DISCIPLINARY COMMITTEE DECISION

COMPLAINT ABOUT AN ENGINEER

Anonymised for publication

In accordance with:
Engineering New Zealand Rules
Engineering New Zealand Disciplinary Regulations
Chartered Professional Engineers of New Zealand Act 2002
Chartered Professional Engineers of New Zealand Rules (No 2) 2002

Prepared by
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Members of the Disciplinary Committee

8 December 2020

engineering new zealand
Institute of Engineering Professionals

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EXECUTIVE SUMMARY

1. The complainant (**Mr C**) has raised a complaint about the competence and ethical conduct of an engineer (**M**) CMEngNZ CPEng IntPE(NZ).
2. M's firm, (**Company X**), was engaged to design an accessway for a new subdivision to be built on undeveloped land. Mr C considers he did not receive the standard of service he expected from a professional engineer.
3. Having considered the matter following the disciplinary hearing held on 4 June 2020, we have found that the engineering services provided by M did not meet the standard to be expected of a Chartered Professional Engineer and Chartered Member of Engineering New Zealand. The complaint is upheld.

BACKGROUND

COMPLAINT

4. On 24 October 2017, Mr C raised concerns with Engineering New Zealand about engineering services provided by M. Those concerns related to work performed by M during the design of an accessway for a new subdivision to be built on undeveloped land. This involved earthworks, drainage works, a new retaining wall (known as a palisade wall) and a concrete paved driveway.

INVESTIGATING COMMITTEE

5. Following an initial investigation, the complaint was referred to an Investigating Committee for formal investigation.

6. The Investigating Committee did not consider that there were any grounds to dismiss the complaint and, accordingly, determined that it should be referred to a Disciplinary Committee on 10 December 2019.

DISCIPLINARY COMMITTEE

7. The Disciplinary Committee heard the matter by videoconference on 4 June 2020.

8. The members of the Disciplinary Committee are:

   Andrew McMenamin CMEngNZ CPEng (Chair)
   Kelvin Walls FEngNZ (Ret.)
   Royden Mayfield CMEngNZ
   Hamish Wilson, nominated by Consumer New Zealand
   Cordelia Thomas, Barrister and Solicitor of the High Court of New Zealand

9. The following parties attended the hearing.

   Complainant

   Mr C

   Respondent

   M CPEng CMEngNZ IntPE(NZ) — Director, Company X

   Engineering New Zealand

   Colin Hickling CPEng FEngNZ IntPE(NZ) — Investigating Committee Representative
   Engineering New Zealand staff

10. The parties were invited to make submissions before the hearing, but no submissions were received from either party. The Disciplinary Committee notes that the parties had provided a substantial amount of information to the Investigating Committee, both proactively and in response to questions from the Investigating Committee. All the information gathered has been incorporated into our report below, where relevant.

INFORMATION GATHERED

COMPLAINT

11. M is a director of an engineering consultancy firm Company X, and manages a civil engineering team at one of Company X's offices. Mr C engaged Company X to design an accessway for a new subdivision to be built on undeveloped land. This involved earthworks, drainage works, a new retaining wall (known as a palisade wall) and a concrete paved driveway. M signed a short form agreement for the engagement on 3 May 2017.

12. In June 2017, a Company X employee (**Employee A**) sent Mr C a report and drawings for these proposed works. The covering letter of the report was stamped as "draft" (on pages 2 to 4 only) but the plans were not. Mr C used these "draft" plans to obtain quotes from contractors for the construction of the works.

13. On 12 July 2017, Mr C received an email from M advising that the engineering plans had been approved by the council. This email did not mention that the final plans that had been submitted to and approved by the council were different from the draft set provided earlier by Company X to Mr C.

14. Mr C had accepted a quote from a contractor for the works based on the draft plans. When the contractor found out that the works detailed in the final plans were more extensive than those in the draft plans, Mr C was advised that its price would need to be increased by about $10,000 to cover the additional costs involved.

15. Mr C says that the changes between the two sets of plans should have been specifically highlighted to him when the final plans were delivered.

16. Mr C also says that the design of the accessway was deficient, including that it encroached onto his neighbour's land where it crossed the road reserve. Parts of the design were not complete, with M saying they would be worked out when construction began.

17. Because of the plan changes and other issues, Mr C terminated Company X's contract and lodged a complaint with Engineering New Zealand about M's competence and professionalism. He also brought proceedings against M in the Disputes Tribunal.

M'S ENGAGEMENT AND CONTRACT

18. Company X was engaged by Mr C on 3 May 2017. M signed the Short Form Agreement as the approved Consultant. Although Mr C's contractual relationship was with Company X, M had a duty of care to Mr C as the engineer responsible for the services Company X had been engaged to provide. This duty arises under the CPEng Rules and Code of Ethical Conduct, and from M's role as a director and team manager for Company X. M's professional and ethical responsibilities are separate from any commercial liability Company X may have. It is not within Engineering New Zealand's jurisdiction to investigate or make findings as to Company X's commercial liability or contractual obligations.

19. The email accompanying the contract referred to:

> *Accessway design to 5.5m constructed width in a minimum width of 6.5m wide ROW/JOAL allowing for future development and to enable two way access on to [the road].*

20. This acknowledges that M and Mr C had discussed future requirements and that the drive design would need to allow for future development. This was subsequently confirmed by M, who said that 20 or more lots could eventually be developed on the site.

DESIGN AND DRAWING DELIVERY ISSUES

Draft drawings

21. The first submission of documents to Mr C was sent by email from Employee A on 16 June 2017. Documents attached to the email included drawings dated "13 June issue A" under the Revision section, and a letter of report dated 16 June which was stamped "DRAFT" on pages 2 to 4 but not on the front page. The letter of report notes under the heading Conclusion: "We consider that the proposed Civil infrastructure detailed within this report provides suitable solutions to service the 3 lot subdivision".

22. The accompanying email to Mr C from Employee A stated: "See attached draft drawing and report." It noted in a later paragraph that "[M] will be reviewing the documents on Monday, with the Engineering approval and Engineering Common Accessway application being submitted on the same day". The draft status of the drawings was not indicated on the drawings nor was it indicated on the first page of the accompanying emailed letter of report.

23. Aspects of these draft drawings that appear to have later changed include:

    a. Drawings 100, 101, 102, 110, 200 and 208, which in the draft drawings show the drive crossing into the adjacent lot.

    b. Cross sections 00m and 20m on drawing 205, which do not show the drive as hanging over a low zone.

    c. Drawing 112, which indicates (via notes) poles 450 dia, 1.8m centres, 5.1m embedment.

24. M said they were not aware the draft drawings had been sent to Mr C, until Employee A informed M on 26 September 2018 following an "expletive laden phone call" from Mr C and subsequent email. M said they had not been in the office on the day the draft plans were sent to Mr C.

25. Without knowing the draft drawings had been sent to Mr C, M reviewed them and made several corrections and amendments before submitting them to the Council for approval and consent. The changes included correcting the pole spacings and depth (as a result of incorrect figures being transposed from sketch/design plans) and relocating the existing driveway which crossed the neighbouring property, so that the proposed accessway could be fully constructed within Mr C's property and the road reserve.

Consented drawings

26. A common report and set of drawings were used by Company X to apply for engineering approval and building consent, along with specifications and a completed council Building Consent form. Documents were sent by Company X to the council on or about 16 June 2017. The building consent form is shown as being received by the council on 22 June 2017.

27. The report dated 16 June accompanying the submission to the council is a finalisation of the draft previously sent to Mr C. Any changes from the draft are not readily evident or marked up.

28. The drawings submitted remain labelled as "issue A" with the date of 13 June unchanged. However, some changes (not all-inclusive) are evident upon close checking, including:

    a. Drawings 100, 101, 102, 200 and 207 seem to show the drive fully within the subdivision. There appears to be no drawing 110, and drawing 208 has been renumbered to 207.

    b. The drive alignment on cross section 00m on drawing 205 has moved and is now hanging 1.52m above the pre-existing ground.

    c. Drawing 112 indicates (via amended notes) poles of 450mm dia, 1.35m centres and 5.5m embedment. The spacing change appears to be as a result of recommendations from a "Geotechnical Investigation Report" prepared by a geotechnical company and dated 27 Jan 2017. Among the recommendations was one that said pole spacing should not exceed 3 times the pole diameter.

29. These documents were not copied to Mr C at the time they were filed for consent. M provided the approved plans to Mr C when M received them from the council on 12 July 2017. The changes from the draft plans were not identified on the drawings in any way nor were the drawings marked "For consent" or similar.

Driveway retaining wall design

30. The draft plans showed the drive encroaching on the neighbouring lot. This detail was corrected on the drawings sent for consent, with the consent being issued for the drive fully within the C lot. However, in making this change, the drive within the road reserve required a greater encroachment width, which would have had unidentified and unbudgeted extra costs for retention of the outer edge.

31. Although this alignment was part of the approved plans, Mr C (and his later advisers) considered that there was no certainty the council would agree to this extra work close to the formed road edge.

32. The consented alignment shows encroachment onto the existing road edge drain, and cross section 00m on approved drawing 205 showed a 1.52m level difference, with no design of retention or any reference to this change from the draft drawings. The first reference by M to edge retention (or any mitigation of the 1.52m drop) is in the email from M to Mr C dated 3 August 2017, resulting from a tenderer's enquiry. In that email, M said:

    We agree that some form of retaining will be required along this edge, which could be:

    - *A small fill wall below the access way.*
    - *A small cut wall along the property boundary of [the road].*
    - *Concrete piles under the downside edge of the driveway.*

    We would suggest that this can be discussed at/before the pre-construction meeting with Council when works are due to commence.

Vehicle crossing approval

33. The approved engineering plans were sent by email to Company X from the council email on 12 July 2017, with an associated cover letter and copies of the approved drawings and documents. The council email of submission noted "---it looks like the vehicle crossing works were not assessed at Resource

Consent stage? And as such will be subject to [territorial authority] vehicle crossing application and approval."

34. The letter from the council also notes that the approval does not cover structures which need a separate building consent, and that the vehicle crossing would be subject to territorial authority approval.

35. However, it also appears that an "Approval to construct a vehicle crossing" was provided to M dated 6 July 2017. Under "Special Conditions" it notes "maximum width at boundary is now 3m unless you have obtained a Resource Consent". An initial reading of these documents indicated that only a 3m crossing had been approved. However, M subsequently provided a full copy of the crossing application which consisted of an application form and drawing 207, which showed the width as 5.5m. This meant that the standard note regarding 3m was superseded by the 5.5m dimension given in the drawing. The territorial authority supplied a Certificate of Completion for the crossing, with a 5.6m approved width, to M on 27 June 2018.

Final plans supplied to Mr C

36. As noted above, the set of approved engineering plans was forwarded to Mr C by M on 12 July 2017. The accompanying email does not identify the changes from the draft documents earlier sent to Mr C. The attached plans were stamped by the council, "Approved Engineering Plan", but the retaining wall drawings were not stamped as "approved", but instead as "Subject to a Building Consent". The email from M states: "Further to the Building Consent earlier this week, please find attached the Engineering plan approval." The short second paragraph advises that work can commence after a pre-construction meeting with the council.

37. The email appears to have not included the vehicle crossing approval or the Building Consent drawings. While the vehicle crossing approval note was not sent to Mr C, the applicable drawing was included as part of the stamped set of approved engineering plans sent to Mr C.

38. The building consent approval was notified by email from the council on 10 July 2017 to Mr C and M. M responded that day and asked that the building consent documents be posted to M, which the council confirmed they would do. On the same day a separate letter from the council was sent to Mr C, which said: "We are pleased to advise that your building consent has been approved; an invoice and breakdown of fees is attached." The letter made no mention of Mr C needing to uplift documents.

39. M has advised Company X received the building consent documents from the council, but said M had no records as to when Company X provided a copy of the documents to Mr C. M noted they had advised Mr C that building consent had been obtained, in M's email of 12 July 2017 which attached the approved engineering plans. While M's letter to Mr C did state "Further to the Building Consent earlier this week…" M did not explicitly advise Mr C that the consented plans were the same as the approved engineering plans he had been sent. Such a conclusion would need to be inferred.

40. It therefore appears that at no time up to and including the September pre-construction site meeting had Company X provided a stamped building consent set of drawings to Mr C.

41. Furthermore, when providing the draft and approved engineering drawings to Mr C, M did not raise or discuss the risks or indicative costs associated with the likely need for works to address the 1.52m edge level difference at the modified road crossing. The need for any future extra design, which was

intended to be worked out on site during construction, and the potential consenting for a surcharged wall of over 1.5m, could potentially have cost and time impacts.

Drawing version control

42. Drawings usually change between initial concept design and final construction sets. We agree with the Investigating Committee's comment that it is normal to record or track these changes by one or more of the following methods:

    a. To annotate each edition of drawings as "For information", "For consent", "For tender", For Construction", "Not for construction", or similar notations.

    b. To amend the Revision section for each changed version of a drawing along with a brief reference to changes.

    c. To cloud or shade changes to annotations etc on the drawing proper.

    d. To note, at least in general terms, changes made in the email or cover note sent to the client with an amended drawing set.

43. None of the above methods were used in providing any sets of drawings to Mr C after the first "draft" set, which were not actually marked DRAFT.

44. M said that as theywere unaware the draft drawings had been sent to Mr C, they did not realise there was any need to update or issue a revision status when the EPA/Council approved plans were sent to Mr C:

    When the plans left our office to Council for approval they were appropriately labelled "Issue for EPA/ECA" and the approved Engineering Plan Approval (EPA) as approved for construction by Council was appropriately red stamped … The Building Consent as issued by Council was similarly red stamped by Council and contained the same plan set as was also provided for the EPA approval.

Pre-construction site meeting

45. A pre-construction meeting was organised for 5 September 2017, to be attended by Council, Company X, the Contractor and Mr C. M and another Company X employee attended, as well as a council representative, the contractor, and Mr C as the owner and developer. Mr C's concrete contractor provided the only set of plans to be discussed at the meeting, and it transpired they were the first (draft) set issued. M arrived a few minutes late and neither M nor their colleague tabled any plans.

46. M said they had brought a copy of the approved set to the meeting, but as they had arrived after the draft plans had been tabled by others at the meeting, and there was no need to refer to the drawings during the meeting anyway, M had not tabled their set.

47. It appeared that none of the parties present at the meeting noted that the drawings being used were not those incorporating the council engineering plan approval or building consent approval stamps. M said it should have been obvious that the plans were not the stamped versions, but M did not notice because they were not aware at that time that draft drawings had been sent to Mr C.

48. Following that meeting, M said they had a discussion with the council's engineer and the contractor about the "overhang" (discussed above under "Driveway retaining wall design"), and they accepted that the best option would be determined after some preliminary clearing and excavation to confirm

which of the options set out in M's email to Mr C of 3 August 2017. M said they considered the value of these works to be very minor in relation to the total construction costs of the project:

> *In my opinion, and experience this is a common approach to relatively minor changes to the design and construction and is generally completed with client/council/contractor approval.*

UNPROFESSIONAL BEHAVIOUR

49. Mr C alleged that after the site meeting of 5 Sept 2017, M called him "an idiot" for getting initial tenders based on draft drawings. Mr C commented in the same letter that "—[Company X] consultants must then be real idiots to discuss the DRAFT plans at the on-site meeting." In a later response to Engineering New Zealand Mr C indicated that the "idiot" reference was during a telephone discussion after the site meeting.

50. M responded that they did not believe that they would have ever called Mr C an idiot.

> *[Mr C] however used a string of profanities on our staff who had no involvement with this project during telephone calls to our office in the morning of 26 Sept prior to him sending an email.*

The above-mentioned telephone call was some three weeks after the alleged "idiot" name-calling. Mr C also sent an email on 26 September 2017 containing several expletives directed at Company X staff.

51. No further evidence was provided to support or disprove this allegation.

DISCIPLINARY HEARING

Mr C

52. At the hearing, Mr C said he had not received the standard of service he expected from a professional engineer. He said he had instead experienced errors, a lack of communication, evasiveness, and an arrogant attitude from Company X staff including M.

53. Mr C said he was a lay person, who received one set of plans described as draft, and another set described as being approved, with no mention of any changes. As a non-engineer, he said he would never have found the changes unless he was told what they were. He had therefore assumed there were no changes between the two sets of plans.

54. Mr C said that as a director of Company X, M was responsible for their employee's actions in failing to tell M that the draft plans had been sent out, and failing to tell Mr C that the draft plans had changed before approval.

55. The driveway Mr C eventually had constructed, which was designed by another engineer, was slightly changed from the one designed by Company X, so he considered he had paid money for nothing.

M

56. M told the Disciplinary Committee they saw there being three main issues at play:

    a. Employee A had, reluctantly and apparently under some pressure from Mr C, provided draft plans to Mr C on a Friday evening, without telling M that they had done so until 26 September, or informing Mr C that those plans had later changed.

b. It would be unusual for plans not to undergo some changes and revisions during the consent and approval process. Once the stamped plans were obtained, those were clearly what should have been used. M accepted Mr C was a layman, but Mr C was also the project manager, and M had advised Mr C to comply with conditions including using the approved plans.

c. M accepted there should have been further detailing regarding the entryway, but the scale of this small retaining wall (about 10m long and up to 1.5m high) was not large enough to change the scale of the development. The additional cost for piles was unfortunate, but unavoidable – it could never have been done for the cheaper price. Company X had provided Mr C with a cost estimate at the beginning of the project of around $50k and M believed the construction cost was less than that.

57. Regarding the proposal to build on the neighbour's land, this was an error M thought had been resolved prior to lodging the plans with the council. Company X were apologetic for the issues that arose, but M considered their conduct was a "long way from negligence".

Draft plans

58. M reiterated they had no idea the draft plans had been issued until 26 September, three weeks after the pre-construction meeting. On that day, Mr C had called the Company X office and become angry with staff there.

59. At that time Employee A informed M that the draft plans had been issued to Mr C in June, some three months beforehand, and these draft plans had since been given to the contractor by Mr C.

60. M acknowledged it was clearly an error that those plans had been issued and had ended up with the contractor. The plans had been changed within the few days between when they were given to Mr C and when M corrected them and lodged them with the council.

61. Employee A told M, after the issue with the draft plans came to light on 26 September, that the draft plans had been issued on a Friday afternoon after Mr C had put a lot of pressure on Employee A to send them out. No statement or other evidence from Employee A has been provided during the investigation.

Unresolved design issues

62. M accepted it would have been preferable if the unresolved issue concerning the overhang where the accessway met the road had been addressed in the approved plans.

63. M said Mr C had been adamant the planned accessway should not go onto the neighbour's land, where the existing accessway was placed, as Mr C did not own that portion of land at the time.

64. After the plans were lodged, they were approved with minimal changes, and building consent was received on 10 July, and notified to Company X and Mr C.

65. M said that at that point, Company X had satisfied the contract by obtaining the approvals. Company X offered their engagement for further steps such as contract administration, tendering, and construction administration, but Mr C said he would handle that process himself.

66. On 3 August, Company X heard from a contractor on the job that on one of the cross-sections there was an overhang of 1.52m that was pushed out over the embankment. On 4 August, M sent Mr C an email explaining there was an issue that needed to be resolved and that there were several options for resolving this; alternatively, the width of the accessway could be narrowed. Mr C responded that he was very disappointed.

67. M replied to Mr C by email and said it would be most practical to wait until the construction stage, when all the long grass and debris was removed from the embankment, and geotechnical information was available to determine what the best option would be for resolving the road entrance overhang. In M's opinion, it was a relatively minor matter.

68. The next communication Company X received was from the lead consultant on the project, advising that Mr C had requested a meeting and Company X was expected to attend. M reminded the consultant a pre-construction meeting with council representatives was required.

69. M explained at the hearing that the pre-construction meeting is a council meeting to look at the logistics of how the works are going to commence, to introduce the key personnel involved, review the works programme and health and safety plans, and to check consents and approvals have been obtained.

70. There was no discussion of any detailed element of construction in the plans at that meeting, M said. If M had had cause to look at the plans during the meeting, it would have been obvious to M they were not the approved set.

71. At the end of the formal part of the pre-construction meeting Mr C left, and M went with contractors to look at the anomaly created by the overhang and discuss options for providing a crossing that would suit.

72. The area was covered in long grass and M was not certain of the strength of the embankment. M determined with the contractors that a digger would be used to investigate the ground. M acknowledged a further building consent may have been required, but that it was likely Company X would have designed a wall under 1.5m high with no surcharge (therefore not requiring a building consent), or one of several other options.

Staff management and quality assurance

73. In response to Mr C's comment that M was responsible for their employees' actions, M accepted that commercially, they were responsible as a director of the company. However, M did not accept that in the context of professional discipline, they should be held responsible for the confusion over the draft plans – M had been unaware of what had occurred, had tried to manage the process and the problem after they became aware, and did not believe there was anything they could have done to prevent what had happened.

74. In response to questions from the Committee about Company X's quality assurance procedures, M said that the plans sent to Mr C in June should have been stamped as drafts. And that if M had been aware that a draft set had been issued, the set that were later sent for consent and approval would have been given a different revision number. M said Employee A had explained they were under pressure to release the draft plans to Mr C at short notice, and that was the reason Employee A failed to stamp the plans as draft.

75. M said Company X held in-house seminars regularly, including about quality assurance. M considered the firm had good QA processes in place – however, these were not followed in this instance. They had discussed this matter with their staff, and the consequences, and used it as a learning opportunity to highlight the importance of following QA processes.

76. M considered that Company X staff operated as a tight unit, with an open-door policy, and that junior staff were well-supported and able to contact their seniors easily. They were not aware of any comparable situations that had arisen in the past, or since.

DISCUSSION

THE DISCIPLINARY COMMITTEE'S ROLE

77. 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.[1]

78. The role of the Disciplinary Committee in the disciplinary process is to consider whether M has acted in accordance with accepted professional standards and, if not, whether there are grounds for disciplining them in accordance with the Chartered Professional Engineers of New Zealand Act 2002 and Engineering New Zealand Rules and Disciplinary Regulations.

THE LEGAL TEST

79. The legal test to assess whether M acted in accordance with acceptable professional standards is whether they acted in accordance with what a reasonable body of their peers would have done in the same situation.

80. 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".[2]

81. If the evidence is that M acted in accordance with accepted standards, then we will dismiss the complaint. If the evidence is that M 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.[3]

82. This means that the matter for the Disciplinary Committee to decide in this case is whether the engineering services provided by M, as identified in the complaint, met the standard to be reasonably expected of a Chartered Professional Member of Engineering New Zealand and a Chartered Professional Engineer.

83. Our approach to this question has been to consider the work undertaken by M, the standards that applied to the performance of that work, and whether their performance met those standards.

ANALYSIS

Client care and communication

84. Mr C emphasised during the hearing that he was a lay person, not an engineer, and that as a lay person he could not be expected to look for or notice changes between the draft and approved sets of plans.

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

[2] *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.

[3] Ibid.

85. We agree that Mr C should have been informed that the approved plans were different to the draft set, and that only the approved plans should be relied on for obtaining cost estimates from contractors from the date they were issued.

86. We acknowledge that Mr C had taken on the role of project manager for the development, declining Company X's offer of services including contract administration and tendering.

87. However, we also acknowledge Mr C's frustration. He was sent a set of draft plans, followed soon after by a set of approved plans. Without any advice or notes explaining the changes between the two, it would have been easy to look at the approved set and assume nothing had changed. To a non-engineer, the differences are difficult to identify. It is an engineer's responsibility to communicate clearly and effectively with their client, and this has not occurred here.

88. This responsibility applies even when a client is demanding urgent action. M has said they believed Employee A was under some pressure from Mr C to release the draft plans late on a Friday, and that this pressure may have contributed to the failures in communication and client care.

89. We do not have any evidence of this pressure from Mr C beyond M's recounted conversations with Employee A.

90. The question is what a reasonable engineer would have been expected to do in M's situation, and whether there are steps they could reasonably have been expected to take to avoid the issues that arose in this project, noting that an engineer's obligations around client care and communication apply even where there is commercial pressure or frustration expressed by the client.

91. M accepted they were responsible for ensuring the correct plans were tabled at the preconstruction meeting with council engineers and the contractor, although they said that the plans were not central to the meeting as the discussion was more about protocol, logistics and timeframes, and not about the detailed design.

Responsibility for employee's actions

92. Mr C asserted that as a director of Company X, M was responsible for any actions of their staff, including Employee A's sending out of the draft plans and failure to inform him of the changes to the approved set.

93. M accepted that they had some responsibility, and in a commercial sense is accountable as a director of the company. But in a professional discipline context, M disagreed they were responsible for the actions of others, where they could not reasonably have been expected to be aware of those actions or take steps to prevent them.

94. M's position is that they were not aware Employee A had issued the draft plans to Mr C until late September. Without knowing that the draft plans were in circulation, it would be reasonable that M was not "on the lookout" for them at the preconstruction meeting – to M's knowledge, the approved plans were the only ones that had been made available either to Mr C or his contractors.

95. M, as the supervising engineer responsible for the project, did have a responsibility to provide adequate supervision and oversight of junior staff. While we do not consider a reasonable engineer acting in this capacity would be expected to micromanage every aspect of their employees' work, we would expect M to meet with Employee A regularly and get a briefing on any significant matters.

96. It was reasonable for M to expect that Employee A, an engineer with several years' experience, would have followed Company X's usual QA and document control processes and, if draft plans were to be issued, that Employee A would have informed M.

97. We observe that M also did not appear to follow accepted QA and document control processes when they submitted the revised plans to the council. Both sets of plans have the same revision reference and date being Rev A; 13/06/17.

98. Being unaware that the draft plans had been issued, M did not draw Mr C's attention to the changes in the approved plans – to M's knowledge, Mr C had not seen the draft plans and so any changes in the approved set would be meaningless to him.

99. In our view, a chartered professional engineer with responsibility for managing a team should ensure adequate QA processes are in place to avoid documents being inadvertently released. We accept that mistakes will happen, but suitable QA processes should minimise the effects of human error by making it difficult (or, ideally, impossible) for document versions to go out without being tracked.

100. M's position is that if Employee A had complied with Company X's existing QA system requirements by clearly marking the plans they sent as "DRAFT", Mr C may have been alerted to the problem. When M became aware that the draft plans had been issued three months earlier, they took steps to manage the consequences with their client.

101. We were pleased to hear that M has reflected on how the circumstances of this complaint arose, and has taken steps to remind their staff of the importance of robust QA and document control procedures. We would encourage M to also consider what further processes could be implemented to prevent the uncontrolled release of draft documents in the future.

Adequacy of design

102. Mr C was unhappy with perceived errors in the Company X design, and unresolved design issues with the overhang created where the accessway met the public road. In his view Company X's design was unworkable. In contrast, M submitted there were several options for resolving the "pinch point" at the road entrance, and it made practical sense to wait until construction began and more geotechnical information was available to inform the best strategy.

103. We do not know how this aspect of Company X's design would have been resolved because, in the end, Mr C engaged another consultant, and purchased a portion of his neighbour's land where the original accessway lay, which allowed for a different design to incorporate that extra land.

104. The options for resolving the road access issue in Company X's design did have potential cost and logistical implications for the client, and it would have been prudent to flag this for Mr C so that he could plan accordingly. There were some reasonably significant issues that needed resolving, and we would have expected these to be discussed with Mr C in his capacity as project manager. It appears that this aspect of the design was not raised with him until he queried the matter in August 2017.

105. We consider that the failure to address this issue with the client earlier, and communicate the potential cost and logistical implications, does represent a failure to meet expected standards.

Additional costs incurred

106. Mr C has complained about the additional cost incurred by Company X's failure to notify him of the changes between the draft and approved plans, and by his engaging a different consultant to design different plans after the engagement with Company X ended.

107. Engineering design is often an iterative process, and plans are often subject to change. To civil engineers, changes during the design process are par for the course. Clients can perceive that they are receiving a "quote" for a project, when what they are actually getting is an estimate based on initial assumptions.

108. If Mr C had been made aware of the changes to the approved plans earlier, he could have obtained more accurate cost estimates from his contractor at an earlier stage. However, he would still have needed to pay the additional cost for the amended pile design. Mr C's costs incurred in engaging another engineering consultancy to provide an alternative design, and in purchasing his neighbour's land, were also outside M's control.

DECISION

109. A Disciplinary Committee may make an order for discipline against a Chartered Professional Engineer, or a member of Engineering New Zealand, if it is satisfied that the engineer has performed engineering services in a negligent or incompetent manner, or that the engineer has breached the Code of Ethical Conduct.

110. The Code of Ethical Conduct includes an obligation to act competently, which includes an obligation to undertake engineering activities in a careful and competent manner.[4] It also includes an obligation not to "knowingly permit other engineers for whose engineering activities you are responsible to undertake engineering activities in a manner that is not careful and competent".[5]

111. A finding of negligence or incompetence is a more serious finding than a breach of the obligation to perform engineering services in a careful and competent manner. An engineer may breach the Code of Ethical Conduct requirement without meeting the threshold for negligence or incompetence.

112. To determine whether M acted negligently or incompetently we refer to the decision of the Chartered Professional Engineers Council in *R v K*:[6]

> *The starting point is to consider what standard sets the benchmark for negligent or incompetent behaviour. We consider that incompetence is a more serious allegation than negligence. One can be negligent without being incompetent, but it is highly unlikely that someone who is incompetent is not also negligent.*

113. Further, *Robinson v RA* states:[7]

> *Whether engineering services have been performed in an incompetent manner is a question of whether there has been a serious lack of competence (or deficit in the required skills) judged by the areas of competence which in this case are encapsulated by Rule 6* [of the Chartered Professional Engineers Rules (No 2) 2002 (the Rules)].

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[4] Engineering New Zealand Code of Ethical Conduct, clause 4(a)(iii) and rule 42E(a)(iii) of the Rules.

[5] Engineering New Zealand Code of Ethical Conduct, clause 4(b)(ii) and rule 42E(b)(ii) of the Rules.

[6] *R v K,* Appeal Ruling 11/14, Chartered Professional Engineers Council at [36] and [38].

[7] *Robinson v RA* (10 July 2015, *Appeal Ruling* #21) Chartered Professional Engineers Council at [40(c)].

114. We do not consider that the evidence in this case demonstrates a serious lack of competence or deficit in the skills required of a Chartered Professional Engineer. The shortcomings identified in M's practice speak more to a lack of attention and a failure to communicate clearly with M's client.

115. However, we find that M did breach their obligations under the Code of Ethical Conduct to undertake engineering activities in a careful and competent manner.

116. In our view, the breach comprises three omissions by M:

a. the failure to advise Mr C in a timely manner of the unresolved design issue at the road entrance, including options for resolving this, and the potential cost implications;

b. the failure to ensure adequate document control practices by engineers in M's team, which contributed to Mr C's unknowing use of the draft plans instead of the consented plans; and

c. failing to ensure the correct set of plans was presented and referred to at the preconstruction meeting.

117. We consider this breach to be towards the lower end of the scale. There were no life safety consequences and, although there were cost consequences to the client, we consider M's actions fall well short of negligence or incompetence. However, they do demonstrate a lack of due care and a failure to meet the obligation under the Code of Ethical Conduct to undertake engineering activities in a careful and competent manner.

118. We therefore conclude that the grounds for discipline under section 21(1)(b) of Act and rule 4.3 of the Engineering New Zealand Rules apply.

119. Having considered all the evidence, we have decided to uphold the complaint about M.

120. Having found M in breach of their obligations to undertake engineering activities in a careful and competent manner, we need to determine what orders, if any, should be made against M.

121. There are a range of disciplinary actions available to us as set out in section 22(1) of the Act. There are also a range of sanctions in respect of M's membership with Engineering New Zealand under Engineering New Zealand's Disciplinary Regulations.

ORDERS

122. On 18 September 2020, our reserved decision was sent to the parties and they were invited to make submissions on penalties. M provided submissions on 23 October 2020. Mr C did not file submissions on penalty.

RELEVANT LAW

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

a. protect the public (including through deterrence of other practitioners from engaging in similar conduct);

[8] [2012] NZHC 3354.

b. set and maintain professional standards;

c. where appropriate, rehabilitate the practitioner back to the profession;

d. be comparable with penalties imposed on practitioners in similar circumstances;

e. reflect the seriousness of the practitioner's conduct, in light of the range of penalties available;

f. be the least restrictive penalty that can reasonably be imposed in the circumstances; and

g. 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 section 22 of the Act and under the Engineering New Zealand Disciplinary Regulations 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*.[9] 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.*

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

128. The Supreme Court in *Z v Dental Complaints Assessment Committee*[10] also states 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.

129. The reasoning underlying *Roberts'* focus on practitioner rehabilitation is less relevant to penalties under the Act in light of the fact that the removal or suspension of a Chartered Professional Engineer's registration does not prevent the individual practising as an engineer but does prevent use of the Chartered Professional Engineer title.

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 the Act to establish the title of Chartered Professional Engineer as a mark of quality.[11]

M'S SUBMISSIONS

131. M submitted that a fine was not appropriate given our finding that the breach was towards the "lower end" of the scale and that M's shortcomings "speak more to a lack of attention than a failure to

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[9] [2008] NZSC 55.

[10] Ibid.

[11] Chartered Professional Engineers of New Zealand Act 2002, s 3.

communicate clearly with [my] client". If a fine was imposed, M submitted one in the vicinity of $500 would be appropriate.

132. M submitted that suspension or removal is not appropriate or necessary given our view that the breach was at the lower end of the scale. M further submitted censure was also unnecessary in the circumstances, because of changes M has made to their personal practice and more generally to their firm's, around client communication and delegation of work from principals, including M. M provided a summary in their submissions of those changes, which include:

    a. Clarification of Company X's Quality System that any issued plans that are updated must have those updates recorded in the 'Revisions Details' box;
    b. Directives issued to all staff that all 'Preliminary' and 'Draft' plan sets that are issued to clients or anyone else, in addition to advising this status by email or other means, are electronically stamped to include in large format letters the label of 'Preliminary' or 'Draft'; and
    c. All staff must ensure that all plan sets and reports are checked to ensure the latest or most relevant sets are used for issue, construction, liaison, meetings or other use.

133. In addition to these directives, M said they intended to propose an in-house training seminar for Company X staff about our findings to make clear to staff the potential consequences to clients and to the company or not following QA protocols.

134. M said they would be willing to consider making an apology to Mr C if Mr C would accept it, and on the condition our decision remains confidential. We interpret from this that M does not consider they should be named as part of the Committee's orders.

DISCUSSION

135. The public places significant trust in engineers to self-regulate. As a professional, an engineer must take responsibility for being competent and 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.

136. We have found that M has departed from what could be expected of a reasonable engineer. That is, M has breached their obligation to undertake engineering activities in a careful and competent manner.

137. In our view, M's actions, if condoned, would undermine the public's trust in the engineering profession and reduce the public confidence in the Chartered Professional Engineer title and membership with Engineering New Zealand. M's actions showed a lack of judgement, however the departure from expected standards is at the lower end of the scale, and our orders need to reflect our view of the breach.

Registration and membership

138. In respect of orders relating to registration as a Chartered Professional Engineer, we may order that: [12]

- an engineer's registration be removed, and that they may not apply for re-registration before the expiry of a specified period;
- that their registration be suspended for a period of no more than 12 months or until they meet specified conditions relating to the registration; or

[12] Chartered Professional Engineers of New Zealand Act 2002, s 22.

- that the engineer be censured.

139. In respect of orders relating to membership with Engineering New Zealand, we may order that an Engineering New Zealand member be:[13]

- expelled from membership;
- suspended from membership for any period;
- suspended from membership until such time as the member has fulfilled requirements for professional development as have been specified by the Committee; or
- 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.

140. In *A v Professional Conduct Committee*[14] 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 practise which may or may not be amendable to cure'. Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish.*

141. In the decision of *Attorney-General v Institution of Professional Engineers New Zealand Incorporated and Reay*[15] the High Court set out the standard the public expects when an engineer is a member of Engineering New Zealand:

> *[M]embership 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.*

142. The Court also went on to set out the public expectation of Engineering New Zealand's role in maintaining the standard of the profession:[16]

> *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*

[13] IPENZ Disciplinary Regulations, reg 17(3)(a) – (d).

[14] *A v Professional Conduct Committee* [2008] NZHC 1387 at [81].

[15] [2018] NZHC 3211 at [52] and [55].

[16] Ibid at [56].

to maintain that public trust, and the value associated with membership status, then it must act in accordance with this expectation.

143. After considering the principles set out by the High Court in *Roberts* (set out above) we do not consider this case warrants the removal or suspension of M's registration as a Chartered Professional Engineer or 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 do not consider that M's practice poses a risk to the public such that we would need to remove or suspend M. M has accepted their failings in this case and has described the actions M has taken to prevent similar failings from occurring in their personal practice and that of their firm.

144. Although we accept that M's actions have caused Mr C frustration and some unforeseen costs, professional discipline exists to ensure professional standards are maintained and to protect clients, the profession and the community – not to punish the engineer or appease the complainant.

145. We are also cognisant of previous Disciplinary Committee decisions. The most comparable recent decision is, in our view, that of *An Engineer CPEng CMEngNZ*, issued 18 October 2019.[17] In that matter, the respondent signed a PS1 for an inadequate design prepared by a junior engineer without checking it, prepared an amended design that was also inadequate. That Disciplinary Committee decided that the engineer should be censured, fined, and to pay 50% of costs ordered, with anonymised versions of the decision against them and a press release to be issued. The engineer's name was permanently suppressed. In that case, the error was (as in this matter) of a limited scope rather than systemic issue, there were no public safety issues, and the respondent cooperated fully in process.

146. We have upheld the complaint against M, and we are therefore minded to make an order to make it clear that the profession does not condone M's actions. But taking the above into account, and, as we have not identified any wide-ranging competency issues, we consider censure to be the most proportionate penalty in the circumstances.

Fine

147. The Chartered Professional Engineers of New Zealand Act 2002 and the Engineering New Zealand Disciplinary Regulations state that we may order that an engineer pay a fine up to a maximum of $5,000.

148. As stated above, M's behaviour fell below the standard expected of a professional engineer but was towards the lower end of the scale when compared to recent Disciplinary Committee decisions on other matters. There were no life safety risks, no indication of a pattern of behaviour, and no significant concerns as to M's competence to undertake work as a Chartered Professional Engineer or member of Engineering New Zealand. M has acknowledged there are lessons to be learned from this complaint and has described steps M has taken to share these lessons with their staff.

149. M has submitted that if a fine is imposed, $500 would be appropriate. Mr C has not made any submission on penalty.

150. We consider that a fine of $500 is appropriate.

Costs

[17] Available at: https://www.engineeringnz.org/documents/537/Disciplinary_Committee_decision_regarding_house_design.pdf

151. We may order that the engineer pay costs and expenses of, and incidental to, the inquiry by Engineering New Zealand and Registration Authority.[18] We note the ordering of payment of costs is not in the nature of penalty.

152. When ordering costs, it is generally accepted that the normal approach is to start with a 50% contribution.[19] 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.[20]

153. In respect of the medical profession, the Court in *Vatsyayann v PCC* said:[21]

> *[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.*

154. Further, in *O'Connor v Preliminary Proceedings Committee* the High Court stated:[22]

> *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.*

155. Neither party has made submissions on costs. We are cognisant of M's cooperation with the investigation to date, but do not consider there are any compelling factors to warrant departure from the starting point of 50% of the costs incurred by Engineering New Zealand and the Registration Authority; being $9800.

Naming

156. In addition to notifying any orders made against an engineer on the register of Chartered Professional Engineers, the Registration Authority must notify the Registrar of Licensed Building Practitioners appointed under the Building Act 2004 of the order and the reasons for it and may publicly notify the order in any other way that it thinks fit.[23]

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[18] Chartered Professional Engineers of New Zealand Act 2002, s 22(4) and IPENZ Disciplinary Regulations, reg 17(3)(g) respectively.

[19] Including *Cooray v Preliminary Proceedings Committee HC* Wellington AP 23/94, 14 September 1995 per Doogue J.

[20] *PCC v Van Der Meer* 1019/Nur18/422P.

[21] [2012] NZHC 1138 at [34].

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

[23] Chartered Professional Engineers of New Zealand Act 2002, s 22(5).

157. In respect of membership with Engineering New Zealand, we may order that 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 or publicised in any other manner as may be prescribed by the Committee.[24]

158. The Act does not prescribe factors we should consider when deciding whether to name an engineer. While we are mindful of the specific legislative test of "desirability" set out in the Health Practitioners Competence Assurance Act 2003, we are guided by the public interest factors considered by the medical profession when deciding whether to name a practitioner.[25] These include openness and transparency in disciplinary proceedings; accountability of the disciplinary process; public interest in knowing the identity of the practitioner; the importance of freedom of speech; unfairly impugning other practitioners; and that where an adverse disciplinary finding has been made, it is necessary for more weighty private interest factors (matters that may affect a family and their wellbeing, and rehabilitation of the practitioner) to be advanced to overcome the public interest factors for publication.[26]

159. 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*[27] 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.[28]

160. 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".[29] 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.[30]

161. 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.

162. M did not specifically address the subject of naming in their submissions, except to say that M would be willing to consider an apology to Mr C if the decision remains confidential to the parties and M's interim name suppression continues. We cannot impose or facilitate an apology as part of its orders, so if an apology is to occur that will be between the parties to negotiate.

163. In the absence of any submissions from Mr C, and limited submissions as to naming from M, we must consider the principles as they apply to the facts before us. We are again mindful that no risk to public or life safety arose from M's conduct; that no pattern of behaviour has been established; that M's

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[24] IPENZ Disciplinary Regulations, reg 17(5)(h).

[25] The presumption in the Health Practitioners Competence Assurance Act 2003 is that hearing shall be in public, but gives the Tribunal discretion to grant name suppression. The test is whether it is "desirable" to prohibit publication of the name or any particulars of the affairs of the person in question and the Tribunal must consider both the interests of any person and the public interest.

[26] *Professional Conduct Committee of the Pharmacy Council of New Zealand v El-Fadil Kardaman* 100/Phar18/424P at [113] – [114].

[27] [2016] NZCA 474.

[28] Ibid at [25].

[29] Ibid at [32].

[30] Ibid.

breach was towards the lower end of the scale; and that M has taken steps to prevent a similar breach from occurring not only in their personal practice but in that of their firm.

164. While the threshold to displace the principle of open justice is high, we consider the findings of the investigation do not suggest that there are wider competency concerns regarding M's practice. M has accepted accountability and demonstrated they have learned from this complaint, and improved their individual and firm-wide practices as a result. For these reasons, we also do not consider there is any value in M's existing and potential client's knowing of our decision in order to make an informed decision about engaging M's services. We consider this matter is comparable to that of *An Engineer CPEng CMEngNZ*, in which the engineer's name was permanently suppressed.

165. After considering the above factors, we consider there are reasons to justify the departure from the principle of naming. We consider that this would be disproportionate and punitive in this case.

SUMMARY OF ORDERS

166. In exercising our delegated powers, we order that:

a. M is censured;

b. M is fined $500; and

c. M is to pay $9800 towards the costs incurred by the Engineering New Zealand and the Registration Authority in inquiring into M's conduct (approximately 50% of Engineering New Zealand's total costs).

167. In addition, the Registration Authority will:

a. notify the Registrar of Licensed Building Practitioners appointed under the Building Act 2004 of the order and the reasons for it; and

b. publish an anonymised version of our final decision on this complaint on its website, in a public press release and in any other communication it considers appropriate.

168. M's name suppression is to be made permanent.

Andrew McMenamin
Chair of Disciplinary Committee