

**In the matter of the Chartered Professional
Engineers of New Zealand Act 2002**

Appeal 02/22

AND

**In the matter of an appeal to the Chartered
Professional Engineers Council pursuant to
Section 35**

Between

Mr A
Appellant

And

Mr B
Complainant

Decision of the Chartered Professional Engineers Council
Dated 10 February 2023

Introduction

1. Mr A has appealed a decision made by a Chair of Investigating Committees (“the CIC”) of the Registration Authority (“the RA”) to refer a complaint about him by Mr B to an investigating committee [BOD 93-100].
2. The appeal panel of the Chartered Professional Engineers Council (“the Panel”) has been provided with a Bundle of Documents held by the RA in relation to the case. References to specific pages within this bundle are annotated “[BOD nn]”.
3. The RA was granted leave by the Panel to be heard and provide submissions in this matter.
4. With the agreement of the parties and the RA the Panel conducted the hearing on the papers. Key correspondence and submissions relating to this appeal are listed in Schedule 2.

The Legislation

5. This appeal is brought under the Chartered Professional Engineers of New Zealand Act 2002 (“the Act”), from which the Council derives its power to hear and determine appeals of decisions of the RA (being the Institution of Professional Engineers of New Zealand Incorporated trading as Engineering New Zealand).
6. The Chartered Professional Engineers of New Zealand (Appeals) Regulations 2002 (“the Regulations”) set out the requirements pertaining, amongst other matters, to the hearing and the deciding of appeals.
7. The Rules under which the appealed decision was made are the Chartered Professional Engineers of New Zealand Rules (No.2) 2002 (“the Rules”), enacted pursuant to s 40 of the Act.
8. Relevant extracts from the Act and the Rules are set out in Schedule 1.
9. For clarity, the Panel notes that references made to Engineering New Zealand’s complaints resolution and disciplinary regulations in the CIC’s decision and in submissions to the Panel, relate to membership of Engineering New Zealand and are not relevant to this appeal.

Background

10. Mr A is a Chartered Professional Engineer (“CPEng”). Relevantly to the complaint, he is a director of Company C, the developer of subdivision D, and is sole director and majority shareholder of Company I, the engineering consultancy engaged to design and observe the construction of the civil works associated with the development.
11. On 4 October 2021 Mr B, also a CPEng, raised concerns with Engineering New Zealand regarding the watercourse and timber pole-and-waling wall within a property at location E¹ (“the Property”).
12. Mr B has alleged (in summary) that Mr A had, on 11 September 2015, issued a PS1 producer statement, calculations and drawings for a culvert and watercourse, that the watercourse was not formed as specified in the related consent documents, and the wall that was built is inadequate. This has had consequences for the subsequent purchasers of the Property, Mr and Mrs F who purchased it in March 2019² and subsequently built a house on the Property.
13. Mr B states that, following an expression of concern by a landscaper about the stability of the wall, Mr and Mrs F engaged Company G (Mr B’s firm) to produce a report on the matter. Company G’s report of 27 May 2020 concluded the timber pole-and-waling wall was unsound. Following consideration of the report, City Council N issued Mr and Mrs F a ‘notice to fix’.
14. Mr B believes Mr A should be held accountable for fixing the problem with the wall and has sought this through interactions with City Council N and the media, as well as seeking disciplinary action through his complaint to Engineering New Zealand.

Decision being appealed

15. The decision under appeal is the 30 June 2022 decision of the CIC³ to refer the complaint by Mr B to an investigating committee.
16. The process and way in which that decision is to be made are set out in rules 56, 57 and 58 of the Rules. This decision is the first, and preliminary stage of decision-making in what can be a three-stage disciplinary process. If a matter progresses,

¹ BOD page 4-8

² BOD page 5

³ BOD pages 93-100

the subsequent stages are an investigation by an investigating committee and determination by a disciplinary committee.

17. Rules 56 to 58 are set out in full in Schedule 1 to this decision. The Panel notes that, in relation to rule 57(a), the applicable grounds of discipline under s 21(1)(a) to (d) of the Act include a breach of the Code of ethics ('Code of ethical conduct') which are contained in part 3 of the Rules.

Evidence received

18. Under clause 15 of the Regulations, the Council may receive any evidence that the RA would have been entitled to receive on the decision being appealed.
19. The evidence considered by the Panel in arriving at its decision included:
 - (a) Notice of Appeal dated 1 August 2022
 - (b) The paginated Bundle of Documents [BOD 1 to 108]
 - (c) Submissions (Grounds 1-4) of Counsel for Mr A dated 1 September 2022
 - (d) Submissions (Grounds 1-4) of Mr B dated 9 September 2022
 - (e) Submissions (Grounds 1-4) of the RA dated 16 September 2022
 - (f) Reply submissions (Grounds 1-4) of Counsel for Mr A dated 30 September 2022
 - (g) Amended Notice of Appeal dated 18 October 2022
 - (h) Supplementary submissions (Ground 5) of Counsel for Mr A, dated 18 October 2022
 - (i) Submissions of Mr B on "*the amended Notice of Appeal*" dated 25 October 2022
 - (j) Supplementary submissions (Ground 5) of the RA dated 26 October 2022
 - (k) Reply submissions (Ground 5) of Counsel for Mr A dated 2 November 2022

Grounds of appeal and outcome sought

20. Mr A's Notice of Appeal dated 1 August 2022 cited four grounds of appeal.

21. On 22 September 2022, Mr A sought leave to add one additional ground. After considering submissions from Mr A, Mr B and the RA on the matter, the Panel granted leave and directed Mr A to submit an amended Notice of Appeal, containing the additional fifth ground.

22. The amended grounds of appeal cited by Mr A are as follows:

“

- (1) *The decision was made in breach of natural justice, and therefore in breach of s25(a) Chartered Professional Engineers Act 2002, including in the following respects:*
 - (a) *The adjudicator considered material not made available to Mr A. The decision refers to a bundle of documents including, but not limited to, information from Mr B and Mr A's response. No material was provided to Mr A other than Mr B's complaint and the attachments to it.*
 - (b) *Mr B's "reply" on 20 December 2021 went beyond replying to matters in Mr A's response and raised new matters and provided further material that Mr A had no opportunity to comment on.*
 - (c) *The decision asserts that the Council states the "retaining wall" was not in place during its Code Compliance Certificate inspection. Mr A has received no communication from the Council about this matter and had no opportunity to comment on any communication from the Council, that included that statement. In particular, Mr A only became aware of City Council N's email of 15 June 2020 when he received Mr B's response, and had no opportunity to respond to the Council's email.*
 - (d) *The complaint did not allege any impropriety in the nature of a conflict of interest and Mr A was never on notice that there were concerns about this. There was no material before the adjudicator, and certainly no suggestion put to Mr A, that he had failed to disclose or had inadequately managed any perceived conflict.*
- (2) *There is no material in the decision or disclosed to Mr A that provides any basis for a concern about conflict of interest and no basis for an Investigating Committee to investigate such a concern. There is no suggestion that any relevant person was unaware of the perceived conflict, or that he has inadequately managed it.*
- (3) *The complaint should have been dismissed on the basis that the Respondent did not have a sufficient personal interest in the matter. The appellant notes in particular:*
 - (a) *Mr B's complaint acknowledges that he is not a directly affected party. The owners of the property, having received both engineering and legal advice, have not complained.*

- (b) *While it is acknowledged that Mr B had an obligation to report to Engineering New Zealand if he had reasonable grounds to believe that Mr A had committed a significant breach of the Code of Ethical Conduct, he did not, and could not, without having first put his concerns to Mr A, have reasonable grounds in respect of a significant breach. Even if he were obliged to report to Engineering New Zealand, he does not have a personal interest in the matter complained of.*
- (4) *The complaint was not made in good faith in all of the circumstances including:*
- (a) *The complainant lacked personal interest as set out in the previous paragraph.*
- (b) *Mr B never raised his concerns with Mr A, and waited over 16 months before raising the matter with Engineering New Zealand during which he:*
- (i) *made requests under official information legislation (unknown date(s)), referred to Mr B to City Council N correspondence (8 December 2020);*
- (ii) *wrote a lengthy letter to the Chief Executive Officer of the City Council N and sought a meeting (8 December 2020);*
- (iii) *approached a local newspaper and made extravagant and unfounded statements without checking them (Newspaper reports 15 July 2021 and 29 July 2021); and approached a City Councillor (unknown date, referred to in complaint).*
- (c) *The complaint itself included inflammatory and unjustified allegations such as:*
- "He did this to increase the sale price."*
- "He deliberately misled City Council N and ultimately [the purchasers]."*
- "He chose not to construct the watercourse in accordance with the consents."*
- (d) *The complaint further alleged "ongoing approaches to Mr A", and that "Mr and Mrs F's solicitors approached Mr A". No material was supplied to validate those allegations and they are incorrect. The complaint also expressly sought to "punish" the appellant, "fine him plenty", "remove his registration", and "get his actions out in the public arena".*
- (e) *By not raising concerns with Mr A for a period of over a year during which he took the steps listed in paragraphs (a) to (d) above, failed to act with integrity and treat Mr A with respect and courtesy.*

(5) *There is no valid decision of the Chair of Investigating Committees. By Rule 56, the Registration Authority was required to carry out an initial investigation of the complaint in accordance with Rule 58. There are three mandatory consecutive steps under Rule 58(a), Rule 58(b), and Rule 58(e). These require the involvement of both a complaints research officer and the Chairperson of Investigating Committees.*

Here, only one person, Person H, has been involved as an “Adjudicator”, a title which has no meaning in the statutory process. His decision is therefore invalid and of no legal effect.”

23. Mr A is seeking the reversal of the decision to refer the complaint to an investigating committee.
24. The Panel notes that the outcomes available to it after hearing the appeal are those in s 37(5) of the Act.

Nature and scope of this appeal

25. A number of the grounds of appeal are based on allegations of procedural issues in the RA’s decision-making process.
26. A threshold question in this appeal is whether the Council has jurisdiction to consider procedural issues. In arguing this point, both counsel for Mr A and the RA have made extensive written submissions to the Panel.
27. Mr B has expressed the view that the appeal should not be allowed on the basis of ‘purely technical legal procedures’ when it has no substance.⁴
28. The RA’s position can be summarised as follows:
 - (a) As a creature of statute, the Council only has the powers that statute confers on it. The Act does not confer on the Council the power to conduct a procedural review thereby restricting, by implication, the Council’s jurisdiction to substantive matters only.
 - (b) Appeals to the Council must be conducted “by way of rehearing” per s 37(2) of the Act.
 - (c) *Austin, Nichols & Co Inc. v Stichting Lodestar* [2008] 2 NZLR 141 is the appropriate authority to be applied in an appeal of this nature (i.e. a disciplinary context), having been applied or approved by the District

⁴ Respondent submissions, 25 October 2022

Court and High Court in appeals under s 109 of the Health Practitioners Competence Assurance Act 2003 (“HPCAA”).⁵

- (d) Per *Austin, Nichols*, the correct approach in a ‘rehearing’ requires an appeal body to “arrive at its own assessment of the merits of the case”. This language, in particular “merits of the case”, indicates a rehearing is limited to substantive issues raised by the body whose decision is being appealed.
- (e) The Council’s task on appeal is to assess the CIC’s decision and to confirm, vary, or reverse it, or to make any decision that could have been made by the CIC.

29. The Panel accepts, and Mr A does not dispute, the application of the principles of *Austin, Nichols* to an appeal of this nature.

30. Those principles include that the Panel has the responsibility of arriving at its own assessment of the merits of the case.⁶ However, the onus is on Mr A to demonstrate why the decision of the CIC is wrong.⁷

31. In its submissions dated 16 September 2022, the RA referred the Panel to *Pratt v Wanganui Education Board* [1977] 1 NZLR 476 for the proposition that the Council must hear this matter ‘as if it had not been heard before’. While Mr A does not take issue with this proposition, the Panel considers this paraphrasing to be an unnecessary and inaccurate summation and prefers the authority of *Austin, Nichols*. In particular, as:

- (a) this phrasing appears to instead describe a de novo hearing, which is distinct in nature from a rehearing;
- (b) an appeal to the Council is restricted under s 37(6) of the Act, excluding the ability to “review any part of the decision other than the part to which the appeal relates”; and
- (c) it would appear to undermine the principle, per *Austin, Nichols*, that the onus is still on Mr A to demonstrate why the decision under appeal is wrong.

⁵ In support, the RA cited *Ahmad v Medical Council of New Zealand* [2016] NZDC 21788 and *Lim v Medical Council of New Zealand* [2016] NZHC 485

⁶ *Austin, Nichols & Co Inc. v Stichting Lodestar* [2008] 2 NZLR 141 at [5]

⁷ *Austin, Nichols & Co Inc. v Stichting Lodestar* [2008] 2 NZLR 141 at [4]

32. Returning to the RA's interpretation of *Austin, Nichols* that the words "merits of the case" limits a rehearing to substance only, the Panel considers that this requires a significant amount of reading in to the words used by the Supreme Court. In the Panel's view, for this interpretation to be accepted there would need to be more, such as the context or facts of the case of *Austin, Nichols* itself, to indicate that the Supreme Court was intentionally commenting on the distinction between substance and process.
33. The RA provides no authority for its statement that the interpretation it argues for, "*has been applied in the context of disciplinary proceedings for medical practitioners.*" Indeed, one of the decisions cited by the RA in reference to the general adoption of *Austin Nichols*, namely *Lim v Medical Council of New Zealand*⁸, is authority for the opposite view.
34. In *Lim* the High Court approved the approach by the Judge in the District Court⁹ who heard an appeal of a decision of the Medical Council under s 109 of the HPCAA. Section 109 of the HPCAA contains similar wording to s 57 of the Act, also describing the appeal to the District Court as an appeal "*by way of rehearing*".
35. A ground of Dr Lim's appeal to the District Court was that the decision maker, the Medical Council, had failed to comply with a mandatory notice provision of the HPCAA to give the doctor adequate notice of its reasons for (one of) its decisions and failing to give the doctor a reasonable opportunity to be heard.
36. Exercising the jurisdiction of s 109, Judge Hastings both considered and made a finding in relation to the procedural issues raised by Dr Lim. He found that the Medical Council did not give the doctor sufficient notice of its claim that he misused sedatives and that, as a consequence, the doctor had no opportunity to address that matter in his submissions to the Medical Council. However, after making this conclusion, the Judge went on to consider the evidence and determine the underlying substantive matter for himself. On further appeal to the High Court, it held that the Judge was "*entitled to come to his own view about the alleged misuse of sedation and his finding of a procedural error did not require him to allow the appeal.*"¹⁰
37. To the extent that the powers of the Council provide an indication of the scope of an appeal, it is notable that the Council's powers on appeal in s 37(5) of the Act are broader than those in s 109 of the HPCAA. The Council's powers include the ability

⁸ *Lim v Medical Council of New Zealand* [2016] NZHC 485

⁹ *Lim v Medical Council of New Zealand* [2016] NZDC 2149

¹⁰ *Lim v Medical Council* [2016] NZHC 485, at [32]

to refer the matter back to the decision-maker for reconsideration which does not exist in s 109.

38. The Panel considers that the authority provided by *Lim*, could be considered the end of this argument. However, it notes for completeness that the argument that procedural flaws can be considered in an appeal is also supported by the authorities supplied by Mr A, in particular *Ancare New Zealand v Wyeth (NZ) Ltd*¹¹ and associated cases. While these cases are related to appeals on points of law, the Panel accepts that they are authority against the proposition that all procedural errors, no matter what their nature, are irrelevant on a rehearing. It therefore does not appear to be a sustainable position that matters of process can never be grounds of an appeal by way of rehearing.
39. In relation to the remainder of the RA's arguments on this point, the Panel adds:
- (a) The nature of the appeal rights and remedies available under the Act are very broad. As argued by counsel for Mr A, the words 'substance' and 'merit' do not appear in the Act (or Regulations or Rules). The only limitation within s 37 in terms of jurisdiction is s 37(6) – which restricts the appeal to the part of the decision to which the appeal relates.
 - (b) The argument of a limitation to be implied from the absence of permission in the Act relies on the proposition that the jurisdiction to consider matters of process could not have been intended to have been included in the powers given. The Panel has not accepted the RA's argument that the word 'rehearing' limits an appeal to matters of substance and there is nothing in the Act or Regulations that suggests a limitation on subject matter of an Appeal beyond s 37(6).
 - (c) The RA's description of the Council's 'task' in an appeal in paragraph 3.12 of its October 2022 submissions ignores the power available to it under s 37(5)(b) to refer the matter back to the decision authority for it to reconsider the decision.
40. Having reached the view that procedural issues may be considered by the Council in an appeal under s 37, the question becomes, as the RA latterly argues, whether there is a threshold of seriousness or type of procedural error required before it can form the basis of an appeal in a rehearing.

¹¹ *Ancare New Zealand v Wyeth (NZ) Ltd* [2009] NZCA 211; [2009] 3 NZLR 501 (CA)

41. In *Ancare*, which was an appeal on a point of law (as opposed to a general appeal) the Court of Appeal allowed, “*procedural issues which might substantially affect the shape of a hearing*” to be raised as a point of law on an appeal and did not require them to be pursued by way of a judicial review application.¹²
42. Based on the authority of *Lim* and noting the restricted nature of the appeals in question in the line of cases related to *Ancare*, the Panel does not consider it to be appropriate to introduce a similar threshold here for an appeal under s 37 of the Act.
43. However, in the absence of a clear authority, and as discussed further in relation to ground 5 of the Appeal, the Panel does not consider that it has jurisdiction to determine whether a decision under appeal was made without jurisdiction (or ‘*ultra vires*’ or ‘*invalid*’). The determination and remedy for that assertion is an application to the High Court for judicial review, which has exclusive jurisdiction in that regard.

The “cure” of procedural issues on rehearing

44. Counsel for Mr A and the RA accepted that it is possible for procedural flaws or issues to be cured or rendered irrelevant on rehearing.¹³
45. Counsel for Mr A directed the Panel to the case of *Nicholls v Registrar of the Court of Appeal*¹⁴, in which Tipping J stated:

“The leading authority on the cure point is the decision of the Privy Council in Calvin v Carr. Their Lordships took the view that there is no absolute rule one way or the other. Whether an appeal (or its equivalent) cures problems with the first instance decision must depend on the circumstances. It is fair to say that an appeal cannot logically be regarded as curing any defect at first instance in an absolute sense. The defect still exists, but in its discretion, the Court may take the view that, as a result of an appeal or review, the party complaining has had substantial justice and thus no remedy should be granted in respect of the first decision.

...

To my mind, the correct approach is this. The Court should first identify the error, or errors, which are said to vitiate the first instance decision. The second step is to examine what effect the appeal has had on the error, or errors, found at the first stage. If the appeal has in substance removed the prejudice which would otherwise have resulted to the complaining party, the Court should exercise its discretion against relief, because overall

¹² Appellant reply submissions, 30 September 2022, paras 18 to 31

¹³ RA submissions, 26 October 2022, paras 4.1 to 4.6

¹⁴ *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385, at pp 436-437

no continuing prejudice from what went wrong at first instance can be shown. Where, as here, there has been review by way of a rehearing, which is said to have cured any earlier problems, I would put the onus on the applicant for judicial review to demonstrate continuing prejudice. It is only if there is continuing prejudice that the first instance error, or errors, have continued relevance.

In Leary v National Union of Vehicle Builder, Megarry J asked why the plaintiff should have to accept an unjust trial followed by a fair appeal. In Calvin v Carr, their Lordships regarded the proposition inherent in that rhetorical question as too broadly expressed; the ultimate issue is whether the plaintiff has received justice overall. If there is no continuing prejudice from the first instance error, it would be hard to find a failure of overall justice. This is all that needs to be said on the point of principle.”

46. In summary, the Panel’s view after considering the authorities provided, is that:
- a) Issues of procedure may be raised as grounds for an appeal to the Council under s 37 of the Act.
 - b) Such issues do not prevent the Council from determining the appeal.
 - c) The Panel may consider the issues raised to have been cured through the rehearing process where the appellant has had substantial justice.
 - d) The Panel is not the appropriate body to determine whether procedural flaws have rendered a decision ultra vires or invalid.
47. Ultimately, if the Panel reaches the view that the CIC’s decision is wrong in relation to grounds put forward by the appellant, the Panel may exercise its powers in s 37(5), to:
- “.....
- (a) *confirm, vary, or reverse the decision, or part of decision, to which the appeal relates:*
 - (b) *refer the matter back to the decision authority for it to reconsider, either generally or in relation to specific matters, the whole or any part of the decision (together with any direction on that whole or part that the Council or District Court, as the case may be, thinks fit):*
 - (c) *make any decision that could have been made by the decision authority:*
 - (d) *make any order as to the payment of the costs of the appeal that it thinks fit.”*

Discussion and Findings

Specific elements of the appeal

48. The various elements of the matter being appealed are addressed below against the respective grounds, in the order presented in the amended Notice of Appeal (set out at paragraph 22 above).

Ground 1 – “The decision was made in breach of natural justice, and therefore in breach of s 25(a) Chartered Professional Engineers Act 2002,…”

49. The sub-grounds of ground 1 of this appeal, 1(a) to 1(d), are each issues of natural justice within the decision-making process. In summary, these grounds allege that the decision was in breach of natural justice (and therefore the Act) because Mr A was not given all of the material provided to the CIC, did not have appropriate notice of the types of issues the CIC considered of concern, nor an appropriate opportunity to comment on each of the foregoing.

50. With the exception of one document, the ‘Triage Brief’, which is discussed further below, Mr A received disclosure of the material considered by the CIC in reaching his decision at the outset of this appeal and has had an opportunity, through his counsel, to make submissions on that material.

51. In the Panel’s view, barring discussion of the Triage Brief, to the extent that any of the issues raised in 1(a) to (d) are flaws in the decision-making procedure that amount to breaches of natural justice, the rehearing of this matter has effected a ‘cure’.

52. Mr A has now had the opportunity to review and comment on the material related to the CIC’s decision. Counsel for Mr A has focussed the argument under this ground on establishing breaches of natural justice which he says should, as a result of being established, result in overturning the CIC’s decision. However, in the Panel’s view, and following *Nicholls* it has not been demonstrated to the Panel that there is any ongoing prejudice to Mr A from the issues identified in ground 1 such that a remedy should be granted.

53. With respect to sub-ground 1(d), the extent to which there is a material basis for a referral that identifies a conflict of interest as a potential ground of discipline, is discussed below in relation to ground 2.

Triage Brief

54. A document called a 'Triage Brief' was supplied by the RA with its submissions of 26 October 2022 (marked 'RAS3'). This document was not in the bundle and was produced at a point in the hearing where Mr A had only a right of reply in relation to his amended appeal ground 5.
55. Counsel for Mr A points out in that reply, there is still confusion as to the status of this document and whether it was provided to the CIC, given:
- a) The RA stated in its submissions of 16 September 2022 that "No information outside of the Bundle of Documents was provided to the Adjudicator"¹⁵, yet
 - b) The RA supplied the 'Triage Brief' as attachment RAS3 to its subsequent submissions on the fifth ground of appeal, dated 26 October 2022, on the basis that this document is the initial investigation and recommendation undertaken by the complaints research officer ("CRO") for the purposes of rule 58(b) which was 'conveyed to' the CIC upon his appointment.¹⁶
56. The Triage Brief and the CIC's decision contain almost identical wording in the 'Summary' and 'Background' sections as well as paragraphs in other sections, indicating the Triage Brief was provided to the CIC in writing.
57. The RA's failure to include this document in the BOD at the outset of this appeal is arguably a breach of regulation 6(1) of the Regulations. However, given Mr A has received this document in the course of the appeal and has had an opportunity, through counsel, to comment on it (noting counsel did not seek additional time to do so), the Panel considers that this is not a bar to it determining this appeal.
58. In relation to whether Mr A ought to have received and been given an opportunity to comment on the Triage Brief in the process of the CIC's decision, the Panel notes that:
- The Act requires the rules of natural justice to be followed in decision-making (s 25).
 - The question of what natural justice requires is necessarily contextual.

¹⁵ RA submissions, 16 Sep 2022, paras 11.9 - 11.10

¹⁶ RA submissions, 26 Oct 2022, paras 2.10 – 2.13

- The decision being made by the CIC is a preliminary one in the context of the Act's disciplinary process, which does not allow for the testing of evidence.
- The disclosure required by the Rules in the process under r 58 is for the RA to, "*notify the person complained about of the general nature of the complaint before commencing the investigation*". The Rules do not specifically state that the initial investigation or recommendation must be provided to the person complained about.

59. In any case, for the reasons discussed above in relation to other documents Mr A has raised as not having been provided, if this is in fact a breach of natural justice it is one the Panel considers is capable of cure through this rehearing.

60. Mr A has now had an opportunity to receive and comment on the material available to the CIC in reaching his decision not to dismiss the complaint, referring it to an investigating committee. Mr A has raised arguments as to substantive errors of the CIC's decision in grounds 2, 3, and 4 of the appeal. In this rehearing, the Panel has considered those arguments and whether to uphold or dismiss the decision or exercise another of its powers under s 37(5). The Panel is not persuaded that there is an ongoing prejudice to Mr A following this rehearing which would justify granting a remedy based on ground 1 of the appeal.

Ground 2 – “There is no material in the decision or disclosed to Mr A that provides any basis for a concern about conflict of interest and no basis for an Investigating Committee to investigate such a concern...”

61. Mr A's starting position is that, "*no material in the decision or disclosed to the Appellant provides any basis for concern about conflict of interest ...*".¹⁷ Counsel for Mr A acknowledged that a failure by Mr B to identify conflict of interest concerns was not a bar to the CIC doing so, however, Mr A's view is that such concerns came 'out of the blue' and he was not given sufficient notice to address that point.¹⁸

62. Counsel for Mr A further submits that a 'cure' of this issue in a procedural sense, can only be achieved if the Panel provides reasonable particulars of this issue and an opportunity to comment on it.¹⁹

63. In his decision, the CIC identified rule 42F(a)(iii) as one of two applicable grounds of discipline arising from the complaint and that therefore the complaint should not

¹⁷ Appellant submissions, 1 September 2022, para 78

¹⁸ Appellant reply submissions, 30 September 2022, paras 64 - 67

¹⁹ Appellant reply submissions, 30 September 2022, paras 68 - 69

be dismissed under rule 57(a) of the Rules.

64. Mr A has challenged there being any basis for the CIC's decision that the ground of discipline in rule 42F(a)(iii)²⁰ could be applicable. Rule 42F(a)(iii), which is part of the Code of ethical conduct within the Rules, provides:

“42F Behave appropriately

A chartered professional engineer, in performing, or in connection with, the engineer's engineering activities,—

(a) must—

...

(iii) disclose and appropriately manage conflicts of interest;

....”

65. The CIC noted that Mr A had ‘*several roles associated with this project, across multiple parties*’ and what those roles were. The CIC did not identify or connect these with a circumstance that suggested a failure by Mr A to appropriately manage those roles or what conflict of interest may have arisen. While the Panel agrees that it is not for a CIC (or the Panel) to conclude on the matter, something more than identifying that an Engineer held several roles on a project is required. As Mr B points out in his submissions, “*The conflicts of interest faced by Mr A were no more than that normally faced by Engineers*”.
66. At this early stage of the disciplinary process, there is no testing of the evidence to establish alleged facts. Rather, the ‘threshold’ applicable at this stage in relation to whether a complaint should be dismissed on ‘no applicable ground of discipline’ following an initial investigation is, “*confined to considering whether the circumstances which form the basis of a complaint would, if established, qualify as one of the grounds of discipline specified in [the Act]*”.²¹
67. Therefore, the Panel considers the appropriate question in relation to rule 57(a) to be whether, if the factual circumstances of the allegation(s) were to be proven, those facts could give rise to an applicable ground of discipline.
68. In examining whether there was an allegation of a conflict of interest which aligns with rule 42F(a)(iii), the Panel notes the following in Mr B's original complaint:
- a) identification that Mr A is a ‘principal’ in both Company C and Company I and roles of those companies in relation to works on the subdivision (BOD page 5); and

²⁰ A ground of discipline by way of the Code of ethical conduct, referenced in s 21(1)(b) of the Act
²¹ *McLanahan & Anor v The New Zealand Registered Architects Board [2017] NZCA 458*, at [66]

- b) the statement, *“The situation is that [Mr A] chose to not construct the watercourse through Mr and Mrs F’s property in accordance with the consents issued by City Council N based on drawings and specifications he himself as a CPENG Engineer had produced and certified. He did this to create more flat land for what became Mr and Mrs F’s section to increase the sale price.”* (BOD page 6)
69. Referring to Mr A, Mr B submits, *“In my view, as the Site Engineer overseeing the construction of the watercourse through Mr and Mrs F’s property, he failed to manage conflict of interest.”*²² He further submits, *“The interests of Mr A, the subdivision owner trying to make what became Mr and Mrs F’s property more attractive for sale, over-ruled Mr A the Site Engineer’s interest in ensuring the watercourse was formed in accordance with the City Council N consents and good engineering practice. Thus, Mr A’s actions were not acceptable for a CPENG Engineer.”*²³
70. In summary, the Panel understands Mr B’s allegation(s) around a conflict of interest to be that:
- a) Mr A designed and carried out construction observation of the watercourse in a certain way as CPENG. That design was consented and a code compliance certificate was subsequently issued by City Council N.
 - b) Mr A, as developer, altered this design and construction without the consideration of required approvals. Mr A’s decision as developer adversely influenced his decision not to build the watercourse in that way in order to make what became Mr and Mrs F’s property more profitable to him as the developer.
 - c) In doing so, his obligation as a CPENG to ensure the watercourse was formed in accordance with the City Council N consents and good engineering practice came into conflict with his interests as the developer of the subdivision.
71. Mr A submits there is no suggestion that any relevant person was unaware of the perceived conflict, or that he has inadequately managed it.
72. On balance, the Panel considers that there is not a sufficient basis to establish at this stage that the ground of discipline in rule 42F(a)(iii) is applicable. As counsel

²² Respondent submissions, 9 September 2022, page 1, last para

²³ Respondent submissions, 9 September 2022, page 2, first para

for Mr A has argued, the focus of 42F(a)(iii) is the disclosure and appropriate management of a conflict of interest. There are no facts alleged that would amount to a failing of this nature by Mr A as a CPEng.

73. The Panel finds that this ground of appeal has been proven. The CIC should not have found rule 42F(a)(iii) to be an applicable ground of discipline based on the complaint.
74. The Panel notes, that in terms of rule 57(a), rule 42F(a)(iii) was one of two applicable grounds of discipline identified by the CIC, the second of which (rule 42E(a)(iii)) was not the subject of appeal by Mr A. Therefore, this finding does not provide a basis for the panel to dismiss the complaint under rule 57(a). It does however, provide a basis for the Council to exercise its power to vary the CIC's decision under s 37(5)(a) of the Act.

Ground 3 – “The complaint should have been dismissed on the basis that the Respondent did not have a sufficient personal interest in the matter....”

75. Mr A argues that the CIC should have dismissed Mr B's complaint on the basis of rule 57(e).
76. In arguing that Mr B has insufficient personal interest in the matter, counsel for Mr A refers to Mr B's statement in the “Raising Concerns about an Engineer Submission Form”²⁴ that he is not a directly affected party.²⁵ Counsel for Mr A further draws attention to Mr B's reference to the impact of the matters being complained about, on Mr and Mrs F.²⁶
77. The RA submits that, as Mr B is a CPEng, rule 42I applies and argues that the complaint was appropriately made under that provision. It further argues that treating rule 42I as entirely separate from the complaints process would undermine the operation of that rule.²⁷
78. Rule 42I of the Rules provides:

“42I Report breach of code

A chartered professional engineer who has reasonable grounds to believe that another chartered professional engineer has committed a significant breach of the code of ethical

²⁴ BOD 4

²⁵ Appellant submissions, 1 September 2022, para 80

²⁶ BOD 6

²⁷ RA submissions, 16 September 2022, para 11.3 onwards

conduct must report the matter to the Registration Authority.”

79. With respect, the Panel considers the conflation of the obligation in rule 42I to report suspected ethical breaches by another CPEng to the RA and the ability to make a complaint about another CPEng to be inappropriate and unfounded in the Rules.
80. An obligation to ‘report’ another member of the profession places a positive obligation on each CPEng. It is appropriate that there is a threshold before that obligation bites – i.e. a reasonable belief of a “*significant breach of the code of ethical conduct*”.
81. If rule 42I meant that all CPEngs are required to make and pursue a ‘complaint’ as a party against another CPEng through the multi-staged disciplinary process, it would burden the profession in relation to time, money, and relationship concerns. This could discourage CPEngs from making rule 42I reports. The RA has the ability to make own motion inquiries to commence the disciplinary process under rule 55. This would seem to be the natural consideration following receiving a ‘report’ of a potential significant breach from a CPEng under rule 42I. This own motion ability also removes the concern of a gap between the reporting requirement and disciplinary process.
82. Further, introducing the threshold within rule 42I where a CPEng is the individual making a complaint would inappropriately narrow the circumstances in which one CPEng could raise a complaint about another. If a CPEng wishes to exercise their right under rule 54 to make a *complaint* to the RA in circumstances that do not trigger their obligation to make a report under rule 42I, they should not be barred from doing so. They should face the same hurdle as every person making a complaint does – that they have “*a sufficient personal interest in the subject matter of the complaint*”.
83. Therefore, in the Panel’s view, rule 42I should not be conflated with the complaints process and that rule does not, on its own, create a sufficient personal interest for the purposes of a complaint.

Whether Mr B has a sufficient personal interest

84. Mr B acknowledges in his submissions that, “[a]s stated previously, Mr A’s actions did not cost me money or hurt me. The sequence of events which lead me to complain to Engineering New Zealand began when Mr and Mrs F asked me to

*report on the wall in May 2020”.*²⁸ However, he also asserts in detailing his attempts to assist Mr and Mrs F to resolve this issue his report identified, that “[a]fter 27 months of unpaid work in trying to achieve justice for Mr and Mrs F, I believe I now have a personal interest in the case.”²⁹

85. The Panel is in no doubt that Mr B is not a directly affected party but considers this does not necessarily mean that he does not have a sufficient personal interest in the subject matter of the complaint for the purposes of rule 57(e).
86. Being a CPEng, Mr B does arguably have an interest in the integrity and quality of work of other CPEng, in order to maintain the status and reputation of the CPEng qualification. This on its own could be described as a professional as opposed to a personal interest.
87. However, Mr B’s involvement in the subject matter of the complaint goes further. The 27 May 2020 report by Company G, signed by Mr B³⁰ and the 31 May 2020 invoice for services³¹ provide evidence that Company G, and accordingly Mr B, were engaged in connection with the watercourse and pole-wale wall. The watercourse and wall, which are central to the complaint, relate directly to the reporting services provided by Mr B. Therefore, irrespective of the absence of any formal engagement to assist Mr and Mrs F in resolving the Notice to Fix order and remediation of the watercourse / wall issues, the Panel considers that Mr B had sufficient personal interest to pursue the matter, including by laying a complaint.
88. An Engineer in the position of Mr B might arguably have chosen to pursue his concerns differently and, in a more consultative manner with the engineer about whose work he has issues, before engaging with local government politicians, the news media and the complaints process. While the Panel takes a dim view of Mr B not having attempted to engage with Mr A directly on a professional level, it is not Mr B’s conduct which is the subject of the complaint.
89. In essence, in the view of the Panel it is not unreasonable for an engineer to be personally invested in ensuring an appropriate outcome is achieved on a matter for which he has provided professional advice.
90. The Panel finds that ground 3 is not proven and therefore does not provide a basis for dismissal of the complaint without referral to an investigating committee, under

²⁸ Respondent submissions, 9 September 2022, page 2

²⁹ Respondent submissions, 9 September 2022, page 3

³⁰ BOD 9-14

³¹ BOD 15

rule 57(e), the relevant provision of rule 57.

91. The Panel notes that in reaching this view it has not placed any reliance on the letter of support provided by Mr B from Mr and Mrs F in the course of these proceedings, the introduction of which Mr A and the RA took issue with.

Ground 4 – “The complaint was not made in good faith in all of the circumstances ...”

92. Mr A submits that the circumstances of the complaint evidence that it was not made in good faith and therefore the complaint should have been dismissed by the CIC under rule 57(c) of the Rules. In summary, those circumstances argued are:³²
- a) Mr B’s lack of personal interest (per ground 3 of the appeal);
 - b) that Mr B did not raise his concerns directly with Mr A, waited over 16 months before raising the matter with the RA and, in the meantime, “waged a campaign with both City Council N and the media in which he has been highly critical of the Appellant and the Appellant’s associated companies”³³;
 - c) Mr B’s complaint contains ‘extravagant and inflammatory language’, strongly suggesting that Mr A is a liar;
 - d) Mr B hasn’t complied with his own obligations as a member of Engineering New Zealand to act with integrity and treat Mr A with respect and courtesy.
93. The Panel does not consider the timing issues raised by Mr A, particularly in the context of Mr B attempting to assist *Mr and Mrs F* by other means before making a complaint to the RA, to necessarily demonstrate a lack of good faith by Mr B.
94. The Panel acknowledges that Mr B made robust and personal remarks in his complaint. However, in the Panel’s view the comments made do not go beyond an honest, if strongly held, opinion. In the Panel’s view this does not evidence bad faith on Mr B’s part.
95. The Panel is satisfied Mr B’s primary motivation has been to advocate for Mr and Mrs F, and that this has been based on Mr B’s view of Mr A’s work.
96. The Panel generally agrees that it would have been desirable for Mr B to have approached Mr A in the first instance in an attempt to resolve the former’s concerns. However, the Panel does not consider this to be a demonstration of lack

³²Appellant submissions, 1 September 2022, paras 97 to 115

³³ Appellant submissions 1 September 2022, para 99

of good faith, rather a lapse in professional courtesy.

97. The Panel considers that Mr B could have pursued his concerns in a more constructive and consultative manner. However, this does not mean that his motivation was not soundly based, nor does it demonstrate a lack of good faith.
98. The Panel finds that ground 4 is not proven and therefore does not provide a basis for dismissal of the complaint without referral to an investigating committee, under rule 57(c), the relevant provision of rule 57.

Ground 5 – “There is no valid decision of the Chair of Investigating Committees. By Rule 56, the Registration Authority was required to carry out an initial investigation of the complaint in accordance with Rule 58. ...”

99. Rule 58 contains two mandatory steps relating to actions by a complaints research officer, requiring:
- a CRO to carry out an initial investigation of the complaint and recommend to the CIC that the complaint proceed or be dismissed on a ground in rule 57; and
 - the CIC to consider the recommendation before deciding whether the complaint should be referred to an investigating committee or dismissed on a ground in rule 57.
100. Mr A has alleged that this process was not followed and submits that *“There can be no valid decision under Rule 58 without an investigation and any recommendation by a complaints research officer. Any decision without following that two-step process is invalid.”*³⁴
101. Counsel for Mr A argues that the effect of the procedural flaws in the process leading up to the CIC’s decision render his decision ‘invalid’ as he had no power or jurisdiction to decide to refer the complaint to an investigating committee. Mr A submits that the Panel has the power to determine the procedural validity of that decision.
102. The Panel accepts that the decision of the CIC remains valid until determined otherwise.³⁵ In other words, regardless of any actual procedural flaws in the decision under appeal, including its validity, the Council has the jurisdiction to hear an appeal of that decision. *Lim* is also authority that, where a procedural flaw of this

³⁴ Appellant submissions, 18 October 2022, para 7

³⁵ *Love v Porirua City Council* [1984] NZLR 308

nature has arisen, the Council has the ability to continue and determine the appeal under s 37.

103. However, in the absence of a clear authority, the Panel does not consider that it has jurisdiction to determine whether the CIC's decision was made without jurisdiction (or 'ultra vires' and therefore invalid). The determination and remedy for that assertion is an application to the High Court for judicial review, which has exclusive jurisdiction in that regard.
104. Instead, this ground does identify possible procedural flaws that, based on the position the Panel has reached in relation to the nature and scope of this hearing, should be considered within the bounds of the appeal. That is, whether there are procedural issues identified giving rise to ongoing prejudice that cannot be cured in substance by this rehearing.
105. The Panel has already considered the question of the failure to provide the Triage Brief to Mr A at an earlier stage in relation to ground 1 of this appeal.

CRO delegation, initial investigation and recommendation

106. The RA disagrees with the submissions of Mr A³⁶ that the process was not followed and submits that the RA delegated the CRO role to its legal team, citing delegations in an Appendix RAS1 to its submissions.³⁷
107. The RA submits that the legal team initially appointed Legal Advisor Ms J as the CRO on this complaint and that following the departure of Ms J on 21 December 2021, appointed Senior Legal Advisor Ms K to the role.
108. While the RA would not normally need to prove such an appointment or delegation was properly made and that the delegation was appropriately exercised, what has been produced by the RA in an attempt to evidence this, does not do so. RAS1 is a paper which was, presumably, prepared for presentation to the Board of the RA. It contained recommendations to make delegations but is not conclusive evidence that a decision was made to institute those delegations.
109. Even assuming that the recommendation was adopted as set out in the recommendations, it is not clear to the Panel that the intention was to do more than delegate the powers and functions of the CRO to the (then) General Counsel and Complaints Manager, Ms L. The terms of this delegation do not explicitly permit the

³⁶ Paras 99 and 100 above

³⁷ RA submissions on Ground 5, 26 October 2022, paras 2.3 & 2.4

further delegation of that function or power, nor provide the power to appoint further CROs.

110. By contrast, a delegation is also recommended in RAS1 to the Chief Executive which explicitly allows the Chief Executive to appoint any further Complaints Research Officers and delegate the functions and powers of a CRO to them. Therefore, contrary to the RA's assertion, the Panel does not consider that RAS1 is clear evidence of a delegation to the 'Legal Team' for all members to be CROs as the need arises.
111. Therefore, the Panel considers that the literal requirement of rule 58(b) for the investigation by a CRO has not been met. However, the absence of clear appointment of a CRO in this case does not necessarily mean that the role of CRO has not been performed in the manner intended by rule 58(b) or has resulted in ongoing prejudice to Mr A. The Panel considers that the Triage Brief indicates that an initial investigation was carried out.
112. Rule 58(b) also requires a CRO to recommend to the CIC that the complaint proceed or be dismissed on a ground in rule 57.
113. The RA submits "*Ms J and Ms K, the Registration Authority's designated CROs, conducted an initial investigation and made an appropriate recommendation to Mr H...*"³⁸
114. The Panel notes that the recommendation which was contained in the Recommendation section of Triage Brief document RAS3 provides as follows:
- "... I recommend that this matter be forwarded to an adjudicator to consider. There is still a lack of clarity about Mr A's involvement and responsibility and what the consent required."*³⁹
115. The recommendation referred to in 114 above was that the matter be forwarded to an adjudicator, not as set down in rule 58(b) which requires a recommendation "*to the chairperson of investigating committees that the complaint proceed or be dismissed on a ground in rule 57*".
116. However, the Triage Brief does contain a section preceding the 'Recommendation' section which sets out issues and questions raised by the complaint, noting that there may be "*merit in investigating the complaint further*". Therefore, while the Panel considers that this is another instance where the RA has failed to strictly

³⁸ RA submissions on Ground 5, 26 October 2022, para 5.2a

³⁹ RA submissions Ground 5, 26 October 2022, Appendix RS3, final page

adhere to the requirements of the Act, in the Panel's view this is more in the nature of a technical failing.

117. Mr A has had an opportunity through counsel to argue how these failings may result in ongoing prejudice to him (beyond validity of the CIC's decision).
118. It is not clear what else might have been achieved had the task of an initial investigation and recommendation been carried out by a CRO with a clear delegation to do so. This is particularly so given the preliminary nature of the investigation and decision making at this juncture. The Panel accepts the argument by the RA that these procedural insufficiencies are curable by this rehearing in this instance and Mr A has not satisfied the Panel of ongoing prejudice (beyond there needing to be a 'valid' decision) to him from these procedural breaches.

Role of CIC

119. Mr A's submissions in relation to ground 5 also argue the term "Adjudicator" does not have any meaning in the statutory process. The Panel is satisfied that the documentation⁴⁰ makes clear that Mr H's role was that of "Chair of Investigating Committees acting as Adjudicator" and considers this not to be at odds with the requirements of the Rules.
120. Mr A also refers to the terms of Mr H's appointment.⁴¹ The Panel does not consider it necessary to consider the terms or technicalities of Mr H's appointment. Mr H performed the role of the CIC in making the decision under appeal. The Panel does not consider that references to Mr H also having a title of 'Adjudicator' undermines his fulfilment of the CIC role.
121. In conclusion, in respect of ground 5, while the Panel considers that the process followed by the RA was in breach of the Rules, it does not follow that the Panel cannot determine this appeal. However, it is beyond the scope of the Panel's jurisdiction to determine whether the CIC's decision was 'valid' in a jurisdictional sense, that is a matter for the High Court in its judicial review jurisdiction.
122. Having considered whether these are procedural flaws that mean substantive justice cannot be achieved in this process for Mr A, the Panel has concluded that

⁴⁰ BOD pages 81 & 82

⁴¹ Appellant submissions in response, 2 November 2022, para 16

Mr A has not established that there is ongoing prejudice to him as a result of these breaches.

Summary of Findings

123. The Panel's findings with respect to the five grounds of appeal are as follows:

Ground 1 (*decision made in breach of natural justice*)

Sub-grounds 1(a) to 1(d) are cured by the rehearing, there being no ongoing prejudice to Mr A. To the extent sub-ground 1(d) relates to substance as opposed to an allegation of a breach of natural justice, this has been considered under Ground 2.

Ground 2 (*no material in the decision or disclosed to Mr A that provides any basis for a concern about conflict of interest*)

Ground 2 has been proven. The panel has concluded that rule 42F(a)(iii) should not have been identified as an applicable ground of discipline under rule 57(a). However, as there is another applicable ground of discipline that remains unchallenged, this does not provide a basis for dismissal of the complaint.

Ground 3 (*insufficient personal interest of complainant*)

Ground 3 of the appeal is not proven.

Ground 4 (*not made in good faith*)

Ground 4 of the appeal is not proven.

Ground 5 (*no valid decision of the Chair of Investigating Committees*)

The Panel does not consider it has jurisdiction to determine the validity of the CIC's decision. To the extent this ground requires consideration of alleged breaches of natural justice, the panel considers these to have been cured by the rehearing.

Outcome

124. Having found only ground 2 of the appeal proven, the decision of the Panel is to exercise its power in s 37(5)(a) of the Act to vary the decision of the CIC to refer Mr B's complaint to an investigating committee in accordance with rule 59(b) by removing reference in that decision to rule 42F(a)(iii) as an applicable ground of

discipline.

125. The remainder of the appeal is dismissed, there being no grounds for dismissal under rules 57(a) to (e) of the Rules proven, nor ongoing prejudice to Mr A which might justify another outcome.
126. In accordance with s 35 of the Act either party may appeal this decision to the District Court within 28 days.

Costs

127. If costs are sought, memoranda should be filed by 24 February 2023, after which the Panel will consider the matter on the papers and make a ruling.

Dated 10 February 2023

Signed by the Panel



Chris J Harrison (Principal)



Sandra Hardie



Megan Neill

Schedule 1 – Extracts from the Act and the Rules

Section 21(1) of the Act:

“21 Grounds for discipline of chartered professional engineers

- (1) *The Registration Authority may (in relation to a matter raised by a complaint or by its own inquiries) make an order referred to in section 22 if it is satisfied that a chartered professional engineer--*
- (a) *has been convicted, whether before or after he or she became registered, by any Court in New Zealand or elsewhere of any offence punishable by imprisonment for a term of 6 months or more if, in the Authority’s opinion the commission of the offence reflects adversely on the person’s fitness to practise engineering; or*
 - (b) *has breached the code of ethics contained in the rules; or*

- (c) *has performed engineering services in a negligent or incompetent manner; or*
- (d) *has, for the purpose of obtaining registration or a registration certificate (either for himself or herself or for any other person), -*
 - (i) *either orally or in writing, made any declaration or representation knowing it to be false and misleading in a material particular; or*
 - (ii) *produced to the authority or made use of any document knowing it to contain a declaration or representation referred to in subparagraph (i); or*
 - (iii) *produced to the authority or made use of any document knowing that it was not genuine.”*

Section 37(5) of the Act

“37 Hearing and determination of appeal

....

(5) *The Council or District Court, as the case may be, may—*

- (a) *confirm, vary, or reverse the decision, or part of decision, to which the appeal relates:*
- (b) *refer the matter back to the decision authority for it to reconsider, either generally or in relation to specific matters, the whole or any part of the decision (together with any direction on that whole or part that the Council or District Court, as the case may be, thinks fit):*
- (c) *make any decision that could have been made by the decision authority:*
- (d) *make any order as to the payment of the costs of the appeal that it thinks fit.”*

Rule 42E of the Rules

“42E Act competently

A chartered professional engineer—

- (a) Must—*
 - (i) ensure that the engineer’s relevant knowledge and skills are kept up to date; and*
 - (ii) only undertake engineering activities that are within the engineer’s competence; and*
 - (iii) undertake engineering activities in a careful and competent manner; and*
- (b) must not—*
 - (i) misrepresent, or permit others to misrepresent, the engineer’s competence; or*
 - (ii) knowingly permit other engineers for whose engineering activities the engineer is responsible to breach paragraph (a)(ii) or (iii) or subparagraph (i).”*

Rule 42F of the Rules

“42F Behave appropriately

A chartered professional engineer, in performing, or in connection with, the engineer’s engineering activities,—

- (a) must—*
 - (i) act with honesty, objectivity, and integrity; and*
 - (ii) treat people with respect and courtesy; and*
 - (iii) disclose and appropriately manage conflicts of interest; and*
- (b) must not—*
 - (i) offer or promise to give to any person anything intended to improperly influence a decision relating to the engineer’s engineering activities; or*
 - (ii) accept from any person anything intended to improperly influence the engineer’s engineering activities; or*
 - (iii) otherwise engage in, or support, corrupt practices.”*

Rule 42I of the Rules

“42I Report breach of code

A chartered professional engineer who has reasonable grounds to believe that another chartered professional engineer has committed a significant breach of the code of ethical conduct must report the matter to the Registration Authority.”

Rule 56 of the Rules

“56 Registration Authority must refer complaint to investigating committee unless grounds for not doing so

The Registration Authority must, as soon as practicable after receiving a complaint, carry out an initial investigation of the complaint in accordance with rule 58 and—

- (a) refer the complaint to an investigating committee in accordance with rule 59(b); or*
- (b) dismiss the complaint on a ground in rule 57.”*

Rule 57 of the Rules

“57 Grounds for not referring complaint to investigating committee

The Registration Authority may dismiss a complaint without referring it to an investigating committee if the chairperson of investigating committees decides under rule 58 that—

- (a) there is no applicable ground of discipline under section 21(1)(a) to (d) of the Act; or*
- (b) the subject matter of the complaint is trivial; or*
- (ba) the alleged misconduct is insufficiently grave to warrant further investigation; or*
- (c) the complaint is frivolous or vexatious or is not made in good faith; or*
- (d) the person alleged to be aggrieved does not wish action to be taken or continued; or*
- (e) the complainant does not have a sufficient personal interest in the subject matter of the complaint; or*
- (f) an investigation of the complaint is no longer practicable or desirable given the time elapsed since the matter giving rise to the complaint.*

Rule 58 of the Rules:

“58 Way in which decision on whether or not to refer complaint to investigating committee must be made

The Registration Authority must carry out an initial investigation of a complaint against the grounds in rule 57 in the following way:

- (a) the Registration Authority must notify the person complained about of the general nature of the complaint before commencing the investigation; and*
- (b) a complaints research officer must carry out the initial investigation of the complaint and recommend to the chairperson of investigating committees that the complaint proceed or be dismissed on a ground in rule 57; and*
- (c) the complaints research officer, or chairperson of investigating committees, may seek to verify the information provided in the complaint by a statutory declaration from the complainant; and*
- (d) after considering the complaints research officer’s recommendation, the chairperson may explore (with the complainant and the person complained about) the possibility of the complaint being referred to*

conciliation, mediation, or another dispute resolution process for 60 days or any other time period that the chairperson thinks fit; and

(e) if alternative dispute resolution is not used or if it fails to resolve the dispute within the requisite time period, the chairperson must decide whether the complaint should be—

*(i) referred to an investigating committee in accordance with rule 59(b);
or*

(ii) dismissed on a ground in rule 57.”

Schedule 2 - Key correspondence and submissions

- (a) Email from Mr M QC seeking extension of time for filing Notice of Appeal (27 July 2022)
- (b) Letter from Mr M QC regarding request for extension of time for filing Notice of Appeal (28 July 2022)
- (c) Letter from CPEC Chair declining extension of time (28 July 2022)
- (d) Notice of Appeal dated 1 August 2022
- (e) Email from CPEC Chair confirming receipt of Notice of Appeal and outlining actions to follow (1 August 2022)
- (f) The paginated Bundle of Documents [BOD 1-108] (2 August 2022)
- (g) Letter from CPEC Chair naming Panel members, outlining the appeal process and proposing deadlines for submissions (17 August 2022)
- (h) Submissions (Grounds 1-4) of Counsel for Mr A (1 September 2022)
- (i) Submissions (Grounds 1-4) of Mr B (9 September 2022)
- (j) Submissions (Grounds 1-4) of the RA (16 September 2022)
- (k) Memorandum of Counsel for Mr A seeking procedural directions (22 September 2022)
- (l) Email from Panel principal confirming receipt of Memorandum ((k) above) (22 September 2022)
- (m) Letter from Panel principal in response to Memorandum of Counsel ((k) above) (30 September 2022)
- (n) Letter from Counsel for the appellant in response to CPEC letter of 30 September 2022 (30 September 2022)
- (o) Reply submissions (Grounds 1-4) of Counsel for Mr A (30 September 2022)
- (p) Letter from Senior Legal Advisor, RA regarding Mr A's application for leave to add a fifth ground of appeal (6 October 2022)

- (q) Email from Mr B in response to Mr A's application for leave to add a fifth ground (7 October 2022)
- (r) Letter from Panel principal addressing matters raised in Memorandum of Counsel ((k) above) including timetable for filing amended notice of appeal and further submissions (11 October 2022)
- (s) Amended Notice of Appeal (18 October 2022)
- (t) Supplementary submissions (Ground 5) from Counsel for Mr A (18 October 2022)
- (u) Submissions of Mr B on "the amended Notice of Appeal" (25 October 2022)
- (v) Supplementary submissions (Ground 5) of the RA (26 October 2022)
- (w) Reply submissions (Ground 5) of Counsel for Mr A, including Schedule of cases referred to (2 November 2022)
- (x) Letter from Panel principal proposing that the appeal be heard on the papers and inviting any objections from the parties and the RA (10 November 2022)
- (y) Email from Senior Legal Advisor, RA confirming no objection to the hearing being conducted on the papers (10 November 2022)
- (z) Email from Mr B confirming no objection to the hearing being conducted on the papers (10 November 2022)
- (aa) Letter from Counsel for Mr A confirming agreement to the hearing being conducted on the papers (15 November 2022)