

# DISCIPLINARY COMMITTEE DECISION COMPLAINT ABOUT MIKE WILTON

Confidential to parties

**In accordance with:**

Engineering New Zealand Rules 2017

Engineering New Zealand Disciplinary Regulations 2017

**Prepared by**

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**Members of the Disciplinary Committee**

**30 March 2022**



**engineering**  
**new zealand**  
Institute of Engineering Professionals

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# EXECUTIVE SUMMARY

1. Mike Wilton, a Chartered Member of Engineering New Zealand, prepared an engineering report for his client who is the vendor of the property subject to this dispute. The vendor was in dispute with the complainant over repairs the vendor had carried out on the complainant's driveway. Mr Wilton's report was used by the vendor as evidence in a Disputes Tribunal hearing about the driveway repairs.
2. The complainant was concerned the report contained inaccuracies, specifically, that the report implied Mr Wilton had visited their property and included a signature of an apparent reviewing engineer. It has since been established that Mr Wilton did not visit the property, and Mr Wilton's use of the other engineer's signature was unauthorised.
3. Having considered the matter following the disciplinary hearing held on 17 June 2021, we have found that the engineering services provided by Mr Wilton did not meet the standard expected of a Chartered Member of Engineering New Zealand. The complaint is upheld.



# INFORMATION GATHERED

## DRIVEWAY DISPUTE

13. The complainant purchased a property in Christchurch sometime in June 2017. The driveway at the property was reportedly damaged in the Canterbury Earthquake Sequence (**CES**). A building inspection company (the **inspection company**) had assessed the damage to the driveway in February 2017 and identified that a “couple of concrete panels of the drive were proud by about 15 mm.” The complainant said the vendor agreed this issue would be repaired as a condition of settlement.

14. The inspection company assessed the property again on 6 July 2017 and found:

*...Some work has commenced, however it is worse than the initial problem and the new concrete has not been coloured to match the rest of the drive. Again, the workmanship is sub-standard.*

*A much smaller area of concrete has been re-laid, rather than the whole panel that was proud. The drive has been patched and it has ruined the aesthetic appeal of the front of the house.*

15. The complainant brought proceedings against the vendor in the Disputes Tribunal. In a hearing at the Disputes Tribunal on 6 December 2018, the complainant claimed the repairs were uneven, shoddy, and substandard on completion.

16. In the second stage of the hearing on 6 December 2019, the vendor produced Mr Wilton’s report.

17. The report begins by stating “Inspection of the driveway at the above address reveals...” before making several observations about the condition of the driveway. The report then goes on to state:

*A new section of driveway was constructed in May 2017 at the time of sale as a Condition of Settlement. The new section was constructed on compacted hardfill. The new concrete is reinforced & is 100 mm thick (see attached photo).*

18. Mr Wilton’s report observed that since the change of ownership of the property in May 2017 the complainant had removed roses that had been planted in the central area between the two sections of the driveway. A high planter box had also been constructed on the right-hand side of the driveway. The report stated:

*Both of these operations involved Excavation which could weaken the edge of the concrete of the drive. Furthermore the areas have been irrigated which can weaken the ground under the edge of the driveway especially with excessive watering.*

*There is also a possibility that visitors or people just turning around on the driveway could now run over the Grassed area (previously protected by roses) & put pressure on the edge of the driveway slab causing it to crack.*

19. The report concluded “We do not consider your actions repairing a minor area of slab are anyway at fault to the current problems as shown in photos 4, 5 & 6”.

## MIKE WILTON CONSULTING REPORT

### Engagement and assessment

20. Mr Wilton issued a report on 10 October 2018. We do not have any evidence of Mr Wilton's engagement with the vendor, beyond Mr Wilton's recounted conversations. We understand that Mr Wilton was engaged to provide professional advice on the disputed driveway work carried out by a construction company owned by the vendor.
21. Mr Wilton said the vendor advised him the inspection company inspected the driveway before the settlement day and found one panel was slightly lifted. Mr Wilton said the vendor advised him that this was done on the settlement day and checked by the same inspector.
22. The vendor also advised Mr Wilton there had been no complaints from the complainant before or immediately after the settlement.
23. Mr Wilton said he was aware the area of repair prior to the sale had now become defective. He noted that having not seen the preparation and compaction of the hardfill under the repaired concrete, he was not in a position to confirm if the repair was satisfactory in his report.
24. Mr Wilton said the only point he was able to make in the vendor's defence was that maybe some construction vehicles or excessive watering nearby had damaged the driveway since the property was purchased. He noted construction vehicles would have been necessary during the construction of the raised garden beds adjacent to the driveway.

### Discussions about visiting the site

25. The report does not state the format of the inspection carried out, specifically, whether Mr Wilton visited the property prior to issuing the report. The complainant considered the report was misleading because it implied he had visited the site, when he had not.
26. The complainant told Engineering New Zealand that during two different phone calls with Mr Wilton on 6 and 13 November 2018, Mr Wilton told them that he did not visit the property and that he felt he had been misled by the vendor. The complainant said Mr Wilton offered to write to them by the end of the week retracting his report. However, leading up to the hearing, the complainant said Mr Wilton avoided calls and made himself unavailable to be called to the Disputes Tribunal to give evidence of his report.
27. Mr Wilton confirmed with Engineering New Zealand that he had not visited the property and said he had relied on photographs provided by the vendor. He said he regretted not going to the property but did not believe his report misled anyone. He noted that when he was asked by the complainant if he had been to the property, he advised them that he had not, and told the complainant he had relied on photographs of when the driveway repair work had been done.
28. Mr Wilton said that the vendor advised him that the complainant did not want the vendor near the property, therefore, he did not consider it was appropriate to carry out a site visit.
29. Mr Wilton said he was not invited to attend the Disputes Tribunal hearing by either party and that had he been asked to attend the hearing he would have. In his response to Engineering New Zealand he said:

*I do not believe that my report was necessary to withdraw just because I had not been to the site, I established from the photos that the repair appeared to have been done well except the colour did not match. This would be obvious for the disputes tribunal [sic] adjudicator and obviously a point of dissatisfaction for the new owner...*

## Reviewer's signature

30. Mr Wilton's report included a signature by another engineer, Mr Y.

31. When contacted by Engineering New Zealand, Mr Y said he could not recall the report. After checking his records, he confirmed on 5 July 2019 that he had no knowledge of this report or the property. He said he had reviewed work for Mr Wilton in the past, but not for about a year (some months before the relevant report was written).

32. On 12 July 2019 Mr Wilton wrote:

*My inclusion of [Mr Y's] signature was a mistake. I confirm he knew nothing about the job and therefore his signature should not have been on the report. I have used [Mr Y's] before in assisting me with Projects and signing PS1s however with this report there was no need for him to be included and it was included in error. I have checked documentation on other Projects and found this to be a "one off Error" which I take full responsibility for.*

## THE HEARING

33. The complainant did not attend the hearing or provide written submissions to us before the hearing.

34. At the hearing, we asked Mr Wilton if he wanted to comment on his written submissions or provide any further information for the Committee to take into consideration in their determination of the complaint.

35. In responding to our question, Mr Wilton said the complainant brought a claim against him in the Disputes Tribunal, stating that his report adversely affected the outcome at the Disputes Tribunal proceeding against the vendor regarding the driveway repairs. Mr Wilton said that when the complainant was advised by the Disputes Tribunal they would not be compensated because there was no evidence to support their claims, they threatened legal action against him. Mr Wilton acknowledged their complaints are fair because the report was not balanced. However, he noted the past three years have been very stressful for him and he has lost other jobs trying to resolve the matter.

36. In response to questions by the Disciplinary Committee (**the Committee**) regarding his relationship with Mr Y, Mr Wilton said they had worked together for five years in a previous position of employment at a different engineering firm. Mr Wilton said he and Mr Y kept in contact, and Mr Y would assist him with reviewing and advising on work matters. Mr Wilton estimated that Mr Y had probably reviewed about 10 or 12 reports for him in the past.

37. The Committee asked questions about the process Mr Wilton would go through with Mr Y to sign off on his report. Mr Wilton said, "I didn't do many of these sorts of reports as such". He said sometimes he would just request technical advice or assistance from Mr Y, rather than a full review. Where Mr Y's signature was required for a review of this type, Mr Wilton said he would provide Mr Y with the document and ask him to sign it.

38. Mr Wilton said on this occasion he did not send the report to Mr Y. He had a letter from a previous job with Mr Y's signature on it, which he copied and pasted onto the report by mistake. He said he did it in haste because he had been told by the vendor that the Disputes Tribunal hearing was the next day. Mr Wilton said he didn't realise his error until about two weeks later. He said when he realised his error, he did not tell anyone.

39. The Committee asked questions about his relationship with the vendor. Mr Wilton responded that he had dealt with the vendor's building company for about three years and that he had worked with the vendor on about six projects. Mr Wilton said his relationship with the vendor was a professional one and that they were not friends outside of business.

40. In response to further questions by the Committee, Mr Wilton said this specific engagement was between himself and the vendor personally, and not the building company. Mr Wilton said he was told the Disputes Tribunal hearing was sometime that week. In response to a question by the Committee, Mr Wilton said he understood he was engaged by the vendor to provide an expert witness statement as part of the Disputes Tribunal process.

41. Mr Wilton told the Committee that he would not take on jobs in the future that involved this type of time pressure. He said he would visit the site himself and ensure any signatures used on the report were correct.

## DISCUSSION

### RELEVANT STANDARDS

42. The Engineering New Zealand Code of Ethical Conduct states that engineers must behave appropriately.

*In performing, or in connection with your engineering activities, you*

*must:*

*act with honesty, objectivity and integrity; and*

*treat people with respect and courtesy.<sup>1</sup>*

43. The IPENZ<sup>2</sup> Practice Note regarding ethical obligations (current at the time of the behaviour complained of) states that:<sup>3</sup>

*As professionals, Members are required to behave appropriately. This means being honest and objective, demonstrating integrity in their dealings, and treating people fairly and with respect. This obligation covers all professional relationships that a Member might have in all areas of their engineering activities. These include relationships with clients, colleagues, project team members and all other professionals and project contributors. It also applies to all communications whether face-to-face encounters, phone conversations (including voicemails) or in writing (including all forms of digital media). Even in circumstances where Members experience poor or inappropriate behaviour from another person in the course of their professional activities, they must endeavour to maintain their personal professionalism.*

### THE DISCIPLINARY COMMITTEE'S ROLE

44. Professional disciplinary processes primarily exist to protect the public, uphold professional standards, and maintain public confidence in the profession and its regulation. They do this by ensuring that members of the profession adhere to certain universal (or accepted) professional standards.<sup>4</sup>

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<sup>1</sup> Engineering New Zealand Code of Ethical Conduct, cl 5.

<sup>2</sup> On 1 October 2017 IPENZ changed its trading name to Engineering New Zealand.

<sup>3</sup> IPENZ Practice Note 8: Engineers and Ethical Obligations (version 2, 2016).

<sup>4</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC).



45. The role of the Committee in the disciplinary process is to consider whether Mr Wilton has acted in accordance with accepted professional standards and, if not, whether there are grounds for disciplining him in accordance with the Engineering New Zealand Rules and Disciplinary Regulations.<sup>5</sup>

## THE LEGAL TEST

46. To determine whether Mr Wilton breached the Code of Ethical Conduct, we must consider whether Mr Wilton acted in accordance with acceptable professional standards. That is, whether he acted in accordance with what a reasonable body of his peers would have done in the same situation.

47. The assessment of whether an engineer has acted in accordance with accepted standards may be informed by whether reasonable members of the public would “consider such an act or omission, if acceptable to the profession, were to lower the standard of that profession in the eyes of the public”.<sup>6</sup>

48. If the evidence is that Mr Wilton acted in accordance with accepted standards, then we will dismiss the complaint. If the evidence is that Mr Wilton did not act in accordance with accepted standards, then we will uphold the complaint. Where the behaviour meets this criterion, we must consider whether the conduct “falls seriously short of accepted conduct” before imposing a disciplinary sanction.<sup>7</sup>

49. This means that the matter for the Committee to decide in this case is whether the actions of Mr Wilton, as identified in the complaint, met the standard to be reasonably expected of a Chartered Member of Engineering New Zealand.

## ANALYSIS

### Factual findings

50. The series of events which gave rise to the complaint are largely undisputed.

51. The facts as we have found them are that:

- Mr Wilton prepared the report which he knew was intended to be used as evidence in a Disputes Tribunal proceeding between his client and the complainant.
- Mr Wilton did not visit the property to carry out an inspection, either before or after the repairs were carried out.
- The engineer whose signature was included on the report, Mr Y, did not authorise Mr Wilton’s attachment of his signature on the report and had no knowledge of the engagement.

### Code of Ethical Conduct

52. The Code of Ethical Conduct places certain obligations on Mr Wilton as a Chartered Member of Engineering New Zealand. This includes the obligation to behave appropriately. Specifically, in performing, or in connection with his engineering activities, Mr Wilton must act with honesty, objectivity, and integrity.

53. Engineers may be asked to provide a professional opinion in the context of a dispute about work within their expertise. In these circumstances engineers are expected to give an objective opinion based on

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<sup>5</sup> When referring to the Rules or Disciplinary Regulations, we refer to the Engineering New Zealand Rules and the accompanying Disciplinary Regulations that were in place at the relevant time.

<sup>6</sup> *Robinson v RA* (10 July 2015, *Appeal Ruling #21*) Chartered Professional Engineers Council. Available at: <http://www.cpec.org.nz/appeal-rulings/appeal-21-10-july-2015-robinson-v-ra>.

<sup>7</sup> *Ibid.*

their own investigation, and their professional judgement and expertise. As a Chartered Member of Engineering New Zealand, Mr Wilton also has a responsibility to ensure that the documents he prepares and signs are accurate and not misleading.

### **Misleading statements in report**

54. It is undisputed that Mr Wilton had not been to the property to inspect the driveway at any stage of the repairs, and that he solely relied on photographs provided by the vendor in preparing his report. Despite this, Mr Wilton's report concluded that the repairs were not at fault for the driveway defects.

55. Regarding this matter, the Investigating Committee stated:

*The question of whether [the vendor's] repair work caused the current defects in the driveway was a disputed fact. We therefore consider it was inappropriate for Mr Wilton to conclude that his client was not at fault for the work, especially given that he had never seen the site in person, either before or after the works.*

56. We agree with the Investigating Committee, that this was not a reasonable statement to make considering the level of investigation carried out. It raises concerns about Mr Wilton's objectivity when he prepared the report.

57. In our view, Mr Wilton's failure to acknowledge the source of the photographs attached to the report, and that he had not visited the site, created uncertainty around the circumstances in which the report was prepared. We consider that a reasonable engineer in Mr Wilton's position, knowing that his report would be used as evidence in a Disputes Tribunal proceeding, would have taken extra care to ensure his report's accuracy.

58. Mr Wilton has said his report was prepared under tight timeframes, with the Disputes Tribunal hearing being held that same week. In those circumstances, if he was unable to find time to visit the site, he should have been explicit in his report that it was based solely on photographs and information provided by his client.

59. We find that Mr Wilton has not acted in accordance with accepted standards. He prepared a report that implied he had visited the site when he had not. The wording "Inspection of the driveway at the above address reveals..." is unclear at best and creates an impression that a physical inspection was undertaken.

60. The report made unsupported statements about who was or was not at fault for the driveway defects, and this information was relied upon by participants in the Disputes Tribunal proceeding. We have not been provided with evidence to support the complainant's claims that the report influenced the outcome of the Disputes Tribunal proceeding. Nonetheless, Mr Wilton's actions, irrespective of any consequences, if condoned, would be likely to lower the standing of the profession in the eyes of the public.

### **Unauthorised use of another engineer's signature**

61. The use of another engineer's signature in the report without that engineer's knowledge is also of significant concern. It is undisputed that Mr Y did not authorise the attachment of his signature on the report and had no knowledge of the engagement. In response to questions by the Committee querying how he came to apply another engineer's name and signature to a report, Mr Wilton replied that he had an old letter with Mr Y's signature on it, which he mistakenly applied to the report for the vendor. Mr Wilton said he realised his mistake about two weeks later but did not advise anyone of his error.

62. Although Mr Wilton has accepted responsibility for this error and apologised for his actions, we can see no reason why Mr Wilton would have believed he had engaged Mr Y or that he had Mr Y's authority to attach his signature onto the report. Mr Wilton told the Committee that it had been about a year since he had engaged Mr Y in this capacity. He also acknowledged that Mr Y had not authorised Mr Wilton to use an electronic signature in the past. At the hearing, Mr Wilton explained that the usual process for getting work signed by Mr Y is that he would provide the document to Mr Y to sign and return to him.
63. We do not make a finding of fact that Mr Wilton intended to attach Mr Y's signature on the report without his knowledge. However, regardless of what Mr Wilton's intention was, Mr Wilton incorrectly stated in his report that Mr Y had reviewed the report. Mr Wilton then copied Mr Y's signature on the report without his knowledge or consent. It will never be appropriate to copy another engineer's signature on a report without their knowledge or consent. We consider that Mr Wilton's actions are a significant departure from expected standards.
64. At the hearing, Mr Wilton advised the Disciplinary Committee that he was under a lot of pressure from the vendor to prepare the report immediately because the hearing was in a few days. It is Mr Wilton's responsibility as a professional to manage his workflow, and not to undertake work that may compromise his ability to carry out engineering services in accordance with his ethical and professional obligations. We note that Mr Wilton had an opportunity to correct his mistake when he realised his error about two weeks later. However, Mr Wilton did not advise Mr Y or anyone of the incident once he had realised his mistake and we have found no evidence that any steps were taken to remedy his mistakes.
65. The Committee was disappointed that Mr Wilton did not provide any evidence that he had improved his quality assurance and document procedures. We strongly encourage Mr Wilton reflect on how the circumstances of this complaint arose and consider what processes could be implemented to prevent a similar occurrence happening in the future.

## DECISION

66. Engineering New Zealand may make an order for discipline if it is satisfied that a member of Engineering New Zealand has breached their obligations under Rule 4 of the Engineering New Zealand Rules, which includes the obligations sets out in the Code of Ethical Conduct.
67. Our focus in this case is whether Mr Wilton behaved appropriately, in accordance with his obligations under Rule 4 of the Engineering New Zealand Rules and the Code of Ethical Conduct.
68. In respect of Mr Wilton's actions in preparing an inaccurate and misleading report, that included an engineer's signature on it without that engineer's permission, we consider Mr Wilton has acted inappropriately. We therefore conclude that Mr Wilton's conduct has met the grounds for discipline under Rule 10 of the Engineering New Zealand Rules.
69. Having considered all the evidence, we have decided to uphold the complaint about Mr Wilton.
70. Having found Mr Wilton in breach of Rule 4 of the Engineering New Zealand Rules, we need to determine what orders, if any, should be made against him. There are a range of sanctions available to us in respect of Mr Wilton's membership with Engineering New Zealand under Engineering New Zealand's Disciplinary Regulation 17(3).

# ORDERS

71. On 15 November 2021 a substantive decision was sent to the parties and they were invited to make submissions on penalties. The complainant did not make any submissions and Mr Wilton provided his submissions on 6 December 2021.

## RELEVANT LAW

72. In *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand*<sup>8</sup> the High Court outlined a number of principles to be applied by the Health Practitioners Disciplinary Tribunal in determining the appropriate penalty to impose in disciplinary proceedings. The High Court determined that a disciplinary penalty must:

- protect the public (including through deterrence of other practitioners from engaging in similar conduct);
- set and maintain professional standards;
- where appropriate, rehabilitate the practitioner back to the profession;
- be comparable with penalties imposed on practitioners in similar circumstances;
- reflect the seriousness of the practitioner's conduct, in light of the range of penalties available;
- be the least restrictive penalty that can reasonably be imposed in the circumstances; and
- be fair, reasonable, and proportionate in the circumstances.

73. The High Court also stated that while penalty may have the effect of punishing a practitioner, punishment is not a necessary focus for the Tribunal in determining penalty.

74. The principles in *Roberts* are broadly applicable to our power to make disciplinary orders under Rule 10 of the Engineering New Zealand Rules and they are the principles we rely on when considering the appropriate penalty orders in this case.

75. The principles have general application to professional disciplinary proceedings in the light of the Supreme Court's decision in *Z v Dental Complaints Assessment Committee*.<sup>9</sup> In *Z*, the Supreme Court makes general statements about the purposes of professional disciplinary proceedings, noting that such proceedings are designed to:

*Ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.*

76. This is consistent with *Roberts*, as *Roberts* lists public protection and the maintenance of professional standards as the foremost considerations relevant to penalty.

77. The Supreme Court in *Z v Dental Complaints Assessment Committee*<sup>10</sup> also states that while professional disciplinary proceedings are not intended to punish practitioners, they may have a punitive effect in

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<sup>8</sup> [2012] NZHC 3354.

<sup>9</sup> [2008] NZSC 55.

<sup>10</sup> *Ibid.*

practice. This is also consistent with the principles set out in *Roberts*, in that the penalty must be the least restrictive penalty and that punishment is not a necessary focus of a disciplinary penalty.

78. It is appropriate that disciplinary penalties mark the profession's condemnation of the relevant conduct, noting that to do otherwise would not be consistent with the purpose of professional disciplinary processes.

## MR WILTON'S SUBMISSIONS

79. Mr Wilton provided submissions regarding clause 17(3) of the Engineering New Zealand Disciplinary Regulations. Mr Wilton did not address the available penalties specifically, but requested several matters be given consideration by the Committee in reaching their decision.

80. Mr Wilton apologised again for his actions. He submitted this was a result of taking on too much work. He noted he has taken on two young staff who he dedicated much of his time to. Mr Wilton's submissions acknowledged that this is no excuse for not being careful with his own work but said "it can divert your concentration."

81. Mr Wilton submitted he has young staff who rely on the firm to obtain extensions to their work visas.

82. He also submitted he has carried out over 6000 engineering projects since starting his own consulting business in 1999 and had never had this situation before.

## DISCUSSION

83. The public places significant trust in engineers to self-regulate. As a professional, an engineer must take responsibility for acting ethically. The actions of an individual engineer also play an important role in the way in which the profession is viewed by the public. The Committee has found that Mr Wilton's actions departed from what could be expected of a reasonable engineer, and this departure is serious.

84. In our view, Mr Wilton's actions, if condoned, would undermine the public's trust in the engineering profession and reduce the public confidence in members of Engineering New Zealand. Mr Wilton's actions are serious, and our orders need to reflect our view of the seriousness of the breach.

## Membership

85. In respect of orders relating to membership with Engineering New Zealand, we may order an Engineering New Zealand member be:<sup>11</sup>

- removed from membership;
- suspended from membership for any period;
- suspended from membership until such time as the Engineering New Zealand member has fulfilled requirements for professional development as has been specified by the Committee;
- suspended from membership for a period of time if, by a prescribed date, the member fails to fulfil requirements for professional development as has been specified by the Committee;

86. Mr Wilton is a Chartered Member of Engineering New Zealand and all the options outlined above are open to the Committee to consider.

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<sup>11</sup> Engineering New Zealand Disciplinary Regulations, reg 17(3)(a) – (d).

87. In *A v Professional Conduct Committee*<sup>12</sup> the High Court said, in relation to a decision to cancel or suspend a professionals' registration, that four points could be expressly and a fifth impliedly derived from the authorities:

*First, the primary purpose of cancelling or suspending registration is to protect the public, but that 'inevitably imports some punitive element.' Secondly, to cancel is more punitive than to suspend and the choice between the two turns on what is proportionate. Thirdly, to suspend implies the conclusion that cancellation would have been disproportionate. Fourthly, suspension is most apt where there is 'some condition affecting the practitioner's fitness to practice which may or may not be amendable to cure'. Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish.*

88. In the recent decision of *Attorney-General v Institution of Professional Engineers New Zealand Incorporated and Reay*<sup>13</sup> the High Court set out the standard the public expects when an engineer is a member of Engineering New Zealand:

*...membership of a professional body, such as the Institution, can confer a status that signals trustworthiness to the public. This status reflects the value that society places upon the training and skill acquired by members and upon the Institution's ability to maintain the standards of its members through ongoing education, training and disciplinary processes.*

89. The Court also went on to set out the public expectation of Engineering New Zealand's role in maintaining the standard of the profession:<sup>14</sup>

*There is, however, a counterbalance to the public trust that is reposed in members of professional bodies such as the Institution. That counterbalance is the public expectation that the Institution will tightly regulate admission into its ranks and ensure members maintain high professional standards. The public expects that if a person is to be afforded the status of membership of the Institution, then those individuals will maintain professional standards and that those standards will be enforced by the Institution through, if necessary, disciplinary proceedings. If a professional body, such as the Institution, wishes to maintain that public trust, and the value associated with membership status, then it must act in accordance with this expectation.*

90. After considering the principles set out by the High Court in *Roberts* (set out above) we consider this case does not warrant the removal or suspension of Mr Wilton's registration as a Chartered Member of Engineering New Zealand. The primary purpose of cancelling or suspending registration is protection of the public. Although we have upheld this complaint, we consider that Mr Wilton's practice does not pose a risk to the public such that we would need to remove or suspend him.

91. The Committee has considered Mr Wilton's position as a director in a small consultancy and his responsibility as a mentor to junior staff. We are mindful that an engineer suspended from membership is deprived of the peer support and other collegial aspects of belonging to a professional body. In our view, this would be a disservice to Mr Wilton and his employees. The Committee considers that the appropriate approach is for conditions to be imposed on Mr Wilton's membership to ensure he receives the assistance and professional development necessary.

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<sup>12</sup> *A v Professional Conduct Committee* [2008] NZHC 1387 at [81].

<sup>13</sup> [2018] NZHC 3211 at [55].

<sup>14</sup> *Ibid* at [56].

92. While Mr Wilton admitted to the conduct and has apologised, the Committee remains concerned that he lacks insight into the severity of his actions. We note that he has not expressed to the Committee how he has or intends on improving his practice or office procedures going forward. It is on this basis that the Committee considers that supervision for a period of one year is necessary for rehabilitation and to reinforce the standards of, and public trust in, the engineering profession. Mr Wilton will complete professional development, particularly focusing on professional ethics and office management, to the satisfaction of his supervisor who will report back to Engineering New Zealand quarterly. Mr Wilton must also complete the professional ethics course hosted by Engineering New Zealand to satisfy the professional development requirement. Mr Wilton will need to pay for any costs incurred in order to complete the term of supervision and professional development.

93. At the end of the year's supervision, Mr Wilton will provide evidence to Engineering New Zealand that he has met the conditions of his supervision and how this will be reflected in his future engineering practice. Mr Wilton's supervisor will also provide a recommendation to Engineering New Zealand as to whether Mr Wilton has fulfilled the requirements of our order.

94. Mr Wilton's conduct raises serious questions about his ethics and professionalism and his actions, if condoned, would have a significant negative effect on the value and trust society places upon members of Engineering New Zealand. We wish to emphasise the educative aspect to our orders while acknowledging that Mr Wilton's actions fell very far short of what would reasonably be expected of a Chartered Member of Engineering New Zealand. Our orders are forward-focused and will allow Engineering New Zealand to monitor Mr Wilton's professional development.

### **Fine**

95. We may order that the engineer pay a fine to Engineering New Zealand. Under the Disciplinary Regulations in force at the time the complaint was raised, the maximum fine which may be ordered against a member is \$5,000.

96. Mr Wilton's behaviour fell well below the standard expected of a Chartered Member of Engineering New Zealand. It is important that Engineering New Zealand strongly condemns this behaviour, and that this condemnation is reflected in the penalty ordered.

97. In respect of the complaint, we order Mr Wilton to pay a fine of \$3,500. The fine is set at the higher end of the scale to reflect the seriousness of Mr Wilton's conduct. While we cannot establish that Mr Wilton's inclusion of the unauthorised signature was intentional, he had several opportunities to correct his mistake when he noticed it a few days later and failed to take any action. We find this particularly concerning because Mr Wilton knew the report would be used as evidence in a Disputes Tribunal proceeding. This behaviour by a Chartered Member of Engineering New Zealand is unprofessional.

### **Costs**

98. We may order that the engineer pay costs and expenses of, and incidental to, the inquiry by Engineering New Zealand. We note the ordering of payment of costs is not in the nature of a penalty.

99. When ordering costs, it is generally accepted the normal approach is to start with a 50% contribution. That, however, is a starting point and other factors may be considered to reduce or mitigate that portion. Those factors include any co-operation from or attendance at the hearing by the engineer, and consistency with the level of costs in previous decisions. The balance of costs after the orders must be met by the profession itself.

100. In respect of the medical profession, the Court in *Vatsyayann v PCC* said:
- [P]rofessional groups should not be expected to bear all the costs of a disciplinary regime and that members of the profession who appeared on disciplinary charges should make a proper contribution towards the costs of the inquiry and a hearing; that costs are not punitive; that the practitioner's means, if known, are to be considered; that a practitioner has a right to defend [themselves] and should not be deterred by the risk of a costs order; and that in a general way 50% of reasonable costs is a guide to an appropriate costs order subject to a discretion to adjust upwards or downwards.*
101. Further, in *O'Connor v Preliminary Proceedings Committee* the High Court stated:<sup>15</sup>
- It is a notorious fact that prosecutions in the hands of professional bodies, usually pursuant to statutory powers, are very costly and time consuming to those bodies and such knowledge is widespread within the professions so controlled. So as to alleviate the burden of the costs on the professional members as a whole the legislature had empowered the different bodies to impose orders for costs. They are nearly always substantial when the charges brought are successful and misconduct admitted, or found.*
102. We are cognisant of Mr Wilton's cooperation with the investigation to date but consider there are no compelling factors to warrant departure from the starting point of 50% of the costs incurred by Engineering New Zealand.

## **Naming**

103. In respect of membership with Engineering New Zealand, we may order the member be named, the order against the member be stated and the nature of the breach described in the official journal of the Institution of Professional Engineers New Zealand or publicised in any other manner as may be prescribed by us.<sup>16</sup>
104. Naming is the starting point and will only be inappropriate in a limited number of circumstances where the engineer's privacy outweighs the public interest. In *Y v Attorney-General*,<sup>17</sup> the Court of Appeal explored the principles that should guide the suppression of the names of parties, witnesses, or particulars in the civil context. The starting point is the principle of open justice.<sup>18</sup>
105. The question is then, do the circumstances justify an exception to the principle of open justice. In a professional disciplinary context, a practitioner is "likely to find it difficult to advance anything that displaces the presumption in favour of disclosure".<sup>19</sup> This is because the practitioner's existing and prospective clients have an interest in knowing details of the conduct, as this allows them to make an informed decision about the practitioner's services.<sup>20</sup>
106. Consistent with these precedents, the starting point is that naming of engineers subject to a disciplinary order is the normal expectation. This is because public protection is at the heart of disciplinary processes, and naming supports openness, transparency, and accountability.

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<sup>15</sup> *O'Connor v Preliminary Proceedings Committee HC Wellington AP 280/89, 23 August 1990 at [13] per Jeffries J.*

<sup>16</sup> Clause 17(3)(h) of the Regulations

<sup>17</sup> [2016] NZCA 474.

<sup>18</sup> *Ibid* at [25].

<sup>19</sup> *Ibid* at [32].

<sup>20</sup> *Ibid*.



107. Mr Wilton has chosen not to make a submission to us on this point. After considering the above factors, the Committee has no factual material to consider justifying the departure from the fundamental principle of naming. In this case, given the seriousness of Mr Wilton's departure from expected standards, and the absence of evidence of improvement of individual and company-wide practices, we consider it appropriate for Mr Wilton to be named.

## ORDERS

108. We make the following orders under clause 10.5 of the Engineering New Zealand Rules and clause 17(3) of the Disciplinary Regulations:

- a. Mr Wilton must undertake further professional development in office management and professional ethics at his own cost. This must be completed to the satisfaction of a supervising engineer approved by Engineering New Zealand. If Mr Wilton does not complete his supervision and professional development within one year, his membership will be suspended for one year;
- b. a fine of \$3,500;
- c. payment of \$6,430 towards the costs incurred by Engineering New Zealand in inquiring into Mr Wilton's conduct (which is 50% of Engineering New Zealand's total costs of \$12,860); and
- d. publish and name Mr Wilton in our final decision of this complaint on its website and in a public press release.



Andrew McMenemy CPEng CMEngNZ

**Chair of the Disciplinary Committee**