

26 January 2026

Accompanying note to Disciplinary Committee Decision of 15 July 2024

The Respondent engineer appealed the Disciplinary Committee's Decision of 15 July 2024 to the Chartered Professional Engineers Council.

On 17 December 2025 the Chartered Professional Engineers Council ordered:

We order when the Decision is published it does not name or otherwise identify the Appellant.

Parts of the Disciplinary Committee Decision have been redacted following this order.

At their request, the Complainant's name has been redacted too.

Otherwise, the Disciplinary Committee's Decision remains unchanged.

DISCIPLINARY COMMITTEE DECISION COMPLAINT ABOUT

CONFIDENTIAL TO THE PARTIES

In accordance with:

Chartered Professional Engineers of New Zealand Act 2002
Chartered Professional Engineers of New Zealand Rules (No 2) 2002
Engineering New Zealand Rules 2017
Engineering New Zealand Disciplinary Regulations 2017
Engineering New Zealand Code of Ethical Conduct 2016

Prepared by

Jenny Culliford FEngNZ (Ret.)
Chair of Disciplinary Committee

Anita Killeen, Barrister & Solicitor of the High Court of New Zealand
David Naulls, nominated by Consumer NZ
Members of the Disciplinary Committee

15 July 2024

PRIVATE AND CONFIDENTIAL

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SUMMARY

1. Respondent (R) is a mechanical engineer and was the sole shareholder and director of at the relevant time.
2. KiwiRail is the state-owned enterprise responsible for rail operations in New Zealand. KiwiRail relies on third-party certifying engineers, who are approved by KiwiRail, to certify hi-rail vehicles for use on the railway network.¹
3. Complainant (C) is an employee of KiwiRail. At the time C was responsible for approving engineers to certify that high-rail vehicles owned by KiwiRail, and their contractors, comply with KiwiRail's license requirements under the Railways Act 2005. C was also responsible for deciding whether a rail vehicle, including a hi-rail vehicle, could be admitted to the National Rail System.
4. In December 2018 C raised concerns with Engineering New Zealand about R. C made two telephone calls to R in October 2018, and it is the content of these calls that gave rise to C's concerns.
5. During the calls, C sought to assess R's suitability to certify hi-rail conversions on behalf of KiwiRail. C became concerned:
 - R did not disclose he had been removed from Waka Kotahi New Zealand Transport Agency's list of Heavy Vehicle Specialist Certifiers; and
 - R was not open and honest about his relationship with Waka Kotahi New Zealand Transport Agency.

DECISION

6. Having considered the matter, following a hearing held on 24 May 2023, the Disciplinary Committee found R in breach of his obligations as a Chartered Professional Engineer and a Chartered Member of Engineering New Zealand by failing to act with the objectivity and integrity expected of a Chartered Professional Engineer and Chartered Member of Engineering New Zealand.
7. The Complaint is upheld.

BACKGROUND

THE COMPLAINT

8. On 17 December 2018 C raised concerns with Engineering New Zealand arising from two telephone conversations between C and R (the Complaint).
9. R is the Director of
10. C telephoned R twice regarding R's suitability to certify hi-rail vehicles for KiwiRail. It is the content of these calls that gave rise to C's concerns.
11. C complained R engaged with him in an unprofessional manner and misrepresented his professional abilities and status, both to him and on his company website.

¹ A road vehicle fitted with retractable rail trolleys such that it can be driven along the track and can also be driven on or off track at level crossings or other suitable places. <https://www.kiwirail.co.nz/glossary-of-terms>

12. [C] also complained [R] was not open and honest about the relationship [R] had with Waka Kotahi New Zealand Transport Agency (referred to interchangeably as **Waka Kotahi** and **NZTA**). Specifically, [C] considered that [R] should have been more forthcoming in disclosing that his Heavy Vehicle Specialist Certifier (**HVSC**) status had been revoked. He was also concerned in relation to reports he had heard of [R], and/or his staff, taking unauthorised materials into a Waka Kotahi exam. While [C] had no direct evidence of this, he considered that [R] should have offered to discuss this matter.

INITIAL INVESTIGATION

13. The concerns were first put to [R] by Engineering New Zealand on 8 August 2019. Samuel Moore, counsel for [R], responded on 16 December 2019 disputing all aspects of [C's] Complaint.
14. The Complaint was referred to an adjudicator to determine if it should be dismissed or referred for formal investigation.
15. On 18 May 2020 the Chair of Investigating Committees, Dr Carron Blom FEngNZ, was appointed as Adjudicator.
16. On 3 June 2020, Dr Blom referred part of the Complaint to an investigating committee for formal investigation and dismissed the other part, stating:
- *In respect of unprofessional behaviour and misleading statements, there are no grounds for dismissing the complaint. Therefore, on this count, it must be referred to an Investigating Committee.*
 - *In respect of the certification exam complaint, the complaint can be dismissed on the grounds that the complainant does not have a sufficient personal interest in the subject matter of the complaint to warrant further investigation.*

INVESTIGATING COMMITTEE

17. On 22 September 2020, an investigating committee was appointed to consider the Complaint and determine if it should be referred to a disciplinary committee. The members of the Investigating Committee were:
- Dr Wayne Stewart CPEng FEngNZ (Chair)
Mark Apeldoorn CPEng FEngNZ IntPE(NZ)
Dr Dirk Pons CPEng FEngNZ IntPE(NZ)
18. The Investigating Committee considered there were two aspects to [C's] Complaint:
- [R's] conduct was unprofessional in his initial failure to disclose the revocation of his HVSC status when [C] called him; and
 - [R] misrepresented his ability, certification authority, and/or professional status on his company's website.
19. After reviewing the evidence presented, the Investigating Committee considered their primary concern related to [R's] failure to disclose his revocation.
20. The Investigating Committee was of the view that [R's] standard of communication fell short of the professionalism reasonably expected of a Chartered Professional Engineer. Specifically, [R] failed to clearly communicate his individual or corporate authority to undertake the work. It considered this failure sufficiently grave for the matter to be referred to a disciplinary committee.

21. The second aspect of [C's] complaint, relating to misrepresentation, was dismissed under Rule 57(ba) of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 and clause 8(c) of the Engineering New Zealand Disciplinary Regulations 2017, on the basis that the alleged misconduct was insufficiently grave to warrant further investigation.

DISCIPLINARY COMMITTEE

22. On 31 October 2022, a disciplinary committee was appointed to consider the Complaint.
23. A hearing was held on 23 May 2023. The following parties attended the hearing:

Disciplinary Committee

Jenny Culliford FEngNZ (Ret.)

Chair

Anita Killeen

Member, Barrister and Solicitor

David Naulls

Member, nominated by Consumer New Zealand

Complainant

[C]

Respondent

[R]

Samuel Moore

Barrister and Solicitor

Engineering New Zealand

Liana Misa

Secretariat support, Legal Advisor

Wayne Stewart

Investigating Committee Representative

Observers

Izaak Sugrue

Engineering New Zealand

Laura Sturch

Engineering New Zealand

Jessica Palmer

Engineering New Zealand

24. [R] is both a Chartered Professional Engineer and a Chartered Member of Engineering New Zealand. Accordingly, our role is to consider the information before us relative to the Chartered Professional Engineers of New Zealand Act 2002 (the **CPEng Act**), the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 (the **CPEng Rules**), the Engineering New Zealand Rules 2017, the Engineering New Zealand Disciplinary Regulations 2017 (the **Regulations**), and the Code of Ethical Conduct 2016.

INFORMATION GATHERED

BACKGROUND

25. On 5 July 2018 [redacted], a provider of road/rail equipment, contacted [C] via email in relation to hi-rail conversions they were undertaking. [redacted] asked [C] if he would accept [R] as the certifier for the attachment of two second-hand rail modules to two new Hitachi excavators. In response to this query, [C] requested [R's] up-to-date CV for consideration. Instead, [R] provided [C] with a copy of his professional accreditations and pictures of equipment he had certified in the past.

26. [C] was aware [R] was no longer with his previous firm and had heard there may have been some issues between [R], or his firm, and NZTA over heavy vehicle certifications or exams for qualification for vehicle certification work.
27. [C] telephoned [R] on 10 October 2018 (**First Call**). During their telephone conversation, [C] recalls asking [R] if he or his staff members had had issues with NZTA and/or difficulties passing NZTA certifier exams, possibly around truck drawbars. During their conversation [R] denied having issues with NZTA.
28. Following this conversation, [C] made further general enquiries with others in the industry, and said he was told:
 - [R] had previously been subject to complaints about his heavy vehicle and elevating work platform (**EWP**) work.
 - Waka Kotahi revoked [R's] status as HVSC in 2012.
 - There may have been an issue involving [R] and/or his staff taking unauthorised materials into a Waka Kotahi exam room.
29. [C] telephoned [R] a second time on 25 October 2018 (**Second Call**) and asked him about what he had been told. [C] asked [R] directly if he had been revoked as a vehicle inspector. [R] confirmed that his authority as a HVSC was revoked in 2012 and said that he did not see this as an issue. [C] then advised [R] that he would not accept him as a third-party certifier of hi-rail vehicles for KiwiRail.
30. On 29 October 2018 [C] advised [R] he would not accept [R] as a certifier for hi-rail vehicles, or any form of rail work, because he had learned of [R's] revocation. [C] told [R] that [R's] responses to him a few days earlier regarding the hearsay concerns he had put to [R] were inconsistent with [R's] revocation.
31. Following his two telephone calls with [R], [C] complained to Engineering New Zealand in December 2018. [C's] complaint was that "[R] misrepresented his abilities and professional status to me and that his conduct around my enquiries to him was unprofessional."

Statutory Framework

32. KiwiRail are rail operators under the Railways Act 2005. KiwiRail's Hi-Rail Vehicle Code OM94001 (**Hi-rail Code**) sets out KiwiRail's responsibilities under the Railways Act:²

... The [Railways] Act requires all rail operators to hold a licence. A rail operator is a person who provides or operates a rail vehicle. A rail vehicle is any vehicle that runs on a railway line. A hi-rail vehicle is classed as a rail vehicle but only when it is on a railway line. To obtain a licence, a rail operator must have a 'safety case' approved by the NZ Transport Agency (NZTA). The safety case describes the rail operator's activities and how the operator will keep things safe. OM94001 (this code) is a part of KiwiRail's safety case.

Most contractors working for KiwiRail operate under KiwiRail's licence, so must comply with KiwiRail's safety case. KiwiRail is also the Access Provider under the Act. That is why KiwiRail has a particular interest to manage HRVs to ensure safety and ensure it complies with its licence. However, a hi-rail vehicle owner or operator remains entirely responsible for providing, maintaining and operating the vehicle to the requirements of this code, its certification conditions, maintenance and operating requirements.

² <https://www.kiwirail.co.nz/assets/Uploads/documents/Manuals/1faa89cc45/OM94001-Hi-Rail-Vehicle-Code-V4.pdf>

33. The certifying engineer's responsibilities under the Hi-Rail Code include *"adequacy of vehicle documentation such as risk assessment, key safety information and operating restrictions, maintenance regime, and the training and competency syllabus."*
34. The Hi-Rail Code defines a certifying engineer for hi-rail vehicles as *"a Chartered Professional Engineer NZ (CPEng) acceptable to KiwiRail who is independent of vehicle owner and the vehicle supplier/builder/manufacturer, or, other person acceptable to KiwiRail."*
35. [C] provided further information on KiwiRail's responsibilities as follows:
KiwiRail is involved three times over - as contract principle [sic], Access Provider and Network Controller (in terms of the Railways Act), and holder of the license[sic]/Safety Case (in terms of the Railways Act) under which hi-rail vehicles operate (when on rail).
36. At the time he made the Complaint to Engineering New Zealand, [C] was the KiwiRail employee responsible for approving third-party engineers to certify hi-rail vehicles owned by KiwiRail and its contractors. [C] was also responsible for deciding whether a rail vehicle, including a hi-rail vehicle, could be admitted to the National Rail System.

[R's] RESPONSE

37. Counsel for [R], Samuel Moore, provided a response to [C's] complaint on behalf of [R]. [R] said [C's] claims are unsubstantiated and he rejects them in their entirety. [R's] responses to [C's] specific concerns are set out below.
38. [R] confirmed Waka Kotahi revoked his heavy vehicle certification authority. [R] referred to an email from Waka Kotahi dated 8 November 2018 responding to a request by Engineering New Zealand's registrar, for the date and reasons for [R's] removal from the HVSC list. The email said:
Date of removal: 26/12/2012
Reasons: failed to comply with certain conditions of his appointment and with various Land Transport Rules.
39. [R] also referred to a decision of the Chartered Professional Engineers Council (CPEC) from 2012 that relates to the HVSC status issue. The complaint that eventually led to this CPEC hearing was about whether [R] had acted negligently and/or incompetently in his certification of a drawbar. Both the Registration Authority and CPEC dismissed the complaint.
40. [R] provided an excerpt from the decision:
We do not think that his [R's] process would tend to affect the good reputation and standing of Chartered Professional Engineers generally in the eyes of reasonable and responsible members of the public.
41. [R] cited this decision as evidence that his actions as a HVSC have no significance to his practice as a Chartered Professional Engineer.
42. [R] said he is experienced in the certification of the hi-rail vehicles and has certified the relevant type of machines (Hitachi excavators) for [] in the past.
43. [R] said he has recorded approximately 200 certificates of major inspections under his Chartered Professional Engineer authority. He further noted that at no stage have his clients or WorkSafe had an issue regarding his certifications and/or the compliance of his clients' machinery.
44. According to [R], [] has continued to engage [R] in a range of work, including issuing Health and Safety certifications, managing a major gantry crane installation in its new workshops, as well as certifying all hi-rail conversions for overseas clients. [] has also employed a former employee of [] as a HVSC.

45. [R] said he was willing to issue a formal apology to [C] and/or KiwiRail for failing to report the change in his status with Waka Kotahi.
46. In response to the Investigating Committee's provisional decision, [C] provided additional information, which is summarised below in paragraphs 48-50.
47. [R] said [] asked him to respond to the request from [C] for an up-to-date CV. [R] responded by detailing his current business activities and confirmed work associated with heavy vehicles undertaken by [] was performed by his business partner, []. He said [] had all the Waka Kotahi Heavy Vehicle Certification approvals required to undertake this work.
48. [R] also stated that when [C] spoke to him on 10 October 2018, the effectiveness of the communication may have been affected by the fact that [R] was driving at the time and accepted the call on the car's hands-free system. During this conversation, [R] recalled [C] saying that he had heard that [R] and his staff had had issues with Waka Kotahi and/or difficulties passing Waka Kotahi certifier exams, possibly around truck drawbars, and asked him whether there was any substance to it. [R's] response stated due to factors "*such as call quality/unclear voice and concentration on driving*" there may have been a misunderstanding as to what [C] was implying in his questions.
49. [C] accepts while there may have been a misunderstanding during the first phone call, he sought to clarify the status of his relationship with Waka Kotahi in the Second Call.

[C's] RESPONSE

50. Regarding the work that [R] has undertaken for [], including the claim that [R] has certified excavators for [] in the past, [C] does not consider this work to be relevant to the Complaint.
51. [C] expressed concern that the substance of his Complaint had not been addressed in [R's] responses.
52. After receiving the final written Investigating Committee decision, [C] expressed concerns to Engineering New Zealand that he had not been given the opportunity to respond to new material provided by [R] before its inclusion in the final decision. He requested that his concerns be passed on to the Disciplinary Committee.
53. [C] noted that the Investigating Committee's final decision contained a suggestion from [R] that there may have been difficulty in communication during the First Call on 10 October. [C] clarified that he was unaware of this claim before the Investigating Committee's final decision was released, and stated he does not agree with it. [C] said he recorded nothing in his notes about a difficulty in communicating, nor does he recall it.
54. Further, in the Investigating Committee's final decision, [R] claimed he sought to clarify his relationship with Waka Kotahi during the Second Call. [C] stated this clarification only occurred in response to the specific question put to him by [C] it was not a clarification initiated by [R] []

DISCIPLINARY HEARING

PRE-HEARING MATTERS

55. The parties were invited to make written submissions prior to the hearing.
56. Mr Moore sent submissions on behalf of [R]. He also provided a bundle of authorities, the Respondent's witness list, a witness statement for [REDACTED], and an affidavit sworn by [REDACTED] on 3 February 2022.
57. [C] did not make written submissions prior to the hearing. He made an oral submission during the hearing. This is summarised below.

[C]

58. We heard from [C] that when [REDACTED] asked if he would accept [R] as certifying engineer for some hi-rail equipment they were manufacturing, he requested a full CV for [C] as he was aware his circumstances may have changed. [C] said he had heard there may have been some issues between [R], or his firm, and NZTA over heavy vehicle certifications or exams for qualification for heavy vehicle certification work.
59. [C] told us that after receiving a booklet from [R] of copies of professional accreditations and pictures of various pieces of equipment that he had certified instead of a CV, he felt uneasy and telephoned [R] on 10 October 2018.
60. [C] said he told [R] that he had heard hearsay that he or his staff had had issues with NZTA and/or difficulties passing NZTA certifier exams possibly around truck drawbars and asked him whether there was any substance to it. [C] said [R's] response was that there were no issues; he didn't do transport. There were no issues with his qualifications, no issues around drawbars, no TSV³ issues. [C] said [R] went on to separate himself from the person to whom he had sold his previous company. [R] then asked [C] if he knew a particular person within KiwiRail for whom he was a pseudo-uncle.
61. [C] said that he was not comfortable with [R's] response, so he made further enquiries. He said he discovered that [R] had been subject to previous complaints about his heavy vehicle and elevated work platform work, that there had been an issue around [R] and staff members taking materials to an exam room, and that he had been revoked by NZTA as a vehicle inspector and inspecting organisation in 2012.
62. [C] said he then rang [R] again on 25 October 2018 and put what he had learned to him. He said [R's] response was that he didn't make more than one attempt at exams, but that was ten years ago. When [R] and staff members had arrived for an exam, conditions had changed so some of the group left. [C] said he asked [R] directly if he had been revoked as a vehicle inspector. [R] confirmed to [C] he had been revoked but didn't see it as an issue at all.
63. [C] told us that he was most uncomfortable professionally with what had transpired and sought advice from Engineering New Zealand thus starting the complaint process.

Responses to [C's] Submission

64. Counsel for [R] asked [C] if HVSC status was required for the certification work in question. [C] stated that while it was not a requirement of the Hi-Rail Code, most hi-rail

³ [REDACTED]

certifiers are also heavy vehicle certifiers as there is often cross-over in the work. Because [R's] HVSC status was revoked, [C] thought it also called into question [R's] ability to provide competent services in hi-rail vehicle certification.

65. We asked [C] why he would not accept [R] as a certifier for hi-rail vehicles given HVSC status was not required for this. [C] said that he considered [R] had misrepresented his abilities to him. It was a serious matter that he had been revoked as a certifier; however, during the First Call [R] was clear there had been no issues with NZTA.
66. Mr Moore went on to ask [C] if he considered that the cancellation or revocation may have had no bearing on [R's] competence or conduct, rather [R] may have no longer wanted to be certified and undertake that type of work. [C] stated his understanding was that [R] had his status revoked by NZTA, he did not resign or withdraw.
67. NZTA publishes a schedule of qualified HVSCs annually. [R] asked [C] if he checked this schedule to see if [R], or any of his employees, were on that list. [C] stated he had not, that he normally relied on the CVs of, and discussions with, individual engineers to determine their qualifications.
68. In response to questions from Mr Moore, [C] said he did not recall the particular words he used on the phone to [R] on 10 October 2018, but he did retain the notes he made during and immediately after the call.
69. We asked [C] what prompted him to call [R]. It was in response to [R] approaching him to ask if he would accept [R] as a certifier. At the time [R] approached him, [C] was aware [R's] circumstances had changed as he knew [R's] company had changed or been sold. As he was unsure of [R's] qualifications and standing at the time, he called [R] to establish this. Additionally, he had heard one or two disquieting things about [R] and wanted clarification.
70. [C] summarised this by saying he called [R] on 10 October 2018 to understand what his circumstances and his relationship with NZTA were.
71. [C] told us the reasons he was unhappy with [R's] responses were both subjective and objective. Subjectively, he was not happy with [R's] manner during the call. Objectively, [R's] responses "did not square" with what he was hearing elsewhere. He considered the matter was unresolved so made further enquiries.

The Issue of Call Quality

72. We asked [C] if it is his standard practice to make notes during calls and he confirmed it is. [C] said he has no recollection of any interference during the First Call, nor did he make a note to this effect. He was unaware of any issues [R] may have had relating to call quality until after the Investigating Committee released its final decision. [C] described [R's] demeanour as light and cheery and recalled no sense of urgency to terminate the call. He recalled [R] going into detail on the sale of his former company and remembers [R] enquiring about the person he knew at KiwiRail. He said the call lasted about ten minutes.
73. [C] said he had not noted any interference or hearing difficulties with the Second Call. He said he would have noted any issues and made a follow-up call if needed.
74. [C] told us that the nature of [R's] responses in the First Call suggested to him that [R] understood the questions he was putting to him. He noted that the call was prolonged by [R] talking about [R] and the person he knew in KiwiRail.

Final Submission by [C]

75. [C] took issue with the matter being described as trivial in [R's] written submissions. He said the certification of equipment and accepting people to conduct certifications is about safety.
76. [C] did not ask [R] whether he was a heavy vehicle certifier or not on the First Call. The reason for calling [R] was because there were points of concern that had arisen as detailed earlier by [C]. The issue is not whether [R] was a heavy vehicle certifier, a qualification not required for the proposed rail work. The issue is [R's] revocation as a heavy vehicle inspector.
77. [C] was surprised that the revocation and unsatisfactory interactions with NZTA did not come to mind for [R] during the First Call.

[R]

78. Mr Moore characterised the issue for determination is whether [C's] complaint invokes issues around [R's] honesty and integrity, or whether it was a case of misunderstanding or can be attributed to casual use of language. Mr Moore stated *"the crux of the matter... is that the two narratives are not that dissimilar... when the questions were pointed and direct, he answered them accurately."*
79. The Complaint *"does not question the adequacy of [R's] engineering work, nor does it arise from a safety related concern."*
80. Mr Moore, on behalf of [R] raised seven issues in his written and oral submissions to the Disciplinary Committee, which we summarise here:
- a) [R] has always denied the allegations made by [C]. As described in his written submissions:

the only admission that [R] made was that he had told the Complainant that he had no issues with NZTA in the First Call, but that he had misunderstood the Complainant either because of call quality or the context in which the information was requested.
 - b) The Investigating Committee *"cannot have reasonably concluded"* that [R] made a misrepresentation to [C]. In terms of the evidential threshold, Mr Moore submitted *"the evidence must be strong and cogent when it comes to disciplinary matters such as these"* and *"if the committee can't establish precisely what was said, it's very difficult to see how... there could be an adverse finding"* and *"if you have conflicting recollections of events, it simply cannot meet the evidential threshold for misrepresentation."* In *Z v Dental Complaints Assessment Committee* the Supreme Court recognised the standard of proof is *"the civil standard 'flexibly applied'"*.⁴
 - c) The Investigating Committee did not properly outline the reasons for its decision.
 - d) The matter is trivial or *de minimus* and the Investigating Committee should have dismissed the Complaint or referred it to alternative dispute resolution.
 - e) The events in question happened more than three years ago. Given the Complaint concerns disputed recollections, and the *"delay unreasonably hindered the investigation"* the Investigating Committee's decision should not be upheld.
 - f) It is [R's] view that the Investigating Committee's conclusion sets a highly restrictive precedent on engineers that they can never misunderstand a question posed to them over the phone, when giving a response.
 - g) [R] also believed that his apology (or offer of an apology) was not an admission of liability.

⁴ *v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC) at [101]-[105]

81. At the hearing, Mr Moore confirmed that he was fully aware that the Disciplinary Committee was not bound by the decisions of the Investigating Committee. He noted that some of his submissions on behalf of [R] were critical of the Investigating Committee and had been formed in view of an appeal but had been retained as they were useful for context.
82. [R's] oral submission started with a comprehensive summary of his background and experience. He then went on to speak about the two calls from [C]

Call Content and Quality

83. [R] explained the First Call on 10 October 2018 occurred while he was driving back from [] and the call came through on the hands-free kit. He told us [C] said that he had heard that [R] and his staff had issues with NZTA and difficulties passing NZTA certifier exams possibly around truck drawbars and asked whether there was any substance. [R] stated he may have misunderstood what [C] was implying in his questioning due to poor call quality and [R's] focus being split between the call and the task of driving. He said he replied there were no issues with NZTA as he was employing five heavy vehicle certifiers to do the work. He had not worked in transport, did not work in transport and there were no issues with qualifications or drawbars or elevating work platforms.
84. [C] called [R] a second time on 25 October 2018 again while he was driving. [R] said [C] asked specifically whether [R] had been revoked as a heavy vehicle certifier. In response, [R] immediately confirmed that was the case, and informed [C] it was for failing to observe some of the requirements of the NZTA contract and that he agreed that this was right.
85. [R] believes his account shows that he did not state any form of falsehood and did not withhold any information that ought to have been disclosed.
86. In response to a question from [C] [R] told us that he had an ongoing relationship with NZTA for 20 years. He did not always enjoy a good relationship with them because he kept finding things that needed to be improved and upgraded and this put him on a path of dispute on occasions. [R] said that when [C] asked if there were any issues, the final issue as far as he was concerned was in 2012 when he ceased to do any work for NZTA. So by 2018 that matter was so far out of his mind that it did not dawn on him that [C] was referring back to the time when he was "turned off".
87. We asked [R] what he understood to be the purpose of [C's] first call. He said he was surprised to receive the call. He agreed that [C] asked whether there were issues with Waka Kotahi, Waka Kotahi staff, exams and qualifications. He said he did not relate the call or [C's] questions to the issue of his heavy vehicle specialist certifier status. He said he was concentrating on driving, found the questions vague and didn't treat the call, which "came out of the blue", particularly seriously.
88. In response to our asking [R] why he did not call [C] back later if he felt there was any misunderstanding, he responded that he had answered [C's] questions in the way he interpreted them.
89. [R] told us he did not see his revocation as a HVSC for not following NZTA's administrative procedures as an issue because this did not affect his competence as a chartered engineer.
90. We asked about the nature of the First Call. [R] said it was three to five minutes duration, "a casual conversation more than anything else". He told us that the voice quality was good and there was no question of not hearing. There was, however, a question of not understanding what [C] was asking.

91. [R] said that he regarded his revocation as a resolved issue and therefore no longer an issue. He did not want to do further work for NZTA. He confirmed to [C] that the revocation still stood. [C] responded that in his view this meant the revocation was unresolved and the circumstances resulting in the revocation were still relevant.
92. We asked further questions of [R] regarding his understanding of the First Call. He then said that he did not recall [C] asking whether he had any issues with exams or certification and that this matter had come later in [C's] written complaint to Engineering New Zealand. This response contradicted what [R] had told us in his prepared oral submission, [redacted] affidavit (see paragraph 95 below), and statements by [R] when replying to earlier questions.
93. Having received conflicting answers from [R] to our questions about the First Call, we sought further clarification from [R] later in the hearing. [R] told us he responded "something like no issues, I don't sit exams more than once, that is about all I would have said, so there might have been a reference to examinations."

Witness

94. [redacted] submitted a witness statement and affidavit prior to the hearing. At the start of the hearing and again during the hearing, Mr Moore told us he intended to call [redacted]. However, this did not eventuate.
95. [redacted] affidavit states:
- "On 10 October 2018, [R] and I were travelling in our car in [redacted] where he had been visiting clients. While we were in our car, [R] received a call from [C] ([C] I heard their conversation because [R] used the handsfree car kit. The reception was a bit patchy because of our location. I distinctly recall [C] saying that he had heard that [R] and his staff had issues with the New Zealand Transport Agency (NZTA) or difficult passing NZTA exams. [C] asked [R] whether there was any substance to what he had heard. In that context [R] responded that there were no issues with NZTA."*

Apology

96. Discussion between both parties during the hearing identified an error in the Investigating Committee's final decision. The decision states:
- The Investigating Committee requests the Disciplinary Committee consider the apology [R] made to [C] for failure to disclose his change of status in a letter from Samuel Moore Barristers.*
97. The parties clarified that the letter did not contain an apology, instead it contained an offer from [R] to apologise to [C]. [R] made an apology to [C] during the Disciplinary Committee hearing.

DISCUSSION

ROLE OF THE DISCIPLINARY COMMITTEE

98. 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.⁵
99. The role of the Disciplinary Committee in this professional disciplinary process is to determine whether [R] has acted in accordance with accepted professional standards and, if not, whether

⁵ Dentice v Valuers Registration Board [1992] 1 NZLR 720 (HC).

there are grounds for disciplining him in accordance with the CPEng Act, the CPEng Rules, the Engineering New Zealand Rules 2017, and the Engineering New Zealand Disciplinary Regulations 2017.

THE LEGAL TEST

100. The legal test to assess whether [R] acted in accordance with acceptable professional standards is whether he acted in accordance with what a reasonable body of his peers would have done in the same situation.
101. 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”.⁶
102. If the evidence is that [R] acted in accordance with accepted standards, then we will dismiss the Complaint. If the evidence is that [R] did not act in accordance with accepted standards, then we will uphold the Complaint.
103. If the behaviour meets the latter criterion, we must consider whether the conduct “falls seriously short of accepted conduct” before imposing a disciplinary sanction.⁷

ANALYSIS

The Phone Calls

104. We heard different recollections and evidence from [C] and [R] about the content and quality of the two phone calls [C] made to [R] in October 2018.

- [C]
105. [C's] version of events has remained clear and consistent throughout the investigatory and disciplinary process from the time he first raised his concerns with Engineering New Zealand. He has maintained the focus of his complaint as it relates to [R's] conduct during two telephone calls that led to the Complaint.
 106. We find it plausible and accept that [C] made the First Call on the basis he heard rumours there were issues between [R] and Waka Kotahi and wanted to enquire directly with [R] to clarify if there was any substance to these rumours. As the person responsible for accepting an engineer to certify hi-rail vehicles, the rumours were concerning to [C]. [C] was clear that his concerns related to [R's] relationship with Waka Kotahi not whether or not [R] was an accredited HVSC with Waka Kotahi. We consider it was reasonable that [C] made his enquiries by telephone rather than by a more formal written approach.
 107. [C] confirmed it is his usual practice to make notes relating to phone calls. As such, [C's] evidence was backed up by the contemporaneous notes he made during and immediately after the two phone telephone calls with [R]. While the exact words of the questions [C] put to [R] were not written down, it is clear that his written notes support what he has consistently said. We do not consider that not recalling the precise wording of his questions to [R], in any way detracts from the credibility of [C's] evidence.

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

⁷ Ibid.

R

108. We found R's version of events has been inconsistent throughout the investigatory and disciplinary process, including in his evidence during the hearing. He has given inconsistent accounts of his recollections of the calls. R only raised the issue of poor audio quality after the Investigating Committee's provisional decision was released.
109. Evidence regarding call quality has been inconsistent. In affidavit, stated the "reception was a bit patchy". R told us the voice quality was good and there was no question of not hearing.
110. We do not find it plausible that R thought C was making a casual call when he telephoned him on 10 October 2018. R had requested a CV and C had sent documentation about his accreditations and examples of equipment he had certified to C in July 2018, a few weeks before the First Call. From this, we find it likely that R understood that C was making the call on a serious basis. We find it implausible that R did not think the issues he had with Waka Kotahi in 2012, specifically the revocation of his HVSC status and the reasons for the revocation, were relevant and worth mentioning.
111. We note that R was driving at the time he took both calls using the hands-free kit in his car implying that he could not give full attention to the call. However, he did not consider it necessary to follow up the call with C

Conclusion

112. Overall, we find R's evidence was less credible than C's on the basis his version of events has been inconsistent, whereas C has been consistent and credible in his conduct throughout the process.
113. We acknowledge that for various reasons the process has been protracted. The hearing in May 2023 was around four and a half years after the phone calls that led to the Complaint. Neither C nor R could recall the precise wording of their conversations. Mr Moore has said there is an insufficiency of evidence. We disagree. C made his written Complaint to Engineering New Zealand on 18 December 2018, around eight weeks after the Second Call. At all stages he has been consistent in his evidence which has been underpinned by his notes made during and immediately after the telephone calls. We consider that C's contemporaneous notes are credible evidence of the nature of the two calls between C and R and the fact the precise wording of the questions put to C is not recorded does not affect their credibility.
114. We have been told there was a misunderstanding about C's enquiries and that R responded as he interpreted the questions. We find that R did not treat C's First Call with the seriousness it deserved. As stated above we do not find R's explanations plausible. We consider that a reasonable chartered professional engineer in the same circumstances would have understood the questions C was asking and answered fully. If there was a misunderstanding, or difficulty in hearing or concentrating on the call due to driving at the time, a reasonable chartered professional engineer would have arranged to continue the conversation at a different time or followed up with C
115. We find that R's conduct did not meet the standard expected of a chartered professional engineer in that he did not act with objectivity and integrity as required by the CPEng Rules. We do not find that R acted dishonestly.

DECISION

116. Having decided that [REDACTED] R's conduct did not meet accepted professional standards, we must decide whether there are grounds to discipline him in accordance with the CPEng Act and the Engineering New Zealand Rules 2017.
117. We find that [REDACTED] R has breached the Code of Ethical Conduct applicable to both a chartered professional engineer and member of Engineering New Zealand. The Code requires a chartered professional engineer to behave appropriately in performing, or in connection with their engineering activities, acting with "objectivity and integrity." We consider that [REDACTED] R's conduct was not in accordance with what a reasonable body of his peers would have done in the same circumstances.
118. Having considered all the evidence, including written submissions and the oral evidence provided at the hearing on 24 May 2023, we are satisfied that, on the balance of probabilities, there are grounds for discipline under section 21(1)(b) of the CPEng Act and rule 10 of the Engineering New Zealand Rules 2017.
119. Having found [REDACTED] R in breach of his obligations as a Chartered Professional Engineer and a Member of Engineering New Zealand, we need to determine what orders, if any, should be made against him.
120. There is a range of disciplinary actions available to a disciplinary committee as set out in section 22(1) of the CPEng Act. There is also a range of sanctions in respect of [REDACTED] R's membership with Engineering New Zealand under Engineering New Zealand Disciplinary Regulation 2017 at 17(3).

Penalty

121. We reserved our decision on disciplinary sanctions and invited submissions from both parties on the appropriate penalty. We received submissions from both parties.
122. Following receipt of the submissions from the parties, we have considered and determined the detail and nature of any penalties to be imposed.

RELEVANT LAW

123. In *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* 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:⁸
 - 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

⁸ *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354.

- be fair, reasonable, and proportionate in the circumstances.

124. 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.
125. 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.
126. 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*.
127. In *Z*, the Supreme Court makes general statements about the purposes of professional disciplinary proceedings, noting that such proceedings are designed to:⁹

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.
128. This is consistent with *Roberts*, as *Roberts* lists public protection and the maintenance of professional standards as the foremost considerations relevant to penalty.
129. The Supreme Court in *Z v Dental Complaints Assessment Committee* also stated that while professional disciplinary proceedings are not intended to punish practitioners, they may have a punitive effect in 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.
130. 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.

C

SUBMISSIONS

131. C submitted R's name should be published and he should be censured. For the protection of the public, the nature of his breach of professional standards should be made public.

R

SUBMISSIONS

132. Counsel advised R does not accept any of our findings, and we should not make any penalty orders or order R to pay any costs contribution. Further, we should order that R's name is permanently suppressed.
133. Counsel stated the Complaint: *does not question the adequacy of R's engineering work, nor does it arise from a safety related concern. The Complaint entirely concerns a subsequently (and swiftly) clarified misunderstanding, regarding a disclosure as to the revocation of R's status as a Heavy Vehicle Specialist Certifier (HVSC) with Waka Kotahi | New Zealand Transport Agency (NZTA) (the Revocation) and alternative perspectives regarding the disclosure.*
134. Mr Moore outlined previous Disciplinary Committee decisions and the penalties ordered and costs awarded in these decisions,¹⁰ stating these decisions provide guidance for the current matter.

⁹ *Z v Dental Complaints assessment Committee* SC 22/2007 [2008] NZSC 55.

¹⁰ Disciplinary Committee Decision, M, 8 December 2020, Disciplinary Committee Decision, Peter Wastney 484, 31 May 2021, Disciplinary Committee Decision, Peter O'Connor, 18 June 2021, Disciplinary Committee Decision, Mr A, 24 September 2021, Chartered Professional Engineers Council Decision, Mr A, 31 May 2022, Disciplinary Committee Decision, Joo Choo, 21 December 2021, Article re Disciplinary Committee Decision, David Harding, December 2014 and Disciplinary Committee decision, Mr A, 15 September 2016.

Penalty

135. According to Counsel for [R], a common feature in the Engineering New Zealand Disciplinary Committee (ENZDC) decisions outlined above, as well as other decisions published on the Engineering New Zealand (ENZ) website not discussed in their submissions, is that they involve:
- (a) actual incompetence on the part of the engineers in providing services leading to safety issues and costs to the complainants.*
 - (b) conduct involving actual misrepresentations.*
 - (c) deliberate non-disclosure of relevant information such as conflicts of interest and previous involvement in failed works leading to fatalities.*
 - (d) falsification of documents in relation to competence in practice areas.*
136. Mr Moore contends [R's] case can be distinguished from these decisions, as the Complaint:
- (a) does not question [R's] competence, nor does it arise from a safety-related concern.*
 - (b) involved a swiftly clarified misunderstanding as to [R's] HVSC status.*
 - (c) raised conduct which does not rise to the same level as other conduct that have previously come before the ENZDC.*
137. Applying the principles from *Roberts*, Counsel submits:
- (a) The removal of [R's] registration or membership to ENZ would be an extreme penalty in the circumstances.*
 - (b) Suspension of [R's] membership or requiring him to meet specified conditions before allowing re-registration would similarly be extreme.*
 - (c) Requiring [R] to pay a fine in circumstances where he was not found to be acting dishonestly would be extreme in the circumstances.*
 - (d) Censuring or admonishing [R] for a conversation that occurred almost 6 years ago, which neither party could recall with certainty would not be an appropriate penalty.*
138. Counsel also cites [R's] membership of Engineering New Zealand for [REDACTED] years without any question as to his professional conduct but for the Complaint, his offer to apologise and apology as mitigating factors.

Name Suppression

139. According to Counsel, [R] should be granted permanent name suppression as the alleged conduct is on “lowest possible end of the scale” compared to other decisions where name suppression was granted.

Costs

140. Mr Moore states the suitability of ADR for the Complaint was brought to ENZ’s attention on two occasions: through [R] appeal to the CPEC (**Chartered Professional Engineers Council**), and again in submissions to the Disciplinary Committee for the disciplinary hearing. Had the matter been referred to ADR, it is likely that ENZ would not have incurred the same level of costs in inquiring into the Complaint.
141. Counsel states that the seven cases referred to establish it is standard to order 40-70 % of Engineering New Zealand’s total costs are paid by the respondent; however this would be significant in the circumstances due to the extreme delay in the matter.

DISCUSSION

142. We have considered the relevant case law, including *Roberts* and *Z*, and the parties' submissions, including references to other disciplinary decision penalties, in reaching our decision on whether to impose a penalty and, if so, what would be an appropriate penalty.
143. Available penalties include: a fine of \$5,000 and/or \$10,000, removal or suspension of membership with Engineering New Zealand, requiring professional development, censure, a formal reprimand, the publishing of the decision and naming R.
144. We note that R is no longer a CPEng so removing or suspending his registration is redundant. However, he remains an Engineering New Zealand chartered member and an International Professional Engineer/APEC Engineer.
145. We acknowledge R's offer to apologise, his apology and his longstanding membership with Engineering New Zealand.
146. As articulated in our decision, we consider R's conduct was a departure from the standards expected of engineers and members of Engineering New Zealand. While Mr Moore's stance seems to be that R's conduct is not eligible, or does not meet the threshold, for any type of penalty, we disagree. Simply because the Complaint about R may be different from other complaints considered by other disciplinary committees, does not exonerate R or preclude us from determining an appropriate penalty.
147. The Rules contemplate disciplinary committees hearing complaints and determining penalties regarding the competence and conduct of Engineering New Zealand members and/or CPEngs. We are not limited to hearing complaints and determining penalties about conduct or competence limited to the circumstances described by the Respondent in paragraphs 136 and 137 above. This is consistent with *Roberts* where the Court said the Tribunal should impose comparable penalties in similar circumstances, while also acknowledging "*each case will require a careful assessment of its own facts and circumstances. Rarely will two cases be identical*".¹¹
148. In terms of naming R, we start with the presumption that the respondent's name in a disciplinary matter such as this will be published.¹² 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 the interests of open justice, we consider it is important that we are transparent about the outcomes of disciplinary processes, which includes publishing the names of engineers found in breach of their duties. We consider naming practitioners assists to assure the public of the robustness of our process, sets the standard for the profession and acts to deter other practitioners from engaging in similar conduct.
149. This presumption may be displaced if there are strong grounds not to. However, as the Court of Appeal stated, a practitioner is "*likely to find it difficult to advance anything that displaces the presumption in favour of disclosure*".¹³
150. We do not consider R has advanced anything to displace this presumption, such as evidence of it causing extreme hardship and, as such, we are not convinced grounds for permanent suppression exist in this instance.

¹¹ *Roberts* at [48].

¹² *Y v Attorney-General* [2016] NZCA 474.

¹³ *Ibid* at [32].

151. We are mindful of our obligation to impose the least restrictive penalty available, and note the conduct is on the lesser end of the spectrum in terms of seriousness compared to some of the disciplinary decisions raised by [R] in submissions.
152. In taking all of the above factors into account, and the parties' submissions, we do not consider it necessary to impose a fine, remove or suspend [R] membership with Engineering New Zealand, require professional development or formally reprimand him.
153. However, we do order that our decision is published on Engineering New Zealand's website naming [R].
154. We consider this is fair, reasonable and proportionate in the circumstances.

Costs

155. We start our discussions on costs by noting that ordering costs is not in the nature of a penalty. In reference to Counsel's submissions at paragraph 141 above, [R] appealed the Investigating Committee's decision to the CPEC, with one of the grounds being: *the Upheld Complaint concerns communication and professionalism and ENZ has stated that such matters can be resolved by way of ADR*.
156. In its decision, the CPEC stated there is no requirement to refer every complaint regarding communication and professionalism to ADR and the CPEC panel considered the matter more appropriately handled by referral to a Disciplinary Committee. Given this, we do not consider the fact the Complaint was not referred to ADR as relevant in determining the apportionment of costs.
157. The normal starting point for costs is 50%. Per paragraph 142 above, Counsel's view is that costs of 40-70% would be significant due to extreme delays. However, the timeframes for the disciplinary process as a whole have been protracted, at least in part, by [R's] own actions, in particular, his decision to appeal to the CPEC (per his entitlement to do so) and the Respondent's last-minute request to adjourn our first hearing date and subsequent rescheduling. Taken together, these indicate that any delay can at least, in part, be attributed to the Respondent. Given this, we see no mitigating or aggravating factors that provide reason to depart from the usual starting point of 50% for costs.

Summary of Orders

158. In exercising our delegated powers, we order that:
- the decision is published; and
 - the published decision names [R]; and
 - [R] pays 50% of the costs, amounting to \$7,407.63 (plus GST).



Jenny Culliford FEngNZ (Ret.)
Chair of Disciplinary Committee