

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

**Appeal 09/21**

**AND**

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

**From**

Mr A

**Appellant**

**Against a decision of**

The Registration Authority under the  
Chartered Professional Engineers of  
New Zealand Act 2002

**Respondent**

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Decision of the Chartered Professional Engineers Council

Dated 8<sup>th</sup> August 2022

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## Introduction

1. Mr A has appealed the Competency Assessment Board's ("CAB") 15 April 2021 decision, which declined Mr A's application for initial registration as a Chartered Professional Engineer ("CPEng"), under the Chartered Professional Engineers of New Zealand Act 2002 ("the Act").
2. Mr A appealed the decision on the 29 April 2021.

## The Legislation

3. Legislation considered by the appeal panel is presented in Schedule 1, including the right to appeal and the scope of the Chartered Professional Engineers Council's ("the Council") jurisdiction.
4. The appeal is a rehearing of the evidence.
5. Following *Austin, Nichols & Co Inc. v Stichting Lodestar* [2008] 2 NZLR 141, the appeal panel is entitled to take a different view from the CAB, but the appellant carries the burden of satisfying the appeal panel that it should do so.
6. The basis for the Council overturning the original judgement at a rehearing is outlined in *McMullen J in May v May* (1982) NZFLR 165,170. The appellant must show that in the original decision, the decision maker:
  - acted on a wrong principle, or
  - failed to take into account some relevant material, or
  - took into account some irrelevant material, or
  - was plainly wrong.
7. The CAB is appointed by the RA under rule 77 of the Chartered Professional Engineers of New Zealand Rules (No 2) 2002 ("the Rules") and has delegated authority to make registration decisions.

8. It could be argued, based on rule 12 & rule 26 and section 45 of the Act, the Council cannot hear an appeal on registration as it is not a decision of the RA. The CAB is not the RA. The fact the RA member on the CAB has no vote reinforces this separation.
9. The Councils' view is the Act sits over the Rules. Section 24 of the Act is clear, the RA makes decisions relating to registration. It is appropriate for the Council to hear appeals relating to registration.
10. The Council may consider any evidence the Registration Authority was entitled to receive<sup>1</sup>.

### **Chronology, Submissions and Correspondence**

11. Council have requested and the RA have provided a paginated Bundle of Documents (BOD) file<sup>2</sup> held by the RA, including the registration chronology<sup>3</sup>.
12. The timeline for registration commenced at the date of Mr A's submission for assessment on 21 March 2020<sup>4</sup> and concluded on 15 April 2021<sup>5</sup>, the date the RA issued the CAB's final decision.
13. Correspondence and submissions relating to the appeal process are listed in Schedule 2.

### **Grounds of Appeal and Outcome Sought**

14. The grounds of appeal and outcome sought are detailed in Mr A's Notice of Appeal dated 29 April 2021, they are summarised below:

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<sup>1</sup> S 15 of the Chartered Professional Engineers of New Zealand (Appeals) Regulations 2002 (the Regulations)

<sup>2</sup> BOD pages 1 to 1115

<sup>3</sup> BOD pages 1 & 2

<sup>4</sup> BOD 63

<sup>5</sup> BOD 1084

Ground of Appeal 1 - the evidence Mr A provided to the assessment panel does not support the CAB's decision to decline his application for the following reasons:

- (a) Mr A's qualifications exceed the assessment panel recommendation for engineering technician;
- (b) the recommendation that Mr A has not demonstrated sufficient competence in complex engineering, was contradicted by the available evidence, namely infrastructure reports for:
  - Project B;
  - Project C;
- (c) the assessment panel's criticism regarding his answer to the storm water problem (in the written assignment) is incorrect. He requests his assignment be reconsidered.

Ground of Appeal 2 - the Registration Authority's procedure was flawed, Mr A was disadvantaged by requiring him to participate in an online interactive assessment interview rather than an in-person one. It was not possible to show all the evidence and reports in the online interactive assessment.

- 15. The outcome sought by Mr A is that he is registered as a CPEng.

## **Hearing**

- 16. Both parties agreed to the matter being heard on the papers.
- 17. The appeal panel met by video conference and considered the evidence provided, including:
  - (a) The bundle of documents (BOD);
  - (b) Submissions as noted in 13 above.

## **Discussion – Considerations of the Appeal panel**

18. Central to the appeal panel's decision is whether Mr A has demonstrated he meets the requirements for registration as outlined in rule 6.
19. No means other than Mr A demonstrating competence can be regarded as a pathway to registration.
20. Procedural shortcomings lie beyond the jurisdiction of the appeal panel and even if proven do not and cannot demonstrate competence. They may however contribute to establishing context and are able to be considered in that regard by the appeal panel in finalising its decision.
21. The CAB provided the following reasons for declining Mr A's initial registration:
  - (a) There was insufficient evidence of managing complex engineering activities and complex problems at a professional level;
  - (b) There was insufficient evidence of developing technical solutions for complex problems at a professional level; and
  - (c) There was insufficient evidence of undertaking complex engineering activities and complex engineering problems at a professional level.

### Ground of Appeal 1(a) – CAB's decision not supported by evidence

22. Mr A submits his qualifications exceed the assessment panel recommendation for engineering technician. He refers to his Organisation D equivalent qualification; being a registered engineering associate (REA), and being an approved person on Organisation E's list of approved issuers of producer statements in support of this.

23. The 2015 IPENZ letter<sup>6</sup> and the RA's submission acknowledge Mr A satisfies the academic benchmark for registration.
24. The appeal panel acknowledges Mr A has satisfied the academic benchmark for registration, and notes to be successful in obtaining initial registration Mr A must also demonstrate he is able to practise competently in his practise area to the standard of a reasonable professional engineer in accordance with rule 6, specifically rules 6(2)(a) to (k). These requirements are not mutually exclusive.
25. The appeal panel considers this ground of appeal has no merit.

#### Ground of Appeal 1(b) – Complex engineering

26. Mr A submits, the CAB, in reaching its decision failed to consider two complex projects, the infrastructure reports<sup>7</sup> for Project B and Project C.
27. Mr A describes Project B, as a 24 storey apartment building with 220 apartments, car parks, a complex project, located within a stormwater management flow control area, with the 3,698m<sup>2</sup> site changing from undeveloped green field to full development.
28. He describes his role as lead designer responsible for consideration of stormwater, wastewater, water, and earthworks, stormwater collection, retention and disposal options, and for preparing the infrastructure report issued in support of an application given to Organisation E for resource consent<sup>8</sup>.
29. The report includes calculations and drawings<sup>9</sup> for a rain garden at the 6<sup>th</sup> floor (podium level), in addition to stormwater collection and storage at the podium level allowing for reuse of this water by the apartments below the podium level as non-potable water, or storage and disposal by inground detention tanks

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<sup>6</sup> BOD 1062 - IPENZ Letter dated 24 February 2015

<sup>7</sup> BOD 1083 – 1 September 2020- further work samples provided

<sup>8</sup> BOD 653

<sup>9</sup> Appendix C of the report drawing RC4 and A102. S5.1.4 BOD 661

below the lower level carpark and controlled release to reticulation, with the vehicle crossing and onsite carparking resolved by the incorporation of an underground carpark, and consideration given to Organisation E's requirements.

30. Whilst not part of the report, Mr A submits other options were considered for the stormwater collection and disposal along with consideration of maintenance, design and build costs.
31. Mr A describes Project C, as 64 lot subdivision, and his responsibility as lead engineer responsible for design and preparation of drawings for three waters design for resource consent<sup>10</sup>.
32. The RA submitted<sup>11</sup> *"Before deciding whether the applicant should be registered or application declined, the CAB must consider the assessment panel's recommendation and whether the requirements for initial registration including if it is satisfied the applicant meets the minimum standards for registration contained in the rules"*.
33. The RA also submitted, *"the assessment panel considered both work samples, and concluded Mr A did not demonstrate professional competency in his practise area to the standard of a reasonable professional engineer, pursuant to the requirements under rule 6"*.
34. In its role, the appeal panel must also consider the assessment panel's recommendation.
35. The assessment panel's April 2021 report provided a holistic statement and a summary of their assessment under four headings which matched the registration application which combined the 11 elements of rule 6(2)

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<sup>10</sup> BOD 653

<sup>11</sup> RA submission para. 12.1

engineering knowledge, managing engineering work, professional acumen and developing technical solutions.

36. Under the holistic section, the assessment panel stated *“we do not consider that the applicant meets the standard for registration as CPEng. Recommends that the Board declines the application”,* and further *“the appeal panel has reviewed the additional information provided by Mr A for reconsideration of the decision and confirms that the initial recommendation to decline is to remain as a decline”*.
37. The assessment panel further stated their concerns under three of the four headings.
38. Under engineering knowledge, the assessment panel stated, *“the applicant is aware of various guidelines relating to the matters of development and stormwater engineering in the Organisation E area (e.g. codes issued by Organisation E, Organisation F and Organisation G)”*, and concluded *“the applicant understands the engineering principles underpinning his work in the revised PAD, but this is at a technologist’s level<sup>12</sup>.....the assessment panel has concerns as to how the applicant applies and maintains his engineering knowledge at a professional level<sup>13</sup>”*.
39. Under managing engineering work, the assessment panel stated *“The evidence generally supported the applicants competency to manage engineering work other than safety in design”*.
40. Under developing technical solutions, the assessment panel listed 6 projects, provided a description of Mr A’s involvement in each and summarised *“The samples described and the additional information provided, do not confirm that*

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<sup>12</sup> BOD 1088

<sup>13</sup> BOD 1089

*the applicant can develop technical solutions for complex problems at a professional engineering level”.*

41. Of the eleven components of rule 6, four rules specifically refer to complex engineering problems or complex engineering activities.
  - (i) Rule 6(2)(b) define, investigate, analyse complex engineering problems in accordance with good practise for professional engineering;
  - (ii) Rule 6(2)(c) design or develop solutions to complex engineering problems in accordance with good practise for professional engineering;
  - (iii) Rule 6(2)(e) responsible for making decision on part or all of 1 or more complex engineering activities; and
  - (iv) Rule 6(2)(f) manage part or all of 1 or more complex engineering activities in accordance with good engineering management practise.
42. Complex engineering activities and complex engineering problems are defined under rule 7, with additional guidance<sup>14</sup> provided to Mr A at the commencement of the registration process.
43. The appeal panel notes that rule 7 does not define engineering complexity based on project or land size, as highlighted by Mr A, but rather identifies when an engineering problem or activity requires in-depth engineering knowledge to address an issue not often experienced using an original method of analysis, without reliance on standards and codes of practise.

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<sup>14</sup> BOD 24-58 Let's Get you Chartered Guide to Assessment November 2019

44. The RA submits<sup>15</sup> *“out of the range of work and learning samples provided by Mr A, including additional information provided on 18 June 2020 & 1 September 2020, the appeal panel identified one project that demonstrated the required level of complexity for registration – the Project H”*.
45. This project covered the period 2011 to 2017, providing approximately half the historical term under consideration.
46. The assessment panel considered this work sample complex due to its use of diverse resources and its involvement of a diverse group of stakeholders with widely varying needs.
47. The appeal panel acknowledge the volume of support information Mr A has provided covering his role in 3 water projects, which includes no less than 16 infrastructure projects, 15 flood assessment reports, 14 engineering plan applications to the Council<sup>16</sup>.
48. The appeal panel also acknowledge the assessment panel’s conclusion in regard to the Project H, and consider this work sample by itself does not support registration. The evidence does not address rule 6 (a) (ii) and 6(b)-( e).
49. In regard to the Project B and Project C work samples, the appeal panel accepts the assessment panel considered these two work samples in its final assessment and recommendation, and accepts their conclusion as a fair assessment, the two work samples do not address previously identified shortfalls in Mr A’s application, in regard to rule 6, with consideration to rule 7.
50. The information fails to identify the specific complex problem or activity, the consideration given to and the resolution of that complex activity or problem.
51. The appeal panel considers this ground of appeal has not been proven.

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<sup>15</sup> RA submission para. 12.5

<sup>16</sup> Auckland Council

### Ground of Appeal 1(c)

52. Mr A objected to the stormwater design assignment on the basis of having Organisation D equivalent knowledge. He considered the assessment panel's criticism of his response to the storm water problem to be incorrect and requested his assignment be reconsidered.
53. The RA submits *"the assessment panel may set assignments or seek further information from an applicant, ..... the assignment was set to test Mr A's proficiency in the revised PAD"*.
54. The RA further submits, Mr A completed the assignment but *" he had ignored friction losses and overestimated the pipe capacity ..... the appeal panel clearly communicated these concerns about Mr A's assignment to him, and he was given several opportunities to respond"*.
55. Mr A submits, *"the required details were used to provide a report and proved that the current 1.2m diameter pipe has enough capacity. They (the assessment panel<sup>17</sup>) did not provide a friction factor other than Manning's coefficient"*.
56. The assignment set is a Organisation I question. Organisation I provides study to diploma level.
57. The element of this ground relating to Mr A's academic benchmark for registration referred to in 52 above has been dealt with in 22 to 25 above.
58. Rule 9(a) and 11(1)(c) provides for the assessment panel to invite the applicant to provide other information and the applicant to respond if the applicant chooses to do so.

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<sup>17</sup> The assessment panel added by the assessment panel for clarity

59. The role of the appeal panel is to consider the submissions and the evidence provided, not to review the technical content of an assignment, which is the role of the assessment panel.
60. The appeal panel has not seen any evidence to support the ground.
61. The appeal panel considers this ground of appeal has not been proven.

#### Ground of Appeal 2

62. Mr A submits the Registration Authority's procedure was flawed, he was disadvantaged by requiring him to participate in an online interactive assessment interview rather than an in-person one. It was not possible to show all the evidence and reports in the online interactive assessment.
63. The RA submits this matter is a procedural matter which falls outside CPEC's jurisdiction and noted whilst desirable an in-person interview could not happen, and provided reasons.
64. The appeal panel accepts this matter is procedural, noting rule 11(1)(b) to (i) provides for an interactive assessment by any meeting method.
65. The appeal panel considers the evidence presented under this ground does not support the overturning of the CAB decision.

#### **Outcome**

66. The appeal panel's task is to consider whether Mr A's submissions demonstrate he meets the minimum requirement for registration in accordance with rule 6, including rule 6 (1), and rule 6 (2)(a) to (k).
67. The appeal panel have considered all of the evidence, the appeal submissions, Mr A's registration application, work samples, response to the assignment, and all further information provided.

68. The appeal panel concludes the evidence does not adequately demonstrate Mr A's involvement in complex engineering activities and complex engineering problems in NZ to the level required by rule 6.
69. Further to 68 above the appeal panel notes that while Mr A may possess the attributes required for registration as a Chartered Professional Engineer, the key factor is that the appeal panel has not been convinced that his submitted evidence demonstrates that competence.
70. Specifically, Mr A has not demonstrated he meets the minimum requirement of registration in accordance with rule 6(2)(a), (b), (c) and (f).
71. The appeal is declined. The RA's decision stands. Mr A's application for initial registration is declined.
72. It will be important that any future application adequately demonstrates competence in respect of complex engineering.

## Costs

73. Neither party have sought costs. The appeal panel rules that any costs incurred by the parties to this appeal shall lie where they fall.
74. In accordance with s35 of the Act either party may appeal this decision to the District Court within 28 days.

**Dated this 8<sup>th</sup> day of August 2022**

Signed by the Appeals Appeal panel



Sandra Hardie – Principal



Chris J Harrison



Anthony Fairclough

## Schedule 1 – Legislation

1. Legislation for Registration and Appeals on Registration for Chartered Professional Engineers is covered by the following:
  - Chartered Professional Engineers of New Zealand Act 2002 (“the Act”)
  - Chartered Professional Engineers of New Zealand Rules (No 2) 2002 (“the Rules”).
  - Chartered Professional Engineers of New Zealand (Appeals) Regulations 2002 (“the Regulations”).
2. Section 24 of the Act describes how the Registration Authority (the RA) makes decisions relating to the registration of Chartered Professional Engineers; and how the Chartered Professional Engineers Council (the Council) hears appeals on these decisions.
3. Section 40 of the Act enacts the Rules.
4. Rule 6 defines the minimum standard for registration as a Chartered Professional Engineer.
5. The overriding consideration is that expressed in rule 6(1), that a Chartered Professional Engineer should be able to practise competently in a selected practice area to the standard of a reasonable professional engineer.
6. The matters listed in rule 6(2) must be taken into account in making an overall assessment required by Rule 6(1).
7. Relevant to the interpretation of rule 6 is rule 7 which addresses complex engineering activities and complex engineering problems.
8. The onus in rule 6 (1) is on the applicant demonstrating competence. The Rules do not provide for a mandatory “pass mark” for these matters. Ultimately, taking the matters in rule 6(2) into account, an objective decision still needs to be made as to whether an applicant meets the overall standard prescribed in rule 6(1).

9. Further to rule 6 and 7, should registration be granted, rule 21 requires the frequency of reassessment to be determined.
10. Section 35 of the Act, provides the right to appeal a decision of the RA to the Council.
11. Section 45 of the Act states one of the functions of the Council is to hear appeals from decisions of the RA.
12. The Council must deal with an appeal by way of a rehearing, as described in Section 37 of the Act, conducted in accordance with regulations made under Section 65.
13. The Council can confirm, vary or reverse the decision, or parts of the decision to which the appeal relates. The Council may refer the matter back to the decision authority for it to reconsider, either generally or in relation to specific matters, the whole or any part of the decision (together with any direction on that whole or part that the Council thinks fit.
14. The Council may make any decision that could have been made by the Registration Authority.
15. The Council does not have the power to review any part of the decision other than the part to which the appeal relates.
16. The evaluation and decisions made and implemented for an initial registration application is covered by the Rules, and the Act as follows:
  - (a) Rule 10
    - the assessment panel must evaluate each applicant for registration to assess:
    - whether or not the applicant has demonstrated that he or she meets the minimum standard for registration; and

- if so, whether the applicants continued registration should be assessed by the end of the sixth year from 31 December of the year of this assessment, or in an earlier year.

- (b) Rule 11 - the process the assessment panel must evaluate the application.
- (c) Rule 12 - the CAB makes the decision to register (or not) an applicant.
- (d) Rule 13 - If CAB proposes to decline an application, the CAB must notify the applicant of the reasons for the proposed decision; and give the applicant a reasonable opportunity to make written submissions on the matter.
- (e) Rule 14 - the CAB may reject or vary a recommendation by the assessment panel if first the CAB requires the assessment panel to reconsider its recommendation for the reasons given by the CAB and the assessment panel reconsiders its recommendations, carried out any further steps it considers necessary under rule 11, and reports back on whether or not its recommendations should be amended; and the CAB considers the reconsidered recommendation.
- (f) Rule 15 - the RA must notify and implement the decision.
- (g) Rule 21 - the minimum frequency of assessment of continued registration.
- (h) Rule 75 - the RA may appoint a sole assessor or an assessment panel of 2 or more assessors.
- (i) Rule 76 - an assessment panel of 2 must act unanimously in making decisions; if an assessment panel of 3 or more is not unanimous, the decision of the majority of the appeal panel is the decision of the appeal panel .
- (j) Rule 77 - the RA must appoint the CAB consisting of 4 or more voting members and one member from the RA Board (who has no right to vote).

- (k) Rule 80 - the RA may appoint a competency assessment reviewer.

Extracts covering Rule 6 and 7 are provided below.

**Rule 6:**

***“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.*
- (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.”*

**Rule 7:**

**“7 Definitions for the purpose of minimum standard for registration**

*For the purposes of rule 6,—*

**complex engineering activities** *means engineering activities or projects that have some or all of the following characteristics:*

- (a) *involve the use of diverse resources (and, for this purpose, resources includes people, money, equipment, materials, and technologies):*
- (b) *require resolution of significant problems arising from interactions between wide-ranging or conflicting technical, engineering, and other issues:*
- (c) *have significant consequences in a range of contexts:*
- (d) *involve the use of new materials, techniques, or processes or the use of existing materials, techniques, or processes in innovative ways.*

**complex engineering problems** *means engineering problems that have some or all of the following characteristics:*

- (a) *involve wide-ranging or conflicting technical, engineering, and other issues:*
- (b) *have no obvious solution and require originality in analysis:*
- (c) *involve infrequently encountered issues:*
- (d) *are outside problems encompassed by standards and codes of practice for professional engineering:*
- (e) *involve diverse groups of stakeholders with widely varying needs:*
- (f) *have significant consequences in a range of contexts:*
- (g) *cannot be resolved without in-depth engineering knowledge.”*

## **Schedule 2 - Key interactions, correspondence, submissions and communications in this appeal**

- (a) 29 April 2021 – Mr A's Notice of Appeal received.
- (b) 30 April 2021 & 10 June 2021 – email from CPEC to the parties acknowledging receipt of the Notice of Appeal, CPEC's jurisdiction, the appeal panel process proposed, an instruction to the RA to prepare a paginated bundle of documents, and acknowledgment of the RA's contacts.
- (c) 22 September 2021 – email from the appeal panel principal to the parties acknowledging receipt of the Notice of Appeal, advising appeal panel members and the process proposed, including submission timelines, and further instructing the RA to prepare a paginated bundle of documents.
- (d) 9 July 2021 – email from the RA with a OneDrive link to the paginated bundle of documents.
- (e) 13 September 2021 – email from the RA with contents of Mr A's Initial Application with Work Samples.
- (f) 3 October 2021 - appeal submission received from Mr A with supporting documents via one drive.
- (g) 18 October 2021 - submission from the RA.
- (h) 24 October 2021 - submission in response from Mr A.
- (i) 2 & 4 March 2022 – parties agreed to hearing on the papers.