

**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 **Darryl Stewart Small**, Chartered Accountant, of **Wellington**

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**DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND  
INSTITUTE OF CHARTERED ACCOUNTANTS  
18 December 2018**

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**Hearing:** 22 November 2018

**Location:** The offices of Chartered Accountants Australia and New Zealand, Level 7, Chartered Accountants House, 50-64 Customhouse Quay, Wellington, New Zealand

**Tribunal:** Mr MJ Whale FCA (Chairman)  
Mrs A Atkinson FCA  
Mr DJH Barker FCA  
Prof DJD Macdonald FCA  
Dr R Janes (Lay member)

**Legal Assessor:** Mr Matthew Casey QC

**Counsel:** Mr Richard Moon for the prosecution

**Tribunal Secretariat:** Janene Hick  
Email: [janene.hick.nzica@charteredaccountantsanz.com](mailto:janene.hick.nzica@charteredaccountantsanz.com)



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

The charges and particulars are 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 13.39 the Member is guilty of:

- 1) Conduct unbecoming an accountant; and/or
- 2) Negligence or incompetence in a professional capacity and that this is of such a degree and/or so frequent so as to bring the profession into disrepute; and/or
- 3) Breaching the Rules and/or the Institute's Code of Ethics,

## **PARTICULARS**

### **IN THAT**

In the Member's role as a Chartered Accountant in public practice and in relation to a complaint, the Member:

- (1) Signed a Practice Information Questionnaire ("PIQ") on or about 8 December 2016, prior to the Member's practice review, in which he failed to disclose that he had performed at least three audits during the relevant period for the practice review, in breach of the Fundamental Principles of Integrity and/or Professional Competence and Due Care of the Code of Ethics (2014) (paragraphs 100.5(a) and/or 100.5(c) and/or 110.1 and/or 110.2 and/or 130.1 of the Code of Ethics (2014)); and/or
- (2) Performed an audit for ABC for the year ended 31 March 2016 when the Member was not independent, in that the Member and/or his firm Small & Co also compiled the ABC's financial statements from information provided by the client, and there were no safeguards available to mitigate the threat of self-review, in breach of paragraphs 290.10 and/or 290.168 of PES-1 (Revised)<sup>1</sup> and/or the Fundamental Principles of Objectivity and/or Professional Competence and Due Care (paragraphs 100.5(b) and/or (c) and/or 280.2 and/or 130.1 of the Code of Ethics (2014)); and/or
- (3) Failed to perform assurance engagements in accordance with relevant technical and/or professional standards, in that:
  - (a) In relation to the Member's audit of the ABC for the year ended 31 March 2016, the Member:
    - (i) Did not document the terms of the engagement in an engagement letter, as required by ISA (NZ) 210; and/or
    - (ii) Did not perform and/or document risk assessment and/or planning of the audit, as required by ISAs (NZ) 300 and/or 315 and/or 240; and/or

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<sup>1</sup> Being the version of PES-1 (Revised) effective for reporting periods on or after 1 January 2016.

- (iii) Did not perform and/or document audit procedures in response to the risks of material misstatement, as required by ISA (NZ) 330; and/or
  - (iv) Issued an audit opinion which did not comply with ISA (NZ) 700 in that it was not titled to show it was the report of an independent auditor and/or was based on the audit standards that were withdrawn in 2009; and/or
  - (v) Did not document consideration of going concern, as required by ISA (NZ) 570; and/or
  - (vi) Failed to obtain and/or document sufficient appropriate audit evidence in relation to bank balances, as required by ISA (NZ) 200; and/or
  - (vii) Failed to modify his audit opinion when the entity's financial statements did not comply with applicable financial reporting requirements, as required by ISAs (NZ) 700 and/or 705; and/or
- (b) In relation to the Member's audit of EDF for the year ended 30 June 2016, the Member failed to modify his audit opinion when the entity's financial statements did not comply with applicable financial reporting requirements for Public Benefit Entities, as required by ISAs (NZ) 700 and/or 705; and/or
- (c) In relation to the Member's review engagement for GHI for the year ended 31 December 2016, the Member:
- (i) Did not document consideration of his independence, as required by ISRE (NZ) 2400; and/or
  - (ii) Did not document the terms of the engagement in an engagement letter, as required by ISRE (NZ) 2400; and/or
  - (iii) Issued a review report which referred to the incorrect standard, namely NZ ISRE 2410 when the applicable standard was ISRE (NZ) 2400; and/or
  - (iv) Performed the review programme on the basis of a superseded standard RS-1; and/or
  - (v) Did not perform and/or document appropriate review procedures to address planning and/or risk assessment, as required by ISRE (NZ) 2400; and/or
  - (vi) Did not obtain and/or document a letter of representation, as required by ISRE (NZ) 2400; and/or
  - (vii) Did not perform and/or document consideration of subsequent events, as required by ISRE (NZ) 2400; and/or
- (d) In relation to the Member's real estate trust account assurance engagement for XYZ for the year ended 31 March 2016, the Member:
- (i) Did not document the terms of the engagement in an engagement letter, as required by SAE 3100 and/or ISAE (NZ) 3000 (Revised); and/or
  - (ii) Did not document any consideration of his independence, as required by SAE 3100 and/or ISAE (NZ) 3000 (Revised); and/or
  - (iii) Did not perform and/or document appropriate procedures to address risk assessment and/or planning of the audit, as required by SAE 3100 and/or ISAE (NZ) 3000 (Revised); and/or
  - (iv) Did not obtain and/or document a letter of representation, as required by SAE 3100 and/or ISAE (NZ) 3000 (Revised); and/or
  - (v) Only performed one examination of the trust account in the relevant period, when cl 21 of the Real Estate Agents Audit Regulations 2009 required three examinations to be undertaken by the auditor,

in breach of the Fundamental Principle of Professional Competence and Due Care (paragraphs 100.5(c) and/or 130.1 of the Code of Ethics (2014)); and/or

- (4) Accepted appointment as auditor of a real estate agent trust account for XYZ for the year ended 31 March 2017, when the Member was not a qualified auditor in accordance with sections 35 and 36 of the Financial Reporting Act 2013, in breach of clause 10(1)(a) of the Real Estate Agents Audit Regulations 2009 and/or the Fundamental Principles of Professional Competence and Due Care and/or Professional Behaviour (paragraphs 100.5(c) and (e) and/or 130.1 and/or 150.1 of the Code of Ethics (2014)); and/or
- (5) Did not ensure his firm Small & Co had quality control policies and procedures in place and/or documented for assurance engagements, in breach of paragraph 23 of PS-1 and/or paragraph 16 of PES 3 (Amended) and/or the Fundamental Principle of Professional Competence and Due Care (paragraphs 100.5(c) and/or 130.1 of the Code of Ethics (2014)); and/or
- (6) Failed to maintain competence in assurance services in that the Member did not undertake Continuing Professional Development (“CPD”) relevant to assurance services despite undertaking assurance engagements, in breach of the Fundamental Principle of Professional Competence and Due Care (paragraphs 100.5(c) and/or 130.1 of the Code of Ethics (2014)); and/or
- (7) Failed to comply with minimum CPD requirements since at least 2013, in that the Member has not completed a minimum of 60 hours of verifiable CPD over each rolling three year period or within the triennium commencing from 1 July 2012 and/or have not maintained adequate records to verify the CPD undertaken, in breach of Appendix 1 paragraph 2 of the NZICA Rules (until 15 December 2014) and the relevant CPD guidelines issued by NZICA and/or from 1 July 2015 schedule 2 of CA ANZ Regulation CR 7 *Continuing Professional Development*.

## DECISION

The Particulars cover:

- Providing misleading information to the Institute;
- Lack of independence in that the Member compiled and also audited an entity’s financial statements;
- Lack of professional competence, and failure to document quality control policies and procedures;
- Undertaking an audit when the member was not qualified to do so; and
- Failing to comply with continuing professional development obligations.

The Tribunal finds that the Particulars, which the member has admitted, are made out by the evidence submitted by the Professional Conduct Committee (“PCC”). It follows that Charge 3, to which the Member pleaded guilty, is proved.

As to Charge 2, the Member’s failure to recognise that he was not qualified to carry out the audit of a real estate agent trust account, the Member’s failure to perform three audits in compliance with the relevant standards, to maintain professional competence and to document quality control procedures and standards, the Member’s lack of independence and the extent of his shortcomings, demonstrate a lack of care and skill and conduct which falls well below the standards expected of an auditor.

The Member appeared from the evidence not to be aware of changes to the regulatory and financial reporting framework relevant to audits. The Tribunal agrees with the PCC’s submission that there is a direct correlation between the Member’s failure to undertake relevant continuing professional development and his lack of awareness of the changes.

In the Tribunal's view, the conduct established is of such a degree and so frequent as to bring the profession into disrepute. The public expects those who perform audits to maintain professional competence, remain up to date with technical standards and perform audits in a professional manner.

As to Charge 1, the test for conduct unbecoming an accountant is whether the conduct was an acceptable discharge of a member's professional obligations according to the standards applied by competent, ethical and responsible practitioners. The Threshold is inevitably one of degree.

In relation to Particular 1, the Tribunal notes that during the Member's Final Determination before the PCC the Member acknowledged that the reason he had failed to disclose in the Practice Information Questionnaire that he had performed three audits was that at the time he did not want anyone to know that he had performed them. The Tribunal infers that the Member's failure to disclose was deliberate. It considers that that failure and the conduct described in Particulars 6 and 7, particularly the extent to which the Member has failed to comply with CPD requirements and his inability to produce records of the verifiable CPD he declared he had completed, constitutes conduct unbecoming an accountant.

## **PENALTY**

The PCC submitted that the appropriate penalty was a censure, a fine to sanction the conduct of providing a misleading PIQ and an order that the Member not undertake any form of assurance engagements for a period of 10 years.

The PCC referred the Tribunal to its decisions in *Middleton* (15 March 2018) and *Freeman* (31 May 2018).

Both cases involved lack of quality control and professional competence and failure to properly engage with the Institute's processes. Mr Freeman also provided misleading information to the Institute. Mr Middleton undertook audits which he was not qualified to undertake (under the new regulatory regime which applied for accounting periods commencing on or after 1 July 2015), and continued to conduct audits after being directed not to. Both pleaded guilty to in effect the same charges as the Member has.

In *Freeman* the penalty imposed was a censure, a fine of \$4,000 to sanction conduct of misleading the Institute, and an order preventing the member from undertaking assurance engagements for 10 years.

In *Middleton* the penalty was a censure, a fine of \$5,000 to sanction the conduct of performing audits when directed not to, and a ban on undertaking audits for two years.

No two cases are the same, particularly in relation to the nature and extent of the conduct, aggravating and mitigating factors, and the extent of the impact of the conduct on the public.

In reaching its decision on penalty, the Tribunal has taken into account the following factors:

- The Member's previously unblemished record during 45 years of membership;
- The Member's voluntary involvement in community work in the region;
- The Member's acceptance of the Particulars at the time of his Final Determination; and
- There is no suggestion of any personal benefit.

The Member also advised the PCC or its representatives that he was just trying to help out two small entities, and in fact had been put under pressure by some of his clients to provide an audit report. However, the Code of Ethics is clear – members must carry out engagements in compliance with the relevant standards, must maintain and be seen to be maintaining their independence and must not perform services they are not legally qualified or do not have the

professional competence to perform. The Tribunal appreciates the problems that small charities and other organisations have in getting their financial statements audited or reviewed where there is a requirement for them to do so. However, the solution does not lie in members breaching their professional and ethical obligations. As the Tribunal said in *Freeman*:

*Practitioners must understand that if they are considering carrying out audit engagements, irrespective of whether they are required to be registered or licensed to do so, and whether the audit is of a local association, a partly Government funded entity or a major corporate, they should not take on the role unless they are aware of and able to comply with the applicable audit standards. Documenting processes and reasons for conclusions are integral components of those standards, although depending on the size and type of organisation there will be questions of degree.*

As the Member's conduct predated the *Middleton* and *Freeman* decisions, the Tribunal considers the penalty imposed should be broadly in line with the penalties imposed in those decisions.

However, the Tribunal notes that since the Member's practice review last year he has revised his standard review programme, enrolled in a training programme relating to review engagements and appointed a mentor for his review engagements. In light of those steps, the Tribunal considers that the Member should not be prevented from continuing review engagements altogether.

Having regard to all the circumstances, the Tribunal considers that a censure, the imposition of a monetary penalty of \$4,000, an order that the Member does not conduct any audits for a period of five years and an order requiring the Member to appoint a mentor in relation to review engagements is the proportionate response to the conduct the Member has admitted. That penalty appropriately protects the public and deters others, facilitates the Tribunal's role in maintaining compliance with and enforcing professional standards, reflects the seriousness of the misconduct, punishes the Member and is the least restrictive penalty in the circumstances.

**The Disciplinary Tribunal orders that:**

- **Pursuant to Rule 13.40(k) of the Rules of the New Zealand Institute of Chartered Accountants, the Member be censured;**
- **Pursuant to Rule 13.40(c), the Member is to pay the Institute a monetary penalty of \$4,000;**
- **Pursuant to Rule 13.40(g), if the Member continues to perform review engagements, he must engage at his own expense a chartered accountant with expertise in carrying out such engagements to peer review the engagements; and**
- **Pursuant to Rule 13.40(n), the Member is not to undertake audit engagements for a period of five years.**

## **COSTS**

The Professional Conduct Committee seeks full costs of \$12,630.

The Tribunal's general approach is that the starting point is 100% of costs, noting that the Institute already bears the cost of abandoned investigations and costs up to the Professional Conduct Committee's decision to hold a Final Determination.

There was no evidence before the Tribunal of mitigating factors such as excessive or unnecessary expenses incurred or demonstrated evidence of hardship (inability to pay).

**Pursuant to Rule 13.42 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders the Member to pay to the Institute the sum of \$12,630 in**

**respect of the costs and expenses of the hearing before the Disciplinary Tribunal and the investigation by the Professional Conduct Committee. No GST is payable.**

### **SUPPRESSION ORDER**

**Pursuant to Rule 13.62 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the names of the Member's clients and former clients referred to in these proceedings be suppressed.**

### **PUBLICATION**

In accordance with Rule 13.44 of the Rules of the New Zealand Institute of Chartered Accountants the decision of the Disciplinary Tribunal shall be published on Chartered Accountants Australia and New Zealand's website and in the official publication *Acuity* with mention of the Member's name and locality.

### **RIGHT OF APPEAL**

Pursuant to Rule 13.47 of the Rules of the New Zealand Institute of Chartered Accountants which were in force at the time of the original notice of complaint, the parties may, not later than 14 days after the notification to the parties of this Tribunal's exercise of its powers, appeal in writing to the Appeals Council of the Institute against the decision.

No decision other than the direction as to publicity and the suppression order shall take effect while the parties remain entitled to appeal, or while any such appeal by the parties awaits determination by the Appeals Council.



MJ Whale FCA  
**Chairman**  
**Disciplinary Tribunal**