



**Chartered Professional Engineers Council**  
**Kāhui Kaiwetepanga Ngaio Whaimana**

**APPEAL NUMBER 11/15**

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

**AND**

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

**Between**

Mr X

**Appellant**

**And**

Mr Y CPEng., FIPENZ, IntPE(NZ)

**Respondent**

## Decision of the Chartered Professional Engineers Council dated 1 June 2016

---

### The Appeal

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 appeal is of a decision of the Chair of Investigating Committees (‘the CIC’) acting as Adjudicator, dated 31 August 2015.
2. The Appeal relates to a complaint made by Mr X to the Registration Authority (‘the RA’) dated 19 July 2015. Mr X effectively alleged that Mr Y had breached the code of ethics contained in the Rules and thus contravened S 21(1) (b) of the Act.
3. Mr X stated (20/475) that (Rule references added):

*“A Chartered Professional Engineer is supposed to Act with honesty, objectivity and integrity (Rule 45) and not misrepresent competence (Rule 46) not misrepresent chartered professional engineer status (Rule 47), and not review other engineers’ work without taking reasonable steps to inform them and investigate (Rule 53)”*
4. Specifically, Mr X stated that Mr Y had (20/475):
  - i. Knowingly misrepresented himself during and after the “Technical Trial on Foundation Repair Techniques”.
  - ii. Misrepresented himself as the Principal Structural Engineer for BRANZ and represented that he had “peer reviewed” the Trials
  - iii. Used his email signature as the Principal Structural Engineer for BRANZ during the MBIE process of updating their document “Guidance for Repairing and Rebuilding houses affected by the Canterbury Earthquakes”
  - iv. Refused to add his signature, name and post-nominal letters to the Trial report that he reviewed.
5. The Complaints Research Officer of the RA (‘the CRO’) completed an initial investigation report on 13 August 2015, which was then considered together with all of the documentation (as listed on page 5/475) by the CIC.
6. The CIC, in her adjudication report of 31 August 2015 noted that she had:
  - i. explored the prospect of resolution through some alternative means and determined such a prospect unlikely to resolve the matters raised in the complaint; and
  - ii. considered the grounds of discipline under the S21 of the Act;and concluded that the complaint against Mr Y be dismissed on the grounds contained in Rule 57 (a) there being no grounds for discipline under S21 (1) a – d. of the Act.
7. The decision was sent to Mr X by letter from the Acting Chief Executive of IPENZ dated 1 September 2015. Mr X indicated his intention to appeal to the Council via email on 23 September 2015. The Chair of the Council responded to Mr X via email

on 30 September 2015 directing him to the CPEC website where the appeals process and procedures are outlined.

8. At its December 2015 meeting the Council appointed an appeal panel comprising Mr Jon Williams as Principal and Ms Sue Simons and Mr Chris Harrison as members. The process to be followed and timetable for submissions were confirmed in a letter to Mr X and Mr Y dated 14 December 2015.
9. The composition of the Panel and potential conflicts of interests were raised by Mr X. Mr Ross Tanner Deputy Chair of the Council confirmed by email to Mr X on 23 February 2016 the Council's position that there were no potential conflicts of interest and the composition of the Panel would remain unchanged.
10. Mr Edward Cox acted as legal counsel for Mr Y and all subsequent correspondence to Mr Y was through Mr Cox. However, for clarity this decision will refer to all correspondence being from and to Mr Y.
11. Submissions were lodged with the council as follows:
  - i. Mr X 3 February 2016
  - ii. Mr Y 17 February 2016
  - iii. Mr X (in reply) 24 February 2016
12. On 10 May 2016 the Panel outlined the procedures for the hearing and confirmed all evidence to be considered via email. The following documentation was listed as having been admitted for consideration with the appeal.
  - i. The bundle provided by the Registration Authority with pages numbered 1 to 475
  - ii. Mr X's submission received by email 3 February 2016 (Y Appeal 1 Sub.docx, C 2.pdf, DOIA 1516-0071 X Letter 17 August 2015.pdf, Summary of tolerance investigations on new floor slabs v2.pdf).
  - iii. Mr Y's response dated 17 February 2016 (EMC-596562-1-130-1 Respondents statement of evidence on appeal.pdf, EMC-596562-1-131-1 respondent's submission on appeal.pdf)
  - iv. Mr X's reply dated 24 February 2016 (Y Appeal Further Responses 24\_02\_16.docx, Y Appeal Evidence 24\_02\_16.docx)
  - v. Mr X's email dated 16 March 2016 providing links to copies of the Housing New Zealand Report
  - vi. Mr X's email dated 18 April 2016 with attached Confirmation trials were peer reviewed by Mr Y of BRANZ.PDF
13. Subsequent material was provided by Mr X on 14 May 2016:
  - i. Briefing note to Minister for Housing dated 29 May 2013
  - ii. Briefing note to Minister for Canterbury Earthquake Recovery dated 11 November 2011.
  - iii. Link to Stuff news article "EQC called to account over "when new" repairs" dated 14 May 2016.

14. The Panel confirmed via email dated 15 May 2016 that Mr X may submit this additional evidence. Mr Y objected to the admission of this evidence on 17 May 2016. This was noted by the Panel.
15. The hearing took place at the Institute of Directors offices in Wellington on 18 May 2016. Present at the hearing were:
  - i. The Panel – Jon Williams, Sue Simons, Chris Harrison
  - ii. Mr X
  - iii. Mr Y and his legal counsel Mr Edward Cox
  - iv. Ms Robyn Hutchison – transcriber.

The hearing commenced at 10AM and concluded at 1PM.

### **Background and context for the appeal**

16. Mr Y has been, and continues to be, in permanent employment with the Building Research Association of New Zealand (BRANZ) (391/475). BRANZ entered into a Contract for Services with the Ministry of Business Innovation & Employment (MBIE) (previously known as the Department of Building and Housing (DBH)) (392-417/475). This contract was for the participation of BRANZ technical staff on the MBIE Engineering Advisory Group (EAG). Mr Y is listed as being the provider of “Advisory Services” and “Technical Input” (408 and 414/475).
17. Housing New Zealand (HNZ) and Southern Response Earthquake Services (SRES) partnered under a Collaborative Foundation Repair Pilot Programme to undertake a project to assess the viability of various types of foundation repairs utilising damaged HNZ houses as test cases.
18. Arrow International (AI) prepared a draft scoping statement (418/475) for this program which indicated four Principal Parties, namely HNZ, SRES, AI and the Engineering Advisory Group (EAG). This was issued to Mr Z of the EAG on 8 October 2012. Mr Z assigned Mr Y as the EAG point of contact on 9 October 2012 (422/475).
19. A final scoping statement (project plan) was issued by AI dated 26 October 2013 (424/475). Under this scoping statement the Principal Parties were HNZ and SRES. Third Parties comprised AI, Geotechnical Engineers representing both HNZ and SRES, Structural Engineers representing both HNZ and SRES, Design Consultant, Relevelling Contractors and Building Contractors. The EAG, Local Building Consenting Authorities and Canterbury Earthquake Recovery Authority were listed as Advisors and Observers.
20. The scoping statement confirms (426-427/475) that HNZA will “engage Tonkin & Taylor (T&T) as their Geotechnical advisor,” AI “will engage on behalf of SRES two structural engineering companies” and “assist HNZA on the engagement of a design consultant”
21. The EAG scope was defined as follows (429/475):
  - i. *Responsible for self-funding*
  - ii. *Technical overview and observation of how the Building & Housing guidance\* assessment provisions and repair solutions are being implemented*

- iii. *Format procedures for testing processes*
- iv. *Jointly share any IP and information within the project between the joint Principal Parties.*
- v. *Liaise and assist local Building Consent Authorities with the engineering principles and processes engaged within the pilot programme.*
- vi. *Disseminate any EAG approved new repair methodologies developed within the project (or modifications to existing methodologies) as part of future guidance\* updates.*

\* The Panel understood this to refer to DBH (now MBIE) guidance titled "Repairing and rebuilding houses affected by the Canterbury earthquakes".

22. The trials were conducted on 19 houses owned by HNZ. The report dated January 2014 (71/475) was launched at an event in Christchurch by Dr Smith, Minister of Housing with a technical commentary provided by Mr Y (449 - 451/475).
23. The foreword to the report contained the statements (72/475):
- i. *Housing New Zealand worked with Ministry of Business, Innovation and Employment's Engineering Advisory Group, the Building Research Association of New Zealand (BRANZ), Southern Response, Arrow International, Canterbury local authorities and different re-leveling companies to produce a detailed and exact set of results based on specific site trials.*
  - ii. *The report has been peer reviewed by BRANZ giving it the technical endorsement it requires to be used as a part of MBIE's building and construction guidelines.*
24. The report was reissued in March 2014 correcting mainly typographical errors. The March 2014 report contained the foreword as noted above.
25. Mr X contacted BRANZ on 29 March 2015 (22/475) requesting confirmation of whether:
- i. *the report was "appraised" by BRANZ and if so could they provide the appraisal numbers. or*
  - ii. *the report was only peer reviewed and if so could they provide the peer review and peer review request/instructions.*
26. BRANZ responded on 16 April 2015 (21/475) confirming:
- i. *BRANZ had not been contracted to undertake an Appraisal on any system or method detailed in the HNZ technical report.*
  - ii. *That when acting for the EAG their staff are deemed to be working in an advisory capacity for MBIE, not acting for BRANZ.*
  - iii. *BRANZ has full confidence in Mr Y's contribution as a technical expert to the EAG. In BRANZ's view Mr Y's work as a member of the EAG does not constitute a peer review of the report by BRANZ.*
  - iv. *BRANZ was not provided with an opportunity to review the Foreword or Minister of Housing's Introduction prior to publication of the report.*

27. A third reissue of the report was made in April 2015 (79/475). In this issue the statements listed in paragraph 23 had been amended to:
- i. *Housing New Zealand worked with Ministry of Business, Innovation and Employment's Engineering Advisory Group, Southern Response, Arrow International, Canterbury local authorities and different re-leveling companies to produce a detailed and exact set of results based on specific site trials.*
  - ii. Paragraph deleted.

Appendix 4 was added (271/475) which noted:

*"The first edition of Housing New Zealand Technical Report on the results of Foundation Repair Trials Conducted following the Canterbury Earthquakes ISBN 978-0-477-10412-8 incorrectly stated that the report had been prepared and peer reviewed in partnership with the Building Research Association of New Zealand (BRANZ). The report was supported and reviewed by the Ministry of Building Innovation and Employment (MBIE) Engineering Advisory Group (EAG). BRANZ's Principal Structural Engineer is a member of this group. However, when acting for EAG, BRANZ staff are deemed to be working in an advisory capacity for MBIE, not acting for BRANZ."*

28. As was requested under the Arrow scope statement Mr Y on behalf of the EAG reviewed the technical reports for the houses that were included in the HNZ report. Items 2, 3 and 4 of Mr X's 24 February 2016 submission contain copies of emails between Mr Y, HNZ and Arrow indicating requests for review and mark-ups of a report.
29. Mr X highlighted a section of the report that had been specifically commented on by Mr Y in item 4 of his 24 February 2016 submission. The report noted a floor variation of 61mm. Mr Y's hand markup noted this was *"more than the MBIE recommended 50mm maximum"*. The final report (136/475) notes *"finished floor levels came within 28mm"*. There is no information provided as to how the final level variation was derived.
30. During 2014 Mr Y and the EAG prepared and issued "questions and answers" relating to the "notching of bearers and joists" and "perimeter foundation build up" (387/475 and 453-459/475). Mr Y acknowledges that these documents arose directly from his observations of the trial repairs.

## Hearing

31. A transcription of the hearing has been produced. Where applicable the discussion and findings have been cross referenced to the transcription or to the written evidence provided. The following is an outline of the hearing and is included to provide some contextual overview.
32. Mr X presented to his written submissions. Items emphasised were that:
- i. The CRO had made no attempt to contact him to discuss his complaint or to endeavour to pursue a form of alternative dispute resolution.
  - ii. His main focus is not debating the issue in detail but moving the complaint to an Investigating Committee where he will have the opportunity to present more evidence and cross examine Mr Y.
  - iii. Mr X now acknowledged that Mr Y was at all times working for BRANZ and was not misrepresenting himself.

- iv. Mr Y clearly reviewed the reports contained within the HNZ report and because of this he should publicly acknowledge his responsibility for them by signing the report.
  - v. The HNZ report and the associated research directly resulted in updates of the MBIE guidance with respect to the use of “notching of bearers and joists” and “perimeter foundation build up”. Mr X considered these practices were damaging homes in Christchurch and not in line with insurance company repair obligations.
  - vi. Mr X accepted (T28, 33-36) that this was not the forum for debating the technical acceptability of “notching of bearers and joists” and “perimeter foundation build up”. His concern is with its application. (T30, 45-48 and T32, 7-12)
33. Mr Cox made submissions on behalf of Mr Y. He presented the Respondent’s Submission Opposing Appeal and Statement of Evidence On Appeal. He made comprehensive submissions that emphasized:
- i. The details of the complaint in section 9 of his submission.
  - ii. The grounds of appeal in section 5 of his submission.
  - iii. The “*Panel are constrained by what is in the complaint and then only those parts of the appeal that stem directly from points in the complaint (T16, 4-5)*”.

### **Discussion**

34. The Panel notes that it understands the concerns that Mr X is raising relating to the repair methodologies being employed by insurance companies in Christchurch. However, a general complaint against an individual Chartered Professional Engineer is not the avenue to have these issues investigated.
35. The Panel records Mr X’s concerns relating to the CRO not providing “*reasonable assistance that is necessary in the circumstances to enable a person who wishes to make a complaint to put the complaint in writing*” as is required under Rule 54 (3). The Panel struggles to understand what the RA could have added to complaint.
36. Mr X conceded (T27 44-47) that Mr Y was at all times employed by BRANZ. The wording in the 16 April 2015 BRANZ email “*When acting for the EAG our staff are deemed to be working in an advisory capacity for MBIE, not acting for BRANZ*” may have created confusion. This same wording is included in Appendix 4 of the 3<sup>rd</sup> issue of the HNZ report.
37. This concession by Mr X removes the requirement for the Council to consider items i, ii and iii noted in paragraph 4 above from the appeal.
38. The remaining item in the appeal point is:
- iv. Refused to add his signature, name and post-nominal letters to the Trial report that he reviewed.
39. The HNZ trials report was compiled by HNZ in partnership with Southern Response Earthquake Services Ltd and Arrow International. The only signature on the document is that of Hon Dr Nick Smith, Minister of Housing. There is no scope or requirement for further signatures on this document.

40. The additions to the MBIE guidance documents on “notching of bearers and joists” and “perimeter foundation build up” have a formal MBIE publication sign off procedure (40/475). As this guidance note is published by MBIE the sign off for issue is correctly by personnel from within that organisation. Mr Y acknowledges that he and the EAG had input into the content but it would be inappropriate for them to sign off or approve for issue.

## Findings

41. Appeals to the Council are by way of a rehearing (section 37(2) of the Act). The appeal panel is entitled to confirm, vary or reverse a decision (section 37(5) (a)). The panel is able to make any decision that could have been made by the decision authority (section 37(5) (c)). Following *Austin, Nichols & Co Inc. v Stichting Lodestar* [2008] 2 NZLR 141 the panel is entitled to take a different view from the Chair of the Investigating Committee but the appellant carries the burden of satisfying the panel that it should do so.

42. It is important to note that the Panel is not investigating the complaint. The Panel needs to determine if there are sufficient grounds to warrant further investigation

43. Rule 57 states:

*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.*

44. The Panel does not find that the matter, if proved, is trivial 57 (b), insufficiently grave 57 (ba), or that an investigation is no longer practical 57 (f), so cannot dismiss the complaint on these grounds.
45. The Panel finds that Mr X is very sincere in his concerns. It is unclear from the evidence presented if Mr X's own house has been impacted by the issuance of the HNZ report. However, this is an issue that Mr X is clearly interested in and the Panel finds it cannot dismiss the complaint under Rule 57 (c), (d) or (e).
46. The Panel then has to consider if there are grounds for discipline under S21 of the Act, Rule 57 (a).
47. Section 21 of the Act states:
- (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.

48. Clearly, the criteria established under Sections 21 (1) (a), and (d) of the Act do not apply in this case. The question that the Panel has therefore considered is whether there is evidence that Mr Y:

- a) Has performed engineering services in negligent/incompetent manner.
- b) Has breached an aspect of the Code of Ethical conduct set out in the Rules (43-53 respectively).

49. The Appeal Panel has read the submissions and supporting documents provided by the appellant and the responses to them by the respondent, as well as the original submissions to the RA and subsequent report by the CRO and CIC. The panel members have also reviewed the transcript of the hearing that was held.

50. Each of the parts of this complaint are dealt with respectively:

Specifically, that Mr Y had:

- i. Knowingly misrepresented himself during and after the “Technical Trial on Foundation Repair Techniques”.
- ii. Misrepresented himself as the Principal Structural Engineer for BRANZ, and represented that he had “peer reviewed” the Trials
- iii. Used his email signature as the Principal Structural Engineer for BRANZ during the MBIE process of updating their document “Guidance for Repairing and Rebuilding houses affected by the Canterbury Earthquakes”
- iv. Refused to add his signature, name and post-nominal letters to the Trial report that he reviewed.

51. The Panel finds that Mr Y was clearly employed by BRANZ whilst working with the EAG on the HNZ foundations trials project. Some of the communications from BRANZ and the added appendix to issue 3 of the HNZ report may have led to some confusion. The Panel finds no grounds for discipline under issues 50 i, ii or iii above.

52. The Panel finds that the trials report was issued by HNZ under the signature of the Minister of Housing. It was not necessary or appropriate for Mr Y to add his signature to this report. The Panel finds no grounds for discipline under issues 50 iv above.
53. The Panel finds that there are no grounds for discipline under S21 (a) to (d) of the Act and that the Adjudicator was correct to dismiss the complaint under Rule 57 (a)

### Outcome

54. The Appeal is declined, and the decision of the Chair of Investigating Committees acting as Adjudicator is confirmed.

### Costs

55. S 37 (5) (d) of the Act states that The Council or District Court, as the case may be may – make any order as to the payment of the costs of the appeal that it thinks fit
56. The parties are entitled to submit on the issue of costs but the Panel is inclined at first instance to allow costs to lie where they fall and therefore not encourage an application. If, however a costs order is sought by Mr Y an application must be filed by 14 June 2016.

Dated this 1<sup>st</sup> day of June 2016

Mr Jon Williams



Ms Sue Simons



Mr Chris Harrison

