



**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 **Colin Brett Whyte**, Chartered Accountant, of Wellington

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**DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND  
INSTITUTE OF CHARTERED ACCOUNTANTS  
9 December 2013**

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**Hearing:** 21 October 2013 and 9 December 2013

**Tribunal:** Mr RJO Hoare FCA (Chairman)  
Mr GR Leech FCA  
Mr MJ Whale FCA  
Ms A Hauk-Willis (Lay member)

**Legal Assessor:** Mr Paul Radich (21 October 2013)  
Mr Adam Lewis (9 December 2013)

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

At a hearing of the Disciplinary Tribunal held in public at which the Member was in attendance and not represented by counsel the Member pleaded guilty to charges (1) and (2) and admitted particulars (a), (b), (d), (e) and (f) and denied part of particular (c).

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 21.30 the Member is guilty of:

- (1) Breaching the Code of Ethics, in particular:
  - a. the Fundamental Principle of Professional Behaviour [all particulars]; and/or
  - b. Rule 10 – Timeliness [particulars a and/or d and/or e]
- (2) Failing to respond promptly to communications from the Institute [particular e].

### **Particulars**

#### **IN THAT**

In his role as a Chartered Accountant in public practice the Member:

- (a) Failed to pay to the Inland Revenue Department taxes owing by his Chartered Accountancy practice, The Whyte Group Limited, and/or The Whyte Group Superannuation Fund when these were due, including GST and/or PAYE and/or income tax and/or penalties and/or UOMI; and/or
- (b) Failed to make payments to the Inland Revenue Department in accordance with arrangement(s) to repay outstanding tax liabilities, such that in 2012 the Inland Revenue Department applied to liquidate The Whyte Group Limited; and/or
- (c) Operated and continue to operate The Whyte Group Limited while it was and/or remains insolvent; and/or
- (d) Failed to file income tax returns for The Whyte Group Limited within the prescribed time for the 2007 and/or 2008 and/or 2009 and/or 2012 years; and/or
- (e) Failed to respond to correspondence from the Practice Review Unit and/or the Professional Conduct Committee in a timely manner; and/or
- (f) Failed to comply with the undertaking you gave the Professional Conduct Committee at an earlier final determination on 28 July 2009 to provide a copy of his letter from the Inland Revenue Department confirming the new instalment arrangement and to provide copies of his GST and PAYE account statements from 1 January 2009 to 28 July 2009.

### **DECISION**

As to particular (c) the Member has admitted operating the Whyte Group whilst it was insolvent but denied continuing to do so.

The evidence of the prosecution's expert witness was that the Member satisfied the second limb of the insolvency test – namely that his assets exceeded his liabilities.

As to the first limb, namely that the Member must be able to pay his debts as they fall due in the normal course of business, the evidence was that he still owes approximately \$27,000 PAYE which was due on 23 July 2013.

The Member's proposed means of settling this obligation was by set-off of a large GST refund which he expected to obtain from writing off significant bad debts arising from the receivership of a large client.

However, no entitlement to such a refund is due until the Member's claim for those write-offs has been accepted by the IRD. On this basis non payment of the Member's July PAYE constitutes at least a perception of a continuing technical insolvency.

The Tribunal accepts that the Member genuinely believes that the GST refund applied for can be treated as an off-setting receivable.

The Tribunal believes that there is some doubt about the timing of such a receipt, particularly as the Member's refund claim remains subject to IRD review.

Having regard to all the evidence the PCC has not established, on the balance of probabilities, that his practice continues to be unable to pay its debts as they become due in the normal course of business.

The Tribunal finds particular (c) not proved with respect to on-going operations.

## **PENALTY**

The Professional Conduct Committee sought and the Member did not oppose censure and a Practice Review no later than 30 April 2014.

Pursuant to Rule 21.31 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders:

- That the Member be censured (21.31(k))
- That a review of the Member's practice be performed no later than 30 April 2014 (21.31(f))

## **COSTS**

The Professional Conduct Committee seeks full costs of \$32,799.

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.

The Member had pleaded guilty to both charges and admitted all particulars except for part of one particular which was found not proven. The PCC failed to establish the disputed part of that particular, being the matter giving rise to the adjourned hearing.

There are no other mitigating factors such as excessive or unnecessary expenses incurred or demonstrated evidence of hardship (inability to pay).

Pursuant to Rule 21.33 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that **Colin Brett Whyte** pay to the Institute the sum of \$20,000 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 ORDERS**

Pursuant to Rule 21.52 (b) of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the identity of the Member's clients and his former wife remain suppressed.

## **PUBLICATION**

The Member sought non-publication of his name due to the significant commercial impact he believed would result for his practice. However the Tribunal finds that this private interest is outweighed by the public interest in the identity of a tax practitioner whose own practice has had significant and long standing tax arrears.

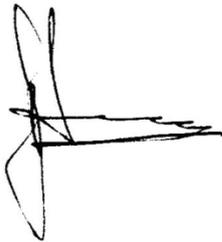
In accordance with Rule 21.35 of the Rules of the New Zealand Institute of Chartered Accountants the decision of the Disciplinary Tribunal shall be published on the Institute's website and in the *Chartered Accountants' Journal* with mention of the Member's name and locality.

## **RIGHT OF APPEAL**

Pursuant to Rule 21.41 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 Member may, not later than 14 days after the notification to the Member of this Tribunal's exercise of its powers, appeal in writing to the Appeals Council of the Institute against the decision.

While the Member remains entitled to appeal, the decision as to publicity shall not take effect.

The suppression orders shall take effect immediately. No other decision shall take effect while the Member remains entitled to appeal, or while any such appeal by the Member awaits determination by the Appeals Council.

A handwritten signature in black ink, appearing to read 'R J O Hoare', with a stylized flourish extending to the right.

R J O Hoare FCA  
**Chairman**  
**Disciplinary Tribunal**