable significance on the possibility of cash being received in the 12 months to March 2017 from the Alpha and Bravo contracts and the, much more uncertain, projects Echo and Foxtrot. There is no reference to any sufficient assessment by the Audit Team of the $31m in forecast earnings from small and medium contracts or to the likely timing of cash receipts from projects Echo and Foxtrot.

86. There is no evidence that the EQCR, in carrying out his objective evaluation of the conclusions reached by the Audit Team, sought or obtained sufficient appropriate evidence in respect of those matters. We are therefore satisfied that the EQCR did not carry out an adequate objective evaluation of the Auditor's conclusion that no material uncertainty existed about Wynyard's ability to continue as a going concern.

87. We find Particular 1(b) established.

Particular 1(c)

88. In light of our finding in respect of Particular 1(b). we consider that the audit opinion reached was not appropriate. That is because it was not based upon an adequate objective evaluation of the Auditor's conclusions. We therefore find Particular 1(c) established.

89. We express no view as to whether the conclusion reached was "right" or "wrong". Although, we have found Particular 1(c) is established. We do not consider that this finding adds anything of significance to our finding in respect of Particular 1(b).

90. We note that there was considerable criticism by the experts called for the PCC of the use in Note 1.5 to the audited financial statements of the term "inherent uncertainties" as opposed to "material uncertainties". The Member said in his evidence that there was discussion of Note 1.5 between him and the Audit Team but that, in his view, because he agreed that no material uncertainty existed about Wynyard's ability to continue as a going concern, it was not necessary to make any disclosure in the financial statements.

91. Although he did not expressly say so, it appears that the Member saw no problem with the reference to "inherent" uncertainties in Note 1.5. Again, there is no documentation in relation to the discussions which the Member says he had with the Audit Team in relation to that issue. We do not, however, consider that the Members agreement with Note 1.5 was in breach of the Standards.

92. We find, for the above reasons, that Particular 1(c) is established.

Particular 2 – Did the Member fail to consider adequately whether the audit documentation selected for review in respect of going concern reflected the work performed and/or supported the conclusions reached by the Audit Team, as required by ISA(NZ)220

93. ISA (NZ) 220 requires the engagement quality control reviewer to consider:

> Whether audit documentation selected for review reflects the work performed in relation to the significant judgements made and supports the conclusions reached.

94. The PCC in its submissions, submitted that the Member reviewed only one of the three going concern work papers (and did not review key attachments to the main work paper) and did not therefore select enough information to adequately discharge the obligations under ISA(NZ)220. The PCC relied upon the evidence of Mr Westworth to the effect that, in his opinion, the documents selected by the Member would not, without more, support the conclusion reached by the Auditor.[60]

95. It is not disputed that the Member did not review two of the three going concern work papers. He clearly did, however, review the going concern work paper itself, which, for the purposes of his assessment that no material uncertainty existed about Wynyard's ability to continue as a going concern, was the most relevant and up to date work paper. He also reviewed the Audit and Risk Committee Final Report dated 21 March 2016. He says he also reviewed the going concern workings and the significant contract revenue recognition paper.

96. There is very little evidence, expert or otherwise, directed at this Particular. Mr Moison in his evidence identified two work papers relating to going concern which did not appear to have been reviewed.[61]

97. Mr Westworth in his evidence on behalf of the PCC, did not specifically refer to the absence of review of those two documents as being a breach of ISA(NZ)220, paragraph 21(c). Whilst acknowledging that the Member had reviewed the main going concern work paper (DT 1408), his opinion appeared to be that the work paper:

> Did not support the conclusion that no material uncertainty existed in relation to going concern.

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[60] See Westworth BOE at paragraph 55 and following and PCC submissions at paragraphs 63 and 64.

[61] Moison BOE at paragraph 70.

> My reasons are set out in my evidence in relation to (the Auditor) paragraphs 74 to 92 where I deal with the issues of material uncertainty and inadequacy of appropriate audit evidence.[62]

98. We are not at all persuaded that the Member's apparent failure to review the two work papers constituted breach of ISA(NZ)220, paragraph 21.

99. We accept that the Member should have reviewed the TS report annexed to the going concern work paper. We also consider that the work paper did not contain sufficient appropriate audit evidence upon which to base the conclusion that there were no material uncertainties that existed about Wynyard's ability to continue as a going concern. Those matters, however, appear to us to go to Particular 1 (b) rather than Particular 2 (which, as Mr Moon seemed to accept in his oral submissions before us was directed at the alleged failure to select documentation for review).[63]

Conclusion

100. We dismiss the appeal in respect of Particular 2.

Charge 1: Was the Member guilty of negligence in a professional capacity of such a degree as to tend to bring the profession into disrepute?

101. We have found that Particular 1(b) and 1(c) are established. The member was also found to have failed to comply with the audit standards relating to identification of threats to independence (Particular 1(a) which was not appealed). We do not, however, consider that these failures were such as to constitute negligence of such a degree as to tend to bring the profession into disrepute.

102. The going concern work paper was comprehensive in nature and, from the perspective of an EQCR, would have reflected a considered approach by the Auditor to the question of whether any material uncertainties existed about Wynyard's ability to continue as a going concern. It is not, therefore, altogether surprising that the EQCR agreed with the conclusions reached without making further enquiry.

103. We consider, however, that further enquiry should have been made, particularly in respect of the projected $32m in revenue from small and medium contracts and (given the reliance by the Auditor on revenues from pipeline contracts to support the forecast) the likelihood and timing of cash from Projects Echo and/or Foxtrot. In the circumstances, we consider those failures as being at the lower end of the scale of negligence.

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[62] Westworth BOE paragraph 60.
[63] Appeals Council hearing transcript at p 50.

104. We do not consider that the failure of the Member to identify threats to independence was sufficient, in itself or cumulatively with the failures identified in respect of Particular 1(b) and 1(c), to constitute negligence of such a degree as to bring the profession into disrepute.

105. The appeal in respect of Charge 1 is dismissed.

CONCLUSION

106. The appeal in respect of Particular 1(b) is allowed.

107. The appeal in respect of Particular 1(c) is allowed

108. The appeal in respect of Particular 2 is dismissed

109. The appeal in respect of Charge 1 is dismissed.

110. We will hear further submissions as to penalty, costs (including costs of this appeal) and name suppression at a date to be set following discussions with counsel.

Dated this 21st day of September 2022

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L J Taylor KC
Chairman
Appeals Council

NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS

NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS ACT 1996

IN THE MATTER	of the New Zealand Institute of Chartered Accountants Act 1996 and the Rules made thereunder
AND	
IN THE MATTER	of **Bruce Allan Baillie** Chartered Accountant, of **Auckland**

DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS
DATED 28 May 2021

Hearing:	7-11 December and 14-15 December 2020 and 3 February 2021 and 6 May 2021
Location:	The offices of Chartered Accountants Australia and New Zealand, Auckland (December), Wellington (February) and Auckland (May)
Tribunal:	Mr DJH Barker FCA (Chairman) Mr P Sinclair FCA Ms J Smaill FCA (for the hearings on 7-11 December and 14-15 December and on 3 February 2021) Dr RS Janes (Lay member)
Legal Assessor:	Mr Matthew Casey QC
Counsel:	Mr Terry Sissons for the PCC Mr David Jones QC and Mr Russell Stewart for the Member
Tribunal Secretariat:	Janene Hick Email: janene.hick.nzica@charteredaccountantsanz.com

The New Zealand Institute of Chartered Accountants regulates the conduct of members of Chartered Accountants Australia and New Zealand that reside in New Zealand in accordance with the New Zealand Institute of Chartered Accountants Act 1996 and other legislation regulating the profession of accountancy in New Zealand.

At a hearing of the Disciplinary Tribunal held in public at which the Member was in attendance and represented by counsel he denied the particulars and pleaded not guilty to the charges.

The charges and particulars were as follows:

CHARGES

THAT in terms of the New Zealand Institute of Chartered Accountants Act 1996 and the Rules made thereunder, and in particular Rule 13.50[1] you are guilty of:

1. negligence or incompetence in a professional capacity and that this has been of such a degree as to reflect on your fitness to practise as an accountant and/or tends to bring the profession into disrepute; and/or

2. breaching the New Zealand Institute of Chartered Accountants Code of Ethics ("Code of Ethics").

PARTICULARS

IN THAT

As a Chartered Accountant in public practice and relation to your role as Engagement Quality Control Reviewer ("EQCR") in respect of the audit of Wynyard Group Limited ("Wynyard") for the financial year ending 31 December 2015 you failed to carry out your role in accordance with the Fundamental Principle of Professional Competence and Due Care of the Code of Ethics (2014) and/or PES-1 (Revised)[2] and/or relevant Auditing and Assurance Standards, in particular you:

1. Failed to evaluate adequately significant judgments made by the audit engagement team and/or conclusions reached in formulating the audit report and/or failed to identify where such judgments were lacking, as required by ISA (NZ) 220, in relation to:

    a. The audit team's evaluation of independence including threats and/or safeguards; and/or

    b. The audit team's conclusion that no material uncertainty existed in relation to Wynyard's ability to continue as a going concern; and/or

    c. The appropriateness of the audit report; and/or

2. Failed to consider adequately whether the audit documentation you selected for review in respect of going concern reflected the work performed and/or supported the conclusions reached by the audit team, as required by ISA (NZ) 220.

DECISION ON LIABILITY

INTRODUCTION

The charges arose from a Financial Markets Authority (FMA) review of audit files of PwC conducted in late 2016 and a subsequent complaint to NZICA by the FMA. The FMA complaint concerns two specific but very important areas of the audit of Wynyard Group Ltd (Wynyard) for the year ended

[1] NZICA's Rules effective 11 May 2020.
[2] PES-1 (Revised) Effective 1 January 2014

31 December 2015 being concerns regarding the conclusion that no material uncertainty existed in respect of Wynyard's ability to continue as a going concern and the audit teams evaluation of independence.

The FMA complaint concerning this issue was against 2 individuals. W was the Audit Engagement Partner for the Wynyard audit. Bruce Baillie (the Member) was the Engagement Quality Control Reviewer (EQCR) of the Wynyard audit. The charges against both individuals were heard contemporaneously as the background issues and facts were very much the same for both individuals. While the charges were heard contemporaneously, the Tribunal considered its decisions separately. This decision focuses on the complaint against Mr Baillie. A number of details are repeated in the decision in relation to W.

The hearing was conducted over the course of 8 days. Evidence was heard from 5 witnesses and from the 2 members concerned.

The Member denied both Charges and all of the Particulars.

HINDSIGHT

Counsel for both the PCC and the Member drew attention to the fact that hindsight must not influence the deliberations of the Tribunal. This is most relevant in the consideration of the issue as to whether a material uncertainty existed in relation to Wynyard's ability to continue as a going concern. The issue arises because Wynyard was placed into liquidation 7 months after the signing of the 2015 audit report and also because conclusions in relation to material uncertainty were influenced by judgements on the collectability of revenue forecast through to March 2017. Some of that forecast revenue did not materialise. The Tribunal has focused on the facts and information available to the Members as at the date of the signing of the audit report on 21 March 2016.

THE WITNESSES

The Tribunal heard evidence from Mr Moison and Mr Westworth on behalf of the PCC. Mr Moison is the Manager of Audit Oversight at the FMA. He outlined the details and factual summary of the FMA's quality review of PwC which gave rise to the complaints. He also outlined the opinions of the FMA based on those facts.

Mr Westworth is a highly experienced auditor based in Australia. He was called as an expert witness by the PCC.

Counsel for the Members called two expert witnesses, Mr Morris and Mr Prichard. Both gentlemen are also highly experienced auditors.

The views and opinions expressed by Mr Moison on behalf of the FMA and Mr Westworth were, on most issues, diametrically opposed to the views and opinions expressed by Mr Morris and Mr Prichard.

The Tribunal has analysed the evidence of the witnesses in each of the Particulars and has indicated the evidence it prefers in each case.

BACKGROUND TO THE PARTICULARS

Particulars 1 (b) and (c) and 2 focus on the conclusion that no material uncertainty existed in respect of Wynyard's ability to continue as a going concern, the validity of that conclusion and the audit evidence supporting the conclusion.

Wynyard produced analytical crime-fighting software for law enforcement agencies and commercial clients.

Wynyard was a relatively new company, still in a growth phase and had generated losses on an annual basis. The loss in the 2014 year was $22.2 million and in the 2015 year was $44 million. To continue as a going concern, the company needed to find continual sources of cash either from new capital or from product revenue.

On 23 February 2016, Wynyard released preliminary unaudited financial statements for the year ending 31 December 2015 to the market. During February 2016 the company realised that it needed to raise more capital and a rights issue aiming to raise $30 million was actioned. The company also needed to collect a significant proportion of the revenue forecast in the 2016 financial year budget in order to remain solvent.

In its statement to the market on 23 February 2016, the Company stated in the "Other Information" section that

-The financial information has been prepared on the assumption the Group is a going concern.
-The use of the going concern assumption assumes the Company and Group will continue to trade for at least the next 12 months.
-In reaching this conclusion the Directors have a reasonable expectation that forecasts for the next 12 months are achievable and that the potential capital raising (announced on 23 February 2016) will be successful.
-The directors acknowledge that there are material uncertainties with the forecast assumptions and in particular the ability to raise sufficient new capital within the timeframe required.
-These uncertainties may cast significant doubt over the ability of the company and group to continue as a going concern for the foreseeable future.
-The financial information above does not include any adjustments that may need to be made to reflect the situation should the Company or Group be unable to continue as a going concern. Such adjustments may include assets being realised at amounts other than the amounts at which they are recorded in the Statement of Financial Position. In addition the Group may have to provide for further liabilities that might arise and to reclassify certain non-current assets and liabilities as current.

In the period between 23 February 2016 and 21 March 2016 (the date on which the audit report was issued) the company successfully organised the capital raise of $30 million. As at 21 March 2016, the material uncertainty in relation to the capital raise had been mitigated.

The question of whether a material uncertainty in relation to the forecast revenue still existed as at 21 March 2016 is the issue. The forecast revenue for 2016 financial year totalled $72 million of which maintenance and recurring revenue was forecast to contribute $16 million, professional services revenue was forecast to contribute $7 million and license and term revenue from new contracts was forecast to contribute $49 million. Collectability of revenue from new contracts, particularly two major contracts with Alpha and Bravo, would be a key factor in enabling the company to continue as a going concern.

The directors concluded, and the audit team agreed, that no such material uncertainty existed in relation to forecast revenue however in the Notes to the Financial Statements for the year ended 31 December 2015, the directors included the following paragraph in their Note 1.5 dealing with going concern – *"the directors acknowledge that significant judgement has been applied in making the forecast assumptions. Those judgements made relate predominantly to the ability of the group to execute on its planned product release program and to achieve the sales timing and quantum is forecast. Nevertheless, after considering the inherent uncertainties described above the directors have a reasonable expectation that the group will continue to operate for the foreseeable future".*

The PCC, FMA and Mr Westworth consider that the uncertainty was more than "inherent" and was in fact material, that the directors should have referred to this material uncertainty in the financial statements and that the Audit Report should have included an Emphasis of Matter paragraph on this material uncertainty. In the absence of this disclosure, they contend that the Audit Report should have been qualified.

The Tribunal is required to consider whether the Member undertook his duties as EQCR appropriately in relation to this specific issue and whether the audit evidence and documentation is sufficient to support the conclusions reached.

Particular 1 (a) deals with compliance with independence requirements and the Member's evaluation of independence including threats and/or safeguards.

This Particular arises because on 19 February 2016, Wynyard engaged PwC's Transaction Services (TS) team to assist with the capital raise (titled Project Dot) by performing a limited scope due diligence review of its 2016 budget. The TS team produced a report dated 21 February 2016 titled "Project Dot Ltd Scope Due Diligence Procedures – FY 16 budget".

A standard PwC document to be used when the firm is supplying other services in addition to the audit engagement is called an Approval for Services (AFS) form. An AFS form was completed in relation to the TS team engagement by a member of the TS team. The Particular refers to audit independence issues arising from the TS team engagement and their report.

PARTICULAR 1(a)

The PCC alleges that the Member failed to evaluate adequately significant judgements made by the audit engagement team and/or conclusions reached in formulating the audit report and/or failed to identify where such judgements were lacking, as required by ISA (NZ) 220, in relation to the audit team's evaluation of independence including threats and/or safeguards.

The Tribunal has determined that the Audit Engagement Partner failed to adequately evaluate the threats to independence arising from the TS team engagement. The self review threat, self interest threat and advocacy threat were not properly evaluated.

There is no evidence on the audit file that the Member had reviewed either the TS report or the TS engagement AFS form. There is no evidence on the audit file that the Member evaluated the audit team's assessment of the impact of the TS engagement on independence or had challenged the Audit Engagement Partner's assessment of the threats arising from the TS engagement.

The Member admitted that he had not read either the TS report or the TS engagement AFS form.

The Member gave evidence that he had discussed the TS engagement with the Audit Engagement Partner in relation to independence but those discussions were not recorded by either the Member or the Audit Engagement Partner. Whether those discussions took place or not does not change the Tribunal's view on this Particular. Ultimately the Member has stated that he signed off the QRP completion step sign off on 21 March 2016 satisfied that he had considered the independence of the audit team and that there was no threat to the team's independence as auditors from the TS engagement. The Tribunal has found that the Audit Engagement Partner did not properly evaluate the threats to independence arising from the TS engagement. If the Member did discuss this with the Audit Engagement Partner then he too reached the wrong conclusion in relation to threats to independence. If he did not consider the threats then it follows that they were not properly evaluated as the Member was required to do.

The Tribunal finds that this Particular has been established.

PARTICULAR 1(b) and (c)

The PCC alleges that the Member failed to evaluate adequately significant judgments made by the audit engagement team and/or conclusions reached in formulating the audit report and/or failed to identify where such judgments were lacking, as required by ISA (NZ) 220, in relation to the audit team's conclusion that no material uncertainty existed in relation to Wynyard's ability to continue as a going concern and/or the appropriateness of the audit report.

Evidence was produced and there was significant discussion on the timesheet records maintained by the Member who charged only 7.5 hours in total to the client for his role as the EQCR. Mr Westworth concluded that he would have expected more than 7.5 hours but he acknowledged that EQCR's do not always record all of the time they spend in consultations and reviews. Both the Member and the Audit Engagement Partner stated that the file and the timesheet records do not record a number of conversations and meetings between them during the course of the audit. The Tribunal accepts that the timesheet records alone do not determine the effectiveness of the review function.

The completion workpaper signed off by the Member lists the consultation issues involving the Member and does refer to the review of the audit work relating to significant risks and in particular the revenue recognition and going concern assumption.

The Tribunal considers that there could have been more evidence of challenge by the EQCR in the form of documentation of various discussions between the Member and the audit team and that that would have been of assistance both to the audit team and to the Tribunal.

However, the Tribunal accepts that the basic functions of the EQCR role and the basic documentation requirements of the role appear to have been met.

The Member acknowledged that he had not personally completed the EQCR planning and completion workpapers but that they had been filled in by a member of the audit team and edited by the Audit Engagement Partner. The Member however did sign off the completion workpaper. The Tribunal considers that the Member could have been more actively involved in the completion of that workpaper but accepts that the basic requirements of sign off have been met.

The Tribunal has found that it was open to the Audit Engagement Partner to conclude that no material uncertainty existed in relation to Wynyard's ability to continue as a going concern and that it was also open to him to issue the audit report without an Emphasis of Matter or Qualification in relation to going concern. The Tribunal has determined that the EQCR did complete the basic functions of his role in relation to those issues.

The Tribunal concludes therefore that Particulars 1(b) and (c) have not been established.

PARTICULAR 2

The PCC alleges that the Member failed to consider adequately whether the audit documentation he selected for review in respect of going concern reflected the work performed and/or supported the conclusions reached by the audit team, as required by ISA (NZ) 220.

Evidence was provided that, according to the Member's review date stamps, he reviewed only one out of three work papers relating specifically to going concern. Mr Westworth's opinion was that while the audit documentation selected for review by the Member may have reflected the work performed by the audit team, it did not support the conclusion that no material uncertainty existed in relation to going concern. Both Mr Morris and Mr Prichard find no fault with the Member's conduct and believe that he has complied with ISA (NZ) 220 in terms of audit documentation.

The analysis in Particulars 1(b) and (c) is again relevant in the analysis of this Particular. The Tribunal does consider that the Member could have recorded his work in more detail and left more fulsome audit evidence to show that he discharged his role as EQCR appropriately. However, the Tribunal is satisfied that the basic requirements of the audit standards in relation to documentation have been met.

The Tribunal finds that this Particular has not been established.

THE CHARGES

The member is charged with:

1. negligence or incompetence in a professional capacity and that this has been of such a degree as to reflect on his fitness to practise as an accountant and/or tends to bring the profession into disrepute; and/or
2. breaching the New Zealand Institute of Chartered Accountants Code of Ethics ("Code of Ethics").

Of the Particulars supporting these charges, the Tribunal has found that Particular 1(a) has been established and that Particulars 1 (b) and (c) and Particular 2 have not been established.

The Tribunal is required to decide whether the failings identified in Particular 1(a) are serious enough to support either or both or neither of the charges.

Charge 2 alleges that the Member has breached the Institute's Code of Ethics. The Tribunal has found that Particular 1(a) has been established and that various auditing standards and provisions of PES 1 have been breached. It follows therefore that the Member has failed to comply with the fundamental Principle of Professional Competence and Due Care in the Code of Ethics. Section 130 of the Code imposes on the Member the obligation to act diligently in accordance with applicable standards. An inadvertent breach of an auditing standard which might be considered to be of lesser weight or importance could be found not to be in breach of the Principle in Section 130 of the Code. Auditor independence and the maintenance of standards in that regard is considered by the Tribunal to be an important foundation of the auditing profession. Breaches of the standards in relation to auditor independence cannot be brushed aside as being of minor importance or of a technical nature. The breach of the standards identified in this case includes a failure to evaluate threats to independence which is considered by the Tribunal to be of significant importance and definitely not of a technical nature.

The Tribunal finds that the Principle in Section 130 of the Code of Ethics has not been met and that Charge 2 has therefore been proved.

Charge 1 alleging negligence or incompetence in a professional capacity is the more serious of the charges. The Tribunal must decide whether the failings identified in relation to auditor independence meet the test of being negligent or incompetent in a professional capacity.

The Tribunal does not consider that the failings constitute Incompetence. "Incompetence" is defined as an inability to perform to expected standards. The Member is a highly experienced auditor with an unblemished record. He has been Audit Engagement Partner and EQCR on many large audits. The failings identified in this case are a one-off occurrence which do not support the contention that the Member is incompetent.

Determining whether the Member has been negligent requires consideration of the standard of care expected of a reasonable practitioner proficient in the practice area concerned and whether the failings fall below that standard. The test is an objective one, meaning that the standard of care is one that would be expected of a competent auditor, qualified to undertake an audit engagement for an FMC entity. The Tribunal considers that the failings in relation to auditor independence, particularly in relation to evaluation of threats impacting on auditor independence do fall below that standard.

The Tribunal is then required to determine whether the Member's negligence is of such a degree as to:

a. reflect on the member's fitness to practise; and/or
b. tends to bring the profession into disrepute.

The Tribunal does not consider that the negligence is of such a degree as to reflect on the Member's fitness to practise as an accountant. The PCC did not advise of any other failings previously identified by regulatory bodies in a long career as auditor of a number of significant entities. The Tribunal is satisfied that the failings in relation to auditor independence are a one-off occurrence and do not reflect on his overall fitness to practise.

The test of tending to bring the profession into disrepute is "whether reasonable members of the public informed of all relevant circumstances, would view the Member's conduct as tending to bring the profession into disrepute. The issue is necessarily to be approached objectively, taking into account the context in which the relevant conduct occurred".

In this case, the Tribunal does not consider that a reasonable member of the public, informed of all the circumstances, would regard the Member's failings as bringing the accounting profession into disrepute. The Tribunal notes that the audit of Wynyard was complex and that the FMA did not identify any other significant shortcomings. The Tribunal does not think that a reasonable member of the public, aware of the extent and professionalism of other audit work completed would regard the failings identified as bringing the accounting profession overall into disrepute.

Accordingly, the Tribunal finds that Charge 1 has not been proved.

SUMMARY OF THE TRIBUNAL'S DECISION

The Tribunal finds that the Member is guilty of Charge 2 in that he has breached the New Zealand Institute of Chartered Accountants Code of Ethics and that Particular 1(a) has been established.

Charge 1 and Particulars 1(b) and (c) and Particular 2 have not been proved.

Ms J Smaill participated as a Tribunal member for the liability phase and in the Tribunal's decisions on Liability. Due to ill health she was not able to participate in the Hearing or deliberations on Penalty, Costs and Publication. The Legal Assessor advised, and the Parties agreed, that the remaining three Tribunal members consider those matters.

PENALTY

Both Counsel for the Members and the PCC drew the Tribunal's attention to the factors identified in the High Court decision of *Roberts v Professional Conduct Committee of Medical Council of New Zealand* when considering penalty. The Tribunal must consider a penalty which:

- Most appropriately protects the public and deters others;
- Facilitates the Tribunal's important role in setting and maintaining professional standards;
- Reflects the seriousness of the misconduct;
- Allows for the rehabilitation of the practitioner, where appropriate;
- Promotes consistency with penalties in similar cases;
- Punishes the practitioner, if appropriate;
- Is the least restrictive penalty in the circumstances; and
- Looked at overall, is the penalty which is fair, reasonable and proportionate in the circumstances.

The PCC has sought censure. The PCC submit that despite the two more serious charges not being proved, the charge of a breach of NZICA Code of Ethics is still serious. Independence is necessary to enable an auditor to express a conclusion without bias, conflict of interest, undue influence of others and is imperative to maintain an adequate attitude of professional scepticism. Public interest considerations require independence not only to be observed but to be seen to be observed.

The PCC submitted that the Member's refusal to accept the shortcomings in relation to his compliance with independence requirements as an aggravating circumstance. The PCC however acknowledges that there are mitigating circumstances, including the one-off nature of the offending and the Member's unblemished record over many years. However, The PCC submit that even after taking those mitigating factors into account, the Member's conduct overall is sufficiently serious to give rise to a disciplinary sanction. The Tribunal agrees.

The PCC note that recent cases before the Tribunal (*Browning 2019*, *Flood* and *Kennerly*) regarding licensed auditors of significant entities have all resulted in the members being censured. In these cases the members were found guilty of more serious charges and in addition to censure, fines were imposed and orders in relation to future audit activity were issued.

Counsel for the Member noted that there are relatively few decisions in the Tribunal and Appeals Council concerning auditors and EQCRs. They note that in these decisions the charges usually comprise more serious findings of conduct unbecoming an accountant and negligence or incompetence in a professional capacity in addition to breaching the Institute's Code of Ethics. They note that the penalty ordered in these decisions was a censure, a fine and (in some cases) a prohibition from undertaking further audits.

Counsel for the Member also noted that in the 2021 New Zealand Lawyers and Conveyancers Disciplinary Tribunal decision in *Auckland Standards Committee 2 v Halse* that *a censure is a permanent mark on a practitioner's record. It is a significant penalty component, not something to be treated as a mere matter of course*.

Counsel for the Member noted that he had never previously been the subject of a complaint or had a complaint laid against him and his record is spotless. However, they note that the Member accepts the findings of the Tribunal in relation to charge 2. They note that in terms of the appropriate penalty, the Tribunal's consideration of what is fair, reasonable and proportionate in the circumstances, needs to be considered against the mitigating factor being his previously unblemished record. They conclude that it will be for the Tribunal to assess whether a censure is warranted in the circumstances of this case.

The Tribunal considers that failings in relation to independence are serious and they are fundamental to the overall integrity of an audit, to enable an auditor to act objectively and for users of the audited financial statements to have confidence in the audit process and the opinion.

The importance of the Engagement Quality Control Reviewer (EQCR) role has also been clearly acknowledged in other cases involving licensed auditors such as *Browning* and *Kennerly*. EQCR's play a crucial role in respect of quality control on audits of FMC reporting entities. The underlying reason for effective quality control is to promote public confidence in the audit industry. Shortcomings in the performance of the EQCR role must be taken seriously.

Accordingly, departure from those standards must be viewed seriously and a disciplinary sanction is required. The Tribunal notes that the Member accepts the findings of the Tribunal in relation to the Charges but the Member had previously denied the majority of the Particulars in relation to auditor independence. It is appropriate that a sanction be imposed in these circumstances.

The Member provided an Affidavit to the Tribunal addressing penalty, costs and publication. He states that he:

- Relinquished his auditor license on 14 June 2017 and retired as a Partner of PwC on 30 June 2017,
- has no intention of resuming a career as an auditor,
- has suffered from periods of insomnia arising from the stress resulting from the complaint process,
- was worried about the impact of informing organisations which had approached him for Board or Advisory positions of the charges against him;

The Tribunal acknowledges that the complaints process is stressful and may have flow on consequences for the members concerned. The Tribunal considers, however, that where shortcomings have been identified which warrant penalty, this supersedes the personal impact on the member which is an inevitable outcome of any penalty.

The Tribunal does not consider that a fine or restriction of future audit activity is warranted in this case and considers that a censure is the proportionate and appropriate sanction and meets the tests in *Roberts*.

Pursuant to Rule 13.40(k) of the Rules of the New Zealand Institute of Chartered Accountants effective 26 June 2017, the Disciplinary Tribunal orders that Bruce Allan Baillie be censured.

COSTS

The costs summary for the hearing of both W and Mr Baillie is $490,621.07. The Tribunal may make such order as it thinks fit in relation to costs and expenses and has a discretion as to the award of costs. The Tribunal's Practice Note dated 2 February 2015 notes that where a charge is established, it will normally be fair and reasonable for the Member to pay all the costs involved. Circumstances where it may be appropriate to award less than the full amount include:

- where charges or particulars have not been proven where, and to the extent that, additional costs to the member can be directly attributable to the failure to prove;
- where excessive or unnecessary expenses have been incurred.

Counsel for the Member has submitted that the PCC were wrong in progressing with the prosecution. The two most serious charges were dismissed and they submitted there were opportunities prior to the Tribunal Hearing to resolve the complaint. The PCC note however, that the Tribunal's decision on liability states that those charges dismissed were dismissed only by a "fine margin" and that it was a "close call". The PCC submit that it was appropriate for them to pursue the investigation and the charges. The PCC note that in the case conference held on 12 March 2020, which panel included three licensed auditors, that panel concluded that there was a case to answer of sufficient seriousness to warrant referral to the Disciplinary Tribunal and did not consider that it was a complaint which could be resolved by consent order. The Tribunal agrees that the charges were serious enough to be heard by the Tribunal.

The Practice Note requires costs to be reduced if any costs were excessive or unnecessary. The Tribunal is satisfied that the PCC followed an appropriate process. The Tribunal does note that there were delays in bringing the process to a conclusion. The Tribunal is disappointed that the PCC was unable to expedite the process. However, the Tribunal's view is that this delay did not contribute to excessive or unnecessary costs.

The PCC has been challenged as to whether it was reasonable for the PCC to engage an independent expert to review and respond to the reports provided by the Members. This was a complaint laid by the FMA and there was an obligation on the Institute (through the PCC) to investigate the complaint. The Tribunal considers that it was both reasonable and appropriate for the PCC to engage an independent expert in order to properly investigate the complaint.

The Practice Note does require the Tribunal to consider reduction of costs where charges or particulars have not been proven. The PCC have suggested a 25% reduction to recognise the charges or particulars not proven. Counsel for the Member has suggested a 100% reduction for the following reasons:

- the unnecessary pursuit of the case by the PCC;
- the fact that 2 of the 3 charges were not proved;
- the costs which the Member's Firm, PwC, have incurred on behalf of the Members which, Counsel informed the Tribunal, were significantly greater than the costs incurred by the Institute.

The legitimacy of pursuing the case has been covered above in this decision and the Tribunal have determined that it was appropriate, and in fact necessary, for the PCC to pursue the investigation and the resulting hearings at the PCC and at the Disciplinary Tribunal. The Tribunal considers that the costs incurred by the Member or their firm are not an issue which the Tribunal is required to address. There were no submissions or cases presented to the Tribunal to support this line of argument. Most members who appear before the Disciplinary Tribunal will incur costs of varying degree in relation to advice or representation.

In other cases where charges have not been proven, the costs have usually been reduced by between 20% and 50% of actual costs.

On balance, weighing up all the factors, the Tribunal considers that a reduction of 40% of actual costs is warranted to reflect the Charges and Particulars not proven.

The investigation and hearings into the charges laid against Mr Baillie have been held concurrently with the investigation and hearing into the charges laid against W. Total costs awarded against both members, taking into account the 40% reduction, will be $294,000. The Institute is required to award costs against an individual member and there is a requirement to apportion the total costs between W and Mr Baillie. In the absence of any other submissions, the Tribunal considers that the award of costs should be split equally between the Members.

Pursuant to Rule 13.42 of the Rules of the New Zealand Institute of Chartered Accountants effective 26 June 2017, the Disciplinary Tribunal orders that Bruce Allan Baillie pay to the Institute the sum of $147,000.

PUBLICATION AND SUPPRESSION

The position of the parties is that the PCC seeks a direction that notice of the decision including the Member's name, location, the particulars of the charges and a summary of the reasons for the decision and any penalty imposed, be published in *Acuity* and on the CAANZ website. The PCC also seeks publication of the names of Wynyard, PwC and the FMA. The PCC has no objection to the names of Wynyard's clients or the name of Y Limited being suppressed.

The Member seeks suppression of his name and location as well as that of PwC and of Wynyard.

The Rules of NZICA which apply to this hearing set the framework for the discussion on publication and suppression. Because the complaint was made in August 2017, the Tribunal accepts that the Rules which became effective on 26 June 2017 apply. The Rules which became effective on 30 May 2019 contain slightly different provisions in relation to publication and suppression which are not relevant to this case.

Rule 13.44(a) of the 2017 Rules provides that unless the Tribunal directs otherwise, decisions are to be published with mention of the member's name and location. Rule 13.62(b) provides that if the Tribunal considers that it is "appropriate" to do so, having regard to the interests of any person or to the public interest, it may, among other things, make an order prohibiting the publication of the name of the person to whom any hearing relates or any other person.

Both the PCC and Counsel for the Members agree that, as a starting point, there is a presumption in favour of full publication in order to maintain public interest, open justice and a maintenance of confidence in the disciplinary process.
Suppression of the Member's name

It was noted that the leading authority on publication of Tribunal decisions (under the 2017 Rules) is *J v The Institute of Chartered Accountants Appeal Council and Ors*. The Legal Assessor also noted that this High Court decision warrants careful consideration. The Court held that:

- Rule 13.44(a) establishes a strong presumption in favour of publication, which may be displaced under 13.62, although the threshold is high;

- There needs to be supporting evidence to depart from the presumption in favour of publication;
- The standard in the disciplinary context is high, and closer to the criminal than civil jurisdiction due to the public interest factors of transparency, accountability and public protection;
- There is not an onus or burden on the person seeking suppression;
- Publication decisions in disciplinary cases are inevitably fact-specific, requiring the weighing of the public interest with the particular interests of any person in the context of the facts of the case under review;
- There is not a single universally/applicable threshold. The degree of impact on the interests of any person required to make non publication appropriate will lessen as does the degree of public interest militating in favour of publication (for instance, where a practitioner is unlikely to repeat an isolated error);
- However, because of the public interest factors underpinning publication of professional disciplinary decisions, that standard will generally be high;
- The use of the word "appropriate" in Rule 13.62 does not add content to the test usually applied in the civil jurisdiction or set a threshold lower than that applying in the civil jurisdiction. The rule is broad and sets out neither a specific threshold nor mandatory specific considerations. The question will simply be, having regard to the public interest and the interests of the affected parties, what is appropriate in the particular circumstances.

The PCC noted a number of cases and prior Tribunal decisions supporting their position that the Member's name be published.

In *Hart v The Standard Committee (number 1) of the NZLS* the Supreme Court held that it is necessary to strike a balance between the principle of open justice and the interests of the party seeking suppression.

In *T v Director of Proceedings* the Judge noted that *"following an adverse disciplinary finding… The probability must be that public interest considerations will require that the name of the practitioner be published in a preponderance of cases".*

In *Daniels v Complaints Committee No 2 of the Wellington District Law Society* the High Court held that *"Harm to reputation is an inevitable consequence of publication if a professional is the subject of an adverse disciplinary finding but of itself cannot provide sufficient ground for there to be suppression of his name… It is more than a question of publication being required to protect the public. Rather it is to advance the public interest, namely to protect the profession's most valuable asset, being its collective reputation."*

In *Collier v Director of Proceedings* the High Court held that the public is entitled to know if a professional has engaged in practice deemed by others to be below standard and what, if any, restrictions have been put in place.

In *Erceg v Erceg* the Supreme Court noted that the party seeking the suppression order "must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule, but agree that the standard is a high one."

Counsel for the Member submitted that the factors supporting suppression of his name comprise:

- The Tribunal had found that it was *"satisfied that the failings in relation to auditor independence are a one-off occurrence and do not reflect on the member's overall fitness to practice".*
- While independence matters are in themselves serious, the Member's failings are not at the high end of the scale. There is less of a need to publish details.
- There is absolutely no prospect of the Member repeating the error – he has not renewed his auditor license and is no longer a qualified auditor with CAANZ and has retired from PwC. The complaint and his response to it have meant that his career as an auditor is over.

- There is no deterrence or intrinsic value in publishing the Member's name. It is now over 5 years since the events of the charges and 3 years since the Member was last involved as an auditor. Importantly, the application of the auditing standards in relation to auditor independence has changed and improved since 2016. Auditors are now fully aware of the independence issues in light of the FMA's annual audit quality reports. Publishing the Member's name serves no useful purpose.

The Tribunal does not consider that these reasons make it appropriate to suppress the Member's name.

- While the failings identified by the Tribunal were one-off and do not reflect on the Member's overall fitness to practice, they are nevertheless serious and the shortcomings identified of considerable importance to the maintenance of auditing standards and the credibility of the EQCR role. Maintenance of public confidence in audit quality and the Disciplinary process is also important.
- While a Member may have ceased auditing and is now filling another role, the Tribunal considers that he should be judged on his actions at the time rather than what has happened subsequently.
- While there is no risk currently to the broader market because the Member is no longer a licensed or qualified auditor, the Member could technically resume auditing in the future.
- The Tribunal acknowledges that there has been greater emphasis on audit independence in the FMA annual audit quality reports since 2016 but notes that the issue of audit independence has always been a fundamental principle of Auditing Standards and breaches thereof are considered to be a serious breach of the Institute's Code of Ethics.
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- It is important for the maintenance of auditing standards that all Members of the Institute undertaking audit work are aware of shortcomings identified whenever they occur.

Counsel for the Member also drew a number of prior cases to the attention of the Tribunal. In *Name Not Published* (29 June 2012), the member was found guilty of conduct unbecoming an accountant (on multiple occasions, lending or investing substantial amounts of client money to companies in his control). The Appeals Council granted name suppression taking into account a combination of factors including the member's previous unblemished record, the fact he was 70 years of age and the fact that the member would not be practising as a Chartered Accountant ever again. While the charges of which that member was found guilty are more serious than the Member in this case, he was older than the Member in this case and the Member is continuing to seek work on Boards or in Advisory roles using his designation as a Chartered Accountant. In addition, this complaint was raised by a government organisation on behalf of the public and the issues traversed are of considerable interest to the wider audit community. For those reasons, the Tribunal does not consider that this case is comparable to that in *Name Not Published.*

The Member submitted in his Affidavit that publication of details of his identity will have a disproportionate and detrimental effect on his ability to retain and obtain Board consulting engagements. The Tribunal considers that harm to reputation is an inevitable consequence of an adverse disciplinary finding and that this position is consistent with previous Tribunal decisions.

The Tribunal considers that in professional disciplinary cases there is a presumption in favour of publicity which is reflected in rule 13.44. The Tribunal does not consider that the arguments put forward by Counsel for the Member or by the Member in his Affidavit meet the requirement of being *specific adverse consequences* justifying suppression of the Member's name.

Suppression of PwC's name

It is accepted that publication of the Member's name will lead to disclosure of PwC. Counsel for the Member submitted that publication of the Member's name will have a detrimental and prejudicial effect on PwC and to its clients. The Tribunal notes that the Member was representing PwC as EQCR and the audit report was signed in the name of PricewaterhouseCoopers not in the name of the Member. The Tribunal has concluded that there are no special circumstances making

it appropriate to suppress the name of the Member. The Tribunal considers that the same reasons apply to a finding that PwC's name also not be suppressed. An affidavit by Karen Shires, the Chief Risk Officer for PwC, was presented as evidence. Ms Shires submitted that publication of both the Member's name and that of PwC would have a detrimental effect on the firm. As noted previously in this decision, the Tribunal considers that harm to reputation is an inevitable consequence of an adverse disciplinary finding and is not a sufficient reason to suppress identification of the Member or their firm.

Suppression of Wynyard's name

Counsel for the Member submitted that naming of this company has the potential to bring into question the integrity of the audit in question and harm the company commercially. The company audited by the Member collapsed and has now been liquidated. The liquidators were able to sell some of the company's intangible assets and brand as part of the liquidation. Those sales occurred 4 years ago. The Tribunal does not consider that the naming of Wynyard would have any detrimental effect on the new owners of those products or the brand. The Tribunal agrees with the submissions of the PCC that investors in Wynyard and the public are entitled to know that the regulator and the profession have taken disciplinary proceedings against the auditor.

The Tribunal can see no reason why Wynyard's name should be suppressed. The Tribunal agrees it is appropriate to suppress the names of Wynyard's clients.

Suppression of Y Limited's name

Y Limited, on the other hand, is still operating as a public company in New Zealand. The Tribunal notes that the particulars in relation to Y Limited were not proved. The Tribunal accepts that it may be detrimental to that entity if it is named and the Tribunal considers that Y Limited's name and any details which might identify it should be suppressed.

Pursuant to Rule 13.44 of the Rules of the New Zealand Institute of Chartered Accountants effective on 26 June 2017, the decision of the Disciplinary Tribunal shall be published on the website and in the official publication *Acuity* with mention of the Member's name and location.

Pursuant to Rule 13.62(b)(iii) of the Rules of the New Zealand Institute of Chartered Accountants effective on 26 June 2017 the Tribunal orders that the details of Y Limited and the clients of Wynyard Group Ltd and any information or documents which might identify them, be suppressed.

RIGHT OF APPEAL

While issues of liability, penalty and publication are to be determined under the 2017 Rules, the right of appeal is a procedural matter and is covered by the Rules now in force. Pursuant to Rule 13.59 the Tribunal's decision as to penalty does not take effect while the Member remains entitled to appeal, or while any such appeal awaits determination by the Appeals Council. The Tribunal considers that the interim suppression orders it made prior to the hearing should continue in effect until the appeal period expires. If an appeal is filed, the question of ongoing suppression is then a matter for the Appeals Council.

Pursuant to Rule 13.63 of the Rules of the New Zealand Institute of Chartered Accountants effective 4 December 2020, the Member or the PCC may, not later than 21 days after the notification to them of this decision, appeal in writing to the Appeals Council of the Institute against the decision.

The interim suppression orders shall remain in force until the expiration of the period for an appeal. The decision as to publication shall not take effect while the parties remain entitled to appeal, or while any such appeal awaits determination by the Appeals Council

DJH Barker FCA
Chairman
Disciplinary Tribunal