NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS

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

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| **IN THE MATTER** | of the New Zealand Institute of Chartered Accountants Act 1996 and the Rules made thereunder |
| **AND** | |
| **IN THE MATTER** | of **Shane Matthew Browning,** Chartered Accountant, of **Auckland** |

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**DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS**
**26 April 2019**

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| **Hearing:** | 26 March 2019 |
| **Location:** | The offices of Chartered Accountants Australia and New Zealand, Level 1, Carlaw Park Complex, 12-16 Nicholls Lane, Parnell, Auckland, New Zealand |
| **Tribunal:** | Mr MJ Whale FCA (Chairman<br>Ms A Atkinson FCA<br>Mr DJH Barker FCA<br>Ms B Gibson (Lay member) |
| **Legal Assessor:** | Mr Matthew Casey QC |
| **Counsel:** | Mr Richard Moon for the prosecution<br>Mr Philip Skelton QC and Mr Michael Greenop for the Member |
| **Tribunal Secretariat:** | Janene Hick<br>Email: janene.hick.nzica@charteredaccountantsanz.com |

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.

At a hearing of the Disciplinary Tribunal held in public at which the Member was in attendance and represented by counsel the Member admitted the particulars and pleaded guilty to the charges.

The charges and particulars as laid 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 13.39 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 as to reflect on the Member's fitness to practise as an accountant and/or tends to bring the profession into disrepute; and/or

3) Breaching the Rules and/or the Institute's Code of Ethics; and/or

4) Failing to comply with the requirements of the Auditor Regulation Act 2011,

**PARTICULARS**

**IN THAT**

In his role as a Chartered Accountant and in relation to a complaint, the Member:

(1) Performed the compliance audit of WWW Limited, being a contributory mortgage broker, for the periods ending 31 December 2016 and/or 31 March 2017 when the Member was not a licensed auditor under the Auditor Regulation Act 2011 as required by the enactments applicable to the entity[1] and/or when the Member knew (or ought to have been aware) that such audits must only be performed by a licensed auditor and/or when the Member had confirmed to NZICA in an email of 10 February 2017 that he would not perform any further FMC audits, in breach of the Fundamental Principles of Professional Competence and Due Care and/or Professional Behaviour and/or 100.5(c) and/or 100.5(e) and/or 130.1 and/or 130.3 and/or 150.1 of the Code of Ethics (2014)[2]; and/or

(2) Failed to ensure that assurance engagements he performed were completed with professional competence and due care and/or in accordance with the relevant technical and professional standards, in that in acting as auditor of WWW Limited for the periods ending 31 December 2016 and/or 31 March 2017, the Member:

    a. failed to perform and/or document appropriate client acceptance and continuance procedures so as to ensure that he possessed the necessary competence to perform the engagements and/or that the engagements would be completed in accordance with the relevant technical and ethical requirements, as required by paragraphs 21 and/or 22 of ISAE (NZ) 3000 (Revised) and/or paragraph 210.5 of PES 1 (Revised); and/or

[1] Securities Act (Contributory Mortgage) Regulations 1988, Regulations 2(1), 2(4), and 39; Securities Act 1978, section 2C; Auditor Regulation Act 2011, section 8.
[2] And, as applicable, the equivalent provisions of the Code of Ethics (2017) and/or PES 1 (Revised).

b. failed to ensure the terms of the engagements were agreed with his client prior to issuing his assurance reports, as required by paragraph 27 of ISAE (NZ) 3000 (Revised) and/or paragraph 23 of SAE 3100; and/or

c. failed to appoint a suitably qualified Engagement Quality Control Reviewer, as required by the applicable standards[3]; and/or

d. failed to ensure the engagements were appropriately planned, as required by paragraphs 29 to 32 of SAE 3100; and/or

e. failed to ensure written representations were obtained from the responsible party, as required by paragraph 45 of SAE 3100; and/or

f. failed to ensure the engagement team considered specific risks applicable to the engagements, as required by paragraph 23 of SAE 3100; and/or

g. failed to appropriately direct and supervise the engagement team, as required by paragraph 33(b) of ISAE (NZ) 3000 (Revised); and/or

h. in his audit reports, when referring to the Broker's compliance with the Securities Act 1978 and the Securities Act (Contributory Mortgage) Regulations 1988 ("the Regulations"), incorrectly referred to compliance by its nominee company, in breach of Regulation 39(6) of the Regulations; and/or

i. failed to ensure his audit reports met the mandatory form and content requirements of paragraph 58 of SAE 3100 and/or paragraph 69 of ISAE (NZ) 3000 (Revised), in that they did not:

    i. clearly indicate that they were independent assurance reports, as required by paragraph 69(a) of ISAE (NZ) 3000 (Revised) and/or paragraph 58(a) of SAE 3100; and/or

    ii. identify and/or set out the responsibilities of the responsible party and the assurance practitioner, as required by paragraph 69(g) of ISAE (NZ) 3000 (Revised) and/or paragraph 58(i) of SAE 3100; and/or

    iii. identify that the engagements were performed in accordance with ISAE (NZ) 3000 (Revised) and/or SAE 3100, as required by paragraph 69(h) of ISAE (NZ) 3000 (Revised) and/or paragraph 58(j) of SAE 3100; and/or

    iv. contain an identification or description of the level of assurance obtained, as required by paragraph 69(c) of ISAE (NZ) 3000 (Revised) and/or paragraph 58(l) of SAE 3000; and/or

    v. contain a statement as to the existence of any relationship (other than as assurance practitioner) he had with, or any interests in, the entity, and/or that he

[3] Auditor Regulation Act (Prescribed Minimum Standards and Conditions for Licensed Auditors and Registered Audit Firms) Notice 2012, paragraph 8(f).

had complied with the independence requirements of PES 1 (Revised), as required by paragraph 69(j) of ISAE (NZ) 3000 (Revised) and/or paragraph 58 NZ (ka) of SAE 3100,

in breach of the Fundamental Principles of Professional Competence and Due Care and/or paragraphs 100.5(c) and/or 130.1 and/or 130.3 and/or 130.4 and/or 130.5 of the Code of Ethics (2014)[4]; and/or

(3) Issued unmodified assurance reports in respect of his compliance audits of WWW Limited for the periods ending 31 December 2016 and/or 31 March 2017 when he knew (or ought to have known) the entity had failed to comply with the Regulations, in that:

a. it had failed to register with the Companies Office Registrar, as required by Regulation 9; and/or

b. its audits were not completed within the relevant quarters and/or within three months of year end, as required by Regulations 39(2) and/or 39(5); and/or

c. it had failed to deliver an annual report to the Companies Office Registrar within 3 months of the year end including audited financial statements, as required by Regulation 12(3); and/or

d. it had failed to establish and maintain a trust account in the name of its nominee company, as required by Regulations 9(e) and 17; and/or

e. it had paid and/or held contributions and/or other monies it received in a general solicitor's trust account maintained by WWW Limited, and not a separate trust account in the name of its nominee company, as required by Regulations 18 and/or 24 and/or 25,

in breach of the Fundamental Principles of Professional Competence and Due Care and/or Professional Behaviour and/or paragraphs 100.5(c) and/or 100.5(e) and/or 130.1 and/or 130.3 and/or 130.4 and/or 150.1 of the Code of Ethics (2014)[5]; and/or

(4) Failed to maintain his professional competence to ensure that he remained up to date with all current standards applicable to assurance engagements, in breach of the Fundamental Principle of Professional Competence and Due Care and/or Paragraphs 100.5(c) and/or 130.1 and/or 130.3 of the Code of Ethics (2014)[6].

**DECISION**

The evidence of the Professional Conduct Committee's ("PCC") investigator was admitted by consent. The Tribunal finds on the evidence before it that the Particulars, which the Member has admitted, have been made out.

It follows that the Member is guilty of charges 3 and 4, which he has acknowledged.

[4] And, as applicable, the equivalent provisions of the Code of Ethics (2017) and/or PES 1 (Revised).
[5] And, as applicable, the equivalent provisions of the Code of Ethics (2017) and/or PES 1 (Revised).
[6] And, as applicable, the equivalent provisions of the Code of Ethics (2017) and/or PES 1 (Revised).

As to Charge 2, which the Member has also admitted, in the Tribunal's view it is clear from Particulars 2 and 3 and the evidence that the Member has been negligent and incompetent (unable to perform to expected standards) in a professional capacity. The purpose of the audits the Member conducted was to report on the broker's compliance with regulatory requirements. The Member failed to identify and report a number of clear breaches of the Regulations, some of which were fundamental. These shortcomings came to the attention of the Regulator, the Financial Markets Authority. In the Tribunal's view, the Member's conduct was of such a degree as to reflect on his fitness to practice as an accountant and tends to bring the profession into disrepute. It finds Charge 2 proved.

As to Charge 1, conduct unbecoming an accountant is conduct which departs from acceptable professional standards. The departure must be significant enough to attract sanction for the purposes of protecting the public. In the Tribunal's view, the conduct referred to in Particular 1, and cumulatively in Particulars 3 and 4, constitutes conduct unbecoming an accountant. It finds this Charge, which the Member also admitted, proved. As to Particular 1, the Tribunal notes that the Member had taken on the audit work before the voluntary cancellation of his audit licence (which happened earlier than he had originally intended) but the audits were completed and signed off after his licence had been cancelled. The Tribunal accepts the Member's explanation that he did not intentionally breach the Auditor Regulation Act or his earlier statement to the Institute that he would not perform any further FMC audits. However, the Member's failure to realise that the relevant audits were FMC audits, and that he was acting in breach of the law, fell well below acceptable professional standards. This also put the Member's client in breach of the law.

**PENALTY**

The parties were generally aligned on the penalty which they considered should be imposed being a censure, a monetary penalty and that the Member not undertake audits as an Audit Engagement Partner for a period of two years. Whilst the parties agreed that a monetary penalty was appropriate, they were not aligned on the quantum of that penalty.

The PCC noted that this was the Member's second offence, and submitted that the Member's conduct showed a surprising lack of attention to detail given the context of the Charges.

The Member referred to *Roberts v Professional Conduct Committee of the Medical Council of New Zealand* [2012] NZHC 3354, which identified the relevant factors to be considered when tribunals are determining penalty. Looked at overall, the penalty must be fair, reasonable and proportionate in the circumstances.

The Member submitted that his errors in relation to the audit work were of a technical non-compliance nature and did not involve loss of client funds. However, the failings referred to in Particular 3 were more than mere technical non-compliance. Also, the entity involved was a contributory mortgage scheme. In the Tribunal's view, and as noted by the PCC's witness, the potential for loss arising as a result of a negligently conducted audit cannot be overlooked – no loss of funds is not a mitigating factor.

The Member's counsel referred to the Tribunal's decision in *Middleton* (5 March 2018) which involved similar conduct and where a monetary penalty of $5,000 was imposed. The Member submitted that his conduct fell short of that demonstrated by the member in *Middleton* and warrants a lesser monetary penalty. However, the Tribunal considers that an aggravating factor in this case

is that the audits took place around the time that the Member was involved in a disciplinary process involving shortcomings on other audits. It appears that the Member did not learn sufficiently from that process. The Tribunal considers that a penalty of $6,000 is the appropriate monetary sanction in these circumstances.

The Tribunal was referred to *Commerce Commission v New Zealand Milk Corporation Limited* [1994] 2 NZLR 730 – there a full High Court held that, where the parties have reached a consensus on penalty, the Court is likely to provide its approval if it accepts that the agreed penalty is proportionate to the evidence available, and the defendant's conduct. The approach has since been applied in disciplinary proceedings against health practitioners and veterinarians, and by this Tribunal.

Having reviewed the decisions referred to above and taking into consideration the Member's submissions, the Tribunal is satisfied that in the circumstances of this case the proposed penalty is within the range the Tribunal considers as one which appropriately protects the public and deters others, facilitates the Tribunal's important role in setting and maintaining professional standards, and reflects the seriousness of the misconduct.

In reaching its decision the Tribunal has considered the following:

1. The Member's acceptance of the Charges and Particulars at an early stage and his cooperation throughout the disciplinary process;
2. The Member's remorse and insight into his action, and the rehabilitative steps he has taken;
3. There is no suggestion of any personal benefit - in fact quite the opposite.

**The Disciplinary Tribunal orders that:**

**Pursuant to Rule 13.40(c) of the Rules of the New Zealand Institute of Chartered Accountants, the Member pay to the Institute a monetary penalty of $6,000.**

**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(n) of the Rules of the New Zealand Institute of Chartered Accountants, the Member not undertake any audits as the Audit Engagement Partner or the Engagement Quality Control Reviewer for a period of two years.**

**COSTS**

The Professional Conduct Committee seeks full costs of $13,500. The Member accepted that the costs sought appeared to be reasonable in all the circumstances.

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.

In this case the Tribunal was not provided with any evidence that would justify a departure from this standard position. There are no relevant 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 that the Member pay to the Institute the sum of $13,500 in respect of the costs and expenses of the hearing before the Disciplinary Tribunal, the investigation by the Professional Conduct Committee and the cost of publicity. No GST is payable.**

**PUBLICATION & SUPPRESSION ORDERS**

The PCC sought publication of the Tribunal's decision in *Acuity* magazine and on the Chartered Accountants Australia and New Zealand website, with mention of the Member's name and locality as well as that of his firm. In requesting that the firm's name be published the PCC noted that the information was currently publicly available for all to search. In addition, the PCC advised that another member with the same name resided in Wellington and is practicing as a Chartered Accountant also and that care would need to be taken with regards to specific publication.

The Member sought an order under Rule 13.62(b) (iii) suppressing the names of the client and of his firm.

The Member referred the Tribunal to its decision in *Butterfield* (20 June 2018). In that case the Tribunal recorded that, because a firm in which a Member is a partner, consultant or employee is not the subject of the complaint, the Tribunal generally suppresses the name, or does not name the firm, in its decision – exceptions might be where a number of partners of the firm are involved, audit cases or where the name of the firm has already been linked in the public domain to the Member in connection with the conduct.

The Member submitted that the conduct the subject of this proceeding was his alone and where he worked at the time is of little moment. The firm has had an unblemished record for almost 50 years and carries an excellent reputation. The Member also noted remedial actions to be undertaken by his firm with regards to audit work including a commitment to increase staff training and a new engagement partner for all audits with the Member no longer being the engagement partner on any audit assignments. A review of several audit files by an independent quality reviewer had already taken place and the firm had appointed an independent qualified auditor to function as the quality reviewer for 2019 and beyond. Importantly, in the Tribunal's view, the Member confirmed that the firm will no longer carry out FMC audits.

The Tribunal has carefully considered these and other submissions the Member made in support of suppression of his firm's name, the submissions of the PCC as to the publication of the firm's name and the advice of its legal assessor. In the circumstances, it has determined that his firm's name should not be published. However, given the ease with which a person searching public registries, or searching social media, would be able to establish the firm's name, the Tribunal considers that no useful purpose would be served by suppressing it.

**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 the Institute's website and in the official publication *Acuity* with mention of the Member's name and locality. The Tribunal orders that the publication specifically note that the Member is now, and have always been based in the Auckland Region.**

**Pursuant to Rule 13.62(b) if the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the name of the Member's client be suppressed.**

**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.

The suppression orders shall take effect immediately. No decision including the direction as to publicity 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**