

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

Appeal 06/24

AND

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

Between

Mr A

Appellant

and

Mr B

Respondent

Decision of the Chartered Professional Engineers Council

Dated 1 November 2025

Introduction

1. This decision relates to an appeal to the Chartered Professional Engineers Council (“the Council”) under the Chartered Professional Engineers of New Zealand Act 2002 (“the Act”), the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 (“the Rules”) ¹ and the Chartered Professional Engineers of New Zealand (Appeals) Regulations 2002 (“the Regulations”).
2. The appeal is of a decision by a Chair of an Investigating Committee (“the CIC”) acting as the Adjudicator for the Registration Authority (“the RA”). That decision was to dismiss a complaint by Mr A, a chartered professional engineer (“CPEng”), about Mr B, also a CPEng, rather than to refer it to an Investigating Committee.
3. Mr A has appealed the decision of the CIC to the Council under s 35 of the Act (“Appeal”).²
4. The panel of the Council convened to hear this appeal (“the Appeal Panel”) has been provided with a Bundle of Documents held by the RA about the case. References to specific pages within this bundle are annotated “[BOD nn]”.
5. The RA has been granted leave by the Appeal Panel to be heard and provide submissions on this matter.
6. As agreed by the parties and the RA, the hearing of the Appeal has been conducted on the papers with the assistance of written submissions and documentation from Mr A (“the Appellant”), counsel for Mr B (“the Respondent”), and the RA.
7. The material considered by the Appeal Panel in arriving at its decision included:
 - a. Notice of Appeal, dated 12 June 2024
 - b. Bundle of Documents [BOD 1 to 416], dated July 2024
 - c. Submissions for the Appellant, dated 11 November 2024
 - d. Submissions for the RA, dated 9 December 2024
 - e. Submissions for the Respondent, dated 9 December 2024
 - f. Appellant’s Submissions in Reply, dated 16 December 2024
8. The Appeal Panel notes that, in the absence of additional evidence supplied by the parties where there are no objections to asserted facts without supporting information in the BOD, it relies on the parties’ submissions and summaries for some of the factual background to the Appellant’s complaint.

¹ The Chartered Professional Engineers of New Zealand Rules 2025 came into force on 1 August 2025. The 2002 version of the Rules was in force at the time of the conduct and complaint.

² While the parties and RA have used the term ‘Adjudicator, the Appeal Panel will refer to ‘the CIC’ as this is the role and title in the Rules.

The legislation

9. Summarised below is legislation central to the Appeal.
10. All CPEngS are subject to the Act. CPEC 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) from the Act. The Regulations made under the Act set out procedural requirements related to appeals. The Rules under the Act set out the process by which the appealed decision was made.
11. For clarity, the Appeal Panel notes that any reference made to Engineering New Zealand's complaints resolution and disciplinary regulations in the RA's process or decision relates to the Respondent's membership of Engineering New Zealand, not his status as a CPEng, and is not relevant to this Appeal. CPEC's jurisdiction is limited to the Act, Rules, and Regulations and does not extend to the Engineering New Zealand Rules, Engineering New Zealand Code of Ethical Conduct, or Engineering New Zealand Complaints Resolution and Disciplinary Regulations.
12. The Appeal Panel notes that the parties refer to provisions of the Engineering New Zealand Code of Ethical Conduct 2016 in the Notice of Appeal and submissions. The code of ethics relevant to the Respondent's conduct as a CPEng (and therefore this Appeal) is not that document but rather the code of ethical conduct contained in part 3 of the Rules.³ However, due to the similarity of the provisions of the code of ethical conduct in part 3 of the Rules and the Engineering New Zealand Code of Ethical Conduct, the Appeal Panel has 'translated' the parties' points to the parallel provision.
13. The right of appeal in respect of decisions of the RA is established by s 35 of the Act and appeals to the Council are by way of rehearing (s 37(2) of the Act).
14. The CIC is appointed by the RA under rule 83 of the Rules and has delegated authority to decide under rule 56 of the Rules and, following the process in rule 58, whether to dismiss a complaint on a ground in rule 57 or refer it to an investigating committee.
15. The Appeal Panel is entitled to confirm, vary or reverse a decision (or part of decision) under appeal (s 37(5)(a)), refer the matter back to the RA for it to reconsider, either generally or in relation to specific matters, the whole or any part of the decision (s 37(5)(b)), and may make any decision that could have been made by the decision authority (s 37(5)(c)).
16. Following *Austin, Nichols & Co Inc. v Stichting Lodestar* [2008] 2 NZLR 141, the Appeal Panel is entitled to take a different view from the RA, but the Appellant carries the burden of satisfying the Appeal Panel that it should do so.

³ The ground of discipline in s 21(1)(b) of the Act is a breach of "the code of ethics contained in the rules", the 'rules' being those made by the RA under s 40 of the Act, i.e. the Chartered Professional Engineers of New Zealand Rules (No 2) 2002.

17. As recently noted by the District Court in *Deo v Chartered Professional Engineers Council* [2024] NZDC 22169 in applying the Court of Appeal's judgment in *Green v Green*⁴, the application of *Austin, Nichols* means that while it is an appellant decision-maker's obligation to "form its own independent judgment on the merits of an appeal by way of rehearing"..."it is still axiomatic that the appellant bears the onus of persuading the appellate court to reach a different conclusion. Of necessity, in discharging that onus the appellant must identify the respect in which the judgment under appeal is said to be in error."

Background

18. In 2009, Mr and Mrs C ("the homeowners") purchased the property at address in Northland ("the Property"). [BOD 152]
19. Shortly after moving into the Property, the homeowners noticed a 'musty mouldy odour' in the downstairs room, dampness under the house and water stains on the concrete pad. The homeowners engaged Company D in 2009 to consider the drainage at the Property and were advised to install a 2.5m cut off drain to keep ground water levels from compromising land stability during heavy rainfall ("Company D 2009 Report"). [BOD 154; 320]
20. Due to the cost of Company D 2009 Report's recommendations, the homeowners instead engaged a civil construction specialist to install a 1-meter drain on either side of the driveway at the garage level, which extended east and west. The drainage was then installed on the west side of the property to a depth of 1 metre. [BOD 154; 320]
21. Between 2009 and 2022, further and various damage was noted around the Property and various engineering firms produced reports related to or regarding the property and/or surrounding area. However, while some separation of the driveway was noticed in 2013, the homeowners did not notice cracks or movement until nearly a decade later, in 2018. [BOD 320]
22. Around 7 October 2019 the homeowners lodged a claim with the Earthquake Commission ("EQC") for the damage to their Property from a natural disaster. This claim was declined by EQC on 14 October 2019, on the basis that it had determined, "none of the damage is physical loss or damage that is the direct result of a natural disaster and EQC considers a claim is not valid on this basis". [BOD 24]⁵
23. Around 23 February 2022, the homeowners engaged the Appellant, a director of Company E ("Company E Ltd"), a locally based geotechnical consultancy. The Appellant was asked to visit the site, review the information available and advise on the possibility of reopening the EQC claim. [BOD 15]

⁴ *Deo v Chartered Professional Engineers Council* [2024] NZDC 22169 at [46], citing *Green v Green* [2016] NZCA 486 at [30]

⁵ Note: this is based on a quote in an email as the letter from EQC was not included in the BOD provided to the Appeal Panel.

24. The Appellant concluded the property damage was caused by a natural landslip and emailed EQC on 3 March 2022 with an outline of his findings and opinion and requested, on behalf of the homeowners, that the 2019 claim be reopened (“Company E Ltd 2022 Advice”). [BOD 348] In that outline, which attached an annotated site plan, the Appellant set out his opinion that:
- a. The damage to the Property is natural disaster (landslip) damage.
 - b. The damage to the Property was consistent with landslip damage and included:
 - i. Displacement of the full dwelling downslope as evidenced by the opening of a large gap between the driveway and entrance to the garage.
 - ii. Approximately 150mm of differential settlement across the dwelling and associated cracking of wall linings, distortion of doors/windows, movement around kitchen cupboards etc
 - iii. Displacement of land over very nearly the full site.
 - c. Evidence supporting that conclusion included:
 - i. Observed ground cracking (less cracking visible than may be expected but significant displacement can occur in area without ground cracking due to the plastic nature of the soils which have a highly pre-sheared structure).
 - ii. The hummocky nature of the ground visible onsite, in LiDAR terrain models and aerial photography.
 - iii. Extensive cracking and slumping of adjacent roads.
 - iv. Previous identification that this area is widely unstable (note landslips occur in this area on surprisingly flat slopes due to the very weak underlying geology).
 - v. Subsequent inclinometer monitoring upslope of the dwelling has confirmed lateral movement.
 - d. While a reasonable portion of the damage predated the notification period in the EQC Act, it was ‘very likely’ that landslip movement occurred in the months prior to claim lodgement given observations on a similar site, progressive slumping of adjacent roads, monitoring results from 2020.
 - e. Also offered to supply any further information or discuss the site and noting that the homeowners had other engineering reports on the site that could be supplied.
25. On 16 March 2022, EQC reopened the homeowner’s 2019 claim and, on 30 March 2022, EQC sent a Specialist Service Request (“SSR”) to WSP.
26. As the (then) EQC Project Director, the Respondent received all SSRs from EQC and provided quotations for the work.

27. WSP have a panel contract with EQC requiring WSP to execute and complete any geotechnical consultancy services it requires.⁶
28. The 'Brief' in the SSR was: [BOD 350]

Brief

Event type	<input type="checkbox"/> EQ	<input checked="" type="checkbox"/> Landslip	<input type="checkbox"/> Storm/flood	<input type="checkbox"/> Hydrothermal	<input type="checkbox"/> Volcanic	
Request type	<input checked="" type="checkbox"/> Desktop	<input type="checkbox"/> Site visit	<input type="checkbox"/> Peer review	<input checked="" type="checkbox"/> Challenge		
Known Issues	Retaining walls	<input type="checkbox"/> Y	<input checked="" type="checkbox"/> N	Spring	<input type="checkbox"/> Y	<input checked="" type="checkbox"/> N
	Evacuated land	<input checked="" type="checkbox"/> Y	<input type="checkbox"/> N	Potential dwelling damage	<input checked="" type="checkbox"/> Y	<input type="checkbox"/> N
	Inundated land	<input checked="" type="checkbox"/> Y	<input type="checkbox"/> N	Potential services damage	<input checked="" type="checkbox"/> Y	<input type="checkbox"/> N
	Other <input type="checkbox"/> Y <input type="checkbox"/> N If yes, please provide details:					
Additional information/ Instructions for Consultant	Please begin by reviewing the various reports on file, beginning 2009 [REDACTED] Looking at potential site visit but wanting review of information to date completed first. Damage appears to have been occurring since at least 2009. Call assessor for more background prior to commencement.					

29. Notably, the 'Request type' marked is 'Desktop' and 'Challenge' but the instructions note that EQC is "looking at potential site visit but wanting review of information to date completed first."
30. The Respondent, in his role as EQC project director, received the SSR from EQC and provided a consultant's proposal for the work. This included the following proposed personnel and costs: [BOD 351]

Proposed personnel and costs

Personnel level	Graduate	Intermediate	Experienced	Expert	Other Specialist
Contracted hourly rate (NZD)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	
Description of work	Hours per personnel level				Line total (NZD)
Desktop study and site visit preparation			1	1	[REDACTED]
Onsite inspection+travel			2		[REDACTED]
Prepare draft report			12		[REDACTED]
Technical review				1	[REDACTED]
Sub-total (NZD)					[REDACTED]
<input checked="" type="checkbox"/> Estimated cost <input type="checkbox"/> Capped cost					
Description of proposed disbursement* (if applicable)				All SSR numbers relating to shared disbursement	Estimated cost
Vehicle running Whangarei CBD – Heads return 60km				41003	[REDACTED]
Sub-total (NZD)					[REDACTED]
<small>* Proposed disbursements must be itemised. Where a proposed disbursement relates to two or more SSR numbers, the total estimated cost of that disbursement must be shared equally across those SSR numbers, and only the proportionate share of the total estimated cost must be provided above.</small>					
TOTAL COST (NZD excluding GST)					[REDACTED]

31. The proposal included an allowance of two hours for "onsite inspection+travel" and associated disbursement of 60km vehicle running costs. The Respondent has said that this was included in case a site visit was instructed.
32. The Respondent was proposed as the 'Expert' who would undertake the review of the report prepared by an 'Experienced' engineer.

⁶ Respondent's submissions at [2.5]

33. On 6 April 2022, the Respondent received a summary of the background to the request from EQC's Senior Natural Disaster Assessment Specialist ("Mr C"). The Respondent recorded this in an email to himself as a file note. This record included the following notes on damage to the Property and suggested the Respondent 'see photos': [BOD 353]
- a. Land movement is causing east end of house to subside and move in northeasterly direction away from driveway.
 - b. Main part of house is causing widespread cracking of gib and ceiling from centre of house to the east end of house. This has caused a 12 cm gap between garage and driveway. Driveway separation first noted in 2013 but has increased dramatically in last 3 years with door/window frames involved and cracking in gib.
 - c. Driveway has pulled away from the curb at street about 30 mm.
 - d. Floor is off level by 114 mm as measured by engineers.
 - e. East end of house has several door and window frames off kilter and not closing properly.
 - f. Cracking of gib in walls and ceiling - four doors will not close, and three windows will not close due to warping of aluminium frames.
 - g. The outside decking is buckling up and coming apart.
 - h. Garage entry by autos difficult.
 - i. Ongoing slippage will require extensive home site land stabilization and extensive repairs/replacement of pilings supporting house with repair of door/window frames, gib repair/painting after stabilization of land and house supports.
34. In relation to 'Loss Date' the email note records: [BOD 353]

Loss Date

Claim has been reopened to allow for further investigation.

Part of the investigation is to establish whether a loss from natural disaster occurred within 2 years of lodgement date. Current 'out of time' loss date subject to change.

██████████ (18/03/2022 03:05 PM)

35. EQC accepted the quote on 11 April 2022. [BOD 352]
36. After a further interaction between the Respondent and Mr C around 19 April 2022, the Respondent asked the nominated 'Experienced' engineer to review the reports then call Mr C, noting "*He thinks a site visit might not be necessary as you can review the Geotech reports. This appears to be different from normal.*" [BOD 354]
37. The Respondent has submitted that, by the statement, "*This appears to be different from normal*", he meant that:

...desktop reviews are not undertaken for historical matters (unless there are other EQC claims that relate to the review) as historical movement is not covered by EQC. For the Owners' claim to be covered, an event had to have occurred within the Lodgement Period, which had ended on 7 October 2019 (2 ½ years ago).

38. As the nominated experienced engineer had a conflicting time commitment, the file was handed on to another engineer, Ms A, an intermediate civil and geotechnical engineer based in Whangārei. The Respondent notes that Ms A had been trained and supervised by WSP in completing such inspections and had over four years' experience in Northland and elsewhere.
39. The Respondent acknowledges that EQC provided WSP with the following information about the claim, in addition to the Property's LIM and invoices for drainage works completed by the Homeowners:⁷
- a. June 2009 – Company D report on a geotechnical investigation relating to drainage issues at the Property, which included exploratory drill holes to determine subsoil conditions and recommendations for a remedial drainage solution. [BOD 182-197] This report:
 - i. Noted that the Property was within a high instability zone on the Council hazard maps and observed: signs of land subsidence and soil creep with driveway panel displacement; cracks in the concrete block wall under the house; and water pooling to the west of the house, under the house, and along the northern boundary.
 - ii. Considered site was unstable due to inadequate drainage and recommended installation of cut off drainage of 2.5m deep to maintain the groundwater level during heavy rainfall. Also recommended regular monitoring of the property to ensure effective drainage and no movement of the retaining wall due to concern with the underlying ground stability.
 - b. 2013 – driveway separation noticed. [This information was provided by the EQC assessor, Mr C]. [BOD 353]
 - c. July 2018 – WSP report for Council on a geotechnical assessment of a landslip along Whangarei Heads Road, which had been monitored using an inclinometer since 2014 ("WSP Opus 2018 Report"). [BOD 198-218] This report noted movements recorded up to May 2018 indicated that the slip was slow-moving, with creep-like movements triggered by saturation of the landslide materials and considered the likelihood of a 'catastrophic event' involving a major landslide to be rare.
 - d. September 2018 – the homeowners engaged Company F Ltd as they had, "noticed cracks across garage entry increasing and downstairs walls and doors becoming difficult to close" [BOD 320]. Company F advised the homeowners by email on 21 September 2018 there were no signs of slope instability on the Property, and it was difficult to determine what the issue was. [BOD 219]
 - e. 20 February 2019 – the homeowners sent a further email to Company F with photographs showing gaps between a frame and window in their downstairs

⁷ Respondent's submissions at [2.18]

room and cracks in plasterboard. They noted they had been away overseas a lot of the previous year and had not followed up.

- f. May 2019 – the Owners submitted a notice to the Council which reported the Owners had seen significant movement of their driveway, footpath, and house and had engaged Company D to help. The ground movement above the house and drains needed investigating (by the Council).
- g. October 2019 – Company D report following site visits in March and May 2019 which reported on various investigations, including three cone penetration tests, three hand augered boreholes with hand shear vanes and five scale penetrometer tests. Commissioned by the homeowners in relation to the Property (“Company D 2019 Report”). [BOD 220-278] Observations from the March 2019 site visit included >100mm horizontal movement between the concrete driveway and the garage; tilting piles; significant cracks in the gib; hummocky ground and damp and eroded areas of ground. A floor level survey was undertaken in May 2019 which indicated settlement towards the eastern side of the dwelling.

The Company D 2019 Report’s conclusions included:

- i. The site is situated on an area of historic landslide. This is likely overlying Northland Allochthon material. Both of these layers can be unstable even at shallow slope angles.
 - ii. Signs of global instability were observed during the site investigation, suggesting that the site is unstable.
 - iii. It is likely that a slip surface is located at the interface between the Allochthon and Historic Landside layers, approximately 6 – 8mbgl.
 - iv. Further investigation and monitoring before and after installation of in-ground palisade wall recommended.
 - v. High groundwater levels exacerbate the instability of the site and drainage should be installed per its 2009 recommendation along with a palisade wall.
- h. October 2020 – Company D report on monitoring and investigations in 2020. Commissioned by the homeowners in relation to the Property (“Company D 2020 Report”). [BOD 322-346] The report concluded that there was evidence of small and slow-moving surficial ground movement between March and August 2020, recommended monitoring continue, with six-month frequency to characterise the ground movement, and reiterated the mitigation options from the October 2019 report.
 - i. May 2021 – Company D reported on further monitoring between August 2020 and March 2021. Commissioned by the homeowners in relation to the Property (“Company D 2021 Report”). [BOD 283-306] The report concluded there was evidence of moderate and slow-moving surficial ground movement up to 10-20mm per year and up to 2m depth, and that ground movements appeared irregular but were greater in the northwest and northeast directions. Company D

recommended groundwater control by construction of a deep counterfort drain and an in-ground timber palisade wall with capping beam around the house footprint to mitigate ground movement.

- j. February 2022 – Company E Ltd 2022 Advice (see above paragraphs 23 and 24). Commissioned by the homeowners in relation to the Property. Email by the Appellant following a site visit, review of the existing available information and advice on reopening the claim to EQC. [BOD 15]
 - k. Copies of photographs taken of the Property by Company D in 2009, 2019, 2020 and 2021. [BOD 173-174]
40. A further report relevant to the area was provided to the RA by the Appellant, dated August 2010. This report was produced by ‘Opus International Consultants’ (prior to becoming WSP Opus) and commissioned by Council in relation to history of subsidence in the Reotahi area and previous slips on Reotahi Road, Reotahi Road and Whangarei Heads Road intersection, and Whangarei Heads Road Reotahi Slip (“Opus 2010 Report”) [BOD 53-138]. This report includes summaries and attachments of earlier geotechnical testing results from 2007 and 2008 as well as reports and/or correspondence between Opus and Council dating from November 2000; March/April 2006; June 2006; and August 2008. It is unclear whether the Respondent had access to this report as well when undertaking the review for EQC.
41. The Respondent says that he and WSP understood the scope of the SSR for the Property to be to evaluate the damage to the Property based on a desktop review of the material provided by EQC and identify if it was caused by a sudden Natural Disaster event.
42. The Respondent says that Ms A undertook the desk-top review and liaised with him on any queries. When Ms A had completed the draft report, the Respondent completed the initial technical review of this report.
43. The first draft report, drafted by Ms A and reviewed by the Respondent, was provided to EQC on 18 May 2022. [BOD 32-34]
44. On 30 May 2022, Mr C emailed the Respondent and asked him to clarify the mechanism of failure at the site and damage period in the report. [BOD 369-370]. The Respondent replied by email the following day: [BOD 369]

Based on the Company D reports the failure mechanism is long-term subsidence, which has been exacerbated by a high groundwater table.

The conclusion of the 2020 Company D report does a good job at summarizing the groundwater/subsidence correlation.

I am at a loss understanding your second bullet point [about damage period]. Can you mark on the attachment what it should be.

45. A further email from Mr C noted that ‘as discussed’, could the statement that soil creep is not covered by EQC be removed and, “*If the primary cause of the failure is long term subsidence exacerbated by high groundwater, can we state that clearly.*” Mr C also supplied wording for the lodgement period paragraph. [BOD 368-369]

46. WSP revised the draft report and provided it to EQC on 1 June 2022 (“WSP June Draft Report v 0.2”). [BOD 367-368] It was then accepted and issued to EQC on 3 June 2022. [BOD 367; 35]
47. A week later EQC advised that it had made an error regarding the effect of changes to the EQC Act on the Lodgement Period (during which natural disaster damage could be considered) and asked for the report to be amended accordingly, amending the period’s start date from 1 July 2019 to 1 February 2019. [BOD 367]
48. The final version of the WSP report, prepared by Ms A and reviewed and approved by the Respondent, was issued on 13 June 2022 (“WSP June Final Report”). [BOD 38-40] This report, and the drafts/versions that preceded it, are at the centre of the Appellant’s complaint.
49. The WSP June Final Report is a report of just over two pages. In introducing the purpose of the report, it states in the introduction that:

WSP has been engaged by the Earthquake Commission (EQC) to assess the claim for natural disaster damage at [the Property]. The engineering assessment was undertaken to determine whether physical loss or damage of the property had occurred and whether there was any imminent risk to the property because of the natural disaster that has occurred.

50. It then provides a brief description of the Property, describes the geology of the area (as ‘Rakaia Tarrane consisting of grey sandstone/mudstone sequences and poorly bedded sandstone’), and provides summaries of the 2009, 2019, 2020 and 2021 Company D reports before concluding with a ‘Discussion’.

51. The ‘Discussion’ section states:

The reason for dismissal of the 2019 claim appears to have been due to reporting at the time not identifying an event that resulted in the property damage, and the property damage occurring outside of EQC timeframes.

It is important to note that for the purposes of assessing an EQC claim, damage occurring within a consecutive 48-hour period which is the direct result of a natural disaster is treated as a single “event”. EQC have advised that as the claim was lodged on 7th October 2019, WSP can only consider any natural disaster damage to insured elements that has occurred between 1st February 2019, and 7th October 2019 inclusive.

Risk to the property was initially noted in 2009, with the Company D report and options produced as a result of this. This was followed by the driveway separation occurring in 2013 and increased movement in three years leading up to 2019.

WSP does not consider the damage to be landslip damage as defined by the Earthquake Commission Act 1993 (EQC Act). The primary cause of property damage in this case is longterm subsidence which has been exacerbated through a high groundwater table.

Additionally, the Company D report from 2009 recommended installation of a 2.5 m-deep drainage channel, but this was installed to a lesser standard at only 1 m-

deep. Not following this recommendation resulted in groundwater crossing the instability, which caused additional damage to the property than would have occurred if the channel had been properly constructed.

52. Also on 13 June 2022, EQC sent the Appellant a copy of a draft of the WSP June Draft Report v 0.2 and asked for his comment noting its conclusion was different to his. The Appellant responded the same day noting serious concerns about the report’s content and querying whether the authors might be acting outside of their competence.
53. After further exchanges between the Appellant and EQC, including an online meeting to discuss the Appellant’s concerns, EQC instructed WSP to undertake a site visit to the Property and prepare a further report. It was agreed that the then Principal Engineering Geologist at WSP (who was also acceptable to the Appellant) would undertake the work. The Respondent was retained as the Report Reviewer and Approver.
54. A variation of the SSR proposal was provided to and accepted by EQC:

Proposed personnel and costs – requested to re author the report using an acceptable Engineering Geologist

Personnel level	Graduate	Intermediate	Experienced	Expert	Other Specialist
Contracted hourly rate (NZD)	█	█	█	█	
Description of work	Hours per personnel level				Line total (NZD)
Desktop study of all reports and site visit preparation				3	█
Onsite inspection+travel				2.5	█
Prepare draft report				10	█
Technical review/meetings				1	█
Sub-total (NZD)					█
<input checked="" type="checkbox"/> Estimated cost <input type="checkbox"/> Capped cost					
Description of proposed disbursement* (if applicable)				All SSR numbers relating to shared disbursement	Estimated cost
Vehicle running Whangarei Heads – Auckland 185km				41003	█
Sub-total (NZD)					█
* Proposed disbursements must be itemised. Where a proposed disbursement relates to two or more SSR numbers, the total estimated cost of that disbursement must be shared equally across those SSR numbers, and only the proportionate share of the total estimated cost must be provided above.					
TOTAL COST (NZD excluding GST)					█

55. The site visit was arranged for 7 July 2022.
56. After the draft report was accepted by EQC in August 2022, WSP issued their final report on 15 September 2022 (“WSP September 2022 Report”).⁸
57. In comparison to the WSP June 2022 Report, the WSP September Report:
 - a. Is 10 pages including appendices.
 - b. Includes a more detailed description of the Property and surrounding area and describes the geology of the site not as Rakaia Terrane but instead as, “*underlain by Late Pleistocene to recent landslide deposits comprised of mixed lithologies that in turn overlie Northland Allochthon Undifferentiated Melangé.*” It further comments that “*This geology unit is known for its slope instability and numerous*

⁸ Provided as Appendix A to RA’s Submissions

signs of such instability are visible on the road and surrounding slopes. The failure mechanism is characterised by regular periodic discreet and incremental movements, often only 50-200mm at a time and usually associated with artesian groundwater coming up from depth and often triggered by heavy rainfall events, although not always."

- c. Retains the summaries of the Company D reports.
- d. Has additional sections describing the July 2022 site visit observations and property damage.
- e. Concludes that the damage to the property is landslip damage as defined by the EQC Act and *"the primary cause of property damage in this case is discreet movement of the deep-seated landslide following the rainfall event."* There is little information of the 'event' beyond reference to the homeowner's providing information during the site visit that some damage was noticed following 'the rainfall event', and in two places references a 'storm event'.
- f. Further comments that it is unlikely that the cut off drain recommended in the Company D 2009 Report would have been sufficient to stabilise the deep-seated landslide.
- g. Includes a section commenting on 'Imminent Risk'.
- h. Outlines conceptual remedial works.
- i. There has been no material physical change to the land (in the evacuation zone) as a direct result of the natural disaster with any associated loss of utility. Therefore, there is no recommended conceptual remedial solution to address land damage from the event subject to this claim. As described in this report there has been cumulative damage to the land due to multiple landslide movements over several years that ultimately will require ongoing repairs and remediation.

The Concern/Complaint

- 58. On 17 March 2023, the Appellant, raised his concern about the June 2022 Report and the Respondent as author of it to the RA.
- 59. The Appellant was concerned the Respondent's June WSP report conclusion lacked full consideration.
- 60. The Appellant was also concerned about the Respondent's competency based on the report content and the Respondent's practise area at the time of the complaint.

The RA initial investigation

- 61. Between March 2023 and December 2023, the RA corresponded with the Appellant and the Respondent (including the Respondent's counsel) about the complaint. As part of these exchanges, the Respondent's CV was provided to the Appellant, who agreed this demonstrated that the Respondent has geotechnical experience and that the correspondence showed he had taken an active role in reviewing the report. [BOD 374]

62. However, this did not resolve the Appellant’s concerns about the flaws in the WSP June 2022 Report. In particular, the use of the term ‘subsidence’ and failure to undertake a site visit, asserting that: [BOD 376]

...a careful and competent geotechnical engineer assessing the cause and implications of land movement should be very well aware and conscious of the fact that they will always gain an increased understanding of a site and a greater appreciation of previous assessment and reporting by actually visiting a site. Visiting a site provides an understanding that is not readily possible from written reports and photos.

63. He also noted additional examples of a lack of care in review, including that it states the geology comprises the Rakaia Terrane, a geological unit that does not occur north of Palmerston North. [BOD 374 - 377]
64. After further correspondence and responses from the parties to the RA, the matter was considered by the RA’s triage team⁹ and then forwarded to the CIC. On 17 May 2024, the RA issued a copy of the CIC’s decision (dated 13 May 2024) to the Appellant, which dismissed his complaint.

The decision being appealed

65. Under rule 56 of the Rules, the Registration Authority must refer the complaint to an investigating committee unless there are grounds for not doing so. The applicable grounds for a dismissal are limited to those in rule 57. Under rule 58, the CIC makes this decision following an initial investigation process by the RA.
66. Rule 57 provides the following grounds of dismissal:

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

⁹ RA’s Submissions at [8.42]

(f) an investigation of the complaint is no longer practicable or desirable given the time elapsed since the matter giving rise to the complaint.

67. Section 21(1) of the Act, which sets out the applicable grounds of discipline referred to in rule 57(a), provides:

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 or 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.*

68. The CIC’s report of their decision dated 13 May 2024 concluded: [BOD 410]

Having reviewed all the information provided to me, I have decided to dismiss the complaint under rule 57(a) of the CPEng Rules, on the ground that no applicable ground of discipline applies.

69. The CIC’s reasons for that decision are brief and provided under the heading of ‘Adjudicator Notes’. These are:

Having reviewed all the information provided, I consider this complaint is about a difference of engineering opinion. I believe [the Respondent] has acted as a reasonable peer would have acted in the same circumstances, carrying out the work required as set out in the scope of engagement provided to him by EQC. I have not been provided with any evidence that [the Respondent] acted incompetently, outside his competence, and/or inappropriately in the matter. I note any concerns about the final report should have been directed to EQC as the organisation who engaged [the Respondent] in the work. I am satisfied that [the

Respondent], in carrying out the work within the scope of his engagement, acted in a careful and competent manner.

Grounds of appeal and outcome sought

70. The Appellant seeks a reversal of the RA's decision to dismiss the complaint, and for the complaint to be referred on to an investigating committee.
71. The Appellant's reasons or grounds of appeal are contained in the Notice of Appeal, with some expansion of examples or particulars within his submissions. The Appeal Panel summarises the Appellant's grounds of appeal as follows:¹⁰

Ground One

- a. The CIC considered the complaint to be about a difference of opinion, when in fact Mr A's opinion was wrong. The CIC did not acknowledge that the Respondent's opinion was incorrect. The Appellant further says it is unclear whether the CIC had the specific knowledge necessary to assess his complaint (landslip assessment in accordance with the EQC Act).

Ground Two

- a. The CIC was wrong to dismiss the complaint under rule 57(a), finding that there were no applicable grounds of discipline, as s21(1)(c) ('has performed engineering services in a negligent or incompetent manner') is applicable in that the Respondent acted negligently or incompetently in the manner by which he reached his opinion and/or content of the WSP June 2022 Report. In particular, by:
 - i. Failing to adequately understand or apply the EQC Act when this was directly relevant to the engineering assessment in the WSP June 2022 Report. Examples include:
 - A. Failing to distinguish between a landslip and subsidence.
 - B. Failing to adequately understand or apply the definition of a Landslip in the EQC Act.
 - C. Failed to comprehend the importance of the damage period and revised it without critically reviewing the implications.
 - D. Making concerning statements (following the report) such as:
 - He did not need to determine if a landslip had occurred or not in assessing if there was landslip damage.
 - The subject Natural Disaster event was a rainfall event (when the EQC engagement clearly states that it was for a Landslip event and the EQC Act does not include the term or event of 'rainfall').

¹⁰ Numbering added by Appeal Panel for ease of reference.

- ii. Not carrying out the work in accordance with the scope of his engagement as:
 - A. The engagement required the Respondent to arrange for an experienced engineer to complete the review and the engineer who undertook it had limited experience of landslips and EQC assessments.
 - B. The Respondent was expressly requested by EQC to report on the mechanism of the failure on the site yet he claimed he did not need to assess if it was a landslip or not.
- iii. Not arranging/undertaking a site visit.

Ground Three

- a. The CIC was wrong to dismiss the complaint under rule 57(a), finding that there were no applicable grounds of discipline, as s 21(1)(b) ('has breached the code of ethics contained in the rules') is applicable in that the Respondent may have breached his obligations to:
 - i. Act competently and undertake engineering activities in a careful and competent manner (rule 42E(a)(iii))¹¹, for the same reasons as outlined in Ground One above.
 - ii. Behave appropriately and treat people with respect and courtesy (rule 42F(a)(ii))¹² in that the manner in which he dismissed the need for a site visit showed a lack of respect and courtesy for the homeowners and the Appellant's professional opinion.

Ground Four

- a. The CIC stated in his decision that, "*the parties have already had a meeting together with EQC to resolve their differences in opinion, but this did not resolve the matter.*"
 - b. This is incorrect as:
 - i. The meeting with EQC did not involve the Respondent and was to resolve the insurance claim, not to address the inadequacy of the WSP June 2022 Report.
 - ii. Despite attempts by the Appellant, the Respondent has not engaged with him.
72. The Appellant has also raised concern about aspects of the RA's process which are not framed as a ground of appeal. The Appellant considers that the process of summarising his concerns to a limit of two pages meant that the complaint was not 'laid out up front with a depth of reasoning'. That concern has been noted and through this process will

¹¹ Parties referenced clause 4(a)(iii) of the ENZ Code of Ethical Conduct which does not apply, rule 42E(a)(iii) is the equivalent provision of the code of ethical conduct contained in the Rules.

¹² Parties referenced clause 5(a)(ii) of the ENZ Code of Ethical Conduct which does not apply, rule 42F(a)(ii) is the equivalent provision of the code of ethical conduct contained in the Rules.

have been drawn to the attention of the RA. However, as any potential prejudice arising from that process has been cured by this appeal through the opportunity to provide fulsome submissions, it does not provide a basis on which to overturn the CIC's decision.

Discussion

73. The Appeal Panel has read and considered the CIC's decision, the bundle of documents, and all submissions by the parties and the RA.
74. As noted above, in reaching its decision in this appeal the Appeal Panel should form an independent judgment, but it is for the Appellant to persuade the Appeal Panel that the original decision was wrong. Therefore, the Appeal Panel has first considered the arguments on the CIC's decision that the complaint should be dismissed on the basis on rule 57(a).
75. In considering the position of the CIC as the decision-maker, as the RA emphasised, it follows an *initial* investigation. This decision is early in what can be a three-stage disciplinary process and is 'akin to a screening role'.¹³
76. With respect to rule 57(a), the CIC considers alleged conduct in light of what a reasonable (competent, ethical and responsible) peer would have done in the same circumstances and, whether a ground of discipline in s 21(1)(a) – (d) of the Act may apply to the alleged conduct.
77. It is not the role of a CIC to determine or find that the ground of discipline is made out – e.g. make a finding that the Respondent did in fact breach the code of ethical conduct.¹⁴ As outlined in an earlier decision of CPEC on an appeal from a decision of the CIC:

[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.

[Footnote: *McLanahan & Anor v The New Zealand Registered Architects Board* [2017] NZCA 458, at [66]]

¹³ RA Submissions at [8.5] and [8.40]

¹⁴ RA Submissions at [8.2]

78. The Appeal Panel adopts this approach with respect to considering applicable grounds of discipline for the purposes of rule 57(a).
79. The CIC found there is no possible grounds of discipline under s 21 (1)(a) to (d) of the Act, based on the complaint being a *“difference of engineering opinion, and finding [the Respondent] acted as a reasonable peer would have acted in the same circumstances.”* The CIC considered the Respondent acted in a careful and competent manner; and that he carried out the work required, as set out in the scope of engagement, provided by EQC, and EQC accepted his report.
80. The Appellant has asserted that two grounds of discipline in s 21(1) are applicable to his complaint:
- a. Section 21(1)(b): ‘has breached the code of ethics contained in the rules’; and/or
 - b. Section 21(1)(c): ‘has performed engineering services in a negligent or incompetent manner’.
81. The Appeal Panel also agrees that it is not the role of the CIC and this Appeal Panel to resolve technical aspects of a complaint. However, that is not to say that if arguments are raised about ‘technical’ aspects of engineering services or activities that they should be dismissed on that basis.
82. The Appellant has raised that it is unclear whether the CIC had the specific, geotechnical knowledge necessary to assess his complaint (landslip assessment in accordance with the EQC Act). The role of the CIC and this Appeal Panel is limited to identifying whether the complaint should or should not be referred to an investigating committee. The CIC’s specific geotechnical knowledge is not relevant to this appeal.
83. However, this is not to say that the Appeal Panel accepts the RA’s submission that a number of the Appellant’s arguments should be dismissed on the basis of being ‘technical’ and in the nature of partisan expert evidence. Such as, whether or not the Respondent:
- a. Undertook a ‘competent’ natural disaster damage assessment under the EQC Act.¹⁵
 - b. Critically assessed the mechanism of failure at the site.¹⁶
 - c. Should have carried out a site visit.¹⁷
 - d. Should have made enquiries during his assessment.¹⁸
 - e. Made an incorrect finding.¹⁹

¹⁵ RA’s Submissions at [8.6(a)] and [8.7]

¹⁶ RA’s Submissions at [8.11]

¹⁷ RA’s Submissions at [8.17]

¹⁸ RA’s Submissions at [8.19]

¹⁹ RA’s Submissions at [8.20(a)] and [8.21]

- f. Did not show critical assessment of the damage period.²⁰
- g. Did not provide reasons for there being no natural disaster (landslip) damage to the dwelling.²¹

84. In doing so it refers back to [8.7] of its submissions that:

The Registration Authority submits the above views are akin to expert advice. Such advice is on technical issues relating to natural disaster (landslip) damage assessment under the EQC Act. The Registration Authority submits such advice is irrelevant to this appeal. The purpose of this appeal is to rehear the evidence that was before the Adjudicator. [The Appellant's] advice is also not independent. He is the complainant in this case. For these reasons, the Registration Authority will not respond to [the Appellant's] views above or on other technical issues.

[Footnote omitted]

- 85. The Appeal Panel does not accept the argument that a technical allegation or argument should not be considered either by the CIC or CPEC on appeal.
- 86. The Appeal Panel acknowledges that the CIC or CPEC (when considering a decision of the CIC) is not required to either be, or to seek input from, an independent expert given the early stage and nature of the decision.
- 87. However, this cannot mean that allegations and arguments that are technical in nature should be dismissed for that reason. The question for the CIC (or CPEC as the case may be), should not be whether or not an issue raised is technical in nature (and dismissed if it is). But rather, if the alleged issue were to be further investigated or assessed at the investigating committee stage and found to be supported by evidence, would a ground of discipline in s 21(1)(a) – (d) apply.
- 88. In this context, it is open to the Appeal Panel to consider whether the allegations and arguments raised on appeal show that the CIC was wrong to dismiss the complaint as having no applicable ground of discipline. Generally speaking, if there are matters that require expert input, unless they can confidently be dismissed on a ground under r 57, the Appeal Panel's view is that it would suggest to a decision-maker that referral to an investigating committee for it to exercise its greater powers of investigation and assessment would be appropriate.
- 89. The CIC considered that the Respondent was careful and competent and had undertaken the work in the manner that a reasonable body of peers would have. It is understandable that the Appellant, having technical knowledge which enabled him to

²⁰ RA's Submissions at [8.20(b)] and [8.21]

²¹ RA's Submissions at [8.20(f)] and [8.21]

identify the issues raised in the first place, would, when appealing that decision, use the knowledge he has to attempt to demonstrate how and why that decision is wrong.

Discussion – Ground One – Difference of opinion

90. In his reasoning for dismissing the complaint, the CIC states that he considers the complaint is about a difference of engineering opinion. The Appellant says this is wrong and doesn't acknowledge that the Respondent's opinion is wrong and reached in a manner that was negligent or incompetent.
91. The Appeal Panel accepts the Appellant's argument in principle that a complaint should not be dismissed merely because it involves a difference of opinion. It may be the case that one of those opinions is objectively wrong, and wrong to an extent or reached in a manner that may indicate negligence or incompetence, or a breach of the CPEng's ethical obligations. This would, regardless of there existing a 'difference of opinion', mean that a ground of discipline under s 21(1)(a) to (d) could be available.
92. The Appeal Panel further accepts that the Appellant has not made the complaint nor lodged this appeal due to the mere fact of holding a different opinion to that in the WSP June Final Report. He has genuine concerns about the adequacy of that report in circumstances which had significant consequences for his clients and the trust placed in CPEngs to uphold standards of competency.
93. However, the Appeal Panel does not understand the CIC's decision to rest simply on there being a difference of opinion. The CIC goes on to say that his view is the Respondent has:
 - a. Acted as a reasonable peer would have acted in the same circumstances carrying out the work required as set out in the scope of engagement provided to them by EQC.
 - b. Not been evidenced to have acted incompetently, outside their competence, and/or inappropriately in the matter.
 - c. In carrying out the work within the scope of their engagement, acted in a careful and competent manner.
94. Whether the Appellant has persuaded the Appeal Panel that the CIC was incorrect in the above is discussed below. Therefore, while the Appeal Panel takes the principle of this argument into account when considering whether the CIC's decision was correct, it does not consider the correctness or not of the CIC's view about the matter being about a difference of opinion to be a sufficient basis for overturning the decision.

Discussion - Ground Two – s 21(1)(c)

95. In considering the application of s 21(1)(c), it must be 'engineering services' that are said to have been performed in a negligent or incompetent manner.
96. No definition of 'engineering services' is provided in the Act. The Rules refer to and define 'engineering activities' as "*activities for which a chartered professional engineer uses the engineer's engineering knowledge and skills*".

97. The Appeal Panel accepts that the Respondent was providing engineering services when they engaged with EQC about the homeowner's claim and assisted with and reviewed the draft and final WSP reports.
98. As set out above, the Appeal Panel is not required to determine whether the Respondent has performed engineering services in a negligent or incompetent manner but rather whether there are circumstances which, if established (by further investigation), may be negligent or incompetent.
99. It is therefore helpful to consider what 'negligence' and 'incompetence' is in this context. In the matter of *Robinson v IPENZ*²² CPEC considered a number of cases and concluded that:²³

...

(b) *Whether engineering services have been performed in a negligent manner is a question of whether there has been a serious lack of care judged by the standards reasonably expected of a Chartered Professional Engineer. That standard may be informed by whether reasonable members of the public would consider such act or omission, if acceptable to the profession, were to lower the standards of that profession in the eyes of the public.*

(c) *Whether engineering services have been performed in an incompetent manner is a question of whether there has been a serious lack of competence (or deficit in the required skills) judged by the areas of competence which in this case are encapsulated in Rule 6 [of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002].*

(d) *Rule 6 in turn references the need to comply with the Code of Ethics which includes Rules 43, 45 and 46. While these rules do not reference negligence or incompetence, there must still be a standard against which to measure the performance of a Chartered Professional Engineer and we conclude that it is no different to the test enunciated under subparagraph (b) above.*

...

100. Rule 6 of the Rules provides, in full:

6 Minimum standard for registration as chartered professional engineer

- (1) *To meet the minimum standard for registration, a person must demonstrate that he or she is able to practise competently in his or her practice area to the standard of a reasonable professional engineer.*

²² *Robinson v IPENZ as the Registration Authority*, 10 July 2015, CPEC Appeal Ruling #29

²³ *Ibid* at [40]

(2) The extent to which the person is able to do each of the following things in his or her practice area must be taken into account in assessing whether or not he or she meets the overall standard in subclause (1):

(a) comprehend, and apply his or her knowledge of, accepted principles underpinning—

(i) widely applied good practice for professional engineering; and

(ii) good practice for professional engineering that is specific to New Zealand; and

(b) define, investigate, and analyse complex engineering problems in accordance with good practice for professional engineering; and

(c) design or develop solutions to complex engineering problems in accordance with good practice for professional engineering; and

(d) exercise sound professional engineering judgement; and

(e) be responsible for making decisions on part or all of 1 or more complex engineering activities; and

(f) manage part or all of 1 or more complex engineering activities in accordance with good engineering management practice; and

(g) identify, assess, and manage engineering risk; and

(h) conduct his or her professional engineering activities to an ethical standard at least equivalent to the code of ethical conduct; and

(i) recognise the reasonably foreseeable social, cultural, and environmental effects of professional engineering activities generally; and

(j) communicate clearly to other engineers and others that he or she is likely to deal with in the course of his or her professional engineering activities; and

(k) maintain the currency of his or her professional engineering knowledge and skills.

101. The parties have provided detailed submissions on the instructions, scope, and May and June versions of the Reports. The Appeal Panel has considered those submissions and the referenced documents and does not feel it necessary to reproduce that detail here.

102. Having considered those arguments and the provisions above, the Appeal Panel is persuaded that the CIC's decision was wrong in concluding (by virtue of determining that there are no applicable grounds of discipline) that s 21(1)(c) was not an applicable ground of discipline.

103. CPEng is intended to be a title that is a mark of quality. That requires that engineers only be registered and continue to be registered as a CPEng if they meet the minimum

standards.²⁴ They must also be held to those standards and obligations of ethical conduct. The public cannot have trust in the title of CPEng unless those standards are maintained.

104. It is clear from this and the minimum standards in rule 6, that when a CPEng agrees to undertake engineering services it is expected that (amongst other attributes) they will have the competence, knowledge, and skill to undertake that service, and can be relied on to both define and resolve complex problems as well as exercise sound professional engineering judgment at all times.
105. A CPEng is expected to exercise professional engineering judgment independently. They cannot rely on having followed a client's instructions in performing a service when they knew or ought to have known that it was not possible to provide that service to the expected standard based on those instructions or scope. Clients engaging a CPEng expect they will identify any limitations that the instructions place on being able to deliver that service to the expected standard.
106. The Appeal Panel considers that the Appellant has demonstrated there is a sound basis for the allegation that the WSP June Final Report and the process by which it was prepared may have been negligent or incompetent. The Appeal Panel is not in the position of determining whether the opinion formed and the report content was the standard expected but considers there is sufficient substance to the allegation it fell short through either negligence or incompetence as:
 - a. The Respondent ought to have either undertaken a site visit or ensured that the report was caveated, identifying its limitations on that basis. A site visit was within contemplation of both EQC and the Respondent, who prepared the proposal on the basis of including a site visit (whether this was 'if needed' or not). It can be expected that a CPEng would volunteer to their client if a site visit would be of assistance. If it was not reasonable to provide a definitive expert engineering opinion on the mechanism of failure at the site and damage period based on the information available (whether because it was incomplete, conflicted, or ambiguous) this should have been raised with EQC and either a site visit undertaken or identify the report's limitations.
 - b. A comparison with the September 2022 Report is demonstrative of the difference that undertaking a site visit made to both the quality of the assessment and the conclusion reached.
 - c. There would appear to be at least conflicting evidence in the documentation available to the Respondent about the potential mechanism of failure, when and what damage had occurred, and site conditions to have prompted either acknowledgment of this in the report or attempted resolution to form an independent opinion through a site visit.

²⁴ Chartered Professional Engineers Act of New Zealand 2002, s 3

- d. Given the email exchange between the Respondent and EQC on 30 and 31 May 2022 [BOD 310] it would appear that the Respondent’s opinion is that the failure mechanism was as a result of long-term subsidence, exacerbated by a high groundwater table. There is evidence to suggest that this was not a sound conclusion to have been reached, or at least reached unequivocally, given the documentation available to the Respondent.
 - e. The acknowledged error in identifying the site’s geology as Rakaia Terrane would not, on its own, be suggestive of negligence or incompetence but does add a cumulative weight to the concerns regarding the report.
107. The Appeal Panel finds that Ground Two is made out on the basis that the Respondent’s conduct may amount to negligence or incompetence, which means s 21(1)(c) is a potentially applicable ground of discipline and the CIC was therefore wrong to find that there are no applicable grounds of discipline per rule 57(a).

Discussion - Ground Three – s 21(1)(b)

108. The Appellant has asserted that s 21(1)(b) is an applicable ground of discipline as the Respondent may have breached one of the following two obligations of the code of ethical conduct, failing to:
- a. “undertake engineering activities in a careful and competent manner”, rule 42E(a)(iii); and/or
 - b. “treat people with respect and courtesy”, rule 42F(a)(ii).

Rule 42E – Act competently

109. Rule 42E(a) provides:

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;*

(iii) undertake engineering activities in a careful and competent manner;

...

[emphasis added]

110. The Appeal Panel considers that a failure to undertake engineering activities in a 'careful and competent manner' is very similar to, but is breached by lesser conduct than, 'negligence and incompetence'. Therefore, for the same reasons as discussed under Ground Two, the Appeal Panel considers that the Respondent may have breached Rule 42E(a)(iii) by being less than careful in supervising and reviewing the WSP May and June 2022 reports.

Rule 42F – Behave appropriately

111. The Appellant submits that the Respondent failed to treat the homeowners and himself with respect and courtesy, when the engagement limited the report to a desktop review and excluded a site visit. He submits:

In this situation [the Respondent] was required to give due respect and courtesy to the homeowners despite being engaged by EQC. I believe [the Respondent] failed to show due respect and courtesy to the homeowners by failing to provide them the opportunity explain the damage occurrence to him (or his representative) in a meaningful way, in not acknowledging the engineering opinion they had commissioned and provided and not demonstrating that he had considered their case with care and consideration.

112. The Appellant says this may be a breach of rule 5(a)(ii) of the Code of Ethical Conduct and therefore a ground for discipline under s 21(b) of the CPEng Act. The appropriate equivalent ethical obligation in the Rules, rule 42F(a), provides:

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

...

[emphasis added]

113. The obligations in the code of ethical conduct in the Rules, including 42F, are not only owed to a CPEng's clients. Client satisfaction or carrying out a client's instructions are also no excuse for a CPEng behaving in breach of these obligations. So long as the action complained of was in performing, or in connection with the Respondent's 'engineering activities', the obligations in 42F including to treat people with respect and courtesy apply.
114. However, the Appeal Panel's view is that, while there was potentially a lack of consideration of the impact his actions or inactions would have on the homeowners, in the circumstances the Respondent's conduct does not reach a level at which it could confidently be said that the Respondent was disrespectful or discourteous.
115. Therefore, the Appeal Panel doesn't consider rule 42F(a)(ii) to be a basis for s 21(1)(b) to be an applicable ground of discipline.
116. The Appeal Panel finds that Ground Three is made out on the basis that the Respondent's conduct may have breached rule 42E(a)(iii) (but not 42F(a)(ii)), which means s 21(1)(b) is a potentially applicable ground of discipline and the CIC was therefore wrong to dismiss the complaint on the basis that there are no applicable grounds of discipline per rule 57(a).

Discussion - Ground Four – incorrect statement

117. The Appellant has alleged that the CIC’s decision contained an incorrect statement regarding the attempt at a resolution. That is, “*the parties have already had a meeting together with EQC to resolve their differences in opinion, but this did not resolve the matter.*” The Appellant says the parties did not meet to discuss the adequacy of the engineering service provided to EQC.
118. The Respondent and Appellant agree that they have not met or had a conversation with to discuss the Appellant’s complaint.²⁵
119. The Appeal Panel accepts that the statement made by the CIC was incorrect.
120. However, in the Appeal Panel’s opinion this does not provide a sufficient basis to find that the CIC’s decision in relation to rule 57(a) was ‘wrong’. As a matter of procedure, the Appeal Panel notes that rule 58(d) makes it discretionary for the CIC to explore the possibility of alternate dispute resolution and rule 58(e) allows the CIC to make a decision whether or not alternative dispute resolution is used.

Remainder of rule 57

121. Having been persuaded that the CIC was wrong to dismiss the complaint on the basis of rule 57(a), the Appeal Panel has considered the balance of the rule 57 and its potential application. The Appeal Panel considers that:
- a. Rule 57(b) “*the subject matter of the complaint is trivial*”: The subject of the matter is not trivial. The purpose of the disciplinary process is to uphold professional standards and maintain public confidence in the profession. A consequence of the Respondent’s actions or inactions if proven, but for the intervention of the Appellant and EQC, had the potential to create an outcome in which insured homeowners were deprived of their entitlement to damage repair. The homeowners were living in a stressful situation; in a home ²⁶affected by a long-term ongoing landslip since 2009; they had been presented a report that could have greatly undermined their confidence in the engineering profession, and resulted in a 3 month delay before obtaining the second report from WSP (WSP September Report), which provided an indication of professional costs but not construction costs. Rule 57(b) does not apply.
 - b. Rule 57(ba) “*the alleged misconduct is insufficiently grave to warrant further investigation*”: Stepping back, the Appeal Panel sees this as a matter in which an otherwise experienced CPEng appears to not have adequately supervised and reviewed another engineer’s work. There is evidence to suggest that his actions or inactions were below the standard expected and, without intervention of EQC and the Appellant, could potentially have had significant consequences for the homeowner. However, there also appears to be the possibility of explanations

²⁵ Respondent’s Submission at [6.4], and Appellant’s Submissions at [12]

²⁶ BOD 10

being available that mean his conduct would not be seen as conduct worthy of sanction. In addition, the Respondent has now retired and is no longer practising. Before retiring he did not re-register as a CPEng (so is not currently on the CPEng Register). Further, as the Appellant has taken the step of appealing the CIC's decision to CPEC and this decision which finds that grounds of discipline do potentially apply, some learning from this matter will be available to the profession on publication of this decision. Therefore, on balance, the Appeal Panel considers that the complaint doesn't warrant further investigation due to the current circumstances. The Appeal Panel considers that rule 57(ba) applies and that the complaint should be dismissed on this ground.

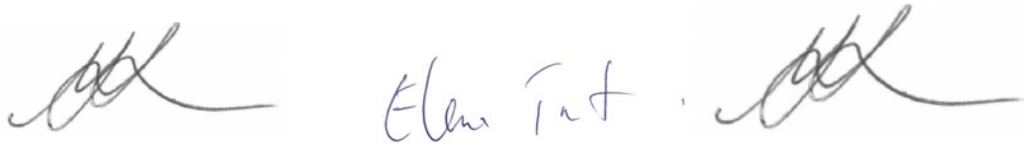
- c. Rule 57(c) "*the complaint is frivolous or vexatious or is not made in good faith*": The complaint is neither frivolous or vexatious, nor was it made in bad faith. We consider the Appellant's concerns to be genuine and accept his submission that this complaint is not a vehicle through which to obtain a different outcome for the homeowners. Therefore, rule 57(c) does not apply.
- d. Rule 57(d) "*the person alleged to be aggrieved does not wish action to be taken or continued*": We have no evidence the homeowners do not wish action to be taken or continued. Therefore, rule 57(d) does not apply.
- e. Rule 57(e) "*the complainant does not have a sufficient personal interest in the subject matter of the complaint*": The Appeal Panel considers that the complainant has a sufficient personal interest in the subject matter of the complaint. The homeowners engaged the Appellant to consider whether there was evidence in support of their EQC claim and the engagement included the consideration of the Respondent's report. Rule 57(e) does not apply.
- f. Rule 57(f) "*an investigation of the complaint is no longer practicable or desirable given the time elapsed since the matter giving rise to the complaint*": While some time passed between the conduct complained of (April – June 2022) and the Appellant raising concerns with the RA (March 2023), the Appeal Panel does not consider that it, nor the time spent in the RA and CPEC processes, would render the investigation process impracticable or undesirable. Further, the Appellant has satisfactorily explained the timing of his raising a concern with the RA around the EQC process. Rule 57(f) does not apply.

Outcome

- 122. For the reasons given above, the Appeal Panel is persuaded that the CIC's decision to dismiss the complaint on the basis of r 57(a), that there is no applicable ground of discipline under section 21(1)(a) to (d) of the Act, was wrong.
- 123. The Appeal Panel considers there are two potentially applicable grounds of discipline:
 - a. Section 21(1)(b): 'has breached the code of ethics contained in the rules' – the potential breach being of rule 42E(a)(iii); and
 - b. Section 21(1)(c): 'has performed engineering services in a negligent or incompetent manner'.

124. However, the Appeal Panel is empowered under s 35(5)(c) to make any decision that the CIC could have made. Having considered the other grounds for dismissal under rule 57, the Appeal Panel has determined that, in all of the circumstances, the complaint should be dismissed on the basis of rule 57(ba) of the Rules. That is, the alleged misconduct is insufficiently grave to warrant further investigation.
125. Therefore, the Appeal Panel reverses the decision of the CIC to dismiss the complaint on the basis of rule 57(a) and instead dismisses it on the basis of rule 57(ba).
126. Neither party has sought costs and the Appeal Panel considers that all costs associated with this appeal should fall where they lie.

Dated this 1 day of November 2025



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Ms Megan Neill

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Ms Elena Trout

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Ms Sandra Hardie*

Principal

**Following the hearing of this matter Ms Hardie retired from CPEC.*