NEW ZEALAND
INSTITUTE OF
CHARTERED
ACCOUNTANTS

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

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

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**DECISION ON APPEAL AS TO PUBLICATION/NAME SUPPRESSION**

**Dated 13 December 2022**

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

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

**Appeals Council Secretariat:** Janene Hick
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Refer to the decisions of the Appeals Council dated 21 September 2022 and the Disciplinary Tribunal dated 28 May 2021

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

**Introduction**

1. This is an appeal against a decision of the Disciplinary Tribunal in which it ordered publication of the Member's name and personal details. The Member also appealed the Disciplinary Tribunal's decision declining the Member's application to suppress the name of the Member's firm and the name of the client company which was the subject of the audit which gave rise to the disciplinary proceedings against the Member.

2. The Member's application for name suppression in the Disciplinary Tribunal was supported by an affidavit filed by the Member and an affidavit filed on behalf of the Member's firm. In the submissions filed in support of the appeal, the primary grounds of appeal were that the Tribunal was wrong to decline name suppression of the Member, his firm and the client, because:

    a. The conduct of which the Member had been found guilty was at the lower end of the scale of seriousness;

    b. Publication of the Member's name would have a disproportionate effect on his reputation and his (then) current employment;

    c. The Member had ceased carrying out any audit role and had no intention of carrying out audit services.

    d. Public confidence in audit quality, including the importance of independence and the auditing standards and the disciplinary process could be maintained without identifying and naming the Member. It was submitted that publication of the Member's name was largely "irrelevant to public interest".

    e. The Member had an unblemished record and there was no suggestion that the failings identified reflected on his overall fitness to practice. There was therefore no need, for public protection purposes, to publish the name of the Member.

3. It was submitted that publication of the Member's name would automatically identify the firm of which he is a member. It was argued that identification of the firm would have a detrimental reputational effect on the Member's firm. It was asserted that identification of the Member's firm risked readers making an unjustified link between the audit and the subsequent demise of the client company and could undermine confidence in the quality of the firm's audits.

4. It was argued that identification of the client company which was the subject of the audit could have unintended consequences on the client company and its former directors (the client was liquidated some years ago but some of its intellectual property was sold and may still be in use). It was therefore argued that the name and identifying details of the client company should also be suppressed.

5. The above submissions were filed in September 2021 in anticipation of the Member's appeal being heard immediately following the hearing of an appeal by the PCC against some of the liability findings of the Disciplinary Tribunal. The appeal as to liability, however, took much longer than anticipated and hearing of the Member's appeal was therefore deferred until after the decision of the Appeals Council on liability.

**Application to adduce new evidence**

6. Following the decision of the Appeals Council on liability, but before the hearing of the Member's appeal against publication, the Member made application to adduce new evidence in support of his appeal against publication. The application, and the affidavits and evidence in support, were admitted on appeal by consent.

7. The new evidence disclosed that the Member is suffering from a life-threatening medical condition in respect of which he had undergone major surgery and is receiving ongoing treatment. The expert evidence filed in support of the Member's appeal demonstrated that the Member was suffering high levels of stress and anxiety and that it was important for his ongoing treatment that his stress and anxiety levels be kept to a minimum.

8. Both the Member and the experts expressed concern that publication of the Member's name would add to his stress and anxiety. The Member also believes that the names and identifying details of other persons and entities involved in the audit would inevitably lead to his identification. His evidence is that this would add to his already high levels of stress and anxiety and would detrimentally affect both his ability to fight his condition and the outcome of his treatment.

9. The Member therefore seeks suppression of the name and details of another Member of his firm (who was the Engagement Quality Control Reviewer **(EQCR)** and was also the subject of disciplinary proceedings relating to the audit), the firm of which he is a member, and the client company which was the subject of the audit **(the third parties)**.

**Hearing of the appeal**

10. The PCC stated at the outset that it did not oppose, and indeed consented to, an order suppressing the name and details of the Member. We accept that such an order is appropriate in light of the grave personal circumstances which the Member is facing.

11. The PCC, however, opposed orders for suppression of the names and details of the third parties. It argued, for the reasons discussed in detail below, that prohibition of publication of the names and details of the third parties was not appropriate when balanced against the public interest in publication.

12. At the hearing of the appeal the Member supported the appeal against publication on the basis of the submissions previously provided and the new evidence relating to the Member's personal circumstances referred to above.

13. The Appeals Council made it clear at the outset of the hearing that it would be making an order permanently prohibiting publication of the name and personal details of the Member. The submissions at the hearing were therefore focussed on the orders sought in relation to the third parties. It was submitted that publication of the names of the third parties, and details which might lead to their identification, would effectively defeat the purpose and effect of the order suppressing the name and personal details of the Member.

**Merits of appeal based on evidence before the Disciplinary Tribunal**

14. We are not persuaded that the Disciplinary Tribunal was wrong, on the basis of the evidence before it, to refuse name suppression for the Member or the third parties. In essence, we agree with the decision of the Disciplinary Tribunal, based on the evidence before it, that suppression of the names of the Member and the third parties was not appropriate.

15. We summarise below our reasons why we would not have allowed the appeal based on the evidence before the Disciplinary Tribunal.

16. In our view, the initial grounds put forward to justify suppression of the name and personal details of the Member and third parties failed to properly recognise the high threshold which must be overcome in order to justify departing from the strong presumption in favour of publication. In order to overcome the presumption in favour of publication there must be strong evidence of highly prejudicial effects on the Member which outweigh the public interest in publication.

17. We do not consider that the reputational effects on the Member of publication of the Member's name are sufficient reason for ordering suppression of his name and personal details. As noted by the Disciplinary Tribunal, adverse reputational

affects on a member who has been found to have breached the standards are a normal consequence of such a finding and would not normally justify an order prohibiting publication.

18. We accept that the conduct in question in this case is not so serious in nature as to require publication in order to protect the public from the Member. That, however, is not a good reason to prohibit publication in the absence of highly prejudicial effects of publication on the Member.

19. We agree with the Disciplinary Tribunal that the breaches of the standards in relation to independence were serious in nature. We also consider that the further findings of breach of the standards in our decision on the PCC's appeal as to liability were serious in nature although at the lower end of the scale of seriousness.

20. Although we did not consider that the breaches of the standards were sufficient to establish negligence of such a degree as to be likely to bring the profession into disrepute, they were nonetheless significant failings in the audit of a publicly listed company. The effects of publication of the Member's name would not, in our view, be in any way disproportionate to the seriousness of the breaches of the standards which were found to exist.

21. Suppression of the Member's name in order to prevent his firm being identified is not a sufficient reason to order suppression of either the Member's name or the name of his firm. The audit in question in this case was the audit of a publicly listed company by licensed auditors who were members of the registered firm.

22. Although the Member has relinquished his audit license the firm continues to provide audit services. In our view there is a legitimate public interest in the identity of the firm which carried out the audit.

23. There is nothing in our decision on liability which draws any causative link between the identified breaches of the standards in relation to the audit and the subsequent failure of the company which was the subject of the audit. Nor did we hear any evidence, or make any findings, as to the reasons for, or causes of, the subsequent collapse of the company.

24. Although some readers may seek to infer such a link, that is not a matter over which the Appeals Council has any control. Nor is it a sufficient reason to justify suppressing the name or identifying details of the Member or his firm.

25. For the reasons given by the Disciplinary Tribunal, we agree with the Tribunal that there is no need to order non-publication of the name of the client which was the subject of the audit. As discussed below, there are important details in relation to the audit which must form part of the decision in order for readers of the decision

to understand the decision and the respects in which the conduct of the Member was in breach of the relevant standards. Those details of the decision make the identity of the client company easily identifiable by anyone who is interested in finding out.

26. The company went into liquidation several years ago and is not carrying on business in New Zealand. Nor has there been any application by the liquidators, or any other persons whose interests might be affected by publication, for suppression of the name of the company.

27. The Member's conduct in this case is not such as to bring into question his fitness to practice or necessitate publication of the Member's name in order to protect the public. The fact that the Member is no longer practising as a licensed auditor might be a significant factor if protection of the public from the Member was in issue and had to be balanced against highly prejudicial effects of publication on the Member.

28. Protection of the public in light of the nature of the conduct in issue is not, however, a significant public interest factor in this case. In the absence of evidence of highly prejudicial effects of publication, we do not regard the fact that the Member is no longer practising as a licensed auditor as a significant factor. It is not a sufficient reason, either in itself or cumulatively with the other factors discussed above, to outweigh the strong public interest in open justice, accountability and maintenance of professional standards which strongly favour publication of the Member's name and details.

29. In order to be satisfied that publication should not be ordered, we must be satisfied that the effects of publication on the Member are such as to outweigh the strong public interest in publication. None of the factors discussed above are sufficient, in our view, to overcome that high threshold.

30. In our view, the matters discussed above do not constitute sufficiently prejudicially effects of publication on the Member which go beyond the regular consequences of publication so as to displace the presumption in favour of publication. It is not sufficient to point to factors which suggest that publication might not be necessary in order to protect the public from the Member as being sufficient to displace the presumption in favour of publication. Nor, for the reasons discussed above, do we consider that there is any justification in the circumstances of this case for suppressing the name of the firm or the company which was the subject of the audit.

31. On the basis of the evidence before the Disciplinary Tribunal, we are not persuaded that the Disciplinary Tribunal's decision to refuse suppression of the Member's name or the name of the firm and company involved in the audit was wrong. We

would not, therefore, have allowed the appeal based on the evidence which was before the Disciplinary Tribunal.

32. Although we would not have allowed the appeal based on the evidence before the Disciplinary Tribunal, the evidence and arguments relating to the appeal from the Tribunal's decision are both relevant and important in considering whether, in light of the new evidence, we should make orders prohibiting publication of the names and identifying details of the third parties.

33. The primary issue on this appeal is whether the names and identifying details of those third parties is appropriate in order to protect the identity of the Member.

**Risk of identification of the Member from naming of third parties**

34. The evidence as to the risk of the Member being identified was primarily based on the evidence of the Member, in particular, his belief that identification of the third parties would inevitably lead to his identification.

35. We accept that naming of the third parties will lead to some people, particularly people in the audit community, being able to identify the Member by association. We do not, however, accept that naming of those parties will "inevitably" result in the Member being identified by members of the public generally or that such identification is likely to be widespread.

36. At the time the audit was carried out, the audit report was signed by the firm as opposed to the Member. Knowledge of the company which was audited and the audit firm involved would not, therefore, inevitably lead to identification of the Member.

37. Similarly, although identification of the EQCR may lead to some members of the audit community being able to speculate as to, or know, who the Engagement Partner was, the connection is not inevitable and would probably only be informed by persons who have some knowledge of who the EQCR partner and audit engagement partner were. Any such persons, in all probability, would already know the identity of the Member.

38. The collapse and subsequent liquidation of the client company was, at the time, well-publicised and was also the subject of detailed investigation by the FMA. That investigation ultimately led to the complaint by the FMA which gave rise to these disciplinary proceedings. The firm engaged in the audit is a matter of public record. The identity of the company being audited, and the audit firm involved, is already a matter of public knowledge and is likely to be well-known in the audit community.

39. We consider that details of the firm which was the subject of the audit and the actions of the auditors and other persons in relation to the audit are an essential part of the decisions as to liability in respect of both the Member and the EQCR. Those details are important in understanding the reasons why, in our findings on liability, we have found that the Member and the EQCR failed to meet the standards required when carrying out the audit and forming the necessary judgements.

40. We consider that publication of those details in the decision, which in our view are necessary for a proper understanding of the decision and the respects in which the Members failed to meet the standards, will make it relatively easy for members of the public who wish to find out (including, in particular, members of the profession who do not already know) to identify the client company and the firm involved in the audit.

**The Member's submissions**

41. Mr Jones KC made strong submissions that, in the particular and very unusual circumstances of this case, the key issue was the Member's health and recovery which, in his submission, "must gazump matters of so-called principles that relate to auditing standards".

42. We summarise Mr Jones' submissions as follows:

   a. The Member is deeply concerned that publication of the third parties' names and details would lead to the identification of the Member. This was a source of considerable additional stress and anxiety to the Member and was the key element.[1] Mr Jones submitted that the fundamental concern was providing the Member with the "best chance or opportunity to successfully navigate his treatment without having any anxiety or stress that would detract from that."

   b. Mr Jones submitted that the Member's belief that identification of the third parties would lead to his identification was all important, whether that belief was real or imagined. Given the evidence that it was important for the ongoing treatment of the Member to reduce his anxiety levels as much as possible, the names and details of the third parties should be suppressed in order to give the Member the best chance of survival.

   c. Mr Jones was forceful in his submissions that publication of the names and details of the third parties would render suppression of the Member's name pointless. He rejected the distinction drawn by Mr Moon, on behalf of the PCC, between knowledge among members of the public of the identity of the

[1] Transcript pages 16, 30.

Member and publication of the name and personal details of the Member. Mr Jones submitted that it was the *identity* of the person whose name was suppressed which was important, not just their name. He argued that the PCC's distinction between the effects of knowledge in the community of the Member's identity and publication of the Member's name and personal details was fundamentally flawed.[2]

d. In his summary of the argument Mr Jones submitted that, having regard to all of the factors which supported name suppression (including those summarised above in support of the appeal before the new evidence was admitted), combined with the Member's belief that identification of the third parties would lead to his identification, and the stress and anxiety suffered by the Member in light of that belief, the names and identifying details of the third parties should be suppressed. He argued that there was no public interest in knowing the names of those third parties which out-weighed the potential effects of publication in terms of the Member's peace of mind and ongoing treatment.

*Submissions by the PCC*

43. Mr Moon, on behalf of the PCC, opposed name suppression in respect of the third parties. In summary, his submissions were:

a. That in essence the Member's request to suppress the names and details of the third parties was based on the Member's belief that publication of the names and details of the third parties would be details which could lead to his identification.

b. Mr Moon argued that, insofar as the request to suppress the name of the EQCR was concerned, it was not possible, within the Rules, to "roll up the position of that person, (who had also been found to be in breach of the standards) as merely an identifying detail in respect of the Member". Mr Moon submitted that the Institute's Rules required an independent assessment and decision in respect of the other member.[3]

c. Mr Moon submitted that the starting point in relation to the publication of the name and details of the EQCR is the presumption in favour of publication contained in Rule 13.44 that, unless otherwise ordered, the name of the Member must be published. He submitted that Rule 13.62 (which empowers the Appeals Council to prohibit publication of "the name of, or any matter that may identify the person to whom any hearing relates or any other

[2] Transcript at page 22.
[3] Transcript at page 39.

person"),[4] was a general provision and not applicable to the issue of publication of the name and details of the EQCR who had been found to have breached the standards in relation to the audit.

d. Mr Moon argued that, when considering name suppression in respect of the EQCR, Rule 13.44, and the strong presumption in favour of publication implicit in that rule, must be applied. He submitted that, unless we were satisfied that the EQCR's personal circumstances were such as to warrant name suppression, publication of that person's name and details cannot (or at least should not) be suppressed in order to protect the identity of the Member in this case.[5]

e. In essence, Mr Moon's submission appeared to be that, on its proper interpretation, the ability of the Appeals Council to suppress the name or any matter that may identify "any other person" in Rule 13.62, did not extend to a person who was the subject of separate charges to whom Rule 13.44 applied.[6] Mr Moon appeared to accept, however, that it would be possible to say, in respect of the EQCR's appeal, that it was not allowed but nonetheless make an order in respect of this appeal that the EQCR's name be suppressed.[7]

f. Mr Moon submitted that publication of details in relation to the audit, in particular the circumstances and nature of the entity which was the subject of the audit and the events and circumstances leading up to the audit report, was critical to the public interest in maintaining standards of the profession. He submitted that it was important for members of the profession to be able to fully understand why the conduct contravened the standards, and the circumstances in which that contravention occurred, in order to (where necessary) adjust their behaviour and ensure they complied with the standards. It was also important for members of the public to know and understand the standard of conduct required of members in carrying out the audit and forming judgements in the course of the audit.

g. Mr Moon made the submission that Rules 13.44 and 13.62 are directed at regulating publication of decisions and the names and identifying details of persons contained in those decisions. He submitted that the Rules are not directed at regulating knowledge that individuals in the community already have or the likelihood that some people will, as a result of matters which are already in the public sphere (such as the collapse of a publicly listed company engaged in a specialised business and the name of the auditor of

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[4] Rule 13.62(b)(iii).
[5] Transcript at pages 39 to 42
[6] Transcript at pages 43 and 44.
[7] Transcript at pages 47 and 48.

that company), be able to make an informed speculation as to the identity of the auditor and the fact that disciplinary proceedings have been taken against that person.

h. Mr Moon pointed out that, even though some people in the community know (or would be able to make an informed guess as to) the identity of the Member, such persons will not, if the name and personal details of the Member are prohibited from publication, be able to publish the name of the Member. Mr Moon submitted that this was a critical distinction. He submitted that prohibition of publication of the name and details of the Member would spare the Member from his name being the subject of public commentary and media stories in relation to the events which gave rise to the charges against him. Mr Moon accepted, however, that publication of the name of the third parties would likely increase the pool of people who know, or may be able to make an informed guess as to, the identity of the Member.[8]

i. Mr Moon rejected the assertion by Mr Jones that the distinction between regulating knowledge of matters which might identify the Member and restricting publication of his name was meaningless. Mr Moon submitted that it was critical, reputationally, for people not to be able to comment publicly and put the person's name in the public domain and link them with the events. As he put it, the Rules enabling prohibition of names and identifying details were intended to spare the Member from being directly linked to, and being the subject of public commentary and media stories in relation to, the events which gave rise to the findings of breach of the standards.[9]

j. Mr Moon did not seek to undermine or under-estimate the genuineness of the Member's belief that publication of the names of the third parties would likely lead to identification of the Member. Mr Moon submitted, however, that the belief was subjective and, should therefore be given less weight when carrying out the cumulative exercise involved in determining whether the orders sought in respect of the third parties should be made.

k. Mr Moon argued that the strong public interest in publication of the names and details of persons who have been found guilty of disciplinary charges carried even more weight in this case because the audit was subject to the Auditor Regulation Act and a specific regulatory regime.[10] Under that Act,

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[8] Transcript at pages 50 and 51.

[9] He stated that in a small audit community such as New Zealand, people are most certain to have knowledge of the events which gave rise to the charges and the people involved. He stated that such knowledge was not knowledge that can be stopped and was not knowledge that the Rules are intended to regulate.

[10] Transcript at page 53.

the audit of a publicly listed firm, such as the company which was audited in this case, is required to be carried out by a licensed auditor.

l. The Act establishes a register of licenced auditors which also includes the firm with whom the licensed auditors are associated. In short, in order for a firm to carry out audits which are subject to the Act, the firm must be registered and the auditors within the firm who carry out that work must be licensed to do so.

m. Under s 42 of the Auditor Regulation Act, NZICA must give written notice to the Registrar of any prescribed changes to the Register including notifying the Registrar where a licensed auditor has been the subject of disciplinary action and sanction. That notification is then publicly noted on the Register.

n. In the present case, such notification on the public Register would not be required because the Members involved are no longer licensed auditors. Mr Moon, however, pointed to the requirements of the Act as indicating a strong public interest in the disciplinary record of persons who are engaged as licensed auditors and the firms involved in audits which are subject to the Act.

o. Mr Moon submitted that persons and firms covered by the Auditor Regulation Act must be taken to know that any disciplinary action in respect of a licensed auditor will be noted on the Register and the association between the licensed auditor and the firm will be publicly known. He submitted that this reinforced the public interest in transparency that is required when firms choose to undertake audit work which is subject to the Act.

p. Mr Moon submitted that publication is not just about protecting members of the public from the risk of incompetence in management of their affairs. He submitted that publication also fulfills an important function in communicating to the profession and to the public generally the standards of conduct which are expected of the profession.

q. Mr Moon argued that particularly where, as in this case, the Member is in a specialised area of practice, there is a strong public interest in transparency which means identification of the practitioner is important. He accepted, however, that where, as in this case, the Member was not going to be engaging in that practice in the future and particularly where the contravening conduct was at the lower end of the scale of seriousness, the strong public interest in publication was not as significant as it would otherwise be.

r. In that regard, we note that the Member is unlikely to practice in the audit field in the future. The member who acted as the EQCR does not practice as an auditor, but is still engaged in roles which involve, to a greater or lesser extent, reliance on his undoubted expertise as an auditor. We also confirm that there is not, in our view, anything in the evidence which gives rise to concerns as to the fitness of the members to practise so as to warrant publication in order to protect the public from incompetence.

s. In addressing the "domino effect" of naming the third parties, Mr Moon submitted that there is no direct connection between the EQCR and the audit engagement partner. He pointed out that EQCRs do rotate and do not necessarily move in tandem file-to-file working exclusively with a particular audit engagement partner. He submitted, therefore, that there was no direct link between naming the EQCR which would inevitably lead to identification of the Member in this case.

t. Mr Moon submitted that the fact that the firm is known as the auditor would not inevitably lead to identification of the Member particularly where, in this case, the names of the audit engagement partner and the EQCR do not appear on the audited financial statements which were signed off in the name of the audit firm.

***u.*** Finally, Mr Moon submitted that, in terms of seriousness, the level of seriousness was higher than it was at the time of the hearing before the Disciplinary Tribunal because of the Appeals Council finding of breaches of the standards in addition to the breach found by the Disciplinary Tribunal.

**Discussion**

44. At the conclusion of the hearing, we indicated our preliminary view that the primary issue, as we saw it, was determining how far the Appeals Council should go in order to protect the Member from being identified. One matter of concern was the suggestion during the hearing that, if the Appeals Council was minded to suppress names and details of the third parties, that could also necessitate anonymising other aspects of the decisions on liability.

45. We therefore requested that the Members provide us with draft amendments to the liability decisions in respect of the Member and the EQCR, setting out precisely what aspects of those decisions they were seeking to be anonymised.

46. We have, since the hearing, received the draft anonymised versions of the liability decisions proposed by the Member. We have received submissions from the PCC in respect of the proposed anonymising of the liability decisions. We have also

received and taken into account submissions from counsel for the Member in reply to the PCC's submissions.

47. The proposed amendments to the liability decisions primarily involve removal of the names of the third parties and also substitution of some code names referred to in the decisions which might, if left unchanged, lead to identification of the company which was the subject of the audit but, more importantly, the clients of that company. The PCC argued that the remaining details in relation to the company that was the subject of the audit (which in its submission were essential for a proper understanding of the decisions) would make the company and the audit firm reasonably easy to identify by members of the public who, for one reason or another, wish to find out.

48. Counsel for the Members, in replying to the PCC's submission, observed that the Members were acutely aware of the need for publication of the decisions and that the decisions needed to be comprehensible and understood in the context of the relevant facts and circumstances of the audit. They submitted that the Members were aware that there were facts that remain in the decisions that possibly could (but not necessarily will) lead to the identification of the third parties and the Member.

49. Counsel for the Member submitted that the redacted/amended decision proposed by the Members more than adequately set out the impugned conduct in the audit of a listed company without reference to the names of the persons involved. Counsel also suggested some further (limited) redactions/amendments that could be made in order to reduce the likelihood of the company being audited and the audit firm being identified, without materially affecting the reader's understanding of the reasons for the decision and the respects in which the conduct of the Members fell below the required standard.

50. In considering the issues which arise in this appeal, we have followed the approach of the High Court in *J v New Zealand Institute of Chartered Accountants Appeals Council*.[11] As the Court noted in that case:

> Publication of decisions in disciplinary cases are inevitably fact specific, requiring the weighing of the public interest with the particular interest of any person in the context of the facts of the case under review. There is not a single universally applicable threshold. The degree of impact on the interest of any person required to make non-publication appropriate will lessen as does the degree of public interest militating in favour of publication (for instance, where a practitioner is unlikely to repeat an isolated error). Nonetheless, because of the public interest factors underpinning publication of professional disciplinary decisions, that standard will generally be high… the question will simply be, having regard to the public interest and the interests of the affected parties, what is appropriate in the particular circumstances.

[11] 2020, NZHC 156.

51. We have also had particular regard to the recent decision of the Court of Appeal in *M v R* [2022] NZCA 502 which, although decided in the context of s 202 of the Criminal Procedure Act 2011 (which does not apply to this proceeding), is generally analogous to the situation in this case where non-publication of the names of third parties is sought in order to protect the interests of the person seeking an order prohibiting publication. We accept, however, that the facts and circumstances of that case are readily distinguishable from the facts and circumstances in this case.

52. In *M v R*, the current employer of a person who had been convicted of serious dishonesty offences (which were completely unrelated to, and occurred prior to, his current employment) sought suppression of the offender's name. It was argued that, if the offenders name was published, that would inevitably lead to the identification of the employer and would be harmful to the employer.

53. The Court of Appeal, although accepting that publication of the employer's name would cause the employer undue hardship, concluded that, even though publication of the offender's name would likely lead to identification of the employer, the public interest in naming the offender (who was not entitled to name suppression in his own right), outweighed the economic interest of the employer in not being linked to the offender.

54. The Court of Appeal in *M v R* ordered that the employer's name be suppressed but declined to order non-publication of the name of the offender. The Court, at paragraph 48, stated:

> … we do not consider it is futile to suppress the names of the employers, but not of (the offender). The order we have made will prevent publicity about the association between (the offender) and the employers in the media, and public attacks on the employers by reference to their association to (the offender) of the kind that Mr Hollyman identified as a particular concern in the present case. If we had seen this approach as futile, that would not have led us to make an order suppressing (the offender's) name. Rather, it would have led us to reconsider whether an order should be made suppressing the employer's names: an order should not be made under s 202(2) of the CPA to prevent undue hardship to a connected person if it is clear that making such an order will not in fact prevent that hardship. But we are satisfied that the approach we have adopted provides some meaningful protection to the employers and strikes a fair balance between the various interests. .

55. The approach of the Court of Appeal in *M v R*, although clearly distinguishable on its facts from the facts and circumstances in this case, tends to support the distinction drawn by Mr Moon in his submissions that an order prohibiting publication of the name and personal details of a person can, and does, provide a real benefit even where there are other facts and details in the proceedings which might lead to identification of the person whose name is suppressed.

56. We also accept that the public interest in not suppressing the offenders name, in order to protect the interests of the current employer, was very strong in that case. In *M v R*, the offender had been convicted of dishonesty offences and

protection of the public was therefore highly relevant. There can be no suggestion that the conduct of the members in this case was anywhere near as serious (we have found that the conduct was at the lower end of seriousness and protection of the public is not a significant consideration).

57. In this case, the strong public interest factors which weigh in favour of publication are outweighed, in the case of the Member, by the grave personal circumstances which he faces, and which would make publication of his name and personal details highly prejudicial to both his medical and psychological wellbeing. We therefore have no difficulty in ordering suppression of the Member's name and his personal details.

58. We consider that we have jurisdiction under Rule 162(b)(iii) to make non-publication orders suppressing the names and identifying details of the third parties in this case in order to protect the Member from being identified. We must, however, be satisfied that such orders are appropriate in the particular circumstances of this case.

59. Although there are no express provisions in the Rules similar to s 202 of the Criminal Procedure Act, we consider the discretion conferred by Rule 162(b)(iii) is sufficiently wide in its terms to encompass such orders should we consider them to be appropriate. We accept, however, that the fact that the EQCR has been found guilty of breaching the standards is a particular consideration which must be taken into account when considering suppression of his name in order to protect the identity of the Member in this case.

60. The strong public interest factors which favour publication, particularly principles of open justice, transparency, accountability and maintenance of professional standards are important principles which continue to be in play when considering non-publication orders in order to protect the identity of the Member who is entitled to name suppression. That is particularly so in respect of the suppression order sought in respect of the EQCR and the Member's firm where the public interest in open justice, transparency and accountability continue to carry considerable weight.

61. We also note that there is a legitimate interest in publication in order to protect the risk of other professionals' reputations being affected by suspicion.[12] Where, as in this case, the audit involved a relatively high-profile public company which later collapsed, the pool of audit firms and individuals which may have been involved in the audit is relatively small. There is, therefore, a risk that, if the individuals and the firm involved are not identified, suspicion may fall on others.

---

[12] See *Daniels v Complaints Committee of the Wellington District Law Society*, [2011] NZAC 1359, citing *Anderson v Professional Conduct Committee of the Medical Council of New Zealand*, High Court of Wellington CIV-2008-485-1646, 14 November 2008 at [36].

62. We accept there is some risk that naming of the third parties may lead to identification of the Member by some members of the public who do not already know his identity. We consider it is likely, however, that some people in the audit community who are involved in auditing public companies will already know the identity of the persons, and the firm, involved in this particular audit.

63. We accept, therefore, that publication of the names of the persons and firm involved in the audit in this case is likely to increase the pool of persons who might, by association, have sufficient knowledge of (or incentive to find out) the identity of the Member. We are not at all convinced, however, that publication of the names of those third parties will inevitably lead to identification of the Member by significant numbers of the audit community and the public who do not already know the identity of the Member and his role in this audit.

64. Although we have found that the grave circumstances of the Member are sufficient to justify suppression of his name and personal details, the only evidence which supports suppression of the names and the details of the third parties is the Member's belief and anxiety that publication of those details will lead to his identification. Whilst we do not doubt the Member's evidence in that regard, we agree with the submission by Mr Moon that the evidence is subjective and that, in reality, publication of the names and details of those parties is unlikely to lead to widespread knowledge of the identity of the Member beyond the pool of people who already are likely to know, or have made an informed guess as to, the likely identity of the Member.

65. In addition, although we accept that reducing the Member's levels of stress and anxiety is likely to enhance his prospects of successful treatment, we are not persuaded that suppression of the third parties' names and details, in order to protect identification of the Member by some members of the public, will significantly affect the prospects of successful treatment of the Member.

*Suppression of the Client Company name*

66. Insofar as identification of the company which was the subject of the audit is concerned, we consider that the information in relation to that company contained in the liability decisions in respect of the Member and the EQCR will enable any person, who is sufficiently interested or knowledgeable, to identify the company even if its name is suppressed. As recognised by the Members, it is important, in order to properly understand the decision and the reasons why the conduct fell below the standards, for those details to be open to readers of the decision.

67. Further amendments of some of the details in the decision is unlikely to significantly reduce the likelihood of such identification occurring. We consider publication of the details to be important to a proper understanding of the

decisions (which is essential to the public interest in maintaining professional standards).

68. We are not, therefore, persuaded that suppression of the name of the client company is either necessary or appropriate in order to protect the Member from being identified or to protect the interests of the client company.

*Suppression of the Firm's name*

69. Identification of the company which is the subject of the audit will mean that a person who possesses that knowledge will be easily able to identify the firm involved in the audit. We also consider that there is a significant public interest in the identity of the firm involved.

70. The firm continues to provide audit services which are subject to the Auditor Regulation Act. Although the two Members involved in the audit have relinquished their audit licences, and are no longer involved in carrying out audit functions by the firm, we consider that the involvement of the firm in the audit is a matter in which the public, and particularly members of the public who are required to engage licensed auditors, have a legitimate interest.

71. The fact that two licensed auditors associated with the firm were found to have breached the standards is, in itself, a matter that the public has a legitimate interest in knowing. We consider that the public interest in knowing the identity of the firm involved in the audit is strong. We are also concerned that suppression of the firm's name and details will risk suspicion falling on others who had no involvement in the audit.

72. We agree with the Disciplinary Tribunal that there is no sufficient basis for non-publication of the firm's name in order to protect it from reputational damage. The failings of the members of the firm in carrying out the audit were at the lower end of the scale of seriousness and were not such as to bring the profession into disrepute. They were, nonetheless, serious failings for which the firm must accept some responsibility.

73. We accept there is a risk that publication of the name of the firm may increase the prospect of some members of the community identifying the Member. We do not, however, consider that the risk of identification of the Member by some members of the profession or public who do not already know is sufficient to outweigh the public interest in the name of the firm being published.

*Publication of the name and details of the EQCR*

74. For reasons we have articulated in our decision on an appeal by the EQCR, we would not have allowed the appeal from the Disciplinary Tribunal decision ordering

publication of the name and details of that Member. There remains, however, the question of whether the name of the ECQR should be suppressed in order to protect the identification of the Member whose name has been suppressed.

75. We accept that publication of the name of the EQCR increases the likelihood that members of the public, particularly those in the audit community, will be able to identify the Member. Publication of the name of the firm will obviously limit the pool of licensed auditors involved in the audit to members of the firm who were licensed auditors at the time.

76. Naming of the individual EQCR will no doubt increase the prospects of the Member being identified by people who were sufficiently involved in the audit community (whether as members of the profession or users of licensed auditing services) to be able to identify the Member. However, that pool of persons is likely to be limited and, in all probability, is unlikely to significantly increase the pool of persons in the community who already know, or have made informed guesses as to, the identity of the Member.

77. We consider that, although naming of the EQCR is likely to increase the risk of some members of the public, particularly members of the audit community, being able to identify the Member, we do not consider that risk, and its possible adverse effect on the member, justifies suppression of the EQCR's name and details. As noted above there is no direct link between the identity of the EQCR and the identity of the Member.

78. Had the EQCR not been found to have breached the standards in relation to the audit we might have been persuaded to prohibit publication of his name in order to reduce the risk of publication of his name leading to identification by some people of the Member's identity. In our view, however, the public interest considerations which persuade us that the EQCR is not entitled to name suppression in his own right outweigh the risk of possible detriment to the Member which may arise from publication of the name and details of the EQCR.

79. Finally, we do not consider that naming of the third parties will render the order prohibiting publication of the Member's name futile or make the order suppressing his name and details pointless. For the reasons discussed by the Court of Appeal in *M v R*, the order prohibiting publication of the Member's name and personal details will prevent widespread public commentary and significantly reduce the risks of increased stress and anxiety on the Member arising from such publicity.

**Conclusion**

80. We make the following orders:

    a. The appeal is allowed in part.

b. The name and personal details of the Member are not to be published and the decision as to liability in respect of the Member is to be anonymised accordingly.

c. The details in the decision as to liability relating to the clients of the company which was the subject of the audit, are to be amended as proposed by the Member in the draft decision provided by the Member.

d. The decisions of the Disciplinary Tribunal are to be amended to the extent necessary in order to give effect to the above orders.

e. The evidence in relation to the Member's medical condition and personal circumstances are to be kept confidential.

Dated this 13th day of December 2022

…………………………………………….
L J Taylor KC
**Chairman**
**Appeals Council**

NEW ZEALAND
INSTITUTE OF
CHARTERED
ACCOUNTANTS

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

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

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**DECISION OF APPEALS COUNCIL**

**Dated 21 September 2022**

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

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

**Appeals Council Secretariat:** Janene Hick
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The New Zealand Institute of Chartered Accountants regulates the conduct of members of Chartered Accountants Australia and New Zealand that reside in New Zealand in accordance with the New Zealand Institute of Chartered Accountants Act 1996 and other legislation regulating the profession of accountancy in New Zealand.

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**The Appeal**

1. This is an appeal against a decision of the Disciplinary Tribunal (**Tribunal**) dated 28 May 2021.

2. In its decision the Tribunal held that the member did not adequately identify all the threats to independence arising from a report prepared by a Transaction Services team within PwC (the **TS report)** and did not adequately evaluate all of those threats to independence. The Tribunal found that, in failing to identify and assess the threats to independence, the member was in breach of the fundamental Principle of Professional Competence and Due Care in the Code of Ethics.[1] There is no appeal from that finding by the Tribunal.

3. The Tribunal also considered three other particulars of the charges against the member. The charges related to the audit of Wynyard Group Limited (**Wynyard**). The Tribunal found that those particulars (Particulars 1, 2 and 3 discussed below) were not established. The Professional Conduct Committee (**PCC**) appeals the findings in respect of each particular.

4. Particular 1 alleged a failure to ensure that sufficient appropriate audit evidence was obtained to support the auditor's conclusion that no material uncertainty existed in respect of Wynyard's ability to continue as a going concern.

5. Particular 2 alleged that the auditor had failed to reach the appropriate conclusion regarding whether a material uncertainty existed in respect of Wynyard's ability to continue as a going concern and/or failed to issue the appropriate audit opinion as required by ISA (NZ) 570.

6. Particular 3 alleged failure to ensure that sufficient audit documentation was prepared on a timely basis, to enable an experienced auditor, with no previous connection with the audit file to understand the audit procedures performed and/or audit evidence obtained and/or how the auditor reached his conclusion that there was no material uncertainty in relation to Wynyard's ability to continue as a going concern, as required by ISA (NZ) 230.

7. This decision deals with those aspects of the appeal which relate to liability. There are outstanding issues on appeal as to penalty, costs and name publication. The parties are agreed that those issues will be resolved separately following the determination of the issues as to liability in this appeal.

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[1] DT Decision at pages 10 and 12.

**Approach to the Appeal**

8. It is common ground that the appeal against liability findings is a general appeal by way of re-hearing in accordance with the principles outlined by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*.[2] As noted by the Supreme Court in *Austin Nichols* the Appeals Council has the responsibility of arriving at its own assessment of the merits of the case.

9. We note that the hearing before the Tribunal was held over a period of eight days and involved extensive evidence (both factual and expert). The transcript of the hearing ran to 684 pages and there were three bundles of exhibits introduced into evidence before the Tribunal.

10. The hearing of this appeal took place over a period of five hearing days in which counsel for the parties canvassed the evidence in considerable detail. We are grateful for the assistance received from counsel for the parties and are satisfied that we have read and considered all of the material evidence of relevance to the appeal.

**Structure of Appeal**

11. In considering this appeal, we consider each of the Particulars alleged by the PCC. We then go on to consider whether there has been breach of the Standards, and the Code of Ethics. Finally, we consider whether, as alleged by the PCC, any breaches of the Standards and Code of Ethics are so serious as to tend to bring the profession into disrepute.

**The material facts**

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

13. As part of the audit, the Member was required to make a judgement as to whether there was any material uncertainty in respect of Wynyard's ability to continue as a going concern. In forming that judgement, the Member was required to make an assessment of the company as a going concern for the period of 12 months after the date of the audit report. In this case, therefore, that required an assessment by the auditor of Wynyard continuing as a going concern for the period from March 2016 to March 2017.[3]

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[2] Austin, Nichols & Co Inc v Stichting Lodestar [2007] NZSC 103 at [4].

[3] ISA(NZ)570 Going Concern and IAS(NZ)1 Presentation of Financial Statements paragraphs 25 and 26.

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

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

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

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

18. On 20 February 2016 PwC contracted to provide the limited due diligence report (the **TS report**). It was that engagement, and provision of the TS report by a PwC Transaction Services team, which gave rise to the findings of the Tribunal that the auditor had not identified the threats to independence arising from the TS report and did not adequately evaluate all of them.

19. The draft TS report was submitted to the Wynyard Board on 21 February 2016.[4] The Member attended that meeting and reviewed both the draft and final TS reports. The final report was completed and presented on 24 February 2016.[5]

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

> The directors acknowledge that there are material uncertainties with the forecast assumptions required to meet its ongoing obligations. These uncertainties relate predominantly to market conditions at the time of the capital raising efforts and the ability of the Group to execute on its planned release program and to achieve the sales timing and quantum forecast. These uncertainties may cast doubt over the ability to continue as a going concern for the foreseeable future. Nevertheless,

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4 W brief of evidence, paragraph 101

5 W brief of evidence, paragraph 86 – Exhibit "DT-932"

> after considering the uncertainties described above, the directors have reasonable expectation that the Group will secure additional capital to allow the Group to continue to operate for the foreseeable future".[6]

21. In his advice to management dated 22 February 2016 the Member discussed the going concern assumption (that the Company and Group will continue to trade for at least the next 12 months) and noted that in reaching that conclusion:[7]

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

22. On 23 February 2016 Wynyard released its preliminary unaudited financial statements to the market.[8] The accompanying explanatory notes to the financial statements included the following note:

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

23. The Member acknowledged in his evidence that, at the time of the issue of the preliminary unaudited financial statements, the Audit Team had not reached any final conclusions as to the reliability of the forecasts and forming a view as to whether any material uncertainty existed about Wynyard's ability to continue as a going concern.[9]

24. The Member stated in his evidence that, at the time the material uncertainties disclosure was made in the preliminary unaudited financial statements, it was clear that Wynyard needed to generate $25m in cash to meet expenses in the next six to eight weeks and there was material uncertainty as to whether "they could earn $25m in revenue if the capital raise failed".[10] The Member stated that he had not "even formed a conclusion at that date it was just obvious that the next six weeks were

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[6] Exhibit "DT-717 and "DT-657.
[7] Exhibit "DT-647".
[8] Exhibit "DT 766" to "DT 775".
[9] T383/4. There had been a discussion with the Wynyard CFO at a planning meeting held on 3 November 2015, which concluded with the note that "audit will reassess management's assumptions at year end".
[10] T383.

fairly critical".[11] The Member was adamant, however, that it was "not the directors view or his view that there were material uncertainties beyond that time".[12]

25. In the hearing before us Counsel for the Member endeavoured to persuade us that the only material uncertainty at that time related to the success (or failure) of the capital raise. Whilst we accept that the success of the capital raise was critical to the going concern assumption (had it failed the company would almost certainly have had to cease trading) we do not accept that it was the only material uncertainty at that time. The draft note to the financial statements prepared by management indicated that there were material uncertainties in relation to forecast sales timing and quantum and the product release program. The assumptions underlying the budget forecast for FY16 had not, at that time, been critically assessed by the auditor and the TS report was at a draft stage (and, when finally issued, was heavily qualified). In addition, the period of the assessment of the going concern assumption was extended beyond the budget forecast period of 31 December 2016, to March 2017.

26. The proposed capital raise was announced on 24 February 2016.[13] By 2 March 2016 Wynyard had received firm commitments for $30m ($5m more than the expected capital raise of $25m).[14] The proceeds of the capital raise were not received until on or around 31 March 2016[15] but, by that time, the Audit Team had reviewed the commitments and satisfied themselves that the capital raise proceeds would be received.

27. On 2 March 2016, having received firm commitments for the $30m, the Chief Financial Officer of Wynyard wrote to the Member stating:[16]

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

28. The Member responded six days later, on 8 March 2016, advising that:

> … there doesn't appear to be any material uncertainties in relation to the capital raise with a view to completing the audit prior to 31 March …

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11 T384.
12 T384.
13 Exhibit "DT-802".
14 Exhibit "DT-804".
15 Exhibit "DT-1342" and "DT-1347"
16 Exhibit "DT-804".

> We also need to ensure there are no material uncertainties in relation to the forecast to March '17 so could you send through:
>
> - Updated forecast for the $30m and latest trading cash position
> - Your reasonable worst-case scenario so we can move away from the sensitivity that Russell had in his report.[17]
> - YTD results to end of Feb if available (or will be available over the next weekend).

29. The Member acknowledged in his evidence that the Audit Team "had not done much work on the forecast" at that stage.[18] The revised financial forecast for the period to March 2017 requested by the Member was received on 17 March 2016.[19]

30. On 21 March 2016, four days after receipt of the revised forecast, the Member issued his audit report[20] and the audited financial statements for the year to 31 December 2015 were issued.[21]

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

> 1.4 **Significant accounting judgements and estimates**
>
> In applying the Group's accounting policies management continually evaluates judgements, estimates and assumptions based on experience and other factors, including expectations of future events that may have an impact on the Group. All judgements, estimates and assumptions made are believed to be reasonable based on the most current set of circumstances available to the Group. Actual results may differ from the judgements, estimates and assumptions.
>
> The significant judgements, estimates and assumptions made by management in the preparation of these financial statements are found in the following notes:
>
> Note 1.5 Going Concern
>
> Note 2.1 Revenue …
>
> 1.5 **Going Concern**
>
> The financial statements have been prepared on the basis the Group is a going concern, able to meet its currently maturing obligations with a 12-month period from the date of the authorisation of these financial statements.

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

> Key judgements, estimates and assumptions
>
> *Going Concern*
>
> …
>
> The Directors have also considered the level of funds in place and the achievability of the FY16 financial performance and cash flow forecast, approved by the Board including the appropriateness of the assumptions underlying those forecasts.
>
> The key assumptions in the FY16 forecast include the quantum and timing of sales and collection of cash from those sales, expenditure on operating expenses and the capitalised software development programme.
>
> The Directors acknowledge that significant judgement has been applied in making the forecast assumptions. Those assumptions made relate predominantly to the ability of the Group to execute on its planned product release programme and to achieve the sales timing and quantum forecast. Nevertheless, after considering the inherent uncertainties described above, the Directors have a reasonable expectation that the Group will continue to operate for the foreseeable future.

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

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

> (The Member) noted that going concern considerations were a key area of focus following on from the preliminary PwC Report,[22] and that, having reviewed the commitments from shareholders to the $30 million capital raise and critically assessed the cash flow forecast prepared by management, PwC concurs with management's view that whilst there is inherent uncertainty in relation to the forecast, there is no material uncertainty that casts significant doubt in relation to the use of the going concern assumption.
>
> In particular, (the Member) noted that PwC has not identified any month in the cash flow forecast where Wynyard is forecast to run out of cash, and assuming the total revenue target is met, there is an appropriate level of headroom that would allow for some revenue slippage and time to react by reducing costs. (The Member) noted that '16 Q4 and '17 Q1 are the most sensitive to contract slippage, and the forecast will require close ongoing management and review.[23]

[22] This appears to be a reference to the 24 February TS report.
[23] Exhibit DT-923.

**The primary issue on appeal**

34. In considering the appeal the Appeals Council has focused on the period between release of the preliminary unaudited financial statements disclosing that material uncertainties existed about Wynyard's ability to continue as a going concern (on 23 February 2016) and release of the audited financial statements, which did not disclose any such material uncertainties, on 21 March 2016 (less than one month later). The primary issue for determination on this appeal is whether the Member complied with the standards when reaching his conclusion that no material uncertainty existed about Wynyard's ability to continue as a going concern which needed to be disclosed in the audited financial statements.

35. The answer to that issue requires a close assessment of events in the period between release of the preliminary unaudited financial statements on 23 February 2016 and release of the audited financial statements on 21 March 2016 (**the Interim Period**). It is that Interim Period which in our view is critical in determining whether Particulars 1, 2 and 3 have been established.

36. As discussed in more detail below the Member, in considering going concern, needed to satisfy himself that the revenue assumptions underlying the cash flow forecasts were adequately supported.

**Particular 1 – Did the Member fail to ensure that sufficient appropriate audit evidence was obtained to support the Member's conclusion that no material uncertainty existed in respect of Wynyard's ability to continue as a going concern, as required by ISA(NZ)200 and/or ISA(NZ)220 and/or ISA(NZ)500 and/or ISA(NZ)570?**

37. As noted above, at the time the preliminary unaudited financial statements were released, the Member had not done much work on assessing whether any material uncertainty existed about Wynyard's ability to continue as a going concern. The Member stated in his evidence that he was concerned to ensure that the TS report did not express any opinions as to the reasonableness of the management assumptions underlying the forecasts because "that's something I would have to do at a later date".[24]

38. Immediately following the release of the preliminary unaudited financial statements on 23 February 2016 the TS report was finalised and presented to the Board. As noted above, the TS report was a limited due diligence report assessing budgeted

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[24] T403.

forecast revenues and costs, cash flow, and working capital for the year ending 31 December 2016.

39. The TS report[25] expressly noted that it was prepared for the purposes of the proposed raising of capital through a Rights Issue and that the limited due diligence carried out took place over a period of two and a half days.[26] The express purpose of the report was to highlight on an exceptions basis the key observations identified as a result of their due diligence procedures on the FY16 budget. The report stated that the report "should not be relied upon for any other purpose."

40. The TS report noted that term revenue (i.e., one-off license revenue from new customers/contracts) assumed 91 new customers would be secured across the three regions and six countries in which Wynyard was operating and indicated that such growth was not therefore reliant "on any one customer or contract". The Report went on to note in respect of term revenue that the budget with regard to customer type and pricing assumed the traditional model and did not include any assumptions for securing large licences such as those received in FY15 for Delta at $2m and Bravo at $3m. It stated however that:

> ..there is a pipeline of work which indicates term revenue of $54.9 million. Whilst there is still an element of risk that the opportunities could fall away and that timing could differ to Management's expectations, it does provide some comfort as to the potential level of demand.
>
> One item in the pipeline relates to Project Echo which could provide revenue of c.$22m.This would represent 37% of total budgeted revenue, although given the size of the contract could take a few months to initiate. Management believe this could be signed in the first half of FY16 B.[27]

41. The TS report records an expectation by management that the forecast term revenue was expected across all contract categories (split by small, medium and large customers at specific price points)[28] resulting in budgeted term revenue (i.e., sale of licence fees) of $33,877,000. That revenue forecast did not, however, include revenue from two significant contracts (the Alpha and Bravo contracts) worth approximately $15m in term revenue which, at the time of the TS report, was being treated as revenue in the 2015 year.

42. The 91 new customers appear to have been derived from estimates by management in the various regions and their estimates of average licence fee revenue expected to be received from those new customers. The TS report also makes it clear that the

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[25] Exhibit "DT-1422".
[26] Exhibit "DT-1424".
[27] Exhibit "DT-1427".
[28] Exhibit "DT-1427".

forecast increase in professional services revenue from that achieved in FY15 was heavily dependent on new customers being signed up.[29]

43. Given the limited time available for the purposes of the due diligence report, the TS report team did not scrutinise or test the management assumptions underlying the forecast. The TS report relied instead upon the identified "pipeline" of sales opportunities as providing some comfort that the projected revenue was achievable.

44. Given the projected term revenue in the then FY16 budget forecast of $33,877,000 and the "pipeline" revenue of $54.9m, the authors of the TS report, whilst recognising the risks of some of those contracts not coming to fruition, were satisfied that the pipeline contracts provided significant comfort that the budgeted term revenues were achievable. The TS report makes it clear, however, that the authors had "not verified the pipeline opportunities besides agreeing the amount to a supporting schedule".[30]

45. It is plain from the work papers on the audit file that the audit team took the TS report into account when considering whether any material uncertainty existed about Wynyard's ability to continue as a going concern.

46. In the going concern audit work paper the Member noted management's view that there are no such material uncertainties and stated that the Audit Team had analysed management's conclusions based on the following:[31]

> Audit notes that TS were engaged to perform a limited due diligence exercise over the forecast to the end of FY16. As part of their review, they checked the integrity of the models as well as the reasonableness of key assumptions. A copy of there (*sic*) report is attached [followed by a link to the TS report].

47. In a further note, which must have followed receipt of the revised forecast to 31 March 2017 provided on 17 March 2016, the Member noted that:

> Whilst audit have performed their own assessment of the forecast, we have considered the conclusions reached by TS and note the key differences between the forecast they reviewed (referring to the FY16 budget forecast reviewed in the TS report) and the forecast that had been used for the final going concern assessment (which we take to mean the revised forecast provided to the Audit Team on 17 March 2016).

48. The note then goes on to identify key differences between the two forecasts as being:

> 1. The preliminary forecasts included $25 million of capital raised. The final amount is $30 million.
>
> 2. TS only considered to 31 December 2016. Our review has considered the 31 March 2017 being one year from the proposed date of signing the financial statements.

[29] Exhibit "DT-1427".
[30] Exhibit "DT-1435".
[31] Exhibit "DT-1408".

3. There had been minor other updates for latest information.

We note that the Forecast are driven by the following key assumptions:

1. Levels of revenue assumed which in turn is associated by the pipeline of licence fee sales as other revenue streams are largely stable or increases are driven from the sale of licences.
2. The timing of the above licence sales and corresponding cash collection.
3. The capital raising activity which is due to complete on 31 March 2016 with firm commitments of $30 million.
4. Cost assumptions are relatively straightforward and are driven off similar FTE levels and the associated full year effects of this.[32]

49. The Member first notes that the revised budget forecast total revenue of $72m[33] (as compared with the budget forecast reviewed in the TS report of $79,017,000[34]) comprised licence revenue of $49m, compared to $7m in FY15, maintenance (or recurring revenue) of $16m compared with $15m in FY15 (rounded up from $14.5m but stated incorrectly in the audit workpaper as $25m)[35] and $7m professional services compared to $3m in FY15. The term (licence) revenue forecast of $49m compares with the licence revenue forecast of $33,877,000 in the FY16 budget reviewed in the TS report.

50. The difference between the $49m forecast term revenue in the revised FY16 forecast and the $33,877,000 forecast in the FY16 budget considered in the TS report is primarily attributable to the fact that revenue from the Alpha and Bravo contracts (approximately $18m) was not included in the $33,877,000 forecast but was included in the revised FY16 budget forecast provided on 17 March 2016.

51. The differing treatment of revenue from the Bravo and Alpha contracts arose because, at the time of the initial FY16 budget considered in the TS report, the revenue from those two contacts was being considered for recognition as revenue in the 2015 financial year. A decision was subsequently made, however, that that the revenue from those two contracts could not be recognised in the FY15 year. The revenue from those two contracts was therefore included in the subsequent FY16 budget forecast.

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32 Exhibit "DT-1409".
33 The revised FY 16 budget showed total revenues of $72,856,000.
34 Exhibit "DT-1431".
35 Exhibit "DT-1431" and compared against Exhibits "DT-1451", "DT-767" and "DT-956".

52. In the revised cash flow forecasts approximately $18m of the $49m of licence revenue was shown in the cash flow forecast as coming from "large one off deals" (primarily Bravo and Alpha). The remaining term revenue of approximately $32m was forecast to come from new (small and medium) sales.[36]

53. The FY16 budget considered in the TS report of $33,877,000 contained a mix (based on management's assessments) of small, medium, and large customers and an average licence fee forecast to decrease from $788k in FY15 to $484k in FY16.[37] The revised budget forecast accounts receivable phasing and cash collection assumptions for the same period refer to 'small and medium sales'[38] (totalling approximately $32m) and, separately, "large one-off deals" of approximately $18m as described above.

54. In contrast to the TS report, which explored average licence fee dollar value, there is no explanation in the audit work papers as to how the approximated $32m forecast cash flow to be received from small and medium contracts in the revised forecast was arrived at. Nor is there any contemporary evidence that the assumptions underlying that $32m of forecast cash flow from term revenue were scrutinised, tested or analysed by the Audit Team following receipt of the revised forecasts on 17 March 2016.

55. Our impression from reading the audit work papers is that the Audit Team adopted the same approach as the TS team when assessing the reliability of the data and whether the assumptions underlying the forecasts were adequately supported.[39] In other words the Audit Team appear, from the audit work paper, to have relied on the "pipeline" contracts to satisfy themselves that no material uncertainty existed about Wynyard's ability to continue as a going concern.

56. That impression tends to be confirmed in the evidence of the Member as to the factors he took into account when considering going concern. The Member expressed a high level of confidence in cash from the Bravo and Alpha contracts being received by the critical third quarter of FY16 (as reflected in the cash flow forecasts). He took comfort from the fact that there was at least an expectation by management that the Project Echo contract (estimated value of $22m-which in March 2016 was at an early draft contract stage) would be signed around mid-2016 and thus had the

[36] Exhibit "DT-1456" and "DT-1451".
[37] Exhibit – "DT-1434".
[38] Exhibit – "DT-1456".
[39] The assessment required by ISA(NZ) 570 paragraph 6(6).

possibility (as opposed to probability) of producing revenue in the period to March 2017.[40]

57. The revised forecasts, however, did not include revenues from large "one-off" deals such as Project Echo ($22m) and Project Foxtrot ($15m). Revenue from those two major "pipeline" contracts considered in the TS report did not form part of the revenues or cash flows in the revised forecasts.

58. It is clear from the TS report that no detailed analysis was carried out by the TS team as to the assumptions underlying the $33,877,000 budgeted term revenue which was expected by management to come from 91 new customers during FY16. It is also clear from the TS report that, given the time available, the TS team relied upon the revenue "pipeline" provided by management as providing some comfort that the overall budgeted term revenue of $33,877,000 was achievable. As noted in the TS report, however, the pipeline opportunities relied on by the TS team had not been verified by the TS team "besides agreeing the amount to a supporting schedule".[41]

59. The going concern work paper on the audit file, having identified some key differences between the TS report and the revised revenue forecast, went on to state under the heading "Audit Response" that:[42]

> Obtaining comfort in relation to the revenue assumption comprises two components. The first is noting that a substantial portion of revenue (circa $20 million) is assumed to have been secured by virtue of the signed contracts with FD and Bravo which weren't recognised in FY15, per the significant matter. The second is (sic) component is consideration of the pipeline which comprises validated opportunities where it has been deemed probably the company will secure the contract over the next six months (note the contracts over six months are not considered by the company as they are not deemed probable or have not been validated).

60. The reference to the 6-month period in the above statement appears to have been derived from the TS report. The various sources of term revenue identified in the "pipeline" were included in the TS report as part of the pipeline on the basis that the pipeline contracts had a "higher than 50% probability of signing within the next six months (i.e., the first six months of FY16)".[43] The audit work paper notes that the six month period was chosen by management (and the Board) on the basis that revenue from pipeline contracts outside the pipeline period of six months were not deemed by management as probable or had not been validated.[44]

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[40] T391.
[41] Exhibit "DT-1435".
[42] Exhibit "DT-1409".
[43] Exhibit "DT-1435".
[44] Exhibit "DT-1409".

61. The audit work paper describes the FY16 "pipeline" as follows:[45]

| | |
|---|---:|
| Secured revenue | $750,000 |
| Alpha | $14,319,000 |
| Bravo | $3,620,000 |
| Golf | $2,500,000 |
| To be signed soon | $1,802,000 |
| Project Echo | $22,500,000 |
| Project Foxtrot | $15,000,000 |
| Other opportunities | $12,348,000 |
| Total: | $72,839,000 |

62. The pipeline identified in the going concern work paper, totalling $72,839,000, is the same as the term revenue pipeline identified in the TS report, totalling $54,900,000, with the addition of expected revenue from the Alpha contract of ($14,319,000) and Bravo contract of ($3,620,000).

63. The going concern work paper states with respect to Project Echo (with estimated revenue at $22m) that the Audit Team had:[46]

> …sighted an early draft of the contract noting it is with the (governmental agency). This would represent 31% of total budgeted revenue, although given the size of the contract could take a few months to initiate. Management believes this could be signed in the first half of FY16.

64. That wording in the audit work paper is essentially the same as the wording used in the February TS report[47] except for the addition of the note that the Audit Team had sighted an early draft contract and a consequential change in the percentage of the budget from 37% in the TS report to 31% in the audit work paper.

65. Project Foxtrot (with an estimated value of $15m) is referred to in the work paper by reference to a discussion with RK (Management Accountant) on 21 March 2016 (the date the audit report was signed off). The note states that the project is "currently in early stages with discussions being held between Wynyard and (a country's government) and the timing of the execution of the project is uncertain, however is expected at some point in FY16…".

66. Reference is then made to an additional "20 projects in the pipeline with potential term revenue of $12.3m". Each has been identified by management and validated as being probable of a sale being recorded".[48] It is not clear from the work paper

45 Exhibit "DT-1410".
46 Exhibit "DT-1410".
47 Exhibit "DT-1427".
48 Exhibit "DT-1410".

whether the validation referred to is the assessment made by management or a separate and independent assessment made by the Audit Team.[49]

67. The work paper goes on to note that contracts had been signed and cash was expected to flow in FY16 from the Alpha, Bravo and Golf contracts representing 28% of the forecast revenue. That statement is supported by the revised cash flow forecast which provides for forecast cash receipts in respect of "large one-off deals" of approximately $18m which clearly includes revenues from the Alpha and Bravo contracts.

68. The above sentence then states that the forecast revenues "… included Project Echo, which audit has sighted an early draft of the contract for, represents 59% of the forecast revenue".[50] It is clear, however, that revenue from Project Echo was not included in the forecast revenue for FY16, nor Q1 of FY17.

69. We understand from the evidence given by the Member that this confusing reference to Project Echo being included in the forecasts revenues was probably intended to refer to the possibility that revenue from Project Echo might be received in the extended forecast period through to 31 March 2017 and thus provided some comfort that the forecast revenues might be achievable.[51] The Member was clear in his evidence that revenue from Project Echo was not included in the revised revenue and cash flow forecasts.[52]

70. Although Project Echo revenue was clearly not part of the forecast revenue in the revised revenue forecast (it was not included in the "large one-off deals" in the cash flow forecasts) the going concern workpaper appears to be suggesting that, because there was a possibility of revenue being received from Project Echo (which given the uncertainty as to when the contract would be entered into, and the additional uncertainty of when invoicing and cash collection would follow if it was entered into during the FY16 financial year, would seem to have been somewhat speculative), revenue from Project Echo, together with the Alpha, Bravo and Golf revenues (totalling approximately $42,000,000) would constitute 59% of the total forecast $72m[53] forecast receipts for the FY16 year.

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[49] The Member asserted in his evidence that the 20 pipeline "other opportunities" had been assessed by audit but there is no documentary evidence of such an assessment or as to when, how and by whom the assessment was carried out. For present purposes, however, we proceed on the basis that the assumptions and data underlying the 20 contract "other opportunities" were adequately supported.

[50] Ibid.

[51] T393.

[52] T392 and T394.

[53] Exhibit "DT-1411".

71. The work paper then states, again somewhat confusingly, that:

> Excluding these contracts (which we take to mean the Alpha, Bravo, Golf, and Project Echo contracts) there is a "c. $30 million gap" that has to be filled to reach the targeted revenue, as can be seen from above, this is expected to be filled with Project Foxtrot and other opportunities in the pipeline.

72. The above statement refers to Project Foxtrot, which was valued at approximately $15m in the pipeline, and approximately $12.3m in "other opportunities" which reflected 20 contracts identified by management as being likely to crystallise (be executed) in the first six months of FY16 and produce revenue during the FY16 year.

73. The "$30m gap" referred to by the Member appears to be referring to the difference between term revenue potentially receivable from the Alpha, Bravo, Golf, and Project Echo contracts (totalling approximately $42m) and the forecast total revenue for the FY16 year of approximately $72m (i.e., a "gap" of approximately $30m).

74. As noted above the pipeline, using management's own assumptions, comprised validated opportunities where it was deemed probable, at the time the pipeline was prepared, that Wynyard would secure the contract over the next six months. By the time the Audit Team came to consider whether any material uncertainty existed about Wynyard's ability to continue as a going concern, however, there could be no basis, using management's assumptions, for including Project Foxtrot as potentially filling the "$30m gap" identified by the Member in the audit work paper. As noted in the audit work paper Project Foxtrot was at an early stage and the timing of Project Foxtrot was uncertain, but management expected it would be executed "at some point" in FY16.

75. It appears that the Member, rather than testing the assumptions underlying the revised forecast of revenue from small and medium contracts of approximately $32m, chose to adopt the same approach as the TS team of using the "pipeline" to provide some comfort that the forecast revenues were achievable.

76. The going concern work paper then discussed, in words similar to those used in the TS report, that the new Lima contract with Delta and post-year end contract with Golf supported the view expressed by management that the product "has now gained acceptance in the marketplace. This should provide future growth opportunities for the business." The entry in the work paper then concludes that:[54]

> Whilst inherently uncertain, the forecast revenue is not materially uncertain and we have considered sensitivities below.

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[54] Exhibit "DT-1411".

77. The reference to considering sensitivities is a reference to sensitivities performed by the TS team in respect of the budget forecast. The auditor stated that the results of those sensitivities were alleviated because the TS report relied on a capital raise of $25m whereas in fact $30m had been raised with the result that the worst-case scenario in December 2016 in the TS report of $275,000 "headroom" was significantly reduced by adding the additional $5m from the capital raise resulting in the worst-case scenario headroom of $5,275,000.[55]

78. It does not appear from the work paper that any additional sensitivity testing was done other than that contained in the TS report. The Member asserted in his evidence that he had done his own sensitivities and did not just rely on the TS report[56] but there is no contemporaneous evidence of that and no reference to that in the audit work paper.

79. As noted above, management had identified 20 contracts which were expected to be entered into within the next six months and for which revenue of $12.38m was projected in the pipeline. As acknowledged by counsel for the Member in the course of his submissions, revenue from those contracts formed part of the projected $32m forecast revenue from small and medium contracts.[57] There is no explanation as to where the remaining $20m from small and medium contracts was to come from or the assumptions underlying management's expectation, recorded in the TS report, of securing 91 new customers/contracts.

*Relevant Standards*

80. ISA(NZ)570, paragraph 9(a) requires the auditor to:

> … obtain sufficient, appropriate, audit evidence regarding the appropriateness of management's use of the going concern assumption in the preparation of financial statements.

81. ISA(NZ)570, paragraph 16 provides that:

> If events or conditions have been identified that may cast significant doubt on the entity's ability to continue as a going concern, the auditor shall obtain sufficient appropriate audit evidence to determine whether or not a material uncertainty exists through performing additional audit procedures, including consideration of mitigating factors. These procedures shall include:
>
> …
>
> (c) Where the entity has prepared a cash flow forecast, and analysis of the forecast is a significant factor in considering the future outcome of events or

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[55] Exhibit "DT-1413".
[56] T421.
[57] Appeals Council hearing transcript ACT 334.

conditions in the evaluation of management's plans for future action: (Ref: para. A17 – A18).

(i) evaluating the reliability of the underlying data generated to prepare the forecast;

(ii) determining whether there is adequate support for the assumptions underlying the forecast.

(d) Considering whether any additional facts or information have become available since the date on which management made its assessment.

82. ISA(NZ)500, paragraph 5(c) and ISA(NZ)200, paragraph 13(b) define what constitutes sufficient and appropriate evidence as follows:

(i) Sufficiency of audit evidence is the measure of the quantity of the audit evidence. The quantity of the audit evidence needed is affected by the auditors' assessment of the risk of material misstatement and, also, by the quality of such audit evidence.

(ii) Appropriateness of audit evidence is the measure of the quality of audit evidence; that is, its relevance and its reliability in providing support for the conclusions on which the auditor's opinion is based.

83. In the present case it is not disputed that management had prepared a cash flow forecast. Nor is it disputed that analysis of the forecast was a significant factor in considering the future outcome of events or conditions in the evaluation of management's plans (in particular, in this case, whether any material uncertainty existed about Wynyard's ability to continue as a going concern). The Member in his evidence accepted that the auditor's job was "to assess the reasonableness of the assumptions used within the forecast".[58]

*The PCC's case*

84. The PCC alleges that the audit evidence obtained by the Member was neither sufficient nor appropriate. It summarised the aspects in which it alleged the audit evidence was neither sufficient nor appropriate at paragraph 139 of its submissions as follows:

(a) Relied on the PwC TS report which was not independent audit evidence (and applied limited sensitivities).

(b) Omitted to test any of Wynyard's assumptions regarding the stump period (being the period from January 2017 to March 2017 which was included in the revised forecast provided to the member on 17 March 2016).

(c) Left unresolved queries with regard to, two key overseas contracts (the Alpha and Bravo contracts together valued at approximately $18m) and Wynyard's "worst-case scenario".

[58] T308, T379 and T391.

(d) Omitted to test the assumptions underpinning the significant increase in forecast revenue from small to medium contracts.

(e) Had identified that other large contracts in the pipeline (in particular Project Echo and Project Foxtrot) even if concluded in the relevant period, were unlikely to provide any revenue until the following year).

(f) Omitted any audit work in relation to Project Charlie, the success of which Wynyard regarded as crucial to providing a material portion of its planned revenue; and

(g) Over-estimated Wynyard's ability to reduce the head count if revenue was delayed.

85. We consider each of those alleged deficiencies as follows.

*Reliance on the TS report*

86. It is clear from the going concern audit work paper that reliance was placed on the TS report.[59] As noted above some of the wording in the TS report has been lifted from the TS report and the TS report is expressly referred to and linked in the going concern audit work paper.

87. The Member was, however, adamant that he carried out his own assessment of the forecast and treated the TS report as no more than part of the audit evidence.[60] The Member acknowledged that the TS work was "over different forecast for a different purpose. Its outcomes were different to the matters that I had to consider".[61] In his interview with the PCC, the Member stated that the TS report was "corroboratory evidence for our file, but I do not place reliance in the context of formal auditor reliance on it".[62] Although asserting that he did not place much reliance on the TS report the Member did not provide any detailed evidence as to what audit work he did to test the reliability and adequacy of the assumptions underlying the revenue and cash flow forecasts. When asked by one of the Tribunal members whether the Member was relying upon the checks done by the TS team the Member responded that:

> My team might have done similar checks and not documented, you know, it's pretty standard procedure, but I haven't ---you know, they haven't documented that and I can't say that it was done.[63]

88. As noted above, the Member had not, at the time he requested the revised forecasts on 8 March 2016, done much work on the forecasts. The revised forecasts were received on 17 March 2016. The audit report was finalised and issued four days later on 21 March 2016. There is no evidence of precisely what, if any, assessment was

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[59] Exhibit "DT-1410/11".
[60] See for instance C/420, T420 and T444.
[61] Exhibit "DT-1838".
[62] Exhibit "DT-1838" see also T398,403/404,420,422 and 444.
[63] T456/7.

done in that four day period to assess and test the data and assumptions underlying, in particular, the forecast term revenue from small and medium contracts of approximately $32m and associated cash receipts.

89. The PCC in its submissions was critical of any reliance being placed on the TS report because, in particular, it was compiled by the PwC TS Team (and was therefore not independent) and was carried out over a limited period and for a specific purpose. The expert evidence called by the PCC went so far as to suggest that no reliance should have been placed on the TS report because it was not sufficiently independent.[64]

90. We do not agree that the Member was not entitled to treat the TS report as part of the audit evidence. We accept, however, that the TS report was of limited assistance and should not have been relied upon as a substitute for the auditor obtaining sufficient and appropriate evidence, as a result of the audit team's own enquiries, to test the assumptions underlying the revised cash flow forecast to March 2017.

91. As acknowledged by the Member in his evidence, the TS report was prepared over a limited period and for a limited and specific purpose. The TS report, itself, made it clear that "given the lack of historical financial due diligence, TS were unable to comment on the achievability of the budget result".[65]

*Omission to test Wynyard's assumptions regarding the stub period*

92. The Member acknowledged in the course of cross-examination that he did not do much testing of the assumptions underlying the forecast closing bank balances of $21m, $21.5m and $19.5m in the January to March 2017 (stub) period[66] of the forecast.[67]

93. The Member explained the failure to test the assumptions underlining that period by stating that, in his mind, the critical period was Q3 and whatever happened in Q3 would determine the level of cash at the end of Q3 and beyond.[68]

94. He went onto state that:[69]

> So, when I was assessing what are the key assumptions, you know, the key assumptions were in the Q3 period predominantly.

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64 Mr Westworth did not consider that the audit team "was entitled to use the … TS report as audit evidence.
65 Exhibit "DT-1426".
66 Reflected in the balance sheet see Exhibit "DT-809".
67 T389.
68 T390.
69 C/390.

95. In answer to questions from one of the members of the Tribunal, the Member stated that he had talked about them (January, February and March) with management but the key features of those cash flows were no large sales or anything which was "very consistent with my understanding of what Q1 would be for the organisation".[70] We note, however, that there was no evidence on the audit file of any such discussion with management or of any analysis of the assumptions underlying the stub period from January 2017 to March 2017.

96. We are not persuaded that the apparent failure of the Member to carry out any detailed assessment of the forecast cash flow for the stub period was, in itself, in breach of the standards. If the assessment required by the standards had been carried out in respect of the data and assumptions underlying the cash flow forecasts for the FY16 year we do not consider any further assessment would be required in respect of the stub period unless the forecast for that period indicated new or changed assumptions (for example increased revenue from a large contract).

*Unresolved questions regarding the Alpha and Bravo Contracts and Wynyard's' worst-case scenario*

97. As noted above, the Alpha and Bravo Contracts, from which term revenue of approximately $18m was expected, were included in the cash flow forecast. Revenue from the Bravo contract was forecast to be received in June 2016 (seven months after the original contract had been entered into). Revenue from the Alpha contract was forecast to be received in three tranches of $5,000,000 each in July, August and September 2016 (seven, eight and nine months after the contract had been signed by Alpha).

98. The Bravo contract had been entered into in November 2015 but a decision had been made by the end-user to use another third party to implement the software which was the subject of the contract. The original contract was, therefore, to be novated to the third party.

99. There were delays in that novation process so that, by March 2016, the novation had not been completed. That was so, notwithstanding indications in February 2016 that the novation process was expected to be completed within the next two weeks. As at March 2016 there was some uncertainty as to when the novation process would be completed. The Member was, however, satisfied with indications by management

[70] T457/8.

that they expected the contract to be completed in April and payment received by June 2016.[71]

100. In respect of the Alpha contract, a binding contract had been entered into with Alpha in December 2015. Alpha was, however, acting as an intermediary and the contract included a "pay when paid" clause (which meant that Alpha was under no obligation to pay the licence fee until and unless it had been paid by the end-user).

101. The Member, when considering recognition of revenue from the Alpha contract in the FY15 year, was unable to obtain written confirmation that a contract had been entered into with the end-user. In addition, the Member learned, in February 2016, that although the contract had been approved by the relevant government agency and the head of government, the government had not approved the budget for the relevant government agency. Upon learning of the budget approval issue the decision was made by Wynyard and the auditor not to recognise revenue from that contract in the FY15 year.

102. By March 2016, when the audit opinion was formed, there had been no further developments in terms of confirmation of a contract by the end-user or government approval of the budget. On the other hand, however, there were no indications that the contract would not be implemented.

103. At the time of the TS report concerns were expressed regarding timing of revenue from large contracts (which at the time appeared to mean contracts over $1.5m). In response to a questionnaire provided by the TS Team, management had indicated that they had adopted a conservative assumption that, in respect of large contracts, cash flows from large contracts were "assumed to occur in months seven, eight and nine after contract execution".[72]

104. The revised cash flow forecast provided to the Member on 17 March 2016 seemed to reflect that assumption. Cash from Bravo was forecast to be received in the seventh month following execution of the original contract. The cash from Alpha was forecast to be received in the seventh, eighth and ninth months, following execution of the Alpha contract.[73]

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71 This expectation was recorded in management's going concern paper to the Board for its 21 March 2016 board meeting.

72 Exhibit "DT-788".

73 Confirmed in re-examination of the member at T432.

105. The Member in the course of cross-examination seemed to refute any notion that the forecast revenues and cash flows from the Bravo and, in particular, Alpha contracts was a result of application by management of the above assumption. The Member asserted that there "was never an assumption it was seven, eight or nine months later (after execution)".[74] Instead, in respect of the Bravo contract, the Member asserted that management expecting completion of the Bravo contract by the end of April, and that the contract being signed in April and paid in June was a reasonable assumption.[75]

106. In respect of the Alpha contract, the Member, rejected the notion that the cash flow forecast was based on the seven, eight and nine months after execution assumption reflected in management's answer to the TS questionnaire. The Member asserted that the cash flow forecast over months seven, eight and nine from the Alpha contract was based on a "modified" assumption by management that the Alpha contract was expected to be completed by June and that cash would be received in "thirds" in July, August and September".[76]

107. There is no contemporary evidence supporting the assertions by the Member that the management assumption stated in the TS questionnaire in respect of revenues from large (more than $1.5m) contracts had been modified in the manner suggested by the Member.[77] Nor is there any evidence to support the proposition by counsel for the Member that the documented assumption was limited to contracts with an intermediary (as opposed to a direct contract between Wynyard and the end user).

108. The assumption as to receipt of cash from large contracts, as reflected in the TS Questionnaire, appears to have been based on management's experience of delays in respect of large contracts. It appears to us to have been a reasonable and conservative assumption. It also appears to have been reflected in the actual revised revenue and cash forecast provided by management on 17 March 2016 (as acknowledged by the Member in re-examination).[78]

109. We are not persuaded that the management assumption of deferred cash for large contracts (such as, for example, Projects Echo and Foxtrot) was changed or modified from the documented assumption contained in the TS questionnaire dated 24 February 2016. The documented assumption explains both the treatment of the

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[74] T380.
[75] T281, T282 and T369.
[76] T374, T374, T375 and T484.
[77] We note that managements going concern Board paper simply notes that forecast cash collection from Alpha as being "unchanged at July, August and September.
[78] T432.

revenue from Bravo and Alpha in the cash flow forecasts and the exclusion of revenue from Projects Echo and Foxtrot from the cash flow forecasts.

110. We consider, however, that, in the absence of any suggestion that the Bravo or Alpha contracts were unlikely to be completed within the next few months, it was reasonable to include those contracts in the manner provided for in the cash flow forecast. Although neither of those two contracts were certain (there were outstanding issues in respect of both of them) we consider there was sufficient and appropriate audit evidence upon which to conclude that revenue being received from those two contracts in the periods provided for was not materially uncertain.

111. The PCC's concern in respect of the failure to obtain Wynyard's "worst-case scenario" arises from the Member's 8 March 2016 email to Wynyard in which he requested a revised cashflow forecast and provision of a "worst-case scenario". The Member, in his evidence, explained the absence of a "worst-case scenario" on the basis that, by forecasting cash flow from the Alpha and Bravo contracts in the June to September period, management had adequately provided for a "worst-case scenario" for that period.[79]

112. The Member noted that management had been critical of the TS report which had applied a general sensitivity of deferring all income by a period of three months. Management regarded this as an unrealistic scenario. The Member appears to have accepted management's position that forecasting revenue for the two major contracts was reasonable and no further "worst-case scenario" was required.

113. In our view, the absence of a specific "worst-case scenario" in the revised forecast was not a material deficiency given the apparent reasonableness of the forecast in forecasting cash flow from the Bravo and Alpha contracts over the period June to September 2016. We consider that was a reasonable and realistic assessment in light of the audit evidence at the time. We are not, therefore, persuaded that further testing of that assumption on a "worst-case scenario" basis was required.

*Omitted to test the assumptions underpinning the significant increase in forecast revenue from small to medium contracts*

114. As noted above, the revised forecast provided by Wynyard on 17 March 2016 forecast revenue from small to medium contracts of approximately $32m. The budget forecast previously relied upon by the TS team (which covered small, medium, and

[79] See T378, T379 and T478.

large customers) had forecast a similar sum (approximately $34m) for the FY16 year to 31 December 2016.

115. The forecast revenue from small to medium contracts contained in the revised forecast is to be compared with approximately $7m in revenue from such contracts derived during the 2015 year. As noted by the TS team, in the limited due diligence carried out by them, no attempt had been made to test the achievability of those revenues through a historical analysis of previous revenues. The TS team, therefore, were unable to comment on the achievability of the budget revenues for the FY16 period.

116. There is no evidence that, following receipt of the revised forecast indicating cash receipts from small and medium contracts of over $32m, the Audit Team carried out any specific enquiry or analysis in order to understand and test the assumptions underlying that part of the forecast. On the contrary, the Member and his team appear to have adopted the same methodology as the TS team had done of using the "pipeline" contracts to provide comfort that the forecast revenues were achievable. That approach by the Audit Team is clearly documented in the going concern audit work paper.[80]

117. Although the pipeline "other opportunities" of $12.3m from contracts expected to be completed within six months was, in our view, a reasonable basis upon which to base the forecast, that management assumption does not explain the basis upon which management were forecasting an additional $20m in cash receipts, from small and medium contracts, in the FY16 year.

118. The Member attempted to explain this, in his evidence before the Tribunal and in submissions before us, on the basis that the Member took into account that there would likely be additional contracts, which were either unknown or outside the 6-month period, which would come to fruition in the course of the year.[81] There is, however, no indication in the going concern work paper of this reasoning. Nor do we accept it as a sufficient reason for the failure properly to assess the data and assumptions underlying that critical part of the forecast.

119. As noted by Mr Moison in his evidence, revenue streams from new contracts represented the biggest exposure to Wynyard. Wynyard was reliant on securing and receiving significant additional revenue from new contracts.[82]

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[80] Exhibits "DT-1409" to "DT-1411".
[81] T480.
[82] Moison evidence at paragraphs 60 and 62.

120. Neither of the expert witnesses who gave evidence on behalf of the PCC were expressly critical of the failure by the Audit Team to carry out more detailed testing or analysis of the projected revenue from small and medium contracts. Their evidence in that regard was more focussed on what they regarded as undue reliance on the TS report. They were also highly critical of the reliance by the auditor on the "pipeline" contracts in making his assessment as to whether any material uncertainty existed about Wynyard's ability to continue as a going concern.

121. Given the significance of the forecast revenue from small and medium contracts of over $30m (compared with $7m in the FY15 year) and the fact that revenue from major pipeline contracts, such as Project Echo and Project Foxtrot, were not included in the revised forecast, we do not consider that reliance on the pipeline was a sufficient or appropriate approach to testing the reasonableness or adequacy of the assumptions by management of forecast revenue from small and medium contracts.

122. In our view, the Audit Team should have made specific inquiry as to how the forecast revenue from small and medium contracts was arrived at and the assumptions used by management in making those forecasts. In our view, the failure of the Member to carry out any such analysis, or to test and understand the data and assumptions underlining that forecast, was a significant breach of the Member's obligation to obtain sufficient and appropriate audit evidence when assessing whether any material uncertainty existed as to Wynyard's ability to continue as a going concern.

*Reliance on large contracts in the pipeline that even if concluded in the relevant period were unlikely to provide any revenue until the following year.*

123. It is plain from the going concern work paper that the Member placed considerable reliance on projected revenue from the "pipeline" as providing comfort that the forecast revenues were achievable. That seems to have been the primary basis of his assessment of the reliability of the forecasts in respect of term revenues.[83]

124. A significant part of the forecast revenue was revenue from 20 contracts which management had identified as being likely to be concluded within the first 6-months of the FY16 year totalling some $12.3m. As noted in the TS report, the TS team had not tested these "other opportunities" identified in the pipeline. There is no evidence on the audit file that any testing or analysis of the 20 contracts identified by management had been carried out by the Audit Team.

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[83] DT-1409 --The going concern workpaper states that "…audit have performed their own assessment of the forecast" and then goes on to describe the key differences between the TS report and the revised forecasts. Under the heading "Audit Response" the going concern workpaper then goes on to describe "obtaining comfort", by reference to the Bravo and Alpha contracts and the "pipeline".

125. The Member has asserted, however, both in the "Summary Document" prepared following enquiries by the FMA and in his evidence, that the Audit Team did carry out a review and analysis of the 20 contracts identified by management and, apparently, satisfied themselves that the assumptions made by management in respect of those contracts were reasonable. There was no evidence, however, as to when that testing was carried out, by whom and what contracts were identified as falling within the "other opportunities" identified in the pipeline.

126. We consider the evidence in this regard to be inadequate and too generalised to be of any material assistance in forming a conclusion as to what, if any, testing of the assumptions in respect of those "other opportunities" was done. We do not, however, consider it necessary to make any final determination in that regard. We proceed on the basis that the "other opportunities" of $12.38m identified by management were realistic and that the assumption by management that contracts outside of that 6-month period were not sufficiently probable to be included in the pipeline was a reasonable assumption.

127. In addition to the other opportunities identified in the pipeline, revenue was expected to be received from the Golf contract which had been signed in January 2016 ($2,500,000) and revenue of contracts "to be signed soon" of $1,802,000. We have no information as to what contracts were included in the "to be signed soon" category or whether any analysis of those contracts was carried out by the Member.

128. The major sources of possible revenue in the pipeline were from Project Echo ($22,500,000) and Project Foxtrot ($15m). The potential for cash from those contracts being received in the period to March 2017 (even though revenue from those projects had not been included in the forecast revenues) was clearly a significant factor taken into account by the Member when reaching his conclusion that no material uncertainty existed about Wynyard's ability to continue as a going concern. The question is whether reliance on the possibility of revenue being received from those two projects was appropriate.

129. Although the Member clearly understood that revenue from Projects Echo and Foxtrot was not included in the forecast, we consider there was at least significant doubt as to whether cash from those two projects would be received in the 12 month period to March 2017. There is no evidence of a sufficient assessment of those two projects in order to satisfy the auditor that there was a realistic probability of revenue from those sources being received within the 12-month period.

130. The limited inquiries in respect of those two projects were not in our view a sufficient basis for concluding that no material uncertainty existed about Wynyard's ability to continue as a going concern. That is particularly so in respect of Project Foctrot which, even on management's expectations was not expected to be crystallised until later in the year.

131. The only evidence on the audit file relating to assessment of the possibility of revenue being received from Project Echo is that the Audit Team had sighted an early draft of Project Echo and that management had indicated that they expected to have a contract signed within the first six months of FY16. There was no evidence as to when the early draft contract had been sighted or when management had indicated they expected Project Echo to be completed within the first six months of FY16. We note, however, that a similar expectation had been expressed by the TS team in its report dated 24 February 2016.

132. There is no evidence that any specific analysis was carried out by the Audit Team in order to assess the reliability of management's expectation that Project Echo would be executed in or around June 2016. Nor is there any evidence of any assessments of risk in respect of that expectation and, just as importantly, any assessment of the likelihood of revenue being received from that contract in the period to March 2017.

133. In that regard we note that, even if Echo was signed up some time in mid-2016, applying management's own deferred cash receipt assumption in respect of large contracts, cash would not be expected to be received until January, February and March of 2017. This may well explain why management had not included cash from Projects Echo and Foxtrot in the revised forecast.

134. Management, as at March 2016, thought it likely that an "Hotel" solution would be required in respect of Project Echo. "Hotel" was the name given to a project which was aimed at developing sophisticated software capable of analysing very large volumes of data and identifying security risks. As at 21 March 2016, however, development of the "Hotel" project had been paused.[84]

135. The Member indicated in his evidence that the pausing of the Hotel project was not regarded by him as a material threat to Project Echo. He stated that Echo was not dependent on Hotel but there had been a "discussion going on" as to whether the Project Echo customer was getting into the realms of using Hotel "…so they (management) were unsure at the time whether India would be the initial solution

[84] Reference to Project Charlie Programme Status Report dated 14 March 2016 - Exhibit "DT-893" and Executive Risk Register – Exhibit "DT-822".

and then Hotel would be beyond or whether it would be the launch. They hadn't made that decision".[85]

136. Notwithstanding the lack of any detailed investigation of the prospects of revenue being received from Project Echo (and the fact that revenue from that source was excluded from the forecasts), the Member placed considerable weight on cash being received from that project as providing "comfort" that the forecasts were achievable. As noted above the Member, in the going concern work paper, expressly noted that if income from Project Echo was included with income from the Alpha, Bravo, and Golf contracts (which were included in the forecast) the total revenue from those contracts would constitute 59% of the total forecast revenue of $72m for FY16.

137. In his evidence in cross-examination, the Member stated that management thought that Echo would be implemented in the second half of 2016,[86] and that he:

> … could see a scenario where Echo was signed in the second half and that would have been on top of Alpha or may be some other smaller contracts didn't get signed or might have got delayed and maybe it would have replaced some of the … these were sort of the judgments I had to think through when I was analysing management's cash flow.

138. The Member went on to state:

> I wasn't using it as a contingency. They hadn't assumed Echo in their forecast revenue, but it was still relevant audit evidence given the advanced stages of Echo that it was a reasonably possible scenario in my view that it could be executed in the second half of 16, but I am not saying that Echo was there to sort of save the day in early Q3 or Q3 (sic).[87]

139. In our view, given the absence of any detailed investigation as to the prospect of revenue being received from Echo in the period to March 2017 and the uncertain position with regard to the use of the paused "Hotel" solution for Project Echo, there was insufficient or appropriate audit evidence upon which to conclude that the possibility of revenue from that source was a sufficient comfort that the forecast revenues were achievable. There was clearly significant uncertainty as to both execution and timing of revenue in respect of this major contract.

140. The position in respect of possible revenue being received from Project Foxtrot was, as acknowledged by the Member, even more uncertain.[88] As noted by the Member in the audit work paper, the only recorded expectation of management in respect of Project Foxtrot was a discussion with RK (management accountant) on 21 March

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[85] T392.
[86] T392.
[87] T393 and T394.
[88] T 392 /3.

2016 that the project was in its early stages with discussions being held between Wynyard and the end user and that:[89]

> … the timing of the execution of the project is uncertain, however is expected at some point in FY16.

141. Notwithstanding the significant uncertainty as to whether revenue from Project Foxtrot would be received in the period to March 2017, the Member placed reliance on the prospect of revenue from that source when reaching his conclusions as to the reliability of the forecast. As noted above, the Member noted in the going concern audit work paper that:

> Excluding these contracts (being the Alpha, Bravo and Golf contracts representing approximately $20m in forecast term revenue) there is a c.$30m gap that has to be filled to reach the target revenue (of $49m), as can be seen from above, this is expected to be filled with Project Foxtrot and other opportunities in the pipeline.

142. In our view, given the lack of any audit evidence supporting a reasonable expectation that revenue would be received from Project Foxtrot in the period to March 2017, there was no sufficient or appropriate evidence to justify the conclusion that Project Foxtrot was expected to contribute to filling the "c.$30m gap".

143. Projects Foxtrot and Echo were of very significant value and the auditor placed significant reliance on them in obtaining comfort that the forecast term revenues were achievable. They were particularly significant in providing comfort in respect of the critical third and fourth quarters (especially if, for some reason, cash from Alpha or Bravo was further delayed). The Members' failure to critically assess the likely timing of execution and receipts from those projects and rely instead on sighting of an early draft contract (in respect of Echo) and management's expectations as to execution, showed a lack of professional scepticism required by the standards.

144. As indicated in auditing standard ISA (NZ) 570, cited above, additional audit work is required to be undertaken where the forecasts are material to the going concern assumption, in order to identify any material uncertainties as to the reliability of the forecasts. In our opinion the audit evidence in respect of Projects Echo and Foxtrot was neither sufficient nor appropriate. The auditor's reliance on those pipeline contracts in providing comfort in respect of the forecast term revenues was in our view misplaced.

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[89] Exhibit "DT-1410".

*Omission of any audit work in relation to Project Charlie the success of which Wynyard regarded as crucial to provide a material portion of its planned revenue*

145. Project Charlie involved development of software projects codenamed India and Hotel. As we understand it, the software being developed related to the development of the crime analytic software product (**Kilo**) focussed on Governmental security agencies, and the cyber threats analysis software product (**Lima**) focussed on corporates and financial institutions.

146. India was an "off the shelf" interface developed in the United States. "Hotel", was an internally developed interface by Wynyard. Hotel was a far more sophisticated and complex project aimed at enabling the consumption of very large volumes of data and identification of Kilo and Lima risks.[90]

147. Although the Kilo product had been sold by Wynyard for a period of approximately 18 months, the Lima product had only been in the market for a period of approximately three months.[91] As noted in the TS report, management were expecting to generate 91 new customers of which a significant portion were expected to come from the newly developed Lima product.[92] It was not expected that there would be revenue generated from sales of either Kilo or Lima using the Hotel interface software because, by the end of the year, development of the Hotel project (which was aimed at very large users such as Government security organisations who were analysing very large volumes of data) was paused.[93] The Member stated that "there were no sales of Kilo or Lima with Hotel assumed within the forecast period…"[94]

148. The pausing of Hotel implies that the India interface would need to be used to generate the majority of FY16 forecast revenue that included the sale of Kilo products to large customers Alpha and Bravo, together with anticipated "pipeline" sales of the Kilo product to Project Echo and Project Foxtrot customers.[95]

149. It does not appear that the audit team carried out sufficient assessment of the reasonableness of management's assumption that there would be an additional 91 new contracts during the FY16 year.

150. There is evidence that the Member had had discussions with management relating to new product development and management's expectations for future sales of the products. Management's general assertions about market demand were corroborated

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[90] T262 and T263 and T288.
[91] T288.
[92] Refer Exhibit "DT-1432".
[93] T262 and T263.
[94] TOP 263.
[95] TOP 288.

by evidence of recent sales (to Delta and Golf) of the new Lima product and the prospect of further sales of that product (among others) in the first six months of FY16). The work paper noted that:

> The launch customer was Delta and services and revenue were recognised in FY15. Whilst there is a risk that such growth will not be achieved, management have indicated that feedback from Delta has been positive, and that the product has gained acceptance in the marketplace as a result. As such, they believe demand will exist for this new product going forward. To further support this, Golf post-year end have entered into a contract for Lima amounting to $2.5m further supporting both the achievability of the pipeline and demand for the Lima product.[96] (our emphasis)

151. However, there does not appear to have been any analysis of the assumptions by management underlying the very significant forecast increase in new contract sales to 91 new customers in FY16. That failure reflects the failure identified above to carry out any detailed testing or analysis of the assumptions underlying the projected revenue from small and medium contracts.

152. We consider that the Member should have investigated the assumptions underlying the forecast revenue from small and medium contracts, including the extent to which management were relying on sales of the recently developed Lima product, in generating the forecast revenue. We note the TS report records $12.1m of revenue was to be generated from the sale of Lima in FY16 compared to only $2.2m achieved in FY15.[97]

153. As noted by Mr Westworth, who gave expert evidence on behalf of the PCC, management themselves had noted in their Executive Risk Register that "the Charlie Project delivers technology that is crucial to the success of deals providing a material portion of our planned revenue. The product approach is novel and the technology is complex and unproven".[98] Management noted in the same document that there were remaining issues with the India interface which they believed would be resolved in the next release of Kilo. When noting that the Hotel Project had been paused, management further stated they were "not sure which geographic market and market sector would be first to take Kilo 2.x".[99] We understand that "Kilo 2.x." is not a new product but was Lima using the India interface.[100]

154. Given those uncertainties and the lack of any detailed assessment by management of the assumptions underlying projected revenues from sale of the new product, we do not consider that there was sufficient appropriate evidence in respect of Project

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96 DT-1410/11- the highlighted wording in this extract of the working paper is word for word with comments made by the TS team in the TS report at exhibit "DT-1432".
97 Exhibit "DT-1433".
98 Exhibit "DT-822" – Executive Risk Register.
99 Ibid.
100 TOP 288.

Charlie upon which to form a view as to whether any material uncertainty existed as to Wynyard's ability to continue as a going concern.

*Over-estimated Wynyard's ability to reduce its head count if revenue was delayed*

155. The Member was required to assess the reasonableness of the forecast operating expenses to March 2017, as these drove the amount of funding Wynyard needed to generate in the period to be able to continue as a going concern. The PCC alleges that, in his consideration of the forecast expenses, the Member over-estimated Wynyard's ability to reduce its head count if revenue was delayed.

156. The forecast monthly "cash burn" (the gross cash outflows each month) is not explicitly stated in Wynyard's forecasts that informed the going concern assessment.[101] The Member estimated the monthly cash burn at between $6m and $7.5m per month.[102] The PCC preferred a figure at the higher end of this range.[103] Averaging FY16's annual forecast operating expenses (before capitalising product development costs) of $83.9m[104] gives a cash burn rate of $7m per month. Salaries and wages made up more than $57m (68%) of Wynyard's forecast gross operating expenses in FY16.[105]

157. Mr Westworth in his evidence[106] stated that in light of the (in his view) material uncertainties in relation to forecast revenues and, in the absence of clear evidence that Wynyard was able to "flex its expenses to adjust for shortfalls in revenue," there was a material uncertainty as to whether the budgeted cash flows might be achieved.

158. The PCC provided no evidence to suggest that the achievability of Wynyard's cashflow forecasts relied on its ability to reduce its head count. According to the TS report,[107] the version of Wynyard's 2016 cashflow forecast analysed by the TS Team assumed an approximate $10m (21%) increase in wages and salaries costs from the previous year and a net increase in head count of 10 FTEs from the previous year's average.

159. The Member gave evidence[108] that he assessed the updated cashflow forecasts that were used to support the going concern assumption. He observed that they assumed an increase of 3% in salaries and wages, an increase of 10 to 15 in employee numbers and a commission component that was consistent with revenue

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[101] Exhibits DT1450-1499 and DT810.
[102] Exhibit DT1413.
[103] Page 355-356 of the DT hearing transcript
[104] Exhibit DT1451.
[105] Exhibit DT810.
[106] Westworth BOE paragraph 98.
[107] Exhibit DT1428.
[108] Page 434 of the DT hearing transcript.

assumptions. The Member noted that the assumptions appeared reasonable and did not give rise to any audit findings.

160. Mr Prichard's evidence[109] was that he would not expect to see any further audit testing or evidence gathered on salary cost assumptions. He stated that:

> My primary observation relating to this aspect is that the hypothetical salary reduction was neither an element of the client's forecasts, nor the auditor's sensitivity analyses.

161. We did, however, note that the Member considered that cost savings might be possible and could mitigate, to some extent, the risks posed by uncertainties around revenue generation.

(a) The audit documentation[110] notes that the operating expense forecast was:

> Reasonably consistent with FY15, given the expense base. Note the expense base is largely fixed and so the increase assumes only a small change in FTE from average FTE in FY15 of 263 to 309 in FY16, full year effect of the FTE increases in FY16, inflation, wage increases and continued expansion of the business. The TS Review had not major findings either in this area. We note that management have some level of discretion over the number of FTE's but sufficient time would be needed to instigate a material reduction in FTEs to derive cost benefit (eg if forecast revenue levels reduced this would need to be identified early so as to mitigate costs due to lead times).

(b) The same work paper[111] goes on to conclude that:

> If forecast revenue reduces, the Board and Management team have the ability to reduce the FTE numbers and avoid development expenditure but there is a lead time in achieving this and so strong forecasting is required. This has been recommended in our final audit committee report.

(c) The Member confirmed the above in his evidence to the DT,[112]stating that he considered Wynyard's operating expense base was largely fixed but that the option of materially reducing staff numbers was considered to be available to Wynyard, with sufficient lead time, should revenues fall short of forecast.

162. We accept that the Member adequately considered the forecast expenditure and formed a view that the assumptions in the forecast as to expenses were reasonable. Having satisfied himself on this matter, we do not consider there was any obligation

[109] Prichard BOE, paragraph 1.16.
[110] Exhibit DT1411.
[111] Exhibit DT1414.
[112] Page 314 of the DT hearing transcript.

to obtain further audit evidence to support the forecast expenses. Nor do we consider that the Member was in breach of the auditing standards in not investigating the ability of the company to "flex" its expenses by reducing FTE levels in the event that forecast revenues did not meet expectations.

*Conclusion as to Particular 1*

163. As indicated above, we consider that the Member failed to obtain sufficient and appropriate audit evidence on which to base his conclusion that there were no material uncertainties casting significant doubt on the ability of Wynyard to continue as a going concern. Although we accept that it was appropriate to take the "pipeline" into account as a form of cross-check or "comfort" as to the prospects of the forecast revenues being achieved, we do not accept that the possibility of revenues being received from Projects Echo and Foxtrot was a sufficient basis for concluding that no material uncertainty existed about Wynyard's ability to continue as a going concern.

164. We also consider that the limited audit evidence relied upon in respect of Projects Echo and Foxtrot showed a lack of professional scepticism required by the standards. Given the very large size of those contracts and the uncertainties as to both execution and timing of cash receipts from them, we consider far more was required than the very limited enquiries of management and the sighting of an early draft contract (in respect of Project Echo).

165. In our view, the approach of the Member in relying on the pipeline as a potential source of the forecast revenues (without making further enquiry as to the likelihood and timing of cash from, in particular, Projects Echo and Foxtrot), rather than analysing and testing the reasonableness of the data and assumptions underlying the cashflow forecast itself (including approximately $32m from small and medium contracts), was inappropriate.

166. In reaching that conclusion we do not agree that there was any material uncertainty in respect of the Bravo and Alpha contracts which cast significant doubt on the forecast cash flow assumptions in relation to those two contracts. Even though neither of those contracts had been finally completed (by budget approval and confirmation of an end user contract in respect of the Alpha contract and by completion of the novation which was in progress in respect of the Bravo contract) we do not accept the view expressed by Mr Westworth that the uncertainties in respect of those two contracts were in themselves sufficiently material to require a conclusion that material uncertainty existed as to Wynyard's ability to continue as a going concern.

167. In our view, the fact that audit evidence pointed to those contracts being finalised in the short term, and the deferral of cash receipts from those contracts in the forecast to June, July, August and September 2016, were sufficient and appropriate audit evidence upon which to conclude that there was no material uncertainty in relation to those contracts.

168. We conclude that the failure to test and analyse the assumptions underlying the forecast term revenue cashflows (including Project Charlie and product implementation risks and the associated assumptions underlying the forecast from the sale of Kilo and Lima products) and the reliance on possible revenue from Echo

169. and Foxtrot (without sufficient investigation or assessment of the timing and revenue from those projects) was in breach of the standards. The Member did not, in our view, obtain sufficient and appropriate evidence in relation to the forecast when agreeing with management that no material uncertainty existed about Wynyard's ability to continue as a going concern.

**Particular 2 – The Member failed to reach the appropriate conclusion regarding whether a material uncertainty existed in respect of Wynyard's ability to continue as a going concern and/or failed to issue the appropriate audit opinion as required by ISA(NZ)570**

*The relevant standards*

170. ISA(NZ)570 requires that:

> Based on the audit evidence obtained, the auditor shall conclude whether, in the auditor's judgement, a material uncertainty exists related to events or conditions that, individually or collectively, may cast significant doubt on the entity's ability to continue as a going concern. A material uncertainty exists when the magnitude of its potential impact and the likelihood of occurrence is such that, in the auditor's judgement, appropriate disclosure of the nature and implications of the uncertainty is necessary for:

(a) in the case of a fair representation financial reporting framework, the fair presentation of the financial statements, or

(b) in the case of a compliance framework, the financial statements not to be misleading.

171. ISA(NZ)200 states:

> Professional Scepticism
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> 15. The auditor shall plan and perform an audit with professional scepticism recognising circumstances may exist that cause the financial statements to be materially misstated.

172. Professional scepticism is defined as "An attitude that includes a questioning mind, being alert to conditions which may indicate possible misstatement due to error or fraud, and a critical assessment of audit evidence".

173. ISA(NZ)200 provides at paragraph 16:

> Professional Judgement
>
> 16. The auditor shall exercise professional judgement in planning and performing an audit of financial statements.

174. ISA(NZ)200 at paragraph 17 requires that:

> 17. To obtain reasonable assurance, the auditor shall obtain sufficient appropriate audit evidence to reduce audit risk to an acceptably low-level and thereby enable the auditor to draw reasonable conclusions on which to base the auditor's opinion.

175. The Application and Other Explanatory Material section of ISA(NZ)200 provides that:

> A26. Professional judgement can be evaluated based on whether the judgment reached reflects a competent application of auditing and accounting principles and is appropriate in the light of, and consistent with, the facts and circumstances that were known to the auditor up to the date of the auditor's report.

*The Disciplinary Tribunal decision*

176. In its decision in respect of Particular 2, the Tribunal stated that:

> The Tribunal's role is to decide on the balance of probabilities, whether the conclusion on material uncertainty reached by the Member was an appropriate conclusion that could be reached by a responsible auditor based on the audit evidence available to him at the time. The Tribunal is not required to determine if the correct conclusion was reached. It is not a binary determination. The Tribunal must determine if the conclusion reached was available to a reasonably competent auditor.[113] (our emphasis)

[113] Tribunal Decision at pages 6 and 7.

177. The Tribunal noted that it was clear that the conclusion in relation to material uncertainty was a "close call". The Tribunal recognised that some reasonably competent auditors would have concluded that material uncertainty existed.

178. The Tribunal noted the expert evidence called by the PCC to the effect that the conclusion reached by the Member was not open to a reasonably competent auditor. The Tribunal stated, however, that the evidence of the experts called for the Member, that despite shortcomings in the audit evidence "it was open for the Member to reach the conclusion that he did", "was credible and considered".[114]

179. The Tribunal concluded that the evidence of the experts called for the Member was "sufficient to show that the conclusion that the Member reached was available to him". It therefore held that Particular 2 was not established.

180. In the course of the hearing before us we expressed some concern regarding the appropriateness of the question which the Tribunal was asked to answer. The way in which the question was framed by the Tribunal, however, very much reflected the framing of the issue by the parties and their experts in the hearing before the Tribunal.

181. Mr Moison, the FMA investigator who gave evidence for the PCC, although accepting the question of whether material uncertainty existed involved professional judgement, "did not consider the conclusion reached by the Member to be one that could be reached by any reasonable auditor in possession of the same information at the time".[115]

182. Similarly, Mr Westworth (the independent expert called by the PCC) identified various uncertainties which in his view existed and stated that in his view those uncertainties "would have caused a reasonably competent auditor to conclude there was a material uncertainty …".

183. Mr Morris (one of the experts called to give evidence by the Member) concluded first that the Member had obtained sufficient and appropriate evidence to support term revenue cashflows of approximately $43.7m and, having regard to Project Foxtrot and other pipeline revenue gained "sufficient appropriate audit evidence" that the revenue included in Wynyard's 2016 forecast was appropriate".

184. In addressing whether the conclusion reached by the Member (that no material uncertainty existed about Wynyard's ability to continue as a going concern), Mr Morris stated that "whilst in his opinion reasonable minds may differ, the

[114] Tribunal decision at page 6
[115] Moison BOE at para 78.

conclusions that were reached by the Member were reasonable and the work that was undertaken and the consideration that the Member gave to these issues was consistent with a standard of a reasonably competent auditor".[116] Mr Morris therefore concluded that:

> It cannot be said that no reasonably competent auditor would have reached the conclusions that W reached.[117]

185. Mr Prichard, who also gave expert evidence on behalf of the Member, stated that he had been "asked to consider whether the opinion reached by the (Member) was an opinion that could reasonably be reached, based on the evidence obtained by him".[118]

186. Mr Prichard stated that, in his professional opinion, there was a reasonable basis for the Member's conclusion that there was no material uncertainty.[119] At paragraph 2.21 of his brief of evidence Mr Prichard concluded that the member had sufficient and appropriate evidence on which to make his judgement and that the opinion reached that no material uncertainty existed about Wynyard's ability to continue as a going concern was "an opinion that was reasonably reached, based on that evidence".

*Discussion*

187. Mr Moon in his submissions before us, stated that no reasonably competent licensed auditor acting diligently could have concluded that the uncertainty in relation to forecast revenue was not material.[120]

188. Counsel for the Member, Mr Jones QC, at paragraph 14 of his submissions, stated the test as being:

> …whether it was open to a reasonably competent auditor exercising professional judgement to reach the same conclusion as the Member and whether the audit evidence and the documentation was sufficient to support that conclusion.

189. Mr Moon, in his oral submissions before us, accepted that the question of whether the Member's conclusion was "appropriate" was not answered by considering only the evidence actually obtained by the Member upon which he based his conclusion. In considering whether the conclusion reached was appropriate it must first be established that the Member had obtained sufficient and appropriate information upon which to form a professional judgement.

[116] Morris BOE at para 240.
[117] Morris BOE at para 241.
[118] Prichard BOE at para 2.4.
[119] Prichard BOE at para 2.14.
[120] PCC submissions at paragraph 165.

190. In our view, the answer to the question whether the conclusion of the Member was "appropriate" is best found by asking whether, based on the information obtained by the Member, or which ought to have been obtained by the Member, there was sufficient audit information upon which to reasonably conclude that there was no material uncertainty.

191. Framing the question in that way is consistent with the provisions of ISA(NZ)200 in evaluating whether the judgment reached reflects a competent application of auditing and accounting principles and is appropriate in light of, and consistent with, the facts and circumstances that were known to the auditor up to the date of the auditor's report.[121] It is implicit in that evaluation that the Member must have complied with the obligations to perform the audit with professional scepticism and to obtain sufficient and appropriate audit information upon which to form the required judgement. If not, the judgement will not reflect "a competent application of auditing and accounting principles".

*Conclusion*

192. Contrary to the views expressed by the experts called on behalf of the Member, we have found that the Member failed to obtain sufficient and appropriate audit evidence upon which to reasonably conclude that no material uncertainty existed about Wynyard's ability to continue as a going concern. We have also found that the Member was wrong to rely on pipeline revenues, (such as Projects Foxtrot and Echo) as providing "comfort" that the forecast cashflows and revenues were achievable without making further enquiry as to whether, or when, cash was likely to be received from those projects in the period to March 2017. That is particularly so when revenue from those pipeline projects was not included in the revenue and cash flow forecasts.

193. Given those findings the conclusion reached by the Member that no material uncertainty existed about Wynyard's ability to continue as a going concern was not "appropriate". The conclusion reached was based on insufficient and inadequate audit information and reflected, in our view, a lack of professional scepticism by the Member.

194. In reaching that conclusion, we express no view as to the correctness or otherwise of the conclusion reached by the Member. We agree with the Tribunal that it is not necessary to decide whether the conclusion reached by the member was correct.

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[121] See ISA(NZ)200 paragraph 16 and A26.

195. We note, however, that Counsel for the Member argued that there was audit information available to the Member that, even taking into account the various risks identified in relation to revenues from small and medium contracts, Project Charlie and pipeline revenues, sufficient cash could have been received from other sources (such as recurring revenue, the Bravo, Alpha, and Golf contracts, and revenue from the twenty "other opportunities" in the pipeline) to cover the expected "cash burn" of $6m to $7m per month.

196. Counsel for the Member accepted that the Member did not approach the question of whether there were material uncertainties in that way. It was argued, however, that the prospect of revenue from those sources would have justified a conclusion that no material uncertainty existed about Wynyard's ability to continue as a going concern.

197. Whilst we accept that, mathematically, revenue from those more probable sources may have been sufficient, if received in time, to cover the projected cash burn and keep Wynyard going for the relevant period to March 2017, we do not consider that information would have been a sufficient basis upon which to conclude that no material uncertainty existed about Wynyard's ability to continue as a going concern. A "break-even scenario" of that kind would, in itself, have raised significant doubts as to Wynyard's ability to continue as a going concern and would almost certainly have required more detailed scrutiny of the assumptions underlying the projected sources of revenue. In addition, the increase in forecast professional services and other revenue, from those received in FY15, was significantly dependent on forecast sales to new customers being achieved.

198. There is no evidence before us which persuades us that it would have been reasonable for the Member to conclude that there were no material uncertainties in light of the projected revenues from those sources. Nor do we consider that it is necessary for us to make a finding on that issue in view of our findings that the judgement reached by the Member was not appropriate.

199. For the reasons discussed above we conclude that the conclusion reached by the Member was not appropriate. It was based on insufficient and inadequate audit information and reflected a lack of professional scepticism. We therefore find Particular 2 established.

*Material v Inherent Uncertainty*

200. As noted above, the audited financial statements replaced the previous material uncertainties note in the unaudited preliminary financial statements with Note 1.5. Rather than referring to material uncertainties, Note 1.5 referred instead to "inherent

uncertainties' in respect of (among other things) Wynyard's ability to continue as a going concern.

201. Mr Westworth was highly critical of the reference in Note 1.5 to "inherent" rather than "material" uncertainties. In his view, the acknowledgement by management of "inherent" uncertainties was tantamount to an acceptance that there were material uncertainties. In light of the previous acknowledgment by management of material uncertainties in the February unaudited preliminary financial statements, Mr Westworth regarded the use of the word "inherent" in Note 1.5 as misleading.

202. The PCC, in its submissions before us, suggested that Mr Morris had accepted in cross-examination that the words "inherent uncertainty" and "material uncertainty" were essentially synonymous. Although we accept that the reference to the evidence which Mr Moon relied upon could be read as constituting such an acceptance, we have no doubt, given the general tenor of the evidence from Mr Morris on the use of those terms, that he did not regard them as synonymous.

203. In our view, the words "inherent uncertainty" and "material uncertainty" convey quite different concepts. An "inherent" uncertainty is not the practical equivalent of "material" uncertainty under ISA(NZ)570.[122] We do not, therefore, accept the PCC's submission that the use of the term "inherent" uncertainty in Note 1.5 was essentially a recognition by management of material uncertainty which ought to have been expressed in the accounts with an emphasis of matter (EOM) paragraph, or by way of a qualified or adverse opinion by the auditor.

204. The auditor's task when considering going concern is to identify whether there are any material uncertainties. Cash flow forecasts are, by their nature inherently uncertain. On one view of it, therefore, the reference in Note 1.5 does no more than state the obvious; that forecasts as to future revenues are inherently uncertain.

205. There is therefore force in the argument that, if there were significant or material uncertainties as to whether the forecasts revenues were achievable (which is essentially a question of degree upon which the auditor must form a professional judgement) then reference in the notes to the accounts to inherent uncertainties would be misleading. It could convey a message that the uncertainties in relation to the cash flow forecasts were no greater than the normal or "inherent" uncertainties which attach to cash flow forecasts generally.

[122] See PCC submission at paragraph 196.

206. In his evidence, the Member stated that:

> If management had written "material" then I would have alerted them that has a defined meaning. If they had written "uncertainty", I probably would have asked them to express it in a different way. You know, there are general uncertainties, but ISA 570 used the term "inherent uncertainties" in management assessments of going concern. So I pointed them in that direction, you know, because they were trying to explain the uncertainties they had and they chose to adopt the ISA 570 wording.[123]

207. As noted in ISA(NZ)570, management's assessment of the entity's ability to continue as a going concern involves making a judgement, at a particular point in time, about "inherently uncertain outcomes of events or conditions".[124] The auditor's responsibility, however, is to obtain sufficient appropriate audit evidence about the appropriateness of management's use of the going concern assumption and to conclude whether there is any material uncertainty in respect of events or conditions which cast doubt on the entity's ability to continue as a going concern.

208. There is at least some risk that inclusion of an "inherent" uncertainties statement may be used as a "soft option" in circumstances where there are significant uncertainties but a difference of view, or some doubt, as to whether they are sufficiently material to require disclosure. In addition, the reference to "inherent" uncertainties does not, depending on the context, state anything more than the obvious. There is therefore the potential for a reader to overlook the significance of the statement on the basis that "inherent" uncertainty is part and parcel of any cash flow forecast.

209. There is certainly no requirement, in circumstances where management and the auditor have formed the view that there are no material uncertainties, for a statement such as that contained in Note 1.5 to be made. As pointed out by the Member, however, there is no bar to a statement being made that there are uncertainties in the forecast which the reader should take into account. Such a statement is also arguably consistent with the current policies promoting more, rather than less, disclosure.

210. The danger in the use of the word "inherent", particularly in the circumstances of this case, is that it may have the effect of downplaying the significance of the uncertainties which do exist. We consider that, if such a statement is intended to convey a degree of uncertainty which is greater than "inherent" but something less than "material", then different and more express wording would be desirable in order to ensure that the reader is not misled.

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[123] T297.

[124] ISA(NZ)570 at paragraph 5.

**Particular 3 – The Member failed to ensure that sufficient audit documentation was prepared on a timely basis, to enable an experienced auditor, with no previous connection with the audit file, to understand the audit procedures performed and/or audit evidence obtained and/or how you reached your conclusion that there was no material uncertainty in relation to Wynyard's ability to continue as a going concern, as required by ISA(NZ)230**

*The relevant standards*

211. ISA(NZ)230 sets out in paragraphs 2, 3 and 5 the nature, purpose and objective of audit documentation.

212. Paragraph 5 states the objective as being to prepare documentation that provides:

> (a) A sufficient and appropriate record of the basis for the auditor's report; and
>
> (b) Evidence that the audit was planned and performed in accordance with ISAs(NZ) and applicable legal and regulatory requirements.

213. Paragraph 7 requires that the audit documentation be prepared on a "timely basis". That requirement:[125]

> …helps to enhance the quality of the audit and facilitates the effective review and evaluation of the audit evidence obtained and conclusions reached before the auditor's report is finalised. Documentation prepared after the audit work has been performed is likely to be less accurate than documentation prepared at the time such work is performed.

214. It was common ground at the hearing before us that the audit file containing the records that comprised the audit documentation for a specific engagement should be collated and completed within 60 days of the completion of the audit. The practise of the auditor in this case was to complete the audit file within 45 days of the audit report.

215. Paragraph 8 of ISA(NZ)230 requires the auditor to prepare:

> Audit documentation that is sufficient to enable an experienced auditor, having no previous connection with the audit, to understand:
>
> (a) The nature, timing and extent of the audit procedures performed to comply with ISAs(NZ) and applicable legal and regulatory requirements;
>
> (b) The results of the audit procedures performed, and the audit evidence obtained; and

[125] ISA(NZ)230, paragraph A1

(c) Significant matters arising during the audit, the conclusions reached thereon, and the significant professional judgments made in reaching those conclusions.

216. Paragraph 9 of ISA(NZ)230 requires, among other things, that the auditor record who performed the audit work, the date such work was completed and who reviewed the audit work performed and the date and extent of any such review. The auditor is also required to "document discussions of significant matters with management including the nature of the significant matters discussed and when and with whom the discussions took place."[126]

217. Paragraph 16 of ISA(NZ)230 relevantly provides that:

> Where the auditor finds it necessary to modify existing audit documentation or add new audit documentation after the assembly of the final audit file has been completed, the auditor shall, regardless of the nature of the modifications or additions, document:
>
> - (a) The specific reasons for making them; and
>
> - (b) When and by whom they were made and reviewed.

218. In Explanatory Note A24 to paragraph 16 of ISA(NZ)230, provides:

> An example of a circumstance in which the auditor may find it necessary to modify existing audit documentation or add new audit documentation after file assembly has been completed is the need to clarify existing audit documentation arising from comments received during monitoring inspections performed by internal or external parties."

*Material facts*

219. The Financial Markets Authority (**FMA**) carried out a Quality Review of the audit of various PwC audit files including the audit of the Wynyard Group. The audit review was initiated in August 2016 and carried out in December 2016 and January 2017.

220. A draft report was prepared on 21 January 2017. The draft report was the subject of various meetings with PwC in which the draft findings were discussed.

221. On 20 April 2017, PwC provided written comments on the draft by way of tracked changes proposing amendments to the draft findings.[127] Various further meetings and a second draft report followed. The final report of the FMA was completed in August 2017.[128] On 22 August 2017, the FMA made a formal complaint to NZICA.

[126] ISA(NZ)230, paragraph 10
[127] Moison BOE paragraphs 11-17
[128] Exhibit "DT-1314"

222. In the course of the FMA investigation and report process, PwC provided the FMA with a written "Significant Matter" document of approximately 13 pages. The document was prepared for the purposes of the FMA investigation and was stated to be "to summarise the background, evidence obtained and our key judgements and final conclusions in relation to use of the going concern assumption…"[129]

223. The initial version of the "Significant Matter document" was provided on 21 April 2017. It was, however, subsequently added to and amended during the PCC investigation process following the complaint by the FMA. That amended version (**the Summary Document**) was added to the audit file on 14 December 2017.[130] The Summary Document was approximately 20 pages in length plus annexures.

224. The Summary Document stated that:[131]

> Following the FMA review of the Wynyard Group 2015 audit file, the engagement team have prepared a summary of evidence paper for inclusion in the audit file. This paper does not introduce new evidence but provides a summary of the evidence and information available to the auditor at the time he signed the audit report.
>
> R&Q have confirmed that the requirements of PwC audit have been met in the completion of the summary document and inclusion in the paper file as hard copy work papers.

225. The Summary Document annexed various documents.

226. Mr Selwyn-Smith, an investigator for the PCC, gave evidence to the Tribunal. He annexed a report which he had prepared in the course of the PCC investigation. As part of that report, he provided a schedule in which he identified apparent differences between the Summary Document and the audit file.[132]

227. In his report Mr Selwyn-Smith also identified documents which were referenced in the Summary Document but did not form part of the audit file.[133] At Table 3 of his report Mr Selwyn-Smith set out a list of the documentation which was on the audit file at the time it was completed in May 2016.

228. Mr Selwyn Smith was not cross-examined on his evidence. We accept the information provided in his Tables 3, 4 and 5 as being correct. We note, however, that Mr Selwyn-Smith was careful, when referring to Table 5 in his report, to say that:[134]

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[129] Exhibit "DT-1472"
[130] Moison BOE paragraph 88 and exhibit "DT-1339"
[131] Exhibit "DT-1339"
[132] Table 5 PCC 2153 replicated in Westworth BOE at paragraph 116
[133] PCC 2151 Table 4.
[134] PCC 2152 at paragraph 30.

> The summary document acknowledges that it has expanded upon the documentation in the audit file in certain areas to "clarify what audit procedures were undertaken, or what evidence was obtained but not clearly documented or referenced on the audit file at the time.

229. He went on to state that, in compiling the main areas of apparent difference in his Table 5, he did not consider it within the scope of his engagement to express any opinion as to the significance of those apparent differences.

*The PCC's case*

230. Mr Westworth, in his expert evidence on behalf of the PCC, acknowledged that some of the differences identified by Mr Selwyn-Smith were not significant. He identified two areas of concern namely:

(a) The way in which the TS work was used by the audit team is generally badly articulated on the file and has resulted in considerable confusion …

(b) There is more emphasis on the contracts in the (Summary Document) than there was in the original audit file, but no new information has been added. It is more a question of emphasis.[135]

231. Mr Westworth expressed the opinion that the documentation on the audit file in respect of the going concern issue was confused. In his view it did not set out a "clear understanding of the risks that Wynyard might not achieve the forecast" and the Member's articulation of the reasons for his conclusions were not clearly documented.[136]

232. At paragraph 119 of his evidence, Mr Westworth expressed the view that, without the Summary Document, which draws attention to material that was not on the audit file, an experienced auditor having no previous experience with the audit would not have been able to understand various aspects of the audit procedures and the reasons for conclusions reached in the exercise of professional judgement on significant matters arising during the audit.

233. Mr Moon in his submissions before us pointed to acknowledgments by PwC in the course of the FMA investigation including acceptance by PwC that:

> The audit work papers did not include a significant matter that summarised the audit work we had performed, and evidence obtained, to support how we reached our conclusion that an emphasis of matter on going concern was not required. We acknowledge that such a significant matter would clearly summarise the audit

[135] Westworth BOE at 117.
[136] Westworth BOE at 118.

> evidence we obtained and documented to support this judgment call as required by ISA(NZ)230".[137]

234. Mr McIntyre, who gave evidence on behalf of PwC, acknowledged in the course of cross-examination that there was insufficient documentation as to why PwC were comfortable with the forecast ended 31 March 2017, and also acknowledged that there were inadequate documents on the file to explain why PwC were comfortable with the assumptions around Opex.[138]

235. Mr Moon argued that referencing and adding documents which had not been included on the audit file, together with a 20-page narrative explanation of the audit procedures and evidence relied upon, was outside the proper scope of paragraph A24 of ISA(NZ)230. Mr Moon argued that the document was not "clarifying" the existing audit documentation, it was documenting how the audit was performed. He also submitted that the Summary Document, together with its annexures, could not cure or remedy deficiencies in the audit documentation required by the standards to be completed and compiled in the audit file in a "timely manner".

*The Member's response*

236. The Member argued that the final Summary Document was in compliance with the ISA(NZ)230 paragraph A24. It was argued that the Summary Document was simply a "road map" and added no new information which was not available to the Member at the time of the audit. Adding it to the audit file in December 2017 was therefore entirely appropriate.

237. The experts called to give evidence on behalf of the Member confirmed that all of the documentation referred to in the Summary Document was available to the Member at the time of the audit. They also stated that they had been able to understand the audit procedures performed, the evidence obtained and how the conclusion that there was no material uncertainty was reached from documents which were on the audit file.[139] Mr Morris said that, in forming his expert opinion on the audit, he did so without any reference to the Summary Document.[140]

*The Disciplinary Tribunal decision*

238. The Tribunal in its decision accepted that the Summary Document did not add any new evidence to the file which was not available as at 21 March 2016 but simply arranged the evidence "in a more coherent and logical manner".[141] It stated that,

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[137] PCC submissions at paragraph 237 – Exhibit DT-1214.
[138] PCC submissions at paragraph 244 – T606/T607.
[139] Prichard BOE at paragraph 315; Morris BOE at paras 253 to 256.
[140] Morris BOE at para 262.
[141] Tribunal Decision at page 6.

where an audit file is subject to close inspection and subsequent review, deficiencies will almost always be uncovered. It concluded that the preparation of the document was not a breach of ISA(NZ) Standards and was reasonably in accordance with ISA(NZ)230 paragraphs 16 and A24.[142]

239. The Tribunal held that Particular 3 had not been established.

*Discussion*

240. In its submissions before us, the PCC relied on a statement in a decision of the Disciplinary Tribunal of 29 August 2017 that:

> The lack of documentation damages the integrity of an audit. Documentation standards are clear – if something is not documented it has not been done.[143]

241. Counsel for the Member was critical of that proposition. He argued that it could not be an accurate statement of the law as a matter of common sense. It is not necessary or practical for an audit to document every matter considered, or professional judgement made, in an audit.

242. We agree that the statement by the Tribunal in *Browning* cannot be relied on literally to support a proposition that, if something is not documented in the audit file, it has not been done. When read in context, the statement in *Browning* was addressing the objective of the standards, which is to ensure that the audit procedures and conclusions reached on significant matters are clearly documented and contained in the audit file.

243. We do not read the statement in *Browning* as stating a blanket rule that, if something is not documented on the audit file, it cannot subsequently be established by the auditor that it was, in fact, done. The absence of sufficient documentation required by the standards will, however, place an evidential burden on the Member to establish that, although not documented, the necessary audit procedures were undertaken and the conclusions reached were reasonable and supported by sufficient and adequate evidence relied on by the auditor at the time of the audit.

244. We have, in the process of considering Particular 3, read the Summary Document in detail and compared the information contained in it with the information on the audit file in relation to the audit of the going concern assumption. We have also had regard to the extensive evidence given by the Member, both in his evidence in chief and in cross examination, in which he expanded on the audit work undertaken and his

[142] Tribunal Decision at page 6.
[143] Browning, 12 October 2017.

reasons for reaching the conclusion that no material uncertainty existed about Wynyard's ability to continue as a going concern.

245. As noted by the PCC the Summary Document addresses the going concern assumption and the audit procedures and reasons for the Member's conclusion that no material uncertainty existed about Wynyard's ability to continue as a going concern. The Summary Document is discursive in nature and contains various detailed assertions in relation to audit procedures undertaken which are not contained anywhere in the going concern audit work paper or in the documentation on the audit file. It also annexes several documents which, although available to the auditor at the time the audit file was completed, were not included in the audit file.

246. We have some sympathy for the submission by Mr Moon that the need to compile the 20-page Summary Document and provide further documents, in order to explain the audit process and the conclusions reached, "speaks volumes" as to the adequacy of the documentation on the audit file. The section of the going concern work paper on the audit file relating to audit of the revenue and cashflow forecasts and the reasons for the conclusion that there were no material uncertainties was contained in less than four pages of which the narrative took up approximately half of each page.

247. In describing the audit procedures carried out in respect of the revenue and cash flow forecasts the work paper simply stated that "whilst audit have performed their own assessment of the forecast, we have considered the conclusions reached by TS and noted the key differences between the forecasts…". Although it is apparent from the work paper that the auditor gained comfort from the "pipeline" contracts which had been compiled by management and considered in the TS report, there was no documentary evidence in the audit file of what the Audit Team's "own assessment" involved, by whom it was carried out, what enquiries were made and what discussions were held with management as part of that assessment, in the four day period between receipt of the revised forecasts (including the three-month "stub" period) and issue of the audit report on 21 March 2016.

248. The need to read the Summary Document in order to try and understand what audit procedures were (or were not) undertaken highlights the lack of documentation on material audit matters on the audit file and demonstrates the importance of complying with the standards when carrying out the audit. The Summary Document contains a number of statements which are not reflected in the documentation on the audit file. For example:

1. The reliability of the forecast had been considered and included knowledge gained as auditors of Wynyard which, with the

exception of 2015, "had a track record of forecasting revenue with reasonable accuracy". There is no suggestion in the audit documents that this was a material factor which was taken into account when auditing the forecasts. Nor would it seem to have much weight given the very significant increased revenues and cashflows contained in the forecasts.

2. The TS report asserts that the revenue forecasts were not compiled on a "contract by contract" basis. A similar assertion is made in the Summary Document although there is no evidence of any specific enquiry by the Audit Team in that regard. The Summary Document then goes on to state, however, that the forecasts were "rather a forecast of total revenue for the period based on the pipeline of validated opportunities, contract status to date, recurring revenue and then estimates of future revenue for unknown contracts based on all available information. In assessing future contracts management only took into consideration the identified pipeline for six months to September 2016".

   We have seen no evidence, or document, supporting the statement that the revenue forecast included "estimates of future revenue for unknown future contracts based on all available information." Nor is there any evidence that any assessment was made of the assumptions underlying that alleged assessment.[144]

   In addition, there is no documentation supporting the assertion that, in assessing future contracts management only took into consideration their identified pipeline for six months "to September 2016". There is no statement to that effect in the audit file and it is inconsistent with the TS report which stated that the pipeline contracts were contracts which were expected by management to be completed within the first six months of FY16 (i.e. to June 2016). There is no documentary record of any revision of the forecast or pipeline being based on management's assessment of contracts likely to be completed by September 2016.

3. It is asserted in the Summary Document that the Audit Team's approach to evaluating forecast revenue was to "perform procedures over this pipeline in support of the revenue assumptions in the forecast". There is, however, no documentary evidence as to what those procedures were, by whom they were carried out, when they were carried out and what the result of those unspecified "procedures" were.

4. The Summary Document states that the Audit Team considered assumptions on the timing of revenue recognition and then conversion to cash. The assumption on realisation of accounts receivable is said to be based on "both historic or actual collections and specific assumption relating to new revenue... as reviewed below". However, there is virtually no documentary evidence indicating what enquiry was made, by

[144] We note, however, that it is arguably implicit in the forecast of $32m from small and medium contracts that a significant part of that revenue was expected to come from contracts which were not expected to be completed within the first 6 months of FY16 and were, therefore, to a greater or lesser extent unknown. There is nothing on the audit file which documents assessment by the Audit Team of the management assumptions underlying those projections.

whom and what the results of those enquiries were to be sure that the cash receipts in the forecast were soundly based. That is especially so in respect of the approximately $32m forecast to be received from new small and medium contracts in the FY16 year.

5. In discussing the forecast revenue assumption, the Summary Document states that management's forecasts of revenue were based on their assessment of the marketplace, recurring revenue and the pipeline of contracts and opportunities that had been reviewed and considered by the Board. The Summary Document then states that from discussions with management, "in our review of the detailed forecast" we noted that revenue is only forecast on a total and month by month basis not on the basis of individual contracts. This was the way that management and Board managed the business and therefore "an appropriate basis for preparing the forecast". The Summary Document then states that "we made enquiries to understand the process for preparing and reporting the sales pipeline by management to the Board".

   Again, there is no documentation at all of any such enquiry by the Audit Team, the persons by whom those enquiries were made or the results of those enquiries. Nor is there any evidence (either in the audit file or otherwise) providing any detail of any such "enquiries". We also note that, although asserting in the Summary Document that any contracts beyond six months were not included in the pipeline as they were not deemed to be probable, that assumption cannot have been applied in respect of Project Foxtrot which management had confirmed on 21 March 2016 was "at an early stage" but was expected to be entered into "at some point in FY16".

6. The Summary Document asserts that the audit team "evaluated the forecast revenue for the YE 31 December 2017 (sic). In addition to forecast receipts from signed contracts such as Bravo and Alpha, the Summary Document referred to "contracts in drafting stage with customers and lawyers - $24.3m (including Project Echo) receipts from "other pipeline contracts – $27.3m that were considered "probable or highly probable" by management at the beginning of the forecast period.

   The $24.3m is apparently referring to the amounts in the pipeline for Project Echo $22.5 m and other (unspecified) contracts which "management expected to be signed soon" of $1.8m. The "other pipeline contracts totalling $27.3m is clearly referring to the "other opportunities" contracts that were expected to be entered into within the next six months of approximately $12.3m and Project Foxtrot which was valued at approximately $15m.

   There is no evidence on the audit file, or in any contemporary documentation, of enquiries being made as to the reliability of management's assessment in respect of the pipeline sums of $24.3m and $27.3m. Other than the assertion that management expected Project Echo to be signed by the first half of FY16 (an assertion that was also recorded in the TS report and not documented as to when it took place or by whom

it was made) and that audit had sighted an "early draft contract", there is no documentary evidence of any enquiry being made to assess the likely timing of revenue from that project even if it was entered into some time in mid FY16.

In so far as the "other opportunities", including Project Foxtrot are concerned, we cannot understand how Project Foxtrot could remain in the pipeline given its early stage and the vague assertion by the Management Accountant that it was expected to be completed sometime in FY16. Nor is there any documentary evidence of enquiry being made as to the timing of receipt of revenue from those contracts.

7. The Summary Document asserts in relation to timing of revenue to cash receipts for the period to 31 March 2017, that Wynyard had assumed, based on the current status of contracts, that one large contract would be invoiced in April and two large contracts would be invoiced in June. This assertion appears to us to be inconsistent with the contemporary documents including the revised forecasts.

The going concern paper provided by management to the Board prior to the Board's 21 March 2016 meeting (which was not on the audit file but was provided with the Summary Document) stated that management were expecting the Bravo contract to be executed in April with payment made by June. The paper also notes in respect of the Alpha contract that "forecast collection unchanged at July, August, and September."

Cash receipts from Bravo and Alpha are reflected in the cash flow forecast in respect of "large one-off deals" being received in June (in respect of Bravo) and $5m in each of July, August and September in respect of Alpha. There is no indication, in any of the contemporary documentation, that management were forecasting revenue of $5m for the months of July, August and September on the basis of revenue being received from "either Alpha or Echo". There is no evidence or documentation from the time which would suggest or support the assertion that management expected payment from Echo within the 12-month period to March 2017. There is nothing in the forecast itself to suggest any such expectation.

For the reasons discussed above it seems more likely that the three instalment payments of $5m related to the Alpha contract and were based on management's forecast assumption in respect of large contracts that cash would be received seven, eight and nine months from the date of execution.

8. The Summary Document states that:

> Because of the uncertainty in relation to the timing of when cash will be received, and the delays experienced to date management have forecast that Alpha **or Echo** won't be invoiced until June and that cash will be received in three equal instalments over the following three months. Expanding on this, and from our revenue walk through and revenue testing the contractual terms of the licence contracts are the (sic) licence revenue could be invoiced on signing of the contract and cash was payable in one lump sum the month following.

> Management spread the timing of cash collection over three months to address the timing risk issue. (our emphasis)

There is no contemporary documentation which supports the assertion that the forecast by management was based on receipts from "Alpha or Echo" as asserted in the Summary Document. Nor was there any evidence, documentary or otherwise, that would support an expectation by management that receipts from Echo were expected within one month of execution. Such an expectation would have been inconsistent with the seven, eight and nine month assumption which management had told the TS team was their assumption for revenue receipt in respect of large contracts.

9. The Summary Document asserts that for all other licence revenue (including remaining large opportunities in the pipeline) the revenue and cash had been spread over the forecast period as the timing was uncertain. (our emphasis) The reference to the forecast "including remaining large opportunities in the pipeline" being spread over the period of the forecast is both confusing and inconsistent with the forecast. The forecast provided expressly for revenue from large one-off opportunities in one line of the forecast with the remaining $32m of forecast revenue from licence fees expected to come from "small and medium" contracts (generally less than $1.5m).

   In our view, this assertion in the Summary Document is both inconsistent with the way the revised forecasts were documented and inconsistent with the assertions in the TS report, and confirmed in the going concern work paper, that contracts in the pipeline were only included if they were expected to be executed within six months. It is also inconsistent with the management assumption detailed in its response to questions from the PwC TS team that their forecasts in respect of large contracts were based on receipt of revenue being received in months seven, eight and nine after the date of execution.

10. The Summary Document asserts in relation to use of the TS Report that:

> We did not "rely" on the TS Report. We had undertaken our own assessment of the updated forecasts and considered the results of the TS engagement. The TS Report and sensitivities were relevant to our considerations, however, we performed our own analysis of the updated forecast as documented on the audit file.

The statement that the auditor did not "rely" on the TS report does not sit easily with the references in the audit work paper to the TS report including by expressly linking the report as part of the audit documentation and repeating aspects of it verbatim in the "audit response" section of the going concern audit work paper. The only "audit analysis of the updated forecast documented on the audit file was identification of "key differences" between the FY16 budget considered by the TS Team and the revised forecast provided to the auditors on 17 March 2016. That analysis, however, provided no information

of what further assessment of the assumptions underlying the revised forecast had been carried out.

11. The audit work paper makes no specific reference to the assessment of assumptions underlying the "stub" period of January, February and March 2017. Indeed, the forecast for that period was not even among the documents on the audit file. It was, however, attached to the Summary Document. The Summary Document, however, asserts:

> We examined the underlying assumptions noting no significant areas of judgement or changes to the assumption review in the period 31 December 2016. For completeness, the total revenue forecast for the three-month period was $10.7m versus the same period FY16 of $7m… We noted that even if no new revenue growth was secured, the impact on forecast cash head room would not change our audit conclusions in this area as the head room for this period was circa $20m each month and under the cash receipts assumptions below, the majority of cash receipts in these months was as a result of contracts and revenue assumptions that had been considered as part of our review of revenue for the period to December 2016.

Notwithstanding the reference in the above statement to enquiries being made and various aspects being "noted" by the Audit Team, there is no contemporary documentation which reflect those enquiries. Some of the observations, for instance the reference to "head room" reflected in the revised forecast, are inferences which can be drawn from the forecast itself. However, there is nothing in the documentation on the audit file which indicates any detailed analysis of the assumptions underlying the forecast, or, for that matter, supporting the conclusion that, as the cash receipts reflected in the "$20m "head room" were expected to come from the contracts and revenue assumptions analysis for the period to December 2016, the Audit Team reached the conclusion that the forecast for the stub period were reasonable and reliable.

249. In our view, the Summary Document goes much further than "clarifying existing audit documentation arising from comments received during monitoring inspections performed by internal or external parties.[145]

250. As indicated in the examples provided above, the Summary Document describes audit work and procedures, and results and conclusions reached, which are not recorded in any of the documentation on the audit file. In addition, as noted above, there was no document on the audit file recording any assessment by the Audit Team of the 20 contracts, valued at approximately $12.3m, which management expected to be completed in the first 6 months of FY16.

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[145] As envisaged in ISA(NZ)230, Explanatory Note A24.

251. The Summary Document states at its beginning that the information contained in the Summary Document:

> Is extracted from the audit file, expanded upon in certain areas to clarify what audit procedures were undertaken, or what audit evidence was obtained but not clearly documented or referenced in the audit file at the time, so as to bring the documentation references together in one place in support of the conclusions reached by the engagement leader in forming our opinion on the financial statements.

252. In our view, that introduction significantly understates the extent to which the Summary Document adds to the information contained on the audit file. It does, however, seem to acknowledge that the Summary Document "expanded" on the information contained on the audit file and purported to explain "what audit evidence was obtained but not properly documented".

*Conclusion*

253. Even the Summary Document was of limited assistance in understanding the nature, timing, and extent of the audit report procedures and, as indicated in the examples above, has in some respects added to our confusion as to precisely what the assumptions underlying the forecast were and what testing and enquiry was made in respect of those assumptions. We also agree with the observation by Mr Westworth, at paragraph 117 of his evidence, that the way in which the TS work was used by the Audit Team is generally badly articulated on the file and has resulted in considerable confusion.

254. Having read the Summary Document in detail, and having reviewed the Member's evidence before the Tribunal, we remain unconvinced that the Audit Team made any specific enquiry relating to the assumptions underlying the revised forecast beyond the enquiries made in the limited due diligence described in the TS report. There is no contemporary documentation of any enquiries made and audit procedures carried out at the time, nor any contemporary documents which clearly record the nature, timing, and results of any such audit enquiries or the reasons for the conclusions reached as a result of those audit procedures and enquiries.

255. The absence of such documentation has, in our view, created considerable confusion as to precisely what audit procedures were undertaken, when and by whom they were undertaken and the reasonableness or reliability of management's assumptions underlying the forecast.

256. We accept the submission by Mr Moon that the Summary Document cannot "cure" or "remedy" the deficiencies in the documentation on the audit file.

257. We also tend to agree that the Summary Document is far more extensive than the sort of clarification contemplated by Explanatory Note A24. Having said that, however, we do not agree that placing the Summary Document on the audit file was inappropriate or in breach of the standard.

258. The need for a document of such length and detail, however, highlights the importance of complying with the standards at the time of the audit so as to clearly document the nature, timing, and results of the audit procedures undertaken and clearly document the audit evidence relied upon and reasons for the conclusions reached. In saying that, we should not be taken to be suggesting that the audit work paper needs to be as detailed and comprehensive as the Summary Document.

259. What clearly is required, however, is a description of what procedures were undertaken, when, and by whom and a sufficient summary of the results of those procedures. Similarly, the requirement to document the audit evidence relied upon and the reasons for the conclusions reached does not need to be comprehensive. It must, however, be sufficiently detailed to enable the reader to understand the reasons why the auditor has reached the conclusion that no material uncertainty existed about Wynyard's ability to continue as a going concern and the audit evidence relied upon in reaching that conclusion.

260. In our view, the documentation on the audit file was inadequate. It did not meet the objective of ISA(NZ)230 to enable an experienced auditor having no previous connection with the audit to understand:

(a) The nature, timing, and extent of the audit procedures performed to comply with ISA's (NZ);

(b) The results of the audit procedures performed, and the audit evidence obtained; and

(c) Significant matters arising during the audit, the conclusions reached thereon, and significant professional judgements made in reaching those conclusions.

261. In reaching that conclusion, we do not disregard the evidence of the experts called by the Member that they were able to understand from the audit file the reasons for the Members conclusion that there was no material uncertainty as to Wynyard's ability to continue as a going concern. We accept that the going concern work paper did indicate some of the audit evidence relied upon and enabled the reader to understand the reasons why the Member reached the conclusion he did. We also accept that the standards do not require the Member to document audit procedures which have not been undertaken.

262. We do not consider, however, that the expert evidence adequately addresses the failure of the auditor to document what procedures were undertaken, by whom and when they were undertaken. Nor is there sufficient documentation of discussions held with management and others during the audit process which clearly records the nature of the discussions, with whom they took place, when they took place and the conclusions reached.

263. We do not see these requirements as being unduly burdensome. Not every discussion or audit procedure needs to be documented but important procedures and discussions which are relied upon in making significant judgements must be documented and the reasons for the conclusions reached clearly documented.

264. The extent to which those matters are documented involves a matter of judgement depending on the nature and importance of the information, discussions or conclusions reached. That, however, cannot excuse a failure to properly document important procedures, discussions and evidence which have formed the basis of the conclusions reached by the auditor.

265. For the reasons discussed above, we find Particular 3 established.

**Charge 1 – Was the Member guilty of negligence in a professional capacity of such a degree as to bring the profession into disrepute.**

*The Disciplinary Tribunal decision*

266. The Tribunal found that the member was in breach of the standards in relation to audit independence. It stated that breach of the standards in relation to evaluating threats to independence was of "significant importance and definitely not of a technical nature".[146]

267. It further held that failings in relation to auditor independence, particularly in relation to evaluation of threats impacting on audit independence, fell below the standard expected of a reasonable practitioner proficient in the practice area (audit) concerned.[147]

268. It held, however, that the negligence was not of such a degree as to reflect on the Member's fitness to practice and was not such as to bring the accounting profession, overall, into disrepute.[148]

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[146] Tribunal Decision at page 12.
[147] Tribunal Decision at page 13.
[148] Tribunal Decision at page 13.

*The test*

269. The Tribunal in reaching its decision described the test as being:

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

270. The test, as articulated by the Tribunal, reflects the test as articulated by the Court of Appeal in *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401. As noted by the Court of Appeal in that case the use of the words "of such a degree" clearly indicates that an assessment of the degree of seriousness of the negligence is required.

271. For negligence to be of such a degree as to bring the profession into disrepute, it must be at the high end of the scale of seriousness. At the low end of the scale negligent conduct may not even warrant disciplinary action. Negligence of such a degree as to tend to bring the profession into disrepute must be at a higher level of seriousness than negligence which is sufficiently serious to justify disciplinary action.[149]

272. Counsel for the parties, in their written submissions, focussed on the Tribunal's finding that the Member was in breach of the standards in relation to independence. In their oral submissions before us, however, they addressed the test in light of the issues relating to Particulars 1, 2 and 3 which were subject to appeal by the PCC.

273. Mr Jones submitted that, essentially because of the way the notice of appeal was framed, the Appeals Council should only consider Charge 1 based on the finding of the Tribunal in respect of Particular 4 (failure to identify threats to independence). Mr Jones submitted that, in considering whether Charge 1 was established, the Appeals Council could not take into account it's findings in respect of Particulars 1,2 and 3.[150]

274. We do not accept that submission. The appeal of the Tribunal's decision is in respect of Particulars 1, 2 and 3, which were particulars of Charges 1 and 2 against the Member. The appeal is by way of rehearing. The relevance of those particulars to Charge 1 is plain. We do not consider that we are restricted in taking our findings in

[149] To justify disciplinary action the negligence must be "high end" – see *Johnson v Canterbury Westland Standards Committee 3* [2019] NZHC 619 and *Lagolago v Wellington Standards Committee* [2016] NZHC 2867*.*

[150] Baillie Appeals Council transcript (ACT) 63 and 64.

respect of all of the particulars into account when considering whether Charge 1 has been established.

275. Mr Jones also appeared to submit that the Appeals Council, in assessing whether Charge 1 was established, must be satisfied, in respect of each particular, that the conduct in question reached the required standard of negligence which was so serious as to tend to bring the profession into disrepute. Mr Jones submitted that it could not be correct that the Appeals Council could stand back and consider whether the established negligence, as a whole, was such as to bring the profession into disrepute.[151]

276. We do not accept that submission. In our view, in assessing whether Charge 1 has been proved, we are entitled to take into account all of the conduct which we find to be in breach of the standards and then decide whether the conduct, taken as a whole, establishes negligence of such a degree as to tend to bring the profession into disrepute.

*Discussion*

277. For the reasons discussed above, we have found that Particulars 1, 2 and 3 are established. There was no appeal by the Member from the finding of the Tribunal that Particular 4 was established and that the Member's conduct in that regard was negligent.

278. As noted by the Tribunal the audit in this case was complex. The going concern assumption, which formed the basis of the charges in this case, was simply one, albeit important, aspect of what was clearly a very lengthy and detailed audit process.

279. The question of whether any material uncertainty existed about Wynyard's ability to continue as a going concern is, ultimately, a matter of judgement. So too are matters such as the extent to which further enquiries were necessary when carrying out the going concern assessment or the extent to which the investigations and conclusions reached needed to be documented.

280. Although we had found that the Member did not meet the applicable standards in respect of Particulars 1, 2 and 3, we do not consider that the breaches of the standards, including the breaches in respect of Particular 4, demonstrate a degree of negligence which is so serious as to tend to bring the profession into disrepute.

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[151] Baillie ACT 61.

281. As Explanatory Note A27 of ISA(NZ)200 makes clear, professional judgement needs to be exercised throughout the audit. It also needs to be appropriately documented. In addition:

> Professional judgement is not to be used as justification for decisions that are not otherwise supported by the facts and circumstances of the engagement or sufficient appropriate audit evidence.

282. In our view, the failures of the Member which we have found to be established reflect significant errors of judgement which, although in breach of the standards, are explicable and which, when viewed in context, are at the lower end of the scale of seriousness.

283. That is reflected, in our view, in the very different views of the experts called by the parties as to whether the Member's conduct was in breach of the standards. It was also brought home, from our perspective, by the very detailed investigation and analysis of the Member's conduct which the charges in this case, and this appeal, have required.

284. Insofar as the Member's breach of the standards relating to independence are concerned, we agree with the Tribunal that breach of the standards was significant and far more than mere technical failures. We also consider that the TS report, prepared in breach of those standards, was a significant contributor to the failure by the Member to properly investigate and critically assess the forecast in relation to small and medium contracts and the likelihood and timing of receipt of funds from the pipeline contracts such as Project Echo and Project Foxtrot.

285. We see the failures identified in respect of Particular 1 as being more serious than those in respect of Particular 3. Our finding in respect of Particular 2 really flows from our finding in respect of Particular 1 and adds nothing to our assessment of the seriousness of the conduct overall. We are not, however, persuaded that the conduct of the audit in relation to the going concern assumption was so serious as to tend to bring the profession into disrepute.

*Conclusion*

286. Although, in our view, the breaches of the standards were sufficiently serious to warrant disciplinary action, we are not satisfied that the Member's conduct in relation to the going concern assumption is so serious as to bring the profession into disrepute. We do not, therefore, find Charge 1 established.

287. Given our findings in relation to Particulars 1, 2 and 3 and the Tribunal's finding in respect of Particular 4 (which is not appealed), we find Charge 2 is established in respect of Particulars 1, 2, 3 and 4.

**Conclusion on PCC Appeal**

288. The appeal is allowed in part.

289. We find Particulars 1, 2 and 3 are established.

290. Charge 1 is not established.

291. Charge 2 is established both on the grounds found by the Tribunal and on the grounds of our findings in relation to Particulars 1, 2 and 3.

292. As agreed with counsel for the parties we will hear submissions as to costs, penalty and name suppression, in light of this decision, at a later date.

Dated this 21st day of September 2022

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L J Taylor KC
**Chairman**
**Appeals Council**

NEW ZEALAND
INSTITUTE OF
CHARTERED
ACCOUNTANTS

**NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS ACT 1996**

| | |
|---|---|
| **IN THE MATTER** | of the New Zealand Institute of Chartered Accountants Act 1996 and the Rules made thereunder |
| **AND** | |
| **IN THE MATTER** | of **W** Chartered Accountant |

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

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

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

The charges and particulars were as follows:

**CHARGES**

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

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

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

**PARTICULARS**

**IN THAT**

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

**<u>In respect of the audit of Wynyard:</u>**

1. Failed to ensure that sufficient appropriate audit evidence was obtained to support your conclusion that no material uncertainty existed in respect of Wynyard's ability to continue as a going concern, as required by ISA (NZ) 200 and/or ISA (NZ) 220 and/or ISA (NZ) 500 and/or ISA (NZ) 570; and/or

2. Failed to reach the appropriate conclusion regarding whether a material uncertainty existed in respect of Wynyard's ability to continue as a going concern and/or failed to issue the appropriate audit opinion, as required by ISA (NZ) 570; and/or

3. Failed to ensure that sufficient audit documentation was prepared on a timely basis, to enable an experienced auditor, with no previous connection with the audit file, to understand the audit procedures performed and/or audit evidence obtained and/or how you reached your conclusion that there was no material uncertainty in relation to Wynyard's ability to continue as a going concern, as required by ISA (NZ) 230; and/or

4. In forming conclusions on compliance with independence requirements and/or making required independence disclosures to those charged with Wynyard's governance and/or in your audit report:

[1] NZICA's Rules effective 11 May 2020.

[2] PES-1 (Revised) Effective 1 January 2014.

a. Failed adequately to identify and/or evaluate all perceived and/or potential and/or actual threats to independence arising in relation to PwC's Transaction Services ("TS") engagement with Wynyard, as required by ISA (NZ) 220 and/or PES 1 (Revised); and/or

b. Failed to take appropriate action to eliminate or reduce to an acceptable level threats to independence posed by the TS engagement by applying safeguards or withdrawing from the engagement, as required by ISA (NZ) 220 and/or PES 1 (Revised); and/or

c. Failed to communicate to those charged with Wynyard's governance in accordance with the requirements of ISA (NZ) 260 the following relationships bearing on independence and/or the related safeguards that were applied in respect of any identified threats:

   i. PwC's TS engagement; and/or

   ii. PwC's taxation and/or executive remuneration services; and/or;

d. Failed to disclose the TS engagement in your audit report, as required by ISA (NZ) 700; and/or

e. Failed to include in your audit documentation your conclusions on compliance with independence requirements that applied to the audit engagement in relation to the services provided by the TS team, as required by ISA (NZ) 220 and/or PES 1 (Revised); and/or

**<u>In respect of the audit of Y Limited:</u>**

5. Failed to communicate to those charged with Y Limited's governance in accordance with the requirements of ISA (NZ) 260 the following relationships bearing on independence and/or the related safeguards that were applied in respect of any identified threats:

   a. PwC's taxation services; and/or

   b. PwC's accounting advice engagements.

**DECISION ON LIABILITY**

**INTRODUCTION**

The charges arose from a Financial Markets Authority (FMA) review of audit files of PwC conducted in late 2016 and a subsequent complaint to NZICA by the FMA. The FMA complaint concerns two specific but very important areas of the audit of Wynyard Group Ltd (Wynyard) for the year ended 31 December 2015 and one issue arising from the audit of Y Limited also for the year ended 31 December 2015. The two issues arising from the Wynyard audit were:

1. Concerns regarding the conclusion that no material uncertainty existed in respect of Wynyard's ability to continue as a going concern, and
2. Concerns in relation to conclusions on compliance with independence requirements and the making of independence disclosures.

In relation to Y Limited, the issue concerning the FMA was disclosure in relation to independence issues.

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

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

The Member denied both Charges and all of the Particulars.

**HINDSIGHT**

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

**THE WITNESSES**

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

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

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

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

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

**BACKGROUND TO PARTICULARS 1 TO 3**

Particulars 1 to 3 focus on the Member's conclusion that no material uncertainty existed in respect of Wynyard's ability to continue as a going concern, the validity of that conclusion and the audit evidence supporting the conclusion.

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

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

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

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

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

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

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

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

The Tribunal is required to consider whether it was **open to a reasonably competent auditor exercising professional judgement** to reach the same conclusion as the Member and whether the audit evidence and documentation was sufficient to support that conclusion.

**PARTICULAR 1**

The PCC alleges that the Member *"Failed to ensure that sufficient appropriate audit evidence was obtained to support your conclusion that no material uncertainty existed in respect of Wynyard's ability to continue as a going concern, as required by ISA (NZ) 200 and/or ISA (NZ) 220 and/or ISA (NZ) 500 and/or ISA (NZ) 570."*

This Particular focuses on the documentation and audit evidence supporting the Member's conclusion in relation to material uncertainty not whether the correct conclusion was drawn.

The sections of the audit file dealing with the assessment of material uncertainty in relation to going concern were submitted to the Tribunal as evidence. It is clear from those workpapers that the Member did carefully consider the issue.

A complicating factor is that during the course of the FMA quality review, PwC prepared a "Significant Matter – Use of the Going Concern Assumption" document and in a latter exchange with the FMA a "Summary of Evidence" document drawing together and, in their view, summarising in a clear manner, the audit evidence and conclusions in relation to material uncertainty. This document was prepared and finalised in 2017, well after the audit report was signed. Auditors must not obtain and document evidence after the date of the audit report. They must complete the audit report based on the evidence available at that time. The FMA and Mr Westworth submit that the preparation of the "Summary of Evidence" document was an admission by the Member and PwC that the documentation on the audit file itself was deficient. The Tribunal has considered the "Summary of Evidence" document and the evidence of Mr Morris and Mr Prichard and concluded that the document does not add any new evidence to the file which was not available as at 21 March 2016. It simply arranges it in a more coherent and logical manner. The Tribunal agrees with Mr Prichard and Mr Morris that the preparation of such a document is not a breach of ISA (NZ) standards and was reasonably in accordance with ISA (NZ) 230 paragraphs 16 and A24.

The draft quality review assessment report prepared by the FMA including PwC comments was also produced in evidence. In the draft report the FMA questioned the sufficiency of the evidence on the audit file in relation to there being no material uncertainty. PwC's response was that while they disagreed with the FMA's overall conclusion, they stated that *"we do however accept that the audit workpapers do not clearly articulate in a significant matter how we reached our conclusion to issue an unmodified opinion without an emphasis of matter paragraph and we did not clearly summarise all the various forms of audit evidence we obtained to support this judgement".*

The Tribunal accepts that when an audit file is subject to close inspection and subsequent review, deficiencies will almost always be uncovered. The test is whether the documentation and evidence available is what a reasonably competent auditor could be expected to produce.

The Tribunal agrees, by a fine margin, with the evidence of Mr Morris and Mr Prichard that notwithstanding the documentation deficiencies noted by the FMA and the PCC the audit file did include sufficient appropriate audit evidence to allow the member to exercise professional judgement which could support the conclusion reached by the Member.

The Tribunal finds that Particular 1 has not been established.

**PARTICULAR 2**

The PCC alleges that the Member *"Failed to reach the appropriate conclusion regarding whether a material uncertainty existed in respect of Wynyard's ability to continue as a going concern and/or failed to issue the appropriate audit opinion, as required by ISA (NZ) 570."*

The Particular refers to the Member failing to reach **THE** appropriate conclusion. The Tribunal's role is to decide, on the balance of probabilities, whether the conclusion on material uncertainty

reached by the member was an appropriate conclusion that could be reached by a responsible auditor based on the audit evidence available to him at the time. The Tribunal is not required to determine if the correct conclusion was reached. It is not a binary determination. The Tribunal must determine if the conclusion reached was available to a reasonably competent auditor.

The collectability of the revenue from the Alpha and Bravo contracts was investigated in detail during the course of the hearing. The value of the contracts was significant and they were an important component of the forecast 2016 revenue. Contracts had been signed prior to 31 December 2015 but because there were outstanding issues with both contracts which needed to be resolved before payment would be made and the software delivered, the Member had advised Wynyard that the revenue from the contracts could not be recognised in the 2015 financial statements. The revenue was however included in the 2016 forecasts. The FMA and Mr Westworth contended that as at the date that the audit report was signed there was still material uncertainty as to the collectability and/or timing of the receipt of revenue from those contracts. Mr Morris and Mr Prichard consider that while there were still issues to be resolved, the contracts had advanced to a point such that it was open for a reasonably competent auditor to conclude that it was reasonable to include the revenue in the 2016 forecasts. The audit file includes evidence that the Member did consider the collectability and timing of receipt of revenue of the contracts and concluded that there was no material uncertainty in relation to that collectability.

It is clear that the conclusion in relation to material uncertainty was a "close call". The Tribunal recognises that some reasonably competent auditors would have concluded that material uncertainty existed. The FMA and Mr Westworth clearly thought so. Indeed, Mr Westworth's evidence was that no other conclusion could be reached. The Tribunal agrees that Mr Westworth's conclusion is one which some reasonably competent auditors would reach but do not agree that it is the only conclusion available.

The Tribunal considers that there could have been more evidence on the file of the demonstration of professional scepticism and challenge in what was a "close call".

No consideration was documented of alternative scenarios other than those management put forward modelling other possible timing and quantum of forecast revenue outcomes to management's base cashflow forecast for the period to 31 December 2016 and no documentation was on file as to the consideration of the achievability of management's cashflow forecast for the period 1 January 2017 to 31 March 2017. There was no commentary on file as to the use of the term "inherent uncertainty' by management in note 1.5 of the financial statements, the views of PwC's technical team in its use were not sought and discussion regarding same with the EQCR was not documented.

The evidence of Mr Morris and Mr Prichard was credible and considered. Their separate conclusion was that, despite the shortcomings in the audit evidence, it was open for the Member to reach the conclusion that he did. The Tribunal accepts that this evidence is sufficient to show that the conclusion the Member reached was available to him.

The Tribunal finds that Particular 2 has not been established.

**PARTICULAR 3**

The PCC alleges that the Member "*Failed to ensure that sufficient audit documentation was prepared on a timely basis, to enable an experienced auditor, with no previous connection with the audit file, to understand the audit procedures performed and/or audit evidence obtained and/or how you reached your conclusion that there was no material uncertainty in relation to Wynyard's ability to continue as a going concern, as required by ISA (NZ) 230."*

This Particular traverses similar territory to that of Particular 1. The Tribunal notes that the FMA and three independent expert witnesses all reviewed the audit file. The FMA and Mr Westworth

disagreed with the conclusions reached but were able to understand the audit procedures performed and the audit evidence obtained.

The preparation by PwC of a “Summary of Evidence” document is covered under the analysis of Particular 1. That analysis concludes that the document does not add any new evidence to the file which was not available as at 21 March 2016.

The PCC’s criticism of the timeliness of audit documentation appears to centre on the admissibility of the “Summary of Evidence” document as audit evidence. The Tribunal has outlined in Particular 1 why it believes the document is admissible as audit evidence.

PwC have also acknowledged in their draft response to the FMA review, as analysed in Particular 1, shortcomings in the documentation and the Tribunal have commented on shortcomings which might have strengthened the audit file.

Nevertheless, three expert witnesses were able to understand the audit procedures performed and the audit evidence obtained.

The Tribunal finds that Particular 3 has not been established.

**PARTICULAR 4**

Particular 4 deals with compliance with independence requirements and making the required independence disclosures in relation to the Wynyard 2015 audit.

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

A standard PwC document to be used when the firm is supplying other services in addition to the audit engagement is called an Approval for Services (AFS) form. An AFS form was completed in relation to the TS team engagement by a member of the TS team. The Member charged a small amount of time to the TS engagement and was present at the meeting when it was presented to the client. The TS team report was relied on by the Member in his going concern workpaper.

The five sub Particulars refer to audit independence issues arising from the TS team engagement and their report.

***Particular 4(a)***

The PCC alleges that the Member *“Failed adequately to identify and/or evaluate all perceived and/or potential and/or actual threats to independence arising in relation to PwC’s Transaction Services (“TS”) engagement with Wynyard, as required by ISA (NZ) 220 and/or PES 1 (Revised*).”

The Tribunal is satisfied that while the AFS form was not in the audit file there was a hyperlink to the AFS form in the audit file.

The threats to independence arising from the TS engagement are a self-review threat, a self-interest threat and an advocacy threat.

The self-review threat arises because the Member refers to the TS report in the going concern workpaper. Some passages were copied word for word from the TS report into the audit file, and. the member leveraged the sensitivity analysis performed by the TS team on the Wynyard 2016 forecasts in his going concern workpaper.

The nature of a self-review threat is described in PES 1 as *the threat that an assurance practitioner will not appropriately evaluate the results of a previous judgement made or service performed by the assurance practitioner, or by another individual within that assurance practitioner's firm, on which the assurance practitioner will rely when forming a judgement as part of providing a current service.*

At the Hearing the Member acknowledged that there was no evaluation of the self-review threat on the audit file. Mr Morris confirmed that the member relied on the TS report and agreed that the TS engagement fits precisely the description of self-review threat provided in PES 1. He also accepted that the TS engagement AFS form does not appropriately recognise the self-review threat involved in the audit's team use and reliance on the TS report.

Mr Prichard has focused on Mr Moison's initial comment that the TS team were management experts rather than the actual potential threat. Mention is also made of Mr Westworth's evidence regarding the reliance placed on the report as audit evidence. The Tribunal does not consider that this evidence supports the conclusion that the threats and safeguards were appropriately considered and evaluated.

Mr Morris's view is that the TS assignment was not in any way connected to the preparation of Wynyard's 2015 financial statements nor was it relevant to the directors' preparation of the financial report. The Tribunal disagrees - the underlying assumption when financial statements are being prepared is that the entity will continue to operate as a going concern for the foreseeable future (commonly interpreted as at least 12 months from the signing of the audit report). In order to assess the validity of the assumption the Wynyard Board would have had to satisfy themselves that this was the case – looking at future forecasts is a key step in doing this. The auditor is then also required to consider the assessment undertaken by the Company and form his/her own view as to whether the application of this assumption when preparing the financial statements is valid.

The nature of a self-interest threat is described in PES 1 as *a threat that a financial or other interest will inappropriately influence the assurance practitioner's judgement or behaviour.*

The audit file did refer to the TS engagement and the sensitivity analysis on the 2016 forecasts provided by that team, and the audit report was issued one month after the TS report was signed off. The PCC submitted that it would be difficult for the member to issue a qualified audit opinion or require an emphasis of matter paragraph to be included in the audit report less than a month after his firm had prepared and presented a report on the revenue forecasts. There was no evidence on the file that the member evaluated this threat. Mr Prichard accepted that there was no evaluation of the self-interest threat on the TS engagement AFS form or on the audit file.

Mr Prichard argues that the safeguards of separation between the TS and audit teams were effective in managing this threat. No actual evidence under this heading is included. However, reference is made to the information under the heading "Self Review". As noted above this focuses on the discussion around reliance placed on the report as audit evidence. While there is acknowledgement that the information in the report is used extensively by the audit team there is no mention of the potential self interest threat and how this has been mitigated. The Tribunal does not agree that there was sufficient evidence to support the conclusion that there was no self interest threat.

Mr Morris's view is that there is no basis for the contention that a self interest threat existed. The Tribunal disagrees. PES 1 (Revised) required evaluation of information relied on – in this case the info in the TS report. Extracts from the report are included in the workpaper but the evaluation of these is not evident.

The nature of an advocacy threat is described in PES 1 as a *threat that an assurance practitioner will promote a client's position to the point that the assurance practitioner's subjectivity is compromised.* The PCC maintains that an advocacy threat arose from the Member's attendance at the due diligence meeting of Wynyard at which the TS report was presented. Mr Morris noted

that "… *If he has not, in the course of that meeting, raised any concerns in connection with the work of the TS team it might then be implied that he supports it or agrees with it or accepts it."*

Mr Prichard noted that W's attendance at the meeting, without distancing himself from the report or raising any concerns about the report, implied that he agreed with its content. There was no evaluation of the advocacy threat on the audit file.

In New Zealand, independence both of mind and in appearance is necessary to enable an auditor to express a conclusion without bias, conflict of interest, or undue influence of others. Independence from an entity is also imperative to maintain an adequate attitude of professional scepticism. Public interest considerations require independence not only to be observed, but to be seen to be observed.

The Tribunal's view is that the Member did not adequately identify all the threats to independence arising from the TS report and he did not adequately evaluate all of them. Accordingly, the Tribunal finds that Particular 4(a) has been established.

***Particular 4(b)***

The PCC alleges that the Member *Failed to take appropriate action to eliminate or reduce to an acceptable level threats to independence posed by the TS engagement by applying safeguards or withdrawing from the engagement, as required by ISA (NZ) 220 and/or PES 1 (Revised).*

The Tribunal has noted under Particular 4(a) that the Member did not sufficiently evaluate the threats to independence arising from the TS report. The TS report was a pivotal document in the going concern consideration and to ignore the independence issues arising from the TS report is a breach of the relevant standard.

It follows therefore that the Tribunal finds that Particular 4(b) has been established.

***Particular 4(c)***

The PCC alleges that the Member *Failed to communicate to those charged with Wynyard's governance in accordance with the requirements of ISA (NZ) 260 the following relationships bearing on independence and/or the related safeguards that were applied in respect of any identified threats*:

1. *PwC's TS engagement; and/or*
2. *PwC's taxation and/or executive remuneration services;*

The Member has acknowledged that he did not include a reference to the specific threats and safeguards relating to the TS engagement in his findings report to the Audit and Risk Committee (ARC). This was based on an interpretation of the standard by PwC generically, which the Member applied. Counsel for the Member submitted that if this is a mistake on his part it does not deserve disciplinary sanction.

The TS engagement was referred to in the non-audit fees section of the ARC report however it did not identify it as a relationship bearing on independence and did not communicate any safeguards. Given that the Member had attended the meeting at which the TS report was submitted to members of the governance group of the company less than one month prior to the final ARC report, it is reasonable to assume that those charged with governance of Wynyard were fully aware of PwC's involvement in the TS engagement. Nevertheless, the TS engagement should have been included in the communication of relationships bearing on independence, a reference in the fees section being inadequate for this purpose.

The taxation and executive remuneration services were communicated using hypothetical and future language. The evidence of both Mr Morris and Mr Prichard is that the disclosures meet the

requirements of paragraph 17 of ISA (NZ) 260. Mr Morris notes that the section in relation to remuneration services is slightly clumsy but nevertheless meets the requirements of the standard.

Accordingly, the Tribunal finds that Particular 4(c) has been established but only in relation to shortcomings in the communication relating to the TS engagement.

***Particular 4(d)***

The PCC alleges that the Member *Failed to disclose the TS engagement in your audit report, as required by ISA (NZ) 700*

This Particular is a question of fact. The audit report does not contain a statement in relation to the TS engagement as required by the standards. The member does not contend otherwise. All 3 expert witnesses agree that the audit report does not contain the required disclosure.

Counsel for the Member submits that this is a technical breach and that while the error is accepted, it is not worthy of disciplinary sanction. The PCC submits that independence disclosures in audit reports are important and that it is the auditor's responsibility to ensure that readers of the audit report are fully appraised of matters that may or may appear to have bearing on the auditor's independence.

The audit report did disclose services provided in relation to executive remuneration and taxation services and disclosed a tenancy relationship. It is likely that the TS report was overlooked because the services were provided after balance date. The auditor's fees for other services in relation to the TS report were not disclosed in Note 2.3 because the services were provided after balance date. The Tribunal accepts that this Particular has been established but that in itself, it is not a significant breach.

***Particular 4(e)***

The PCC alleges that the Member *Failed to include in your audit documentation your conclusions on compliance with independence requirements that applied to the audit engagement in relation to the services provided by the TS team, as required by ISA (NZ) 220 and/or PES 1 (Revised*).

The only reference in the audit file to threats to independence in relation to the TS engagement is the TS team's AFS form.

The analysis in Particulars 4(a) and 4(b) is relevant in this regard. The Tribunal has found that the Member did not adequately evaluate the threats to independence arising from the TS report. It follows therefore that there has not been adequate documentation of the Member's conclusions on compliance with independence requirements.

The Tribunal has already noted that the TS engagement threats were not included in the report to the Audit and Risk Committee or in the audit report, Mr Prichard also acknowledges that there is no documented conclusion that the TS engagement posed no self review threat. His reasoning is based the presumption of knowledge by the ARC rather than actual communication. Mr Prichard correctly quotes PES 1 para 290.29 regarding the requirements around documentation. However, the paragraph following that quoted specifically states that the assurance practitioner shall document conclusions regarding compliance with independence. Mr Prichard has already acknowledged that the conclusions were not documented and the Tribunal agrees.

Mr Morris's view is that the information contained in the AFS form completed at the beginning of this engagement contains sufficient information to address this requirement. The Tribunal disagrees – the AFS form is not kept on the audit file and as it is completed prior to the commencement of the TS engagement does not include any evidence or conclusions that mitigations put in place were effective. From other evidence we understand that the AFS link in the audit file does not actually work.

The Tribunal finds that Particular 4(e) has been established.

**PARTICULAR 5 – Y LIMITED AUDIT**

The PCC alleges that the Member *Failed to communicate to those charged with Y Limited's governance in accordance with the requirements of ISA (NZ) 260 the following relationships bearing on independence and/or the related safeguards that were applied in respect of any identified threats:*

a. *PwC's taxation services; and/or*
b. *PwC's accounting advice engagements*

The evidence in relation to this Particular is not in dispute. The issue is whether or not the words used in the communication met the standard. The PCC submits that the hypothetical language used does not meet the standard. Mr Morris concludes that the audit committee report met the requirements of paragraph 17 of ISA (NZ) 260. Mr Prichard is of the same view. The Tribunal accepts the fact that the disclosures are not expressed in definitive terms is not a breach of the standards.

The use of the word "may" does leave an outsider with lack of clarity but because the report was to the audit committee of the Y Limited board who knew the actual work which had been done, the Tribunal considers that the disclosure was clumsy but adequate. The disclosure may not meet the letter or spirit of the standard but because it could have had no practical consequences in the circumstances, the standard has not been breached.

The Tribunal finds that Particular 5 has not been established.

**THE CHARGES**

The Member is charged with:

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

Of the Particulars supporting these charges, the Tribunal has found that Particulars 1, 2, 3 and 5 have not been established. The five sub particulars of Particular 4 have all been established.

The Tribunal is required to decide whether the failings identified in those 5 sub particulars are serious enough to support either or both or neither of the charges.

Charge 2 alleges that the Member has breached the Institute's Code of Ethics. The Tribunal has found that Particular 4 has been established and that various auditing standards and provisions of PES 1 have been breached. It follows therefore that the Member has failed to comply with the fundamental Principle of Professional Competence and Due Care in the Code of Ethics. Section 130 of the Code imposes on the Member the obligation to act diligently in accordance with applicable standards. An inadvertent breach of an auditing standard which might be considered to be of lesser weight or importance could be found not to be in breach of the Principle in Section 130 of the Code. Auditor independence and the maintenance of standards in that regard is considered by the Tribunal to be an important foundation of the auditing profession. Breaches of the standards in relation to auditor independence cannot be brushed aside as being of minor importance or of a technical nature. The breaches of the standards identified in this case include a failure to evaluate threats to independence which are considered by the Tribunal to be of significant importance and definitely not of a technical nature.

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

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

The Tribunal does not consider that the failings constitute Incompetence. "Incompetence" is defined as an inability to perform to expected standards. The Member is a highly experienced auditor with an unblemished record. He has been audit engagement partner on many large audits. The Tribunal considers the failings identified in this case are a one-off occurrence which are not sufficient to show that the Member is or was incompetent.

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

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

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

The Tribunal does not consider that the negligence is of such a degree as to reflect on the Member's fitness to practise as an accountant. The Member is clearly a highly experienced auditor. He displayed a considerable breadth of knowledge of the company and appeared aware of his obligations as audit engagement partner and there were several examples of making sound judgements such as his determination that the revenue from the Alpha and Bravo contracts could not be recognised as revenue in the 2015 financial year as management had proposed. The Tribunal is satisfied that the failings in relation to auditor independence are a one-off occurrence and do not reflect on his overall fitness to practise.

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

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

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

**SUMMARY OF THE TRIBUNAL'S DECISION**

The Tribunal finds that the Member is guilty of Charge 2 in that he has breached the New Zealand Institute of Chartered Accountants Code of Ethics and that Particular 4 has been established.

Charge 1 and Particulars 1, 2, 3 and 5 have not been proved.

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

**PENALTY**

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

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

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

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

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

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

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

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

The Tribunal considers that failings in relation to independence are serious and they are fundamental to the overall integrity of an audit, to enable an auditor to act objectively and for users of the audited financial statements to have confidence in the audit process and the opinion. Accordingly, departure from those standards must be viewed seriously and a disciplinary sanction is required. The Tribunal notes that the Member accepts the findings of the Tribunal in relation to the Charges but the Member had previously denied the majority of the Particulars in relation to auditor independence. It is appropriate that a sanction be imposed in these circumstances.

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

- did not renew his auditor license in May 2019,
- has no intention of resuming a career as an auditor,
- has taken specialist professional and medical advice to deal with the stress resulting from the complaint process,
- is now earning considerably less because of the change to his career path;
- has worked with PwC in implementing a number of independence related initiatives at PwC.

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

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

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

## COSTS

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

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

Counsel for the Member has submitted that the PCC were wrong in progressing with the prosecution. The two most serious charges were dismissed and they submitted there were opportunities prior to the Tribunal Hearing to resolve the complaint. The PCC note however, that the Tribunal's decision on liability states that those charges dismissed were dismissed only by a "fine margin" and that it was a "close call". The PCC submit that it was appropriate for them to pursue the investigation and the charges. The PCC note that in the case conference held on 12 March 2020, which panel included three licensed auditors, that panel concluded that there was a

case to answer of sufficient seriousness to warrant referral to the Disciplinary Tribunal and did not consider that it was a complaint which could be resolved by consent order. The Tribunal agrees that the charges were serious enough to be heard by the Tribunal.

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

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

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

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

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

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

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

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

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

## PUBLICATION AND SUPPRESSION

The position of the parties is that the PCC seeks a direction that notice of the decision including the Member's name, location, the particulars of the charges and a summary of the reasons for the decision and any penalty imposed, be published in *Acuity* and on the CAANZ website. The PCC

also seeks publication of the names of Wynyard, PwC and the FMA. The PCC has no objection to the names of Wynyard's clients or the name of Y Limited being suppressed.

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

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

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

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

*Suppression of the Member's name*

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

- Rule 13.44(a) establishes a strong presumption in favour of publication, which may be displaced under 13.62, although the threshold is high;
- There needs to be supporting evidence to depart from the presumption in favour of publication;
- The standard in the disciplinary context is high, and closer to the criminal than civil jurisdiction due to the public interest factors of transparency, accountability and public protection;
- There is not an onus or burden on the person seeking suppression;
- Publication decisions in disciplinary cases are inevitably fact-specific, requiring the weighing of the public interest with the particular interests of any person in the context of the facts of the case under review;
- There is not a single universally/applicable threshold. The degree of impact on the interests of any person required to make non publication appropriate will lessen as does the degree of public interest militating in favour of publication (for instance, where a practitioner is unlikely to repeat an isolated error);
- However, because of the public interest factors underpinning publication of professional disciplinary decisions, that standard will generally be high;
- The use of the word "appropriate" in Rule 13.62 does not add content to the test usually applied in the civil jurisdiction or set a threshold lower than that applying in the civil jurisdiction. The rule is broad and sets out neither a specific threshold nor mandatory specific considerations. The question will simply be, having regard to the public interest and the interests of the affected parties, what is appropriate in the particular circumstances.

The PCC noted a number of cases and prior Tribunal decisions supporting their position that the Member's name be published.
In *Hart v The Standard Committee (number 1) of the NZLS* the Supreme Court held that it is necessary to strike a balance between the principle of open justice and the interests of the party seeking suppression.

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

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

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

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

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

- The Tribunal had found that it was *"satisfied that the failings in relation to auditor independence are a one-off occurrence and do not reflect on the member's overall fitness to practice".*
- While independence matters are in themselves serious, the Member's failings are not at the high end of the scale. There is less of a need to publish details.
- There is absolutely no prospect of the Member repeating the error – he has not renewed his auditor license and is no longer a qualified auditor with CAANZ. The complaint and his response to it have meant that his career as an auditor is over.
- There is no risk to the broader market and no need to "protect the public". The Member has taken up a permanent internal role that is not public facing.
- There is no deterrence or intrinsic value in publishing the Member's name. It is now over 5 years since the events of the charges and 3 years since the Member was last involved as an auditor. Importantly, the application of the auditing standards in relation to auditor independence has changed and improved since 2016. Auditors are now fully aware of the independence issues in light of the FMA's annual audit quality reports. Publishing the Member's name serves no useful purpose.

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

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

Counsel for the Member also drew a number of prior cases to the attention of the Tribunal. In *Name Not Published* (29 June 2012), the member was found guilty of conduct unbecoming an accountant

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

The Member submitted in his Affidavit that publication of details of his identity will have a disproportionate and detrimental effect on his new role noting that staff may consider the result demonstrates a lack of professional integrity (which it does not) and which would damage his position of trust in the firm. He also submitted that publication could damage relationships he has built up within his peer group, banks, insurers and other institutions. The Tribunal considers that harm to reputation is an inevitable consequence of an adverse disciplinary finding and that this position is consistent with previous Tribunal decisions.

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

*Suppression of PwC's name*

It is accepted that publication of the Member's name will lead to disclosure of PwC. Counsel for the Member submitted that publication of the Member's name will have a detrimental and prejudicial effect on PwC and to its clients. The Tribunal notes that the Member was representing PwC as audit partner and the audit report was signed in the name of PricewaterhouseCoopers not in the name of the Member. The Tribunal has concluded that there are no special circumstances making it appropriate to suppress the name of the Member. The Tribunal considers that the same reasons apply to a finding that PwC's name also not be suppressed. An affidavit by Karen Shires, the Chief Risk Officer for PwC, was presented as evidence. Ms Shires submitted that publication of both the member's name and that of PwC would have a detrimental effect on the firm. As noted previously in this decision, the Tribunal considers that harm to reputation is an inevitable consequence of an adverse disciplinary finding and is not a sufficient reason to suppress identification of the Member or their firm.

*Suppression of Wynyard's name*

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

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

*Suppression of Y Limited's name*

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

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

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

**RIGHT OF APPEAL**

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

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

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

DJH Barker FCA
**Chairman**
**Disciplinary Tribunal**