

IN THE MATTER of an Application by the Australian Securities and Investments Commission to the Companies Auditors and Liquidators Disciplinary Board pursuant to section 1292 of the Corporations Act 2001

MATTER NO: 01/NSW14

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Applicant

RICHARD LANGLEY STEWART HILL
Respondent

DECISION of the Board to exercise its powers under s1292 of the Corporations Act. Notice of this decision will be given to the Respondent under s1296(1)(a) of the Corporations Act and a copy of that notice will be lodged with ASIC under s1296(1)(b) of the Corporations Act.

24 July 2015

Panel:

Maria McCrossin (Panel Chairperson)

Judith Downes

Karen O'Flynn

DECISION AND REASONS

Introduction

1. These are the decision documents in an application under s 1292 of the *Corporations Act 2001* ("the Act") lodged with the Companies Auditors and Liquidators Disciplinary Board ("the Board") by the Australian Securities and Investments Commission ("ASIC") on 3 April 2014. By the application, ASIC asked the Board to cancel the registration of Mr Richard Langley Stewart Hill ("Mr Hill") (a registered auditor).
2. On 9 December 2014 the Board issued its decision in relation to this matter ("CALDB Decision").
3. On 9 December 2014 Mr Hill lodged a Notice of Application for Review of Decision with the Administrative Appeals Tribunal ("AAT").
4. On 14 January 2015 the AAT stayed the publication of the CALDB Decision and issued an order that the publication of Mr Hill's name and personal details be prohibited and that Mr Hill's name in the AAT proceedings be replaced with a pseudonym.
5. On 24 April 2015 the AAT affirmed the CALDB Decision and issued its reasons for decision ("AAT Decision and Reasons ").
6. On 25 June 2015 the AAT directed two amendments to the text of the AAT Decision and Reasons ("AAT Direction") and, with effect on and from 23 July 2015 revoked its order of 14 January 2015 prohibiting publication of the Applicant's name ("AAT Revocation Order").
7. The following relevant documents are attached for publication in this matter on the Board's website:
 - (a) AAT Revocation Order;
 - (b) AAT Direction;
 - (c) AAT Decision and Reasons and
 - (d) the CALDB Decision.

Maria McCrossin
Panel Chairperson

24 July 2015



Administrative Appeals Tribunal

ADMINISTRATIVE APPEALS TRIBUNAL)
) No: 2014/6346
 GENERAL ADMINISTRATIVE DIVISION)

Re: Richard Hill
 Applicant

And: Members of the Companies Auditors and Liquidators Disciplinary Board
 Respondent

And: Australian Securities & Investments Commission
 Other Party

TRIBUNAL: The Hon. Brian Tamberlin QC, Deputy President

DATE: 25 June 2015

PLACE: Sydney

On and from 23 July 2015, the order made by the Tribunal pursuant to section 35(2) of the *Administrative Appeals Tribunal Act 1975* on 14 January 2015 is revoked and the pseudonym "NHPT" is to be replaced with the applicant's name, unless an appeal is lodged, in which case the order is to continue until the appeal is determined, unless the Tribunal otherwise orders.


 The Hon. Brian Tamberlin QC, Deputy President



Administrative Appeals Tribunal

ADMINISTRATIVE APPEALS TRIBUNAL)
GENERAL ADMINISTRATIVE DIVISION) No: 2014/6345

Re: NHPT
Applicant

And: Members of the Companies Auditors and Liquidators Disciplinary Board
Respondent

And: Australian Securities & Investments Commission
Other Party

DIRECTION

TRIBUNAL: The Hon. Brian Tamberlin QC, Deputy President
DATE: 25 June 2015
PLACE: Sydney

The Tribunal directs the Registrar, pursuant to subsection 43AA(1) of the *Administrative Appeals Tribunal Act 1975*, to alter the text of the decision in this application by:

- (a) deleting the words "from 23 December 2014" from the decision on page 1 and replacing them with "from 24 July 2015"; and
- (b) deleting the words "from 23 December 2014" from paragraph 52 of the reasons for decision and replacing them with "from 24 July 2015".

.....[sgd].....
The Hon. Brian Tamberlin QC, Deputy President





[2015] AATA 245

Division **GENERAL ADMINISTRATIVE DIVISION**
File Number **2014/6345; 6346**

Re **NHPT**
APPLICANT

And **Members of the Companies Auditors and Liquidators
Disciplinary Board**
RESPONDENT

And **Australian Securities & Investments Commission**
JOINED PARTY

DECISION

Tribunal **The Hon. Brian Tamberlin QC, Deputy President**

Date **24 April 2015**

Place **Sydney**

The Tribunal affirms the decisions to suspend the applicant's registration as an auditor, for a period of 12 months from 23 December 2014, and to impose undertakings on him as to future conduct and professional training.

The Tribunal directs the parties to file and serve submissions within 14 days as to the disposal of the remaining matters of costs and publication which have been stood over pending this decision.

.....[sgd].....
The Hon. Brian Tamberlin QC, Deputy President



CATCHWORDS

CORPORATIONS LAW – auditor’s registration – suspension of registration as an auditor – imposition of conditions on future conduct and professional training – previous conditions imposed by ASIC – whether applicant failed to comply with these conditions – whether applicant failed to perform adequately and properly the duties of an auditor – appropriate remedy – decision affirmed

LEGISLATION

Corporations Act 2001 (Cth) ss 324DA, 324DB, 1292(1), 1292(9)

REASONS FOR DECISION

The Hon. Brian Tamberlin QC, Deputy President

24 April 2015

1. These reasons concern an application for review of the respondent’s decision dated 9 December 2014 to suspend the applicant’s registration as an auditor, for a period of 12 months from 23 December 2014, and also impose undertakings on him as to future conduct and professional training.
2. There is also an application to review decisions to award costs of the hearing before the respondent to Australian Securities & Investments Commission (“ASIC”) and as to publicity of the decision. The hearing of the review applications of these decisions has been stood over by consent, pending determination of the substantive decisions to the suspension and undertakings impressed.

THE ISSUES

3. There are three issues arising in relation to the decision as follows:

- (1) whether the applicant failed to comply with conditions of his registration as an auditor;
- (2) whether the applicant failed to perform adequately and properly the duties of an auditor; and
- (3) if the answer to either of the above questions is in the affirmative, what is the appropriate remedy?

LEGISLATIVE PROVISIONS

4. Section 1292 of the *Corporations Act 2001* (Cth) ("the Act") gives the respondent a discretionary power to cancel or suspend for a specified period the registration of the person as an auditor, if it is satisfied on an application by ASIC, that the person has failed to comply with a condition of the person's registration as an auditor, or has failed to carry out or perform adequately and properly the duties of an auditor, or is otherwise not a fit and proper person to remain registered as an auditor: see s 1292.
5. Under s 1292(9), where the Board is satisfied that the person has failed to carry out any of the duties or functions under ss 1292(1), 1292(2)(d) or 1292(3)(d) or is otherwise not a fit and proper person, the Board may deal with the person by admonishment or reprimand. The Board may also require the person to give an undertaking to engage in or refrain from engaging in specified conduct, or require the person to give an undertaking to refrain from engaging in specified conduct except on conditions.
6. It is noted that once the jurisdiction is enlivened, the Board has a discretion as to the appropriate remedy under s 1292. In order for that discretionary power to be enlivened it is necessary for there to have been a failure to comply with a condition of registration or to perform adequately and properly the duties of an auditor.

BACKGROUND

7. The applicant has been continuously registered as a company auditor since 3 December 1982. ASIC has previously imposed conditions on his registration as an auditor following the decision of an independent ASIC delegate, who found that the applicant had breached

ss 324DA and 324DB of the Act, which relate to rotation requirements for auditors of public companies. In a letter to the applicant dated 11 April 2011 ASIC imposed additional conditions on his registration as an auditor. The letter set out four conditions as follows:

- "(a) You must complete 40 hours of professional education courses over the 2 years from the date of this letter.*
- (b) The courses must include education about auditor requirements under the Corporations Act, auditor independence and ethics.*
- (c) The courses must be completed in addition to the continuing training and development required by The Institute of Chartered Accountants in Australia.*
- (d) Within 1 month after the end of each of the 2 years, you must give to ASIC in writing details of the courses completed."*

8. The letter of 11 April 2011 also notified the decision made by the ASIC delegate following a hearing, which had previously been held in October 2010. The letter set out the reasons why additional conditions were being imposed on the applicant's registration.
9. On 11 October 2013, ASIC wrote to the applicant stating that it had not received any correspondence relating to the completion of professional education courses and continuous training and development, and that paragraph (d) of the conditions imposed upon the applicant a requirement to provide it with details of the courses completed by May 2013 at the latest.
10. In its letter of 11 October 2013, ASIC asked the applicant for details of:
 1. *The courses you completed under paragraphs (a), (b) and (c) of the licence conditions, including the name of the course provider, date completed, hours of professional education and the content of the course. Where available the information provided should include course outlines and/or tax receipts for the training courses.*
 2. *Evidence that the courses referred to in paragraph 1 where completed, in addition to the continuing training and development required by The Institute of Chartered Accountants in Australia.*
11. The letter sought a response by 25 October 2013. There was no response by that date.
12. On 29 November 2013 the applicant sent an email to ASIC, however this did not provide the information they had requested. The letter relevantly reads as follows:

"I refer to your letter of 11 October 2013.

1. *No listed public company audits have been conducted during the 2 years April 2013.*
2. *On this basis, the additional 40 hours has not been conducted given the reasons for the additional conditions related to the rotation requirements pertaining to listed companies. The additional courses would have placed an unreasonable cost and time burden on the auditor with no immediate opportunity to recoup the time and cost imposed.*
3. *In addition, the auditor was significantly involved in practice management activities, including by necessity overseeing the firm's investment in the Port Moresby practice.*
4. *The auditor still wishes to pursue listed company activities and wishes to seek your permission to comply with those conditions within the next 6 months subject to availability of suitable courses.*
5. *The firm is also looking at internal restructuring which will result in subject to being registered, a new auditor Colin Lin in DFK who can provide for the rotational issues as they arise. Mr Lin is in the process of lodging his application.*

I would like to discuss the above matters at your convenience.

Regards,

[NHPT]" (Emphasis added)

13. Following that letter there were three Annual Statements filed on behalf of the applicant with ASIC. These statements were dated 18 December 2013, 21 December 2012 and 8 December 2011 respectively.
14. The Annual Statement on 8 December 2011 stated that the applicant had carried out an audit of listed entity, which was inconsistent with the statement by the applicant in his email of 29 November 2013 that "no listed public company audits had been conducted during the two years April 2013".
15. The Annual Statement filed on 21 December 2012 stated, at page 6, that the applicant had carried out an audit of another listed entity. This was again inconsistent with the statement made to ASIC on 29 November 2013.
16. Each of the three Annual Statements filed with ASIC in the relevant years also falsely stated that the applicant's registration as a company auditor was not subject to conditions imposed by ASIC.
17. These statements were signed by the applicant.

LEGAL PRINCIPLES

18. The relevant legal principles which are applicable to the circumstances of this case are briefly summarised below:
- (a) The principal purpose of the proceedings is protective rather than punitive and the guiding principle is protection of the public;
 - (b) The protection of the public includes ensuring that those who are unfit to practise do not continue to hold themselves out as fit to practise;
 - (c) The protection of the public includes deterrence;
 - (d) It also includes the maintenance of a system under which the public can be confident that practitioners will know that breaches of duty will be appropriately dealt with and that the regulatory regime applicable to auditors is effective in maintaining high standards of professional conduct.
 - (e) The impact of the Board's orders on the practitioner is to be given limited consideration, as the prime concern of the Board is the protection of the public;
 - (f) Relevant matters include the respondent's recognition and acceptance of the breaches of duty, attitude to compliance generally and willingness to improve. Genuine acceptance of failure, contrition and remorse are necessary requirements to rehabilitation; and
 - (g) If a respondent is not considered fit and proper, suspension is not appropriate unless the Board can be confident that the respondent would be fit and proper after the period of suspension.

BREACH OF CONDITION

19. As to the conditions (a) and (c) imposed by ASIC on 11 April 2011, the applicant says that these two conditions are ambiguous and confusing, and that this should be taken into account when deciding whether there has been a breach and also on the question of the nature and extent of measures which may be taken under the Act.
20. I do not accept this submission.

21. The conditions are clearly and simply expressed in plain language. The expression "course" in the present context, in its ordinary meaning, denotes a systematic or prescribed series of actions. It would include, for example, "a course of studies", "course of lectures", "a legal course" or "a medical course": see *Macquarie Essential Dictionary*. The applicant contends that the reference to "course" includes informal unsupervised general technical reading as well as formal instruction. The contention is that the applicant carried out parts of the courses required and one component of the applicant's efforts consisted of informal technical reading, which together should be treated as satisfactory compliance.
22. I do not accept the proposition that the expression "course" extends to the generalised reading and unspecified activities claimed to have been done by the applicant. It is evident in my opinion having regard to the reference in condition (c) to continuing training and development required by the Institute of Chartered Accountants in Australia ("ICAA") that the expression refers to a formal, systematic education and not unsupervised "technical" reading.
23. Given that the applicant has been a registered company auditor since 1982, it is improbable, in my view, that he misunderstood the nature or type or extent of the professional education courses required by condition (a).
24. It is also clear that the 40 hours of professional education courses are to be undertaken in addition to compliance with the requirements of the ICAA. The applicant submits that there is some ambiguity in relation to the requirement that the courses must include education about "ethics", in that it does not make it clear whether there must be an entire course directed to "ethics" or whether "ethics" can be included in one of the other subjects. On my reading it is clear by reason of the use of the word "about" that there is no necessity to have a discrete dedicated course to ethics as opposed to it being included in one of the other professional education courses.
25. I note that the applicant took no steps to raise any question of ambiguity or problem with the interpretation or application of the conditions (a) and (c) at the relevant time.

26. In relation to the conditions as to professional education, the letter of 29 November 2013 from the applicant strongly supports the conclusion that the conditions have been breached and that he was aware of this. The substance of the letter is to admit that the 40 hours have not been conducted but that there was a reasonable basis for non-compliance having regard to the cost and time burden on the auditor, and his inability to recoup the time and cost imposed. His assertion that no listed public company audits have been conducted during the two years is an attempt to minimise the importance of that condition as a practical matter. The letter seeks to excuse his non-compliance as due to a lack of time having regard to his need to oversee the firm's investment in Port Moresby. He also seeks an extension of time and permission to comply with the conditions within the next six months, if the courses are available. He also seeks to rely on a proposed restructuring.
27. The applicant sought to minimise the significance of the important admissions in this letter on the basis that it was written before he or his lawyers gave detailed consideration to the problem of construing the requirements. The letter speaks for itself and is an admission of the applicant's failure to undertake the courses as required.
28. An attempt was made by the applicant to establish that, in fact, satisfactory courses of professional education had been undertaken and that the requirement has been substantially satisfied. In support of this contention he produced a schedule of time spent in "educational" activities. However, there were no primary documents which supported these assertions, apart from documents later drawn up in the office of the applicant. The records indicate that another member of the firm may have undertaken education but there is no substantial corroboration of the assertions that the applicant has taken the courses as required.
29. In an attempt to support his case the applicant produced a statement by Mr Black, an experienced and reputable auditor, dated 27 July 2014, which purports to support his contentions as to compliance.
30. The contents of this document do not significantly advance the contentions of the applicant because Mr Black's report is based on unverified statements and information provided to him, as to the activities undertaken by the applicant. The report is therefore

based on unsubstantiated assumptions of fact and interpretations of law, together with subjective speculation as to what might be accepted as "compliance" with the conditions. Insofar as questions of legal interpretation of the conditions are concerned it is clear that Mr Black does not claim to have any legal expertise. By way of example, Mr Black states that the ICAA requirement that a minimum of 40 per cent of the 120 hours required be undertaken in each of the Audit and Tax topics was prima-facie not met by the applicant in respect of the audit component, as only 20 formal hours of audit training had been undertaken. He also ventures the opinion that it would be reasonable to count "technical reading" as opposed to formal study as satisfying the requirement without any factual basis to justify this assertion.

31. In considering whether there has been breach of the conditions, I consider that the admissions made by the applicant in his letter of 29 November 2013 clearly indicate that he had not complied with the conditions, yet he later sought to argue that he did. This approach indicates a failure to appreciate the need for strict compliance in circumstances where he has previously failed to observe the requirements of the Act.
32. In relation to condition (d) it was admitted that there has been no compliance. The applicant has taken no positive action to give any required details at the end of the first year period as to courses completed. This is consistent with there being no completed courses. It was the initiative taken by ASIC in writing to the applicant on 11 October 2013 which first raised the non-compliance.
33. The applicant seeks to diminish the significance of this non-compliance by submitting that somehow there was fault, blame or oversight on the part of ASIC by not investigating and following up compliance with the conditions. In my opinion this submission carries no weight. The obligation to comply is clearly on the applicant. It is essential that a regulatory body such as ASIC should be able to rely on professional auditors' compliance with conditions of registration and that the public should be able to act on the basis that practising auditors complied with the requirements of regulatory bodies.

34. The furnishing of details of courses completed is an important condition which has admittedly been breached. This breach alone is sufficient to enliven the power of the Board to take action under s 1292.
35. Having regard to the foregoing, I am satisfied that there have been failures to comply with conditions of the applicant's registration as an auditor such as to give rise to the discretion in s 1292(1).

DUTIES AS AN AUDITOR – WAS THERE A FAILURE?

36. The respondent contends that the applicant failed to carry out or perform adequately and properly the duties of an auditor because in the Annual Statements that he lodged with ASIC in December 2011, 2012 and 2013, it was wrongly stated that his registration as a company auditor was not subject to conditions imposed by ASIC. Filing of this statement is required by s 1287A of the Act.
37. In each of the three Annual Statements the applicant declared that to the best of his knowledge and belief the information supplied in and with the statement was complete and accurate. In each case that declaration was false and misleading. ASIC contends that the applicant's false statements were made either knowingly or negligently, and that the making of the false statement on several occasions constituted a significant failure on each occasion to carry out or perform adequately and properly the duties of an auditor. I agree.
38. The applicant contends that the requirement for the filing of an Annual Statement cannot be part of the "duties of an auditor" within the meaning of this s 1292(1)(d).
39. I do not accept this submission because the filing of the Annual Statement is the statutory duty imposed on an auditor. If that is not considered a duty of the auditor, one must ask what the proper characterisation of a duty is.
40. The applicant's submission is unduly restrictive of the expression "duty of an auditor" without any textual or commercially sensible justification. There is no reason for reading down the expression "duties of an auditor". The legislation is clearly designed to protect

the public by ensuring the efficient operation of the regulatory system, such that the public can confidently rely on statements of a registered auditor.

41. In each of the Annual Statements by an auditor the question is asked whether registration as a company auditor is subject to conditions imposed by ASIC. If the question is answered in the affirmative then it is necessary to give some further details as to compliance with conditions, dates of non-compliance, and the nature of the non-compliance. The question was answered in the negative and further details were not given.
42. These are significant matters in relation to the effective enforcement and regulation of an auditor's performance and activities and they go to the protection of the public.
43. The evidence shows that on the page following the box in which a cross appears, indicating a negative answer to the question, the applicant has signed the unequivocal statement declaring that the information supplied in and with the document is complete and accurate and it authorises ASIC to take action to verify that the statements and certifications made in the document are not false or misleading.
44. There have clearly been false and misleading statements in breach of the auditor's duties.
45. In the present circumstances, I am satisfied that the incorrect statements were made and repeated as a consequence of substantial inadvertence by the Applicant. I consider that they were made as a consequence of insufficient control procedures extending over a period of several years such as to call for a significant sanction.
46. The applicant has sought to excuse the default by stating that one of his executive assistants completed the form without correction from the applicant and copied part of each form from the previous year's form and he then signed it. I do not accept that this diminishes the significance of the inadvertence. It demonstrates a repeatedly serious disregard of his obligations and a failure to prevent the issue of a misleading document.
47. The applicant submits that the degree of fault is diminished because the false statements in effect were one single act of inadvertence rather than two or three. In my view there

were at least two separate incidents in which the applicant signed the form making a false statement. It was not one single act. There were two distinct breaches and an ongoing failure to ensure the accuracy of statements or to take steps to correct the misleading nature of the assertions.

48. For the above reasons I am satisfied that the applicant has failed to carry out or perform adequately and properly his duties as an auditor in relation to the Annual Statements.

SANCTION

49. I am satisfied that the repeated failure to detect, correct or prevent false statements in the Annual Statements amount to serious inadvertence, and that the non-compliance with ASIC's conditions was serious, particularly having regard to the fact that the requirements were imposed as a consequence of a previous breach by the applicant in relation to rotation. The context in which the conditions were imposed should have caused a competent and responsible auditor to be more attentive and careful to ensure compliance.
50. It is settled law that the main purpose of the power is protective rather than punitive and that such protection can involve deterrence designed to ensure that auditors will perform the duties properly and with due care in the public interest. It is essential to maintain the integrity of the regulatory system which is designed to protect the public by the identification, investigation and remedy of breaches of duty so as to maintain standards of professional conduct. If false reports are furnished, the integrity and reliability of the system will be undermined in that potential breaches will not be brought to the attention of the regulator and appropriate action may not be taken.
51. It is also necessary to take into account the impact of the orders on the practitioner, the nature, extent and relevance of character evidence, the consequences and losses sustained as a result of breaches and impact on the public interest. The character references as to the general repute of the applicant and as to his perceived ability are in his favour in deciding what action should be taken. I have taken these matters into account, however, notwithstanding the strength of the support they provide, I consider that in this case the need for protection and deterrence outweighs the other considerations. The implication of

the suspension imposed below should in my view provide a substantial incentive for the Applicant to pay close attention to the need for compliance notwithstanding his inconvenience, lack of time or expense which he has pleaded as mitigating circumstances.

52. In the light of the foregoing considerations I am satisfied that the applicant has failed to carry out or perform adequately or properly perform the duties mentioned in s 1292(1)(d) and that the appropriate decision was to suspend the applicant's registration as an auditor, for a period of 12 months from 23 December 2014 and also impose undertakings on him as to future conduct and professional training.

DECISION

53. The decision under review as to suspension and undertakings is affirmed.

I certify that the preceding 53 (fifty - three) paragraphs are a true copy of the reasons for the decision herein of
The Hon. Brian Tamberlin QC,
Deputy President

.....[sgd].....

Associate

Dated 24 April 2015

| | |
|--------------------------------|--|
| Date of hearing | 12 February 2015 |
| Counsel for the Applicant | Mr T D Castle |
| Solicitors for the Applicant | Sophie Grace Legal Pty Ltd |
| Solicitors for the Respondent | Australian Government Solicitor |
| Solicitors for the Other Party | In house |
| Counsel for the Other Party | Mr A Connolly |

IN THE MATTER of an Application by the Australian Securities and Investments Commission to the Companies Auditors and Liquidators Disciplinary Board pursuant to section 1292 of the Corporations Act 2001

MATTER NO: 01/NSW14

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Applicant

RICHARD LANGLEY STEWART HILL
Respondent

DECISION of the Board to exercise its powers under s1292 of the Corporations Act. Notice of this decision will be given to the Respondent under s1296(1)(a) of the Corporations Act and a copy of that notice will be lodged with ASIC under s1296(1)(b) of the Corporations Act.

9 December 2014

Panel:

Maria McCrossin (Panel Chairperson)

Judith Downes

Karen O'Flynn

Companies Auditors and Liquidators Disciplinary Board
Level 5, 100 Market Street Sydney NSW 2000
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DECISION AND REASONS

Introduction

The Application

1. This is an application under s 1292 of the *Corporations Act 2001* ("the Act") lodged with the Companies Auditors and Liquidators Disciplinary Board ("the Board") by the Australian Securities and Investments Commission ("ASIC") on 3 April 2014. By the application, ASIC asks the Board to cancel the registration of Mr Richard Langley Stewart Hill ("Mr Hill") (a registered auditor).
2. Section 1292(1)(d) provides:

"The Board may, if it is satisfied on an application by ASIC or APRA for a person who is registered as an auditor to be dealt with under this section that, before, at or after the commencement of this section:

 - (d) that the person has failed, whether in or outside this jurisdiction, to carry out or perform adequately and properly:
 - (i) the duties of an auditor; or
 - (ii) any duties or functions required by an Australian law to be carried out or performed by a registered auditor;

or is otherwise not a fit and proper person to remain registered as an auditor;

by order, cancel, or suspend for a specified period, the registration of the person as an auditor".
3. The basis of the Application is set out in the Statement of Facts and Contentions ("SOFAC"). An initial SOFAC was filed with the Board on 03 April 2014 and a revised SOFAC was filed on 23 May 2014. The application proceeded on the basis of the latter document. Three contentions were alleged as follows:
 - (a) Contention 1, that within the meaning of Section 1292(1)(a)(ia)[second] of the Act, Mr. Hill has failed to comply with conditions of his registration as an auditor.
 - (b) Contention 2, that within the meaning of Section 1292(1)(d)(i) of the Act, Hill failed to carry out or perform adequately and properly the duties of an auditor in that:
 - (i) In each of his 2011, 2012 and 2013 Form 912A Annual Statement by an Auditor "Annual Statement", all lodged with

ASIC, he stated that his registration as a company auditor was not subject to conditions imposed by ASIC, which in each case was false and misleading, being a statement on each occasion when he completed those Annual Statements that he knew to be false or misleading, or in the alternative that he was reckless as to whether the statements were accurate or not, or further in the alternative he failed to exercise proper care as to the accuracy or otherwise of the Annual Statements.

- (ii) Contrary to Section 1308(2) of the Act, in a document required by the Act to be lodged with ASIC, stated, in each of his 2011, 2012 and 2013 Annual Statements, all lodged with ASIC, that his registration as a Company Auditor was not subject to conditions imposed by ASIC, when this was not the case, such statement being to his knowledge false or misleading in a material particular.
 - (c) Contention 3, that within the meaning of Section 1292(1)(d) of the Act, Hill is not a fit and proper person to remain registered as an auditor on account of the fact that each of his 2011, 2012 and 2013 Annual Statements contained a false and misleading statement that his registration as a company auditor was not subject to conditions imposed by ASIC (made by Mr Hill knowingly, or in the alternative recklessly, or further in the alternative without due care).
4. The Respondent has filed three responses in the proceedings. The first was dated 14 May 2014 responding to the original SOFAC. A revised Response dated 4 June 2014 was filed in answer to the revised SOFAC and a further revised Response was filed on 25 July 2014. Leave was sought at the hearing to file the further revised Response. That application was not opposed by ASIC and leave was granted by the Panel.
5. The hearing took place on Monday 04 August 2014. Mr Andrew Connolly of counsel appeared for ASIC and Mr Tim Castle of counsel appeared for Mr Hill.

Outline of facts

6. An outline of the relevant facts which are not in contention between the parties, is as follows:
- (i) Mr Hill has been continuously registered as a company auditor under the Act or its predecessor legislation since 03 December 1982. His current place of practice is DFK Richard Hill Pty Ltd, Level 11, 32 Martin Place, Sydney NSW 2000.
 - (ii) Following the decision of an independent ASIC delegate that Mr Hill breached ss324DA and 324DB of the Act relating to rotation requirements for auditors of public companies, ASIC, by letter dated 11 April 2011 to Mr Hill, imposed additional conditions on

Mr Hill's registration as an auditor. The letter set out 4 conditions as follows;

"(a) You must complete 40 hours of professional education courses over the 2 years from the date of this letter.

(b) The courses must include education about auditor requirements under the Corporations Act, auditor independence and ethics.

(c) The courses must be completed in addition to the continuing training and development required by the Institute of Chartered Accountants in Australia.

(d) Within one month after the end of each of the 2 years, you must give to ASIC in writing, details of the courses completed."

(iii) ASIC's letter dated 11 April 2011 was notification of the decision made by the ASIC delegate following a hearing that had taken place in October 2010. It set out the reasons why additional conditions were being imposed on Mr Hill's registration. The letter also notified Mr Hill of his potential rights in connection with the decision such as review of the decision by the Administrative Appeals Tribunal or the Commonwealth Ombudsman.

(iv) On 11 October 2013 ASIC wrote to Mr Hill noting that ASIC had not received any correspondence from him relating to the completion of the additional training and development set out in the conditions and that paragraph (d) of the conditions imposed upon Mr Hill required him to provide ASIC with details of the courses completed by May 2013. By the letter dated 11 October 2013 ASIC asked Mr Hill for details of:

"1. The courses you completed under paragraphs (a), (b) and (c) of the licence conditions, including the name of the course provider, date completed, hours of professional education and the content of the course. Where available, the information provided should include course outlines and/or tax receipts for the training course.

2. Evidence that the courses referred to in paragraph 1 were completed in addition to the continuing training and development required by the Institute of Chartered Accountants in Australia."

Mr Hill was asked to forward his response to Mr Rajnish Padarath by email, by close of business on 25 October 2013.

(v) On 14 November 2013 Mr Hill was advised by his staff that Mr Padarath had telephoned the office to follow up his letter of 11 October 2013.

- (vi) On 29 November 2013 Mr Hill sent an email to Rajnish Padarath. That email did not provide the information requested by ASIC. As the contents of the email are important it is set out here in full:

"I refer to your letter of 11 October 2013.

- 1. No listed public company audits have been conducted during the 2 years April 2013 (sic)*
- 2. On this basis, the additional 40 hours has not been conducted given the reasons for the additional conditions related to the rotation requirements pertaining to listed companies. The additional courses would have placed an unreasonable cost and time burden on the auditor with no immediate opportunity to recoup the time and cost imposed.*
- 3. In addition, the auditor was significantly involved in practice management activities, including by necessity overseeing the firm's investment in the Port Moresby practice.*
- 4. The auditor still wishes to pursue listed company activities and wishes to seek your permission to comply with those conditions within the next 6 months subject to availability of suitable courses.*
- 5. The firm is also looking at internal restructuring which will result in subject to being registered, a new auditor Colin Lin in DFK who can provide rotational issues as they arise. Mr Lin is in the process of lodging his application.*

I would like to discuss the above matters at your convenience.

Regards,

Richard Hill"

- (vii) Following the letter dated 11 April 2011 from ASIC to Mr Hill, there were three Annual Statements filed on behalf of Mr Hill with ASIC. The Annual Statements were dated 18/12/2013, 21/12/2012 and 08/12/2011 respectively.
- (viii) The Annual Statement filed on 08/12/2011 stated at page 6 that Mr Hill had carried out an audit of listed entity Meridien Capital Ltd. It was not in issue between the parties that this representation was inconsistent with the statement Mr Hill made to ASIC in his email dated 29 November 2013 that *"No listed public company audits have been conducted during the 2 years April 2013"*.
- (ix) Mr Castle accepted that the Annual Statement filed on 21/12/2012 stated at page 6 that Mr Hill had carried out an audit of listed entity Bounty Oil and Gas NL. This was also inconsistent with the statement Mr Hill made to ASIC in his email dated 29 November

2013 that "No listed public company audits have been conducted during the 2 years April 2013 (sic)".

- (x) Each of the three Annual Statements filed with ASIC in the relevant years inaccurately represented on page 5 that Mr Hill's registration as a company auditor was not subject to conditions imposed by ASIC.

Preliminary Matters

No case application and the application of the Briginshaw approach in these proceedings

Submissions

7. At the hearing Mr Hill's counsel applied to the Board that in respect of Contentions 2 and 3, Mr Hill had no case to answer because ASIC had not led any evidence capable of proving that when Mr Hill made the statements to ASIC he knew them to be false.
8. ASIC's position, with respect to the no case application, was that the documentary evidence it had adduced was sufficient to show Mr Hill had knowledge of the matter the subject of his false statements and that the false statements had been made. ASIC stated that if Mr Hill did not give evidence at the hearing it would base its submissions on the documentation already adduced.
9. The hearing proceeded on the basis that the Board would defer ruling on the no case application until making its final determination. If there were matters canvassed in cross-examination of Mr Hill which ASIC relied on in respect of Contentions 2 and 3, then Mr Castle would have the opportunity to make submissions as to the relevance or otherwise of that evidence which the Panel would take into consideration and rule on once it had determined its view on the no case application.
10. It followed of course that if the no case application failed, there was no impediment to taking into account evidence adduced by the cross-examination of Mr Hill. Indeed from a procedural perspective it was appropriate and necessary for ASIC to put its case to Mr Hill (*Browne v Dunn* (1893) 6 R 67).

Questions raised on no case application

11. The no case application raised the following questions for consideration, based on the submissions on behalf of the Respondent:
 - (a) Is there a jurisdictional fact under s1292(1)(d)(i) i.e. does the duty alleged in Contention 2 and relied on in Contention 3 fall within the meaning of "duty" as used in the section;
 - (b) Does the *Briginshaw* principle apply to the applicant, ASIC?

- (c) What is required to demonstrate a prima facie case upon which proceedings may be commenced?
- (d) Has ASIC demonstrated a prima facie case in relation to Contentions 2 and 3?

Is there a jurisdictional fact under Section 1292(1)(d)(i)

- 12. The first issue submitted in support of the no case application was that the allegation in Contention 2 (and relied on in Contention 3) concerning Mr Hill's duty to file his Annual Statement was not an auditing duty under s1292(1)(d)(i) because it went beyond an auditing standard.
- 13. Contention 2 was pleaded on two alternative bases in the revised SOFAC. First, that Mr Hill failed to carry out adequately and properly the duties of an auditor in that he made false and misleading statements, either knowing that they were false, recklessly or without proper care. The second alternative was that he failed to carry out or perform adequately and properly the duties of an auditor because, contrary to s1308(2) of the Act, he made a statement in each of his Annual Statements that he knew to be false or misleading in a material particular.
- 14. The SOFAC identified the duty not to make such statements as arising under either the general law and/or s1287A of the Act and/or under s1308 of the Act.
- 15. Section 1287A of the Act provides:
"A person who is a registered company auditor must, within one month after the end of:
 - (a) *the period of twelve months beginning on the day on which the person's registration begins; and*
 - (b) *each subsequent period of twelve months;**lodge with ASIC a statement in respect of that period".*
- 16. Section 1308 is an offence provision to which Chapter 2 of the Criminal Code applies.
- 17. Section 1308(2) provides:
"A person who, in a document required by or for the purposes of this Act or lodged with or submitted to ASIC, makes or authorises the making of a statement that to the person's knowledge is false or misleading in a material particular, or omits or authorises the omission of any matter or thing without which the document is to the person's knowledge misleading in a material respect, is guilty of an offence"
- 18. Section 1287A is a specific statutory obligation applying to all auditors registered under the Act. Section 1308(2) of the Act potentially applies to

any person making or authorising a statement in a document required to be lodged with ASIC. We reject the argument that compliance with statutory obligations to which all registered auditors are subject are not duties that fall within s1292(1)(d)(i). The Board has exclusive jurisdiction in relation to the cancellation and suspension of auditor registration under s1292 of the Act. Failure to lodge an annual statement is a specific ground for cancellation or suspension of registration under subparagraph (1)(a)(i) and s1308(2) makes it a serious offence to lodge a false or misleading document with ASIC knowingly. It would be entirely contrary to the grant of exclusive jurisdiction to the Board under the Act and to the requirements of these legislative provisions if the duties of an auditor under s1292(1)(d)(i) did not encompass providing complete and accurate information in the Annual Statement for the annual renewal of an auditor's registration under the Act.

19. Counsel for Mr Hill did not cite any authority in support of his proposition that the obligation to lodge an annual return that is not false and misleading was not a duty within s1292(1)(d)(i).
20. ASIC referred the Panel to the decision of *Coopers and Lybrand v Australian Securities Commission* (1994) 53 FCR 599 at 606-607, ("*Coopers and Lybrand*") and to CALDB's published decision in *ASIC v Fernandez* (Decision of the Board, Matter no 02/VIC13) (29 October 2013) ("*Fernandez*"). In *Coopers and Lybrand* the proposition that functions and powers under s1292 did not extend to investigating the activities of auditors otherwise than in relation to their conduct as company auditors auditing a company within Pt 3.7 of the Corporations Law was expressly rejected.
21. The Board in its decision in *Fernandez* referred to the decision of the Administrative Appeals Tribunal (AAT) in *Re Australian Securities Commission and Companies Auditors and Liquidators Disciplinary Board* (1994) 13 ACSR 373 (at 377) in which the AAT held that s1292(1)(d)(i) (failure to carry out or perform adequately and properly "*the duties of an auditor*") related to the *general law* duties of an auditor and that s1292(1)(d)(ii) (failure to carry out or perform any duties or functions required by Australian law to be carried out by or performed by a registered company auditor") related to *statutory* duties of an auditor. On appeal neither party challenged the finding but there was no express endorsement of the finding in the decision of Hill J.
22. The Board expressed the view in *Fernandez* that the construction placed on s1292(1)(d)(i) and s1292(1)(d)(ii) by the AAT was not correct and that the preferable construction was one that included statutory duties as well as general law duties under sub paragraph (i) (*Fernandez* p10). We agree and have followed the approach that "*duties of an auditor*" under s1292(1)(d)(i) are not confined to general law duties but may also encompass statutory duties such as those set out in the Act and relied on by ASIC in this matter.

23. In our view the Board has jurisdiction under s1292(1)(d)(i) in relation to both the statutory and general law duties of a registered auditor. It would be inconsistent with existing authority and the relevant provisions of the Act to confine "duties" under s1292(d)(1) to duties of an auditor relating to auditing standards as submitted by Mr Castle. We reject this submission as a basis for the no case application.

Does the Briginshaw principle apply to ASIC?

24. Mr Castle submitted that the principle expressed by Dixon J. in *Briginshaw v Briginshaw* (1938) 60 CLR 336 ("*Briginshaw*") applied to all disciplinary proceedings and that ASIC must meet the *Briginshaw* test.
25. In *Briginshaw*, Dixon J said at 361-362:
- "... when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences"*
26. Dixon J continued, particularly with regard to circumstantial evidence (at 368-9)
- "Upon an issue of adultery in a matrimonial cause the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact. Further, circumstantial evidence cannot satisfy a sound judgment of a state of facts if it is susceptible of some other not improbable explanation. But if the proofs adduced, when subjected to these tests, satisfy the tribunal of fact that the adultery alleged was committed, it should so find."*
27. The authorities suggest that the *Briginshaw* approach will apply in disciplinary proceedings where allegations of a serious nature are made and where serious consequences may follow: *Jackson (previously known as Subramuniam) v Legal Practitioners Admissions Board [2006] NSWSC*

1338; *Bannister v Walton* (1993) 30 NSWLR 699 at 711-712. In *Polglaze v Veterinary Practitioners Board* (2010) NSWCA 4 Justice of Appeal Baston commented (p8) ff:

"[18] The argument that the Tribunal failed to comply with the Briginshaw principle should be rejected....because....those principles do not apply routinely just because the matter involves a complaint of disciplinary misconduct or unsatisfactory misconduct."

"[19] The facts which were in issue in this case did not give rise to any matter of gravity with respect to the character or behaviour of the practitioner. It is therefore not to be assumed that there was any requirement on the Tribunal to be satisfied to the level of comfort which the Briginshaw principle requires."

28. We have proceeded on the basis that the *Briginshaw* approach applies to our determination of the allegations in the present matter as the allegations are of a serious nature and the order sought by ASIC is cancellation of Mr Hill's registration although we disagree for the reasons set out that those principles apply to all disciplinary proceedings.

29. However, Mr Castle's argument was that ASIC as well as the Board, was required to meet the *Briginshaw* test. We reject this argument on two bases.

30. First the *Briginshaw* approach applies, in appropriate circumstances, to the manner in which a Court or Tribunal must direct itself when considering the evidence before it. In *Briginshaw* Dixon J. referred to the role of the Tribunal:

"...when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality."

31. There is no authority to which we were directed or of which we are aware, that the *Briginshaw* approach creates any obligation on the part of an applicant commencing proceedings in addition to the obligation to have sufficient evidence to ground a prima facie case, based on the relevant standard of proof, in this case the civil standard, which is proof on the balance of probabilities.

32. The second reason we reject Mr Castle's argument, is that the approach in *Briginshaw* is not directed to the standard of proof required even where the matter to be proved involves criminal conduct or fraud.

33. In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 the Court stated at 170-171:

"The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct"

or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct."

34. The authorities clearly support the proposition that *Briginshaw* does not alter the standard of proof required and therefore an assessment by the Panel of whether the available evidence discloses a prima facie case does not relevantly involve consideration or application of the principle set out in *Briginshaw*.

What is required to demonstrate a prima facie case upon which proceedings may be commenced?

35. The next basis of the no case application concerned the sufficiency of the evidence particularised by ASIC and whether it disclosed a prima facie case.
36. Evidence establishing a prima facie case does not need to be irrefutable but sufficient to raise a presumption of wrongdoing. We do not agree with the submission that the only relevant evidence available is the documentary evidence. The objective facts are also relevant. The documentary evidence together with the relevant available objective facts must, prima facie, be capable of grounding the basis for any inference that the Panel may be asked to draw from the evidence in relation to each of the alternative ways in which ASIC alleged that Mr Hill had failed to carry out or perform adequately and properly the duties of an auditor within the meaning of s1292(1)(d)(i) of the Act. As discussed in more detail below in the context of our findings on Contention 2, the allegations that Mr Hill knew or was reckless as to whether the Annual Statements were false and misleading raise an allegation of dishonesty and involve an assessment of Mr Hill's state of mind.
37. Mr Castle argued that without evidence of Mr Hill's state of mind there was no prima facie case to be answered. He submitted that the matters alleged cannot be proved by inference. Mr Castle submitted that the no case application extended to all allegations made in Contention 2 including the allegation of failure to exercise proper care, although we note that this allegation would not necessarily require evidence of Mr Hill's state of mind.
38. Cases alleging dishonesty may be based upon inference. However, if a case is based upon inference, the facts said to give rise to the inference

must be particularised. As Lord Millet said in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 186:

“It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.”

Has ASIC demonstrated a prima facie case in relation to Contentions 2 and 3?

Contention 2

39. The particulars in paragraphs 18-24 of the revised SOFAC state that, based on Mr Hill's knowledge from 11 April 2011 that conditions on his registration had been imposed, and his response to ASIC on 29 November 2013 that he had not complied with these conditions, Mr Hill had either falsely, recklessly or without sufficient care misstated that position in each of his Annual Statements. In each year he positively attested to the completeness and accuracy of the disclosures in the Annual Statements. Those pleaded facts, in our view, demonstrate a prima facie case for Mr Hill to answer that he either knew at the time of completing the Annual Statements that false and misleading information was provided, or he did not care whether the information included was true or false or he failed to exercise proper care.

Contention 3

40. Contention 3 alleges that on the basis that Mr Hill made a false and misleading statement that his registration as a company auditor was not subject to conditions imposed by ASIC in each of his 2011, 2012 and 2013 Annual Statements either deliberately, recklessly or without due care, he is not a fit and proper person within the meaning of s1292(1)(d) to remain registered as a company auditor.
41. The particulars in the SOFAC recite the same particulars as for Contention 2 in support of this allegation. A finding that a registered auditor is not otherwise fit and proper to remain registered is a finding available to the Board under s1292(1)(d) in addition to a finding that Mr Hill has failed to carry out or perform adequately and properly the duties of an auditor under s1292(1)(d)(i). Therefore, the facts particularised in paragraphs 18-24 of the revised SOFAC in respect of Contention 2 and also relied on for Contention 3, demonstrate a prima facie case for Mr Hill to answer for the reasons set out in paragraph 39 above.
42. For the above reasons we find that the no case application in relation to Contentions 2 and 3 fails.

Contention 1

43. ASIC contended that, within the meaning of s1292(1)(a)(ia) [second] of the Act, Mr Hill has failed to comply with conditions of his registration as an auditor.
44. Section 1292(1)(a)(ia)[second] provides as follows:
- "The Board may, if it is satisfied on an application by ASIC or APRA for a person who is registered as an auditor to be dealt with under this Section that, before, at or after the commencement of this section:*
- (a) *the person has:*
- (ia) failed to comply with a condition of the person's registration as an auditor;*
- or is otherwise not a fit and proper person to remain registered as an auditor;*
- by order, cancel or suspend for a specified period, the registration of the person as an auditor."*
45. As noted there were four conditions imposed on Mr Hill's registration as set out in ASIC's letter dated 11 April 2011:
- (a) *You must complete 40 hours of professional education courses over the two years from the date of this letter.*
- (b) *The courses must include education about auditor requirements under the Corporations Act, auditor independence and ethics.*
- (c) *The courses must be completed in addition to the continuing training and development required by the Institute of Chartered Accountants in Australia.*
- (d) *Within one month after the end of each of the 2 years, you must give to ASIC in writing, details of the courses completed."*
- ("ASIC Registration Conditions")
46. ASIC alleged that Mr Hill failed to comply with the conditions of his registration as an auditor by:
- (a) Failing to complete 40 hours of professional education courses of the kind required of him by ASIC in the letter dated 11 April 2011.
- (b) Failing to give ASIC, in writing, within one month of the end of each of the two years from 11 April 2011, details of the courses completed by him in fulfilment of the requirements imposed on him by ASIC.

47. The following matters were not in dispute regarding Contention 1;
- (a) That Mr Hill has been registered as a company auditor since 3 December 1982 and so for the purpose of assessing the commencement of the triennium period under the ICAA continuing professional education requirements (ICAA CPE Requirement) there were two triennium periods relevant - the first which ended on 30 June 2012 and the second which commenced on 1 July 2012.
 - (b) That the ICAA CPE requirement was 120 hours over three years comprising 40% directed to audit training with a minimum requirement of 20 qualifying hours per year of which no more than 10 hours of technical reading may be counted.
 - (c) That on 11 April 2011 ASIC imposed the ASIC Registration Conditions.
 - (d) That Mr Hill failed to comply with condition (d) of the ASIC Registration Conditions as he failed to give ASIC notice in writing within the timeframe stipulated of details of the courses completed.
 - (e) Mr Hill admitted that he did not comply with condition (d) of the ASIC Registration Conditions as he failed to give ASIC notice in writing of details of the courses completed at the end of each year and to that extent the Board's power under s1292(1)(a)(ia)[second] is enlivened.
48. Mr Hill's response on compliance with conditions (a)-(c) of the ASIC Registration Conditions to undertake an additional 40 hours of training in the terms set out moved from admitting that he had not complied fully with the education conditions in his Response (at [11]-[12], [14], 20-[21]) and in his First Revised Response (at [10(a)-(c)]) to asserting full compliance with conditions (a)-(c) in his second revised response at [10(a)-(b)].
49. The ASIC Registration Conditions contained a number of elements and there was considerable evidence adduced by Mr Hill, including expert evidence, as to the nature of the ICAA CPE Requirement, the total hours of training Mr Hill had attended and the subject matter of the training material, as well as submissions regarding the nature of the condition imposed.
50. The documentary evidence adduced by ASIC on Mr Hill's non-compliance with ASIC Registration Conditions (a), (b), (c) and (d) was ASIC's letter to Mr Hill dated 11 October 2013 seeking details of the courses completed and evidence that the courses were completed in addition to the ICAA CPE requirement, and Mr Hill's email to ASIC dated 29 November 2013. Mr Hill stated in the email dated 29 November 2013 that he had not complied with the ASIC Registration Conditions and consistent with that response, he did not provide ASIC with any details of courses completed as requested by ASIC's letter dated 11 October 2013.

51. The evidence adduced by Mr Hill on his compliance with the ASIC Registration Conditions comprised;
- (a) his statement;
 - (b) a schedule setting out the quantity of training hours completed in the period 11 April 2010 to 11 April 2011, discussed in detail below;
 - (c) the expert report of Stuart Black considering quantitative and qualitative aspects of Mr Hill's training, in the period 11 April 2011 to 11 April 2013.
52. We have approached our assessment of the evidence by considering ASIC Registration Conditions (a) and (c) together, as they are interdependent and then conditions (b) and (d), with the latter of which Mr Hill admitted he had not complied.

ASIC Registration Conditions (a) and (c) - You must complete 40 hours of professional education courses over the two years from the date of this letter. The courses must be completed in addition to the continuing training and development required by the Institute of Chartered Accountants in Australia.

53. The first of the ASIC Registration Conditions required Mr Hill to complete 40 hours of professional education courses over the two years from the date of the letter being 11 April 2011.
54. Before considering the evidence in connection with ASIC registration condition (a) it is necessary to consider the impact condition (c) has on the approach to calculation of the requirement in condition (a).

Approach to assessing performance of ICAA CPE requirement [ASIC Registration Condition (c)]

55. It was common ground between the parties that the Institute of Chartered Accountants (ICAA) regulations relating to training and development placed an obligation on all individual members who are required to hold either a full or concessional rate Certificate of Public Practice to undertake 120 hours of training over rolling three year periods, with a minimum of 20 hours to be undertaken in any one year period, of which no more than 10 hours may be technical reading (Regulation 1002).
56. The relevant trienniums in respect of Mr Hill for the purpose of calculating the ICAA CPE requirement of 120 hours were from 1 July 2009 – 30 June 2012 and from 01 July 2012 – 30 June 2015.
57. It was also common ground between the parties that as a registered auditor, Mr Hill was required by the ICAA CPE requirement to complete 40% of the 120 hours in audit related education (Regulation 1002.1). The regulations provide that the assessment of the subject area is a matter of self-assessment.

58. The ICAA CPE requirement posed some challenges with regard to how compliance with the ASIC registration condition was to be demonstrated, largely because the end of one and the beginning of another ICAA triennium period applying to Mr Hill occurred approximately 14 months after the ASIC Registration Conditions were imposed on Mr Hill's registration.
59. At the hearing a Schedule was tendered ("Schedule") which Mr Castle explained should be read as a supplement to Annexure B to Mr Hill's statement. The Schedule dealt with the quantity of Mr Hill's training in the 12 month period preceding the ASIC Registration Conditions. Its purpose was stated to be for building the three-year frame of the ICA CPE requirement.
60. The Schedule did not have regard to the actual triennium periods applicable to Mr Hill's ICAA CPE requirements on the basis that one triennium finished after the first year of operation of the ASIC Registration Conditions and the next period had two years to run following the 2nd and final year of the ASIC Registration Conditions. Instead the Schedule used the period of from 11 April 2010 – 11 April 2013 to create a three year period which had already transpired and which also covered the two years of the ASIC Registration Conditions.
61. While it is not ideal to use a triennial period for the ICAA CPE requirement that was not in fact applicable to Mr Hill, we accept that there are challenges in applying ASIC's condition (c) that the training be in addition to the ICAA CPE requirement, given the different time periods for the ASIC Registration Conditions and the ICAA CPE requirement, the rolling trienniums and the minimum annual ICAA CPE requirement of 20 hours compared to the triennial requirement of 120 hours in total.
62. In the absence of any alternative approach argued for by ASIC (noting that the revised approach contended for by the Respondent was not proposed by him until just before the hearing), we accept the approach set out in paragraph 60 as valid and have adopted it for ascertaining Mr Hill's performance of the ICAA CPE requirement, that is by reference to the period 11 April 2010 - 11 April 2013 and on the basis of that three year requirement being completion of 120 qualifying hours, 30 of which may be technical reading.

Did Mr Hill complete 40 hours of training in addition to the ICAA CPE requirement?

63. Mr Hill said in his statement that his practice maintains a full record of formal training. Annexure B to his statement was an extract from the records of the practice of the professional training said to have been undertaken by Mr Hill, together with Mr Hill's estimate of time spent each year on technical reading (up to 10 hours of which can be counted towards the ICAA CPE requirement).

64. Annexure B recorded Mr Hill as having completed 57 hours in total of training for each of the years 11 April 2011 – 11 April 2012 and 11 April 2012 – 11 April 2013 (i.e. 114 hours altogether, of which 10 hours in each year was technical reading).
65. On the basis of Mr Hill's statement, assuming 40 hours annually was required to meet the overall ICAA CPE requirement, Mr Hill had undertaken 47 course hours and 10 technical reading hours for each of the years. When the ICAA course hours of 40 per year (including 10 of technical reading) were accounted for there were 17 hours available in each of the years to count towards the ASIC requirement of 20 hours, leaving Mr Hill short of the 20 hour ASIC requirement by 3 hours for each year, on the basis that "courses" as stipulated in the ASIC Registration Conditions did not include technical reading (a matter disputed by the expert evidence of Mr Black).
66. The Schedule subsequently tendered showed however that there was an excess of 48 hours of formal training (rather than the 34 hours referred to in his statement) which had been completed over the 2 year period of the ASIC Registration Conditions and which, it was contended, at least as to quantum of hours, could go to satisfying the ASIC Registration Conditions over the two year period from 11 April 2011-11 April 2013.
67. In cross examination, Mr Hill agreed that at the time he made his statement he took the view that he had fallen short of ASIC's registration condition by 6 hours. Mr Hill's evidence in cross examination was that the only difference between the hours completed and referred to in his statement and the additional hours now being contended as completed, was due to the allocation of additional hours from other disciplines, particularly tax, that he was entitled to allocate towards the ASIC education condition, because tax knowledge is an implicit part of being an auditor. This was a different basis to that put forward by Mr Hill's counsel as to the increased hours of courses completed set out above, namely using a triennium period commencing 11 April 2010 to calculate the minimum ICAA CPE requirement.
68. In the context of our consideration of the hours of training completed, we should refer to the email Mr Hill sent to Mr Lee on 28 October 2010, following the hearing that had taken place, regarding whether Mr Hill had breached auditor rotation requirements. Mr Hill's counsel made much of the fact that the independent ASIC delegate did not respond to this email from Mr Hill.
69. In that email, Mr Hill set out a proposed plan for training and professional development to be undertaken by the firm comprising 4x3 hour sessions to be run by a presenter from the ICAA and, states an intention to undertake a similar programme in the following year, subject to reviewing its effectiveness. Mr Hill concluded the email by asking Mr Lee to let him know if he had any comments.

70. In our view that evidence does not bear on the allegation made in Contention 1, that Mr Hill did not comply with the ASIC conditions on his registration as an auditor. It is clear from the documentary evidence that those conditions were imposed on 11 April 2011. What occurred in the lead up to the imposition of those conditions, at least as regards establishing the allegation, is not in our view relevant. Even if those circumstances were relevant to whether the allegation has been established, the evidence was that Mr Hill did not proceed with the plan of action he communicated to Mr Lee although his firm did register some months later for an online training series which appeared to cover similar subject matter. Two sessions of that online training were inadvertently omitted from the Schedule but on the case being made by Mr Hill this was of no consequence, as, on the basis of the Schedule, Mr Hill had well in excess of the training hours required to satisfy condition (a) in any event.
71. When Mr Hill was questioned about the manner in which training records were kept at his firm and whether the records from which the schedules of training had been extracted for this matter included details of each individual that had attended each of the training sessions that was made available to the members of the audit group at the firm, Mr Hill stated that a record of each individual's attendance was not kept. We note in passing that Regulation 1003 of the ICAA requires that a personal record is to be kept and the firm's records are deficient in this regard.
72. Overall, we accept that, through a process of reconstruction from existing records kept by Mr Hill's firm, the schedules provided demonstrate that the quantum of training hours imposed by the ASIC registration condition had been undertaken within Mr Hill's firm. However, those schedules do not corroborate Mr Hill's evidence of the quantum of training he undertook personally, which is the relevant fact about which we must make a finding.
73. In terms of the actual evidence available that Mr Hill attended the training recorded in Annexure B and the Schedule, there is Mr Hill's evidence, after the fact, that to the best of his knowledge, he attended all of the 138 hours of courses set out in the Schedule and Annexure B to his statement over the three year period. We must weigh this evidence against the contemporaneous evidence of Mr Hill's email to ASIC dated 29 November 2013 as well as Mr Hill's evidence about that document adduced at the hearing, which we now turn to consider.
74. In cross examination, Mr Hill admitted that the statement he made in paragraph one of his email dated 29 November 2013 that no listed company audits had been conducted in the past two years, was inaccurate. Mr Hill had signed off on the financial statements of listed entity Meridien Capital Ltd (Meridien) to June 2011, in November 2011. Mr Hill did not recall when the appointment to Meridien had been made. He had also been appointed as auditor to listed entity Bounty Oil and Gas NL during the year ended 30 June 2013.
75. Mr Hill explained the statement he had made in paragraph one of his email further as follows:

"...I guess what I was trying to convey to him was that the audit of listed companies at that time was not a major part of what we do...so I was really making the point that while this was being resolved we weren't on the other hand out there marketing ourselves and that was the only reason I say that.."

76. Mr Hill's statement in his correspondence with ASIC is either inaccurate or so loosely worded that its plain meaning bears no relationship to what Mr Hill meant to say. At the least it demonstrates that Mr Hill was not paying careful attention to the statements he was making to the regulator as to the relevant conduct of his business and matters relevant to his registration as an auditor. Mr Hill was not asked at any stage in the hearing why he had made the statement in the first paragraph of his letter.

77. In further cross examination on the balance of the contents of the email dated 29 November 2013, Mr Hill stated that when he said in his email the words:

"On this basis, the additional 40 hours has not been conducted given the reasons for the additional conditions related to the rotation requirements pertaining to listed companies. The additional courses would have placed an unreasonable cost and time burden on the auditor with no immediate opportunity to recoup the time and cost imposed",

he meant to say that the 40 hours "in total" had not been conducted. He went on:

"So what we're saying there is that I wasn't totally comfortable that we'd got the total 40 hours and that's why I was saying we may well be short but we wanted to talk to him, that's why we said we wanted to discuss it because there were issues about the training programme that I wanted to talk to him about."

78. When Mr Connolly pointed out that Mr Hill had not said that in the email Mr Hill said:

"I didn't say that none of the 40 hours had been completed. That's just not the case."

79. In November 2013 when Mr Hill wrote to ASIC, it seems to us much more likely than not that Mr Hill believed he had not complied at all with the Registration Conditions imposed by ASIC. This is certainly consistent with the plain meaning of the language of the email. Indeed to suggest that the email says what Mr Hill contended for in his oral evidence and set out in part above, is plainly inconsistent with the other contents of the letter which taken together set forth a premise for why Mr Hill had not complied e.g.:

*"no listed company audits have been conducted in the past two years"
... "on this basis, the additional 40 hours has not been conducted" ...
"The additional courses would have placed an unreasonable cost and time*

burden on the auditor with no immediate opportunity to recoup the time and cost imposed".

80. In our view, it is inherently improbable that, if Mr Hill thought that he had undertaken most but not all of the training required by the ASIC Registration Conditions at the time he wrote this email, he would have responded to ASIC on 29 November 2013 using the words he used.
81. For these reasons and bearing in mind the *Briginshaw* approach, we do not accept Mr Hill's evidence that when he said the additional 40 hours had not been conducted, he meant that he "*wasn't totally comfortable*" that he had done the required total of 40 hours.
82. Turning back now to Mr Hill's evidence that he did attend all the hours of training set out in Annexure B to his statement and The Schedule, we have formed the view that, in the context of the other available evidence, and having regard to the fact that there are no contemporaneous records available of Mr Hill's personal attendance at the training, this evidence is not persuasive. In order to accept it in preference to the contemporaneous documentary evidence (the email of 29 November 2013), we would need to be confident of Mr Hill's ability to recall detailed and specific events over extended periods, a matter not at all supported by the evidence before us. Moreover, as we have already noted, his evidence regarding the meaning of the words in his email to ASIC dated 29 November 2013 is not consistent with or supported by the objective facts considered above, or the plain language of that email.
83. For these reasons we have formed the view that Mr Hill did not comply fully with Conditions (a) and (c) of the ASIC Registration Conditions.

Registration condition (b) the courses must include education about auditor requirements under the Corporations Act, auditor independence and ethics

84. ASIC contended that this condition was to be read as meaning that each of the courses to be undertaken in satisfaction of the condition must include the components enumerated, not simply for those topics to be completed as part of the 40 hours of training.
85. Mr Castle submitted that Mr Hill had complied with this condition on the basis that he had completed some courses in respect of the first two subjects and that the ethics requirement was satisfied because there was an ethics component implicit in all the courses undertaken such as to satisfy condition (b) of the ASIC Registration Conditions.
86. ASIC registration condition (b) undoubtedly lacked clarity as to the amount of the training that would be required to be undertaken in each of the areas specified. For that reason we think that it should be interpreted at its most favourable to Mr Hill which in our view would be that any specific training within each of the areas specified would satisfy the condition. We do not however accept the proposition submitted by Mr Hill's counsel that the ethics component had been satisfied on the basis that

ethics education was implicit in all of the courses Mr Hill undertook. In our view there was a clear requirement specified in the ASIC Registration Conditions, for ethics training to be included as a specific course, in the courses to be completed. The ambiguity arose only in relation to what proportion of the training was to be devoted to ethics.

87. There is evidence that on March 22 2011, Mr Hill's practice had enrolled for live on line training modules presented by the ICAA which specifically covered auditing requirements under the Act. Details of the online training were set out in Annexure E to Mr Hill's statement. Annexure E included a copy of an email from Chartered Accountants Live On-line training dated 22 March 2011 confirming a list of training sessions, the date and the starting time (although not the duration) and recording Colin Lin as attendee. There were six sessions altogether.
88. Mr Hill said in his statement that he completed sessions 3-6 of this on line training and the schedule which is Annexure B to Mr Hill's statement recorded attendance at sessions on the 19/04/2011, 4/5/2011, 17/5/2011 and 1/6/2011, each for 1.5 hours. The topics covered in those sessions were gathering audit evidence, determining materiality, evaluating errors and communicating with management, completing the audit and issuing the audit report.
89. The evidence of Mr Hill's actual attendance at the sessions suffers from the shortcoming already identified, that there is no contemporaneous corroborating evidence confirming his attendance at each of the sessions. This fact does not lead to a necessary conclusion that Mr Hill did not complete any audit training in compliance with condition (b). On the basis of the approach set out in paragraph 86, i.e. that any specific training within audit would satisfy the condition, our finding is that it is more likely than not that Mr Hill would have satisfied the audit training component of condition (b).
90. It was clear from Mr Hill's evidence, that no specific training had been undertaken by Mr Hill in the area of ethics and on this basis we find that condition (b) was not met.
91. Mr Hill gave evidence that the reference in his letter to the additional courses placing an unreasonable time and cost burden on him was a reference to the requirement that he undertake ethics training as he had not been able to identify a suitable course that did not involve a significant time commitment on his part.
92. We find Mr Hill's evidence that the part of his email which said:

"The additional courses would have placed an unreasonable cost and time burden on the auditor with no immediate opportunity to recoup the time and cost imposed"

was a reference only to not being able to identify suitable training to satisfy the ethics training, difficult to accept. The language of the email is

not consistent with such a construction. Second, Mr Hill did not refer to this matter in his statement or reply and had never raised the issue with ASIC and there are no objective facts or circumstances consistent with it. Whilst this evidence did not go to whether or not Mr Hill had completed the ethics component we have commented on it for its striking lack of cogency.

ASIC Registration Condition (d)

93. Mr Hill admitted in his response that he did not comply with condition (d) and this matter was apparently not in issue between the parties although Mr Hill was questioned in cross examination in relation to whether he had provided information to ASIC regarding training he had undertaken.
94. In response to questioning by Mr Connolly on whether Mr Hill had provided the information on the courses completed as requested by ASIC in its letter dated 11 October 2013, a matter, as we have noted, that Mr Hill had already admitted to not having done, Mr Hill seemed to avoid answering directly the question being asked. For example, when Mr Connolly asked Mr Hill "*It is correct, isn't it, that you hadn't provided any information regarding courses completed by you*" Mr Hill responded "*only the information at the beginning of the process with Alan Lee, which we had no response to*" and when asked again whether he had sent details to ASIC he said "*Only the original information to Alan Lee which contained that information, as he was requiring. We set out the details of the course and the costs and things back in 2010.*" On his own evidence Mr Hill had not even undertaken any of the courses set out in his email to Mr Lee in October 2014, which was simply a proposal. The simple and relevant answer to Mr Connolly's question, consistent with Mr Hill's admission on the matter was "*no*".
95. On the basis of the evidence, and the admission made by Mr Hill, we find that condition (d) of the ASIC Registration Conditions, was not met.

Summary of findings on evidence regarding Contention 1

96. In summary therefore our findings on the evidence specifically relevant to Contention 1 are as follows;
 - (a) Mr Hill did not comply with condition (d) of the ASIC Registration Conditions as he did not report to ASIC at the end of either of the two years on the details of courses undertaken, a matter that was not in issue between the parties;
 - (b) Mr Hill did not comply fully with condition (b) of the ASIC Registration Conditions as he did not undertake any ethics training;
 - (c) Mr Hill did not comply fully with conditions (a) and (c) of the ASIC Registration Conditions based on the evidence of the email Mr Hill wrote to ASIC on 29 November 2013 stating that he had not completed the training.

97. It has not been necessary, in reaching our conclusion on Mr Hill's compliance with ASIC Registration Conditions (a) (b) and (c), to consider the expert report of Mr Black as the reasons for our conclusion do not rely on an expert view of the questions on which Mr Black was asked to opine. The question of what weight if any would have been placed by the Panel on Mr Black's evidence, having regard to the Board's status as an expert tribunal, has not therefore arisen.

Mr Hill's evidence in cross-examination

98. In the context of our findings above we have noted some of our specific concerns as to the cogency of some of Mr Hill's answers in cross-examination. We had the opportunity to observe Mr Hill in the course of a quite lengthy cross-examination and we found his capacity to recall detailed facts was limited, especially in relation to Contention 2, and that his responses at times were indirect. His overall attitude and demeanour did not give us any confidence that he had taken the imposition of the conditions on his registration as a serious matter at all. Quite the contrary, besides the evidence that his employee Colin Lin had enrolled in the six Moment of Audit Clarity online sessions from 22nd March 2011 – 1 June 2011, there is no contemporaneous evidence of Mr Hill having taken any active steps to achieve compliance with the conditions imposed.

Finding on Contention 1

99. In the circumstances and for the reasons set out we find that, within the meaning of s1292 (1)(a)(ia) of the Act Mr Hill has failed to comply with a condition of his registration as an auditor in that he has failed to comply with conditions (a)-(d) of the ASIC Registration Conditions. Contention 1 is established.

Contention 2

100. ASIC's second contention was that, within the meaning of s1292(1)(d)(i) of the Act, Mr Hill failed to carry out or perform adequately and properly the duties of an auditor in that:
- (a) In each of his 2011, 2012 and 2013 Annual Statements, all lodged with ASIC, he stated that his registration as a company auditor was not subject to conditions imposed by ASIC, which in each case was false and misleading, being a statement on each occasion when he completed those Annual Statements that he knew to be false or misleading, or in the alternative that he was reckless as to whether the statements were accurate or not, or further in the alternative he failed to exercise proper care as to the accuracy or otherwise of the Annual Statements.
 - (b) Contrary to s1308(2) of the Act, in a document required by the Act to be lodged with ASIC, stated, in each of his 2011, 2012 and 2013 Annual Statements, all lodged with ASIC, that his registration as a Company Auditor was not subject to conditions imposed by ASIC,

when this was not the case, such statement being to his knowledge false or misleading in a material particular.

101. It is well established by the authorities that the Board's role is not to exercise judicial power and does not depend upon it being satisfied to a legal standard of the contraventions or failures, or to determine such a matter. Rather the question for the Board is the adequacy and propriety of the carrying out or performance of the relevant duty and that has to be judged by the Board making an evaluative and subjective determination (*ASIC v Allan Gregory Walker* (Decision of the Board, Matter no 06/VIC07) dated 22 December 2008).
102. The level of performance which is called for is that of "adequacy"; the standard is that the duty must be performed "properly" and in making the assessment the Board is entitled to have regard to published codes or standards of professional bodies. The accepted professional standards may be found by the Board to be set by or reflected in the published standards or codes (*Fernandez* at 48(e))
103. Our role therefore is to determine whether Contention 2 has been established on the evidence before us i.e. whether Mr Hill failed to carry out or perform adequately and properly the duties of an auditor under s12921(d)(i) and in determining that we shall have regard to whether and/or to what extent he carried out the duties identified in the first and second limb of Contention 2.
104. ASIC points to two specific duties of Mr Hill, as a registered auditor, which it contends he failed to carry out or perform adequately and properly. The first was the duty to lodge accurate annual statements in December 2011, 2012 and 2013. The second was a statutory duty to ensure that those returns did not contain information known to him to be false or misleading.
105. Section 1287A of the Act, requires a person who is a registered company auditor, within one month after the end of each 12 month period of registration, to lodge with ASIC a statement in respect of that period. The statement must contain such information as is prescribed under the regulations and must be in the prescribed form. The prescribed form is Form 912A, "Annual statement by an auditor".
106. Mr Hill was first registered as an auditor on 3 December 1982. His annual period of registration was from 3 December each year to 2 December in the following year and he was required to lodge an Annual Statement within the month following 2 December each year.
107. Mr Hill lodged Annual Statements for the years ending 2 December 2013, 2012 and 2011 on the following dates respectively: 24 December 2013, 24 December 2012 and 12 December 2011.

108. In each of those Annual Statements, Mr Hill declared that to the best of his knowledge and belief, the information supplied in and with the Statement was complete and accurate.
109. ASIC contends that in each case that declaration was untrue, because Mr Hill's negative answer to the question "*Is your registration as a company auditor subject to conditions imposed by ASIC?*" was false and misleading.
110. Mr Hill admits that each of the Annual Statements was incorrect by reason that it did not refer to the conditions imposed by ASIC or respond to the question whether he had complied with those conditions and says that the incorrect completion of the Statements was not the product of any conscious, deliberate or reckless act on his part to conceal or create an incorrect impression about the imposition of the conditions or his compliance with those conditions, but was the product of inadvertence on his part.

Duty under Section 1292(1)(d)(i)

111. The Respondent submitted either that it was not the duty of an auditor, within s1292(1)(d)(i) to complete the Annual Statements or that it was not a duty to complete them 100% accurately on the basis that there must be a level of tolerance in any system for errors which occur.
112. We have already set out our view that the obligation on registered auditors to complete the Annual Statement annually is a duty comprehended by s1292(1)(d)(i) (see paragraphs 12-23 above). We agree with ASIC's submission that there is a statutory requirement for the maintenance of registration as an auditor under the Act and a correlating duty is to complete the Annual Statements properly under subparagraph (1)(d).

The Board's approach to assessing the extent to which Mr Hill failed to perform the duty adequately and properly

113. The allegations made in Contention 2 present a number of issues for consideration:
 - (a) The first is whether the allegation that Mr Hill completed the Annual Statements knowing they were false is an allegation of dishonesty and if so, whether the allegation of dishonesty has been sufficiently pleaded and particularised;
 - (b) Second, if the allegation of dishonesty is properly pleaded and particularised, whether the evidence adduced by ASIC establishes dishonesty;
 - (c) Third, what is required to establish the alternative allegation of recklessness;
 - (d) Fourth, does recklessness amount to an allegation of dishonesty and if so has the allegation been sufficiently pleaded and particularised;

- (e) Fifth, if recklessness is properly pleaded and particularised whether the evidence adduced by ASIC establishes recklessness;
- (f) Sixth the extent to which Mr Hill has failed to exercise proper care in completing the Annual Statements.
- (g) Whether the allegation made in the second limb of Contention 2 involves dishonesty and whether a case of dishonesty been established. The answer to the question in relation to the second limb of Contention 2 will be informed by our consideration and conclusion on the issues identified in (a) above.

Is the allegation that Mr Hill completed the Annual Statements knowing they were false an allegation of dishonesty and if so, has the allegation of dishonesty been sufficiently particularised and established?

- 114. An allegation of dishonesty must be made “clearly and without ambiguity”: *Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee* (1945) 72 CLR 37 at 63 (Latham CJ).
- 115. In *Fortescue Metals Group Ltd v Australian Securities and Investments Commission* (2012) 247 CLR 486; (2012) 291 ALR 399; [2012] HCA 39, the High Court said, at [26]:

“... It is fundamental, and long established, that if a case of fraud is to be mounted, it should be pleaded specifically and with particularity *Wallingford v Mutual Society* (1880) 5 App Cas 685 at 697, 701, 704 and 709; *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 285. A pleading of fraud will necessarily focus attention upon what it was that the person making the statement intended to convey by its making. And the pleading must make plain that it is alleged that the person who made the statement knew it to be false or was careless as to its truth or falsity. If an alternative case of misleading or deceptive conduct is to be advanced, it is necessary to identify that claim as separate from the allegation of fraud.”
- 116. While this statement was made in relation to an allegation of deceit, it is clear that the principle applies generally to allegations of dishonesty. The rule requiring dishonesty to be pleaded clearly and with particularity is a general rule of practice: *Banque Commerciale SA En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 per Mason CJ and Gaudron J at 285; *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250, at 268. It is not restricted to courts of strict pleading: *Minister for Crown Lands v Tweed Byron Aboriginal Land Council* (1990) 71 LGRA 201. The rule is applicable to disciplinary tribunals, see for example: *Puryer v Legal Services Commissioner* [2012] QCA 300 at [16]-[22].
- 117. The requirements for clarity and particularity “do not require that the word ‘fraud’ or the word ‘dishonesty’ must necessarily be used ... The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a

case it is incumbent upon the pleader to make clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal": Buckley LJ in *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250, at 268.

118. Cases alleging dishonesty may be based upon inference. However, if a case is based upon inference, the matters said to give rise to the inference must be particularised. As Lord Millet said in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 186:
- "It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."*
119. Contention 2 does not contain an express allegation of dishonesty. However, that does not matter if the language otherwise used makes a sufficiently clear allegation of dishonesty. In our view, the matters which allege dishonesty in Contention 2 of the SOFAC are those in sub paragraph (i) that Mr Hill knowingly made a false and misleading statement in each of his annual returns or that he made those statements recklessly and the allegation in subparagraph (ii) that he knowingly submitted false and misleading returns to ASIC contrary to s1308(2) of the Act. Section 1308(2) provides that a person commits an offence when he or she makes a relevant statement "*that to the person's knowledge*" is false or misleading in a material particular.
120. Whether a case of dishonesty was clearly alleged is informed by a consideration of the second question of whether any allegation of dishonesty is fully particularised and we turn to consider that issue.
121. The matters which are said to constitute particulars of the allegation Mr Hill knowingly submitted false information in the Annual Statements are set out in paragraphs 18-24 of the revised SOFAC. Do these matters provide particulars of the allegation that Mr Hill was dishonest and specifically, particulars of an allegation that he knew of the falsity of the statement in the Annual Statement? We bear in mind the High Court's observation in *Fortescue* that any pleading of dishonesty will necessarily focus attention upon the person's state of mind.
122. The particulars in paragraphs 18-24 of the revised SOFAC state that, based on Mr Hill's knowledge from 11 April 2011 that conditions on his registration had been imposed, and his response to ASIC on 29 November 2013 that he had not complied with these conditions, Mr Hill knew he had not complied with the conditions, or was reckless in that regard. ASIC has therefore pleaded the particulars of the circumstances on which it relies to allege that Mr Hill knew of the conditions on his registration and particulars of the three consecutive annual returns which answered "no" to

the question of whether Mr Hill was subject to any conditions. It follows that the allegation of dishonesty is in our view sufficiently pleaded.

Does the evidence establish dishonesty?

123. The next question is whether there is a sufficient basis for finding dishonesty? Clearly Mr Hill knew that conditions were imposed on his licence and yet he included in each of the relevant Annual Statements information that his registration was not subject to conditions.
124. Mr Hill's evidence was that his executive assistant prepared each of the Annual Statements. Once completed he would check the Annual Statement before signing it, paying particular attention to the details relating to clients, specifically resignations/removals and audit client details, including names and fees.
125. Mr Hill confirmed that he had received the letter from ASIC dated 11 April 2011 imposing conditions on his registration as an auditor and he confirmed that he understood his registration was subject to conditions and why they had been imposed. He confirmed that he understood what the annual returns said. He said that he did not give the person who was taking responsibility for preparing the Annual Statement each year any particular instructions regarding completion of the document.
126. Mr Hill stated that he believed the errors arose in the Annual Statements in the years in question because his executive assistant prepared the non-client part of each Annual Statement by copying details appearing in the previous year's statement.
127. Mr Hill said that he does not recall the conditions on his registration being in his mind in December 2011 when he completed the first of the Annual Statements. His evidence was that there was no conscious, deliberate or reckless intention on his part to avoid disclosing or to suppress the imposition of the conditions from the public record and by way of explanation can only point to significant pressures on him in late 2011 which led him to overlook this issue. In the absence of correctly responding to the compliance with conditions question in the Annual Statement in 2011 he said there was no reason why the issue would have come to mind when completing the 2012 and 2013 Annual Statement.
128. When asked directly whether, when he signed the Annual Statement in 2011 he knew it to be false Mr Hill answered;

"No. I would not sign a form deliberately that I knew to be false. I would not do that. I've been an auditor for 30 years. I would not do that. Yes, I overlooked it, but I did not sign it knowing it was wrong."
129. In making our findings on whether Mr Hill made the statements knowing they were false, we need to bear in mind the *Briginshaw* approach. In *Briginshaw v Briginshaw*¹ Dixon J said (at 368-9):

¹ (1938) 60 CLR 336.

“Upon an issue of adultery in a matrimonial cause the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact. Further, circumstantial evidence cannot satisfy a sound judgment of a state of facts if it is susceptible of some other not improbable explanation. But if the proofs adduced, when subjected to these tests, satisfy the tribunal of fact that the adultery alleged was committed, it should so find.”

130. The relevant question is whether the evidence adduced by ASIC supports a conclusion of a deliberate decision by Mr Hill not to refer to the conditions on his licence when completing the three Annual Statements or any of them, or whether the evidence is susceptible of some other “not improbable explanation”?
131. On the basis of the evidence adduced, Mr Connolly submitted that:
- (a) Mr Hill’s evidence that the conditions on his registration did not come to mind when he signed his 2013 Annual Statement even though he had corresponded with ASIC in relation to compliance with those conditions less than three weeks before, is not credible.
 - (b) Mr Hill’s inability to explain how he could have allowed the answer “no” to the question whether there were conditions on his registration is inexplicable and would justify the Board drawing the conclusion that he was fully aware that the answer was false.
 - (c) It can be inferred from the circumstances that Mr Hill did know that his answer in the 2013 Annual Statement to the question of whether there were conditions on his registration was false.
 - (d) Finally, although the circumstances are not as clear in 2011 and 2012, the evidence is that Mr Hill agreed that when he checked the audit tables in the Annual Statements, he turned his mind to the question of audit rotation which then must have brought to mind the hearing with ASIC in 2010 and the subsequent conditions placed on his registration. It was not credible that he would not have turned his mind to the existence of those conditions and so it is inexplicable and incredible that he did not realise the answers in the Annual Statements for 2011 and 2012 were untrue.
132. In order to establish dishonesty it is necessary to show that Mr Hill had some knowledge or belief or intent which according to the standard of the ordinary person, made his actions dishonest (*Macleod v R* (2003) 214 CLR 230).
133. We have carefully considered the evidence and the objective facts and circumstances relevant to the allegation that Mr Hill submitted the Annual Statements for each of the three years knowing they were false.

134. We agree that, particularly in the circumstances of the 2013 Annual Statement, the fact that it did not come to Mr Hill's mind that there were conditions on his registration seems extraordinary. However, the explanation given by Mr Hill, (while it does not exonerate him in terms of discharging his duties adequately and properly under s1292(1)(d)(i)) does provide, in the words of *Briginshaw*, another not improbable explanation of the circumstances in which the Annual Statements came to be inaccurate. Accordingly, we do not consider that it is open to us to infer that Mr Hill completed any of the Annual Statements knowing he was providing false information as to do so would amount to making a finding of intentional dishonesty when the facts are susceptible of some other not improbable explanation.

What is required to establish the alternative allegation of recklessness on Mr Hill's part, does recklessness amount to dishonesty and has recklessness been established?

135. ASIC contended in the alternative that Mr Hill was reckless as to whether the Annual Statements were completed accurately. That allegation relies upon the same particulars as the allegation that he knew the Annual Statements were false. For the reasons set out above we are satisfied that it is sufficiently pleaded.
136. In our view in order to establish that Mr Hill was reckless in completing the Annual Statements the Applicant must show that Mr Hill was aware of the possibility that the forms could be substantively inaccurate in the manner alleged by Contention 2, that this was impermissible and that he proceeded regardless. The key element for establishing recklessness is whether Mr Hill was consciously indifferent to the truth of the answers given. (see *Prepaid Services Pty Ltd v Atradius Credit Insurance NV* 2013 NSWCA 252 at [51])
137. Based on relevant principles, a finding of recklessness would in our view also amount to a finding of dishonesty and therefore civil fraud. In *Forrest v Australian Securities and Investments Commission* [2012] HCA 39; 86 ALJR 1183 at [22], it was emphasised that a false statement "*made through carelessness and without reasonable grounds for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud.*"
138. The allegation of recklessness is also a serious matter requiring us to make a finding as to Mr Hill's state of mind and the principles in *Briginshaw*, already set out, apply.
139. What must be proved to establish fraud was stated by Lord Herschell in *Derry v Peek* (1889) 14 App Cas 337 at 374 in the following terms:
- "...Fraud is proved when it is shewn that a false representation is being made (1) knowingly (2) without belief in its truth or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief*

in the truth of what he states. To prevent a false statement being fraudulent, there must I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief."

140. Lord Herschell went on to note that the formulation set out above covers the whole ground because someone who knowingly represents what is false obviously has no honest belief, and someone who is indifferent to whether a representation is true or false can have no honest belief as to its truth (at [374]). In *Prepaid Services v Atradius Credit Insurance* Meagher JA at [40] stated that being reckless or indifferent to something describes a state of mind or consciousness: *Angus v Clifford* [1891] 2 Ch 449 at 471, *Fidock v Legal Profession Complaints Committee* [2013] WASCA 108 at [93]-[97] (Martin CJ, Newnes and Murphy JJA). The fact of that indifference is the basis for the conclusion as to the absence of any real belief, which is a finding as to the person's state of mind: (*Banditt v The Queen* [2005] HCA 80; 224 CLR 262 at [2]).
141. In *Prepaid Services v Atradius Credit Insurance*, Atradius had denied liability under a contract of insurance on several bases. In the decision at first instance the primary judge had held that the answers to two of the questions on the proposal were wrong and concluded that the officer of the appellant had been recklessly indifferent to the truth of those answers. He concluded therefore that those misrepresentations were fraudulent and the relevant issue on appeal was whether the primary judge erred in holding that the misrepresentations made by the answers to the questions were fraudulent.
142. In the court of appeal judgment Meagher JA carefully analysed the evidence given at first instance in relation to the misrepresentations held to be fraudulent. He noted that the appellant's witness Mr McQuade had agreed that he could not have checked the version of the proposal he received carefully and did not deny the possibility that in all probability he had not read the relevant questions and answers at all and responded that he "*certainly didn't give them enough care*" (at [44]). In answer to the cross examiner's question that there was another explanation for what he had done, namely that he had deliberately signed the form knowing that it contained inaccurate and indeed false answers Mr McQuade denied that was the position and this was accepted by the primary judge [45].
143. In the *Prepaid Services v Atradius Credit Insurance* case at first instance, the cross examiner had not suggested to Mr McQuade, that there was any further explanation for the failures other than that he had deliberately signed the proposal form. Meagher JA noted that "*the relevant further explanation would have been that those failures could not be explained by mere, or even gross, carelessness but rather reflected the fact that he did not care, before and at the time that he signed the proposal, whether the answers in it were correct or not*" [46].
144. Meagher went on to say; "*Although the primary judge's ultimate conclusion is expressed in terms of "reckless indifference" to the truth of*

the relevant answers, His Honour does not in his reasons justifying that conclusion identify us being a necessary part of the relevant inquiry whether Mr McQuade was indifferent to the truth of the answers in the proposal. Nor does his Honour make any separate finding that this was or must have been Mr McQuade's state of mind at the relevant time." [47]

145. There were three matters that led Meagher JA in *Prepaid Services v Atradius Credit Insurance* to conclude that the primary judge erred in failing to address whether Mr McQuade was consciously indifferent to the truth of the relevant answers:
- (a) First, that the formulation of the relevant question, and the five reasons which were given in support of its conclusion, were concerned with an objective assessment of Mr McQuade's conduct as careless, excessively lax and indeed reckless. In accordance with the statement in *Forrest v ASIC* referred to above, those objective considerations were evidence of Mr McQuade not caring that the answers may not be true, but were not determinative of that question. The primary judge had given no consideration in his reasons to the ultimate question, which was whether Mr McQuade was consciously indifferent to the truth of the answers given;
 - (b) second that in addressing the question of whether Mr McQuade was consciously indifferent to the truth of the answers given, it would have been necessary for the primary judge to consider his earlier findings as to Mr McQuade's intention and state of mind in participating in the completion of the proposal form and two of those findings were consistent with Mr McQuade caring that the answers were correct; and
 - (c) third, the primary judge's finding that a third misrepresentation alleged had not been fraudulent because Mr McQuade could have had an honest belief in its truth, was not consistent with the finding he went on to make of reckless indifference in relation to completion of the proposal form as a whole.
146. A further issue which was considered by Meagher JA in the appeal was the appellant's contention that the primary judge's conclusion of fraudulent misrepresentation was not reasonably open to him to make because it had not directly been put to Mr McQuade in cross examination. The appellants relied upon the application of the rule in *Browne v Dunn* (1893) 6 R 67 that ordinarily, if a party contends that a particular characterisation should be placed on a witness' conduct, the witness should be given the opportunity to deal with that contention. (*Browne v Dunn* at 70-71)
147. In considering this submission Meagher JA noted that the case pleaded was that the representations were made "*recklessly, by not caring whether they were true or false*". The cross examiner had not however put a further possible explanation to Mr McQuade, namely that Mr McQuade did not care whether the answers on the proposal form were true or not. Meagher held that that proposition should have been put so as to give Mr

McQuade the opportunity to deal with it, especially in light of his other evidence as to his state of mind. In the absence of that occurring, Meagher JA held relying on the High Court's judgment in *Permanent Trustee Australia Ltd v FAI General Insurance Company Ltd* (in liq) 214 CLR 514 that an allegation of fraud should be clearly and distinctly pleaded and put, and that it was not open to the primary judge to make a finding of fraud on the part of Mr McQuade based on conscious indifference. (at [54])

148. We have set out the findings of the NSW Court of Appeal in *Prepaid Services v Atradius Credit Insurance* in some detail as Meagher JA's judgment provides significant relevant guidance with respect to our approach to a finding as to whether Mr Hill was reckless, a matter on which neither party made submissions.
149. The key evidentiary issue in order for us to be able to make a finding on the case of recklessness pleaded by ASIC is that Mr Hill was consciously indifferent to the accuracy of the statements he made in the relevant returns. Such a finding relies on us forming a view as to Mr Hill's state of mind.
150. When Mr Hill was asked directly whether when he signed the Annual Statement in 2011 he knew it to be false answered:
- "No. I would not sign a form deliberately that I knew to be false. I would not do that. I've been an auditor for 30 years. I would not do that. Yes, I overlooked it, but I did not sign it knowing it was wrong."*
151. Mr Hill was also asked whether, when he was about to sign the 2013 return and saw that the answer no had been checked, whether it must have occurred to him that that answer was incorrect.
- Mr Hill answered:
- "Well if I'd read that particular section probably, yes I agree with you."*
- Mr Connolly:
- "Are you saying you didn't read it properly?"*
- Mr Hill:
- "Well, I mean, the fact is that I perused it and obviously that didn't arise in my reading of it, I overlooked it."*
- Mr Connolly:
- "How could it not arise in the circumstances of December 2013 Mr Hill?"*
- Mr Hill:
- "I don't know I can't answer".*
- Mr Connolly:
- "It must have come to mind that you were subject to conditions?"*
- Mr Hill:

"Well I have just said it didn't come to mind so - it didn't come to mind. That's all I can say."

Mr Connolly:

"Can you explain how it could not have?"

Mr Hill:

"No I can't I overlooked it. If it did, I wouldn't have signed it; I would have changed it. I had nothing to gain from putting "No" nothing at all."

Mr Hill was asked the same question in relation to the 2011 form and his answer was:

"Well I have the same answer: they didn't, or I wouldn't have signed it."

152. In our view the questions put to Mr Hill when he was cross-examined did not squarely address the case of recklessness pleaded by ASIC. That is to say no question was put to Mr Hill, in terms of the recklessness case pleaded, that he had been reckless or did not care whether each of the Annual Statements was accurate or not when completing the statements.
153. In those circumstances Mr Hill was not given an opportunity to deal with the allegation made by ASIC. We therefore conclude, based on Meagher JA's comments in *Prepaid Services v Atradrius Credit Insurance*, that it is not open to us to make a finding of recklessness, even though we do find it quite extraordinary that in not one of the three years, but particularly in 2013, Mr Hill apparently made no conscious connection between completing the annual return required to renew his registration as an auditor and the conditions which had been imposed on that registration as the result of a recent disciplinary process relating to another breach of his duty as an auditor.

The extent to which Mr Hill has failed to exercise proper care in completing the Annual Statements.

154. ASIC contends in the further alternative under the first limb of Contention 2 that Mr Hill failed to exercise proper care in completing the Annual Statements. Mr Hill admits that each of the Annual Statements was incorrect by reason that it did not refer to the conditions imposed by ASIC or to his compliance with those conditions and says that the incorrect completion of the Annual Statements was not the product of any conscious, deliberate or reckless act on his part to conceal or create an incorrect impression about the imposition of the conditions or his compliance with those conditions, but was the product of inadvertence on his part.
155. ASIC contended that Mr Hill was grossly negligent in attending to his duty to ensure these forms were correctly and not misleadingly completed, and therefore still fell well below the standard required by s1292(1)(d)(i).

156. In order to make a finding in relation to the allegation that Mr Hill has not exercised proper care we must objectively assess the evidence regarding Mr Hill's conduct.
157. Each of the Annual Statements contained a false or misleading statement that Mr Hill's registration was unconditional and that to the best of his knowledge and belief the forms were complete and accurate – both substantive matters. Although not relied on by ASIC as part of its complaint, further omissions from the Annual Statements were identified:
- (a) the Annual Statement for 2011 did not record Mr Hill's resignation as auditor of Meridien Ltd; and
 - (b) the 2012 and 2013 Annual Statements omitted information regarding the number of years Mr Hill had been auditor of Bounty Oil and Gas NL.
158. As is clear from the evidence, each of the Annual Statements contained substantive omissions. In our view the omission to disclose that Mr Hill's registration was subject to conditions did not amount to a technical or minor oversight relating as it did to the substantive issue of conditions that had been placed on Mr Hill's licence. Nor was that error isolated to just one Annual Statement, but occurred for three successive years.
159. We reject the submission made by Mr Castle that the omission to disclose that Mr Hill's registration was subject to conditions fell within a level of tolerance necessary having regard to commercial reality.
160. Mr Hill, as the registered auditor, should have ensured that he was personally aware of the specific requirements of the Annual Statement required by the Act to be filed by him annually in order to maintain his registration as an auditor. If the job of completing a first draft of the form was to be delegated to an executive assistant as the evidence shows, at the very least Mr Hill should have provided her with instructions about what was to be done and the importance of complete and accurate information.
161. The evidence that Mr Hill was prepared to attest to the accuracy of the contents of each of the Annual Statements to the best of his knowledge without even checking the contents carefully is most concerning. We regard this conduct as entirely inconsistent with the professionalism, judgment, insight, care and diligence required of a registered auditor and Mr Hill should have been aware of the potential for substantive inaccuracies to occur and that consequences may attach to such inaccuracies.
162. While for the reasons stated there has not been a finding made that Mr Hill deliberately or recklessly completed the Annual Statements inaccurately, we have formed the view that on an objective assessment of the evidence Mr Hill's conduct was grossly careless.

163. In our view the case that Mr Hill did not exercise proper care in omitting to disclose in his Annual Statement for three years that his registration was subject to conditions is more than comfortably made out on the balance of probabilities, even with the *Briginshaw* approach in mind.

Does the allegation made in the second limb of Contention 2 involve dishonesty and has a case of dishonesty been established.

164. It follows from the finding made in paragraph 134 that we are not prepared to make a finding on the evidence adduced that Mr Hill knowingly completed the returns in contravention of s1308(2) of the Act.

Finding on Contention Two

165. The various allegations in Contention 2 as to the character of Mr Hill's conduct that failed to meet the standard required by s1292(1)(d)(i) were made in the alternative by ASIC.
166. Based on our findings in paragraph's 157-164 hereof that Mr Hill failed to exercise proper care in completing the Annual Statements in 2011, 2012 and 2013 by stating in each of those Annual Statements that his registration as a company auditor was not subject to conditions imposed by ASIC, which in each case was false and misleading.
167. We find that Contention 2 is established.

Contention 3

168. Contention 3 alleges that within the meaning of s1292(1)(d) of the Act, Hill is not a fit and proper person to remain registered as an auditor. The particulars in the SOFAC set forth the basis of this allegation on the grounds that each of his 2011, 2012 and 2013 Annual Statements contained a false or misleading statement that his registration as a company auditor was not subject to conditions imposed by ASIC (made by Mr Hill knowingly, or in the alternative recklessly, or further in the alternative without due care).

"Fit and proper"

169. The pre-eminent authority on the meaning of "fit and proper person" is *Hughes and Vale Pty Ltd v The State of New South Wales (No. 2)* (1955) 93 CLR 127, particularly the following passage in the judgment of Dixon CJ, McTiernan and Webb JJ at 156-7:

"The expression "fit and proper person" is of course familiar enough as traditional words when used with reference to offices and perhaps vocations. But their very purpose is to give the widest scope for judgment and indeed for rejection. "Fit" (or "idoneus") with respect to an office is said to involve three things, honesty, knowledge and ability: "honesty to execute it truly, without malice affection or partiality; knowledge to know what he ought duly to do; and ability as well in estate as in body, that he

may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it" - Coke. When the question was whether a man was a fit and proper person to hold a licence for the sale of liquor it was considered that it ought not to be confined to an inquiry into his character and that it would be unwise to attempt any definition of the matters which may legitimately be inquired into; each case must depend upon its own circumstances: R. v Hyde Justices (1912) 1 KB 645, at p 664"

170. The expression is employed as a test for capacity to perform an office or role in widely differing contexts. Whilst there are three facets to the test - "honesty, knowledge and ability" - these are flexible concepts. The "honesty, knowledge and ability" required will be informed by the nature of the office concerned, in this case the nature and obligations of the role of a registered auditor.

Fit and proper is a separate finding under s 1291(1)(d)(i)

171. In *Davies v Australian Securities Commission*, (1995) 59 FCR 22, Hill J considered a submission that s 1292(1)(d) of the Law, (the predecessor to the present s 1292 (1)(d)), did not permit a finding only of failure to carry out or perform adequately and properly the duties referred to in sub-para (i) and (ii) without a finding that the failure was such as to bring about the conclusion that the person so failing was not a fit and proper person to remain registered as an auditor.

172. In rejecting the argument at page 233, his Honour said²:

"There is an obvious difficulty in the construction which is urged on his behalf. Had the legislature intended that it be necessary before s 1292(1)(d) was attracted that it be shown that a registered person was not a fit and proper person to be an auditor, it would have been easy for the legislature to have merely stipulated in s 1292(1)(d) that the person be found not to have been a fit and proper person to remain registered. It would have been unnecessary to have mentioned the specific matters in cl (i) and (ii) of the sub-clause. This is a difficulty in the way of the construction urged by counsel for Mr Davies at least as great as the difficulty thrown up by the use of the words 'or is otherwise' for the construction adopted by the tribunal.

I think the better interpretation is that for s 1292(1)(d) to be attracted there are three separate and independent alternatives. The first is a failure to carry out or perform adequately and properly the duties of an auditor. The second is a failure to carry or perform adequately and properly the duties or functions referred to in sub-para (ii) and the third and alternative requirement is that it be shown that the registered person is not a fit and proper person to remain registered. If the words 'or is otherwise' have any significance at all it is to express a legislative view that a person who does not carry out or perform adequately and properly

² See also *Re Young and Companies Auditors and Liquidators Disciplinary Board* (2000) 35 ACSR 83 (AAT) at [5]-[7].

the duties or functions referred to in sub-paras (i) and (ii) will ordinarily not be a fit and proper person to remain registered as an auditor. To the extent that there are cases which do not warrant cancellation or suspension, these may be dealt with either by the general discretion conferred upon the board in s1292(1) or the power to impose a lesser disciplinary punishment contained in s1292(9).” (emphasis added).

173. We consider that the High Court in *Albarran v the Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) HCA 23 applied the same approach in stating that the words “otherwise not a fit and proper person” in s1292(2)(d) “expanded or added to” sub-paragraphs (i) and (ii).

174. In other words, a failure to carry out or perform adequately and properly the duties of an auditor or the duties and functions of an auditor within s 1292(1)(d)(i) and (ii) may be established whether or not such failure is sufficiently serious to establish that the person is not a fit and proper person to remain registered.

175. In contrast, Lindgren J, in *Gould v Companies Auditors and Liquidators Disciplinary Board* (2009) FCA 475 held that a failure within sub-paragraph (d)(ii) will “*without more, demonstrate that the person is not a fit and proper person to remain registered*”. His Honour stated (at [102]):

“[102] The words ‘or is otherwise not a fit and proper person to remain registered as a liquidator’ provide an alternative to the criteria that precede in sub-paras (i) and (ii). Paragraph (d) must, however, be read as a whole. Its criteria can be analysed as follows (I will refer only to para (i) but the same analysis applies to para (ii)):

- (1) failure to perform adequately and properly the duties of a liquidator; or*
- (2) being otherwise not a fit and proper person to remain registered as a liquidator.*

The word ‘otherwise’ shows that the provision takes it for granted that a failure of the kind described in (1) will, without more, demonstrate that the person is not a fit and proper person to remain registered as a liquidator.”

176. We adopt the views of Hill J in *Davies*, namely, that to the extent that the phrase “*or is otherwise*” has any significance at all, it is to express a legislative view that a person who does not carry out or perform adequately and properly the duties or functions referred to in sub-paras (i) and (ii) will ordinarily not be a fit and proper person to remain registered. But circumstances may well occur where a person has failed to carry out or perform adequately and properly the duties or functions of a registered auditor without that failure demonstrating that he or she is not a fit and proper person. In such a case, the Board may decide not to exercise its powers. After all, the Board has a discretion. Where it is satisfied of the requisite matters, it “*may*” cancel or suspend. However, it may not (cf.

s1292(7)). Alternatively, if the Board considers that the failure does not warrant cancellation or suspension, the Board may impose a lesser disciplinary sanction contained in s 1292(9).

Finding on Contention 3

177. Contention 3 alleges that Mr Hill is not fit and proper to remain registered as an auditor because the statements in his 2011, 2012 and 2013 Annual Statements were misleading and were made by Mr Hill knowingly, recklessly or without proper care. We have found in the context of Contention 2 Mr Hill failed to exercise proper care in completing his Annual Statements and this resulted in those annual statements being false and misleading. We have not made a finding that the way in which Mr Hill completed the Annual Statements involved any dishonesty on his part for the reasons already set out. While this is a relevant matter in our consideration of whether Contention 3 has been established, it is not determinative.
178. Adopting the approach set out above that a person who does not carry out or perform adequately and properly the duties or functions referred to in sub-paras (i) and (ii) will ordinarily not be a fit and proper person to remain registered (*Davies*) the question for us to determine is whether Mr Hill's conduct, based on the evidence adduced by ASIC in relation to Mr Hill's conduct with regard to his Annual Statements for the years 2011, 2012 and 2013, as well as not meeting the standard in s1292(1)(d)(i) as we have already found, also warrants a finding under s1292(1)(d)(i) that Mr Hill is "not fit and proper to remain registered as an auditor."
179. The requirements for "*honesty, knowledge and ability*" need to be considered in the light of the nature and obligations of the office of registered auditor. There is no doubt that the law places onerous and important responsibilities on auditors, which include duties of a public nature. The public is entitled to assume that auditors maintain very high professional standards.
180. Registration as a company auditor under the Act also brings with it a consequent set of obligations, responsibilities and privileges. A person, before being registered must demonstrate competence, fitness and propriety. ASIC regulatory guide 180 states that ASIC will only be satisfied that a person is a fit and proper person to be registered as a company auditor if they are satisfied as to the overall capability, honesty, integrity and good reputation of the applicant. Fitness and propriety is not only a requirement of initial registration but of remaining registered.
181. In addition to dealings with audit clients, Mr Hill's role as a registered auditor carries with it requirements as a regulated person with reporting responsibilities under the Act in relation to his auditing roles, to regularly provide information to ASIC. The credibility and robustness of the regulatory process relies upon the trustworthiness and reliability of those registered to make sure they find out what is required of them at all times and execute those requirements diligently. That is no doubt one of the

reasons for requiring fitness and propriety as well as capability to be demonstrated before registration under the Act can be granted.

182. There is no doubt that the findings we have made regarding Mr Hill's conduct in relation to the Annual Statements lodged in 2011, 2012 and 2013, amount to a serious failure on Mr Hill's part and we are guided by the principle in *Davies* that a person who does not carry out their duties adequately and properly will not ordinarily be a fit and proper person to remain registered.
183. We find some aspects of Mr Hill's evidence regarding the process he adopted for completing the Annual Statements very troubling. He was prepared to attest to the accuracy and completeness of the returns without even fully or properly checking them and in circumstances where the details had been completed by administrative staff who had been given no instructions regarding their completion.
184. That course of conduct was not an isolated occurrence but occurred for three consecutive years. Even in 2013, when he had only recently corresponded with ASIC regarding the status of compliance with conditions on his registration, he did not apparently make any connection between completion of the Annual Statement, a process critical for the maintenance of his registration as an auditor, and the conditions imposed on his registration. In terms of "fitness", Mr Hill has not demonstrated, in the words of *Coke* quoted in *Hughes v Vale*, "*knowledge to know what he ought duly to do*" (at 156).
185. A touchstone of propriety must be that a registered company auditor can be relied on only to attest to the completeness and accuracy of documents to the best of his knowledge in circumstances where he has been diligent to ensure, and can demonstrate, that his signature stands as verification for the relevant contents. That is not to say that any document attested to in this manner may not contain an error without a presumption of impropriety arising. The words "*to the best of my knowledge*" contained in the attestation in our view acknowledge this. However, in circumstances where the registered auditor takes no steps or insufficient steps to verify that the contents accord with his knowledge, or no steps or insufficient steps to check the accuracy and completeness, there is impropriety.
186. We have formed the view based on the conduct set out in paragraphs 183 and 184 and for the reasons we have set out that Mr Hill is not a fit and proper person to remain registered.
187. A matter that was raised at the hearing was that the Annual Statements are lodged with ASIC but are not publicly available. It was put in mitigation of the conduct, that there was no scope for the public to be misled by the inaccuracies in the Annual Statements. In our view this misses the point, particularly in this matter. ASIC, in Regulatory Guide 180 on auditor registration (September 2012), refers to the purpose of lodging Annual Statements and highlights that the Annual Statement provides ASIC with up-to-date information for monitoring purposes (and therefore time

extensions for lodgement will only be granted in exceptional circumstances).

188. The fact therefore that the three Annual Statements did not disclose that Mr Hill's registration was subject to conditions had a direct impact on ASIC's ability to monitor compliance with those conditions. ASIC relies on the veracity of the information provided. This only underscores the point that trust in those registered to undertake their responsibilities diligently is a fundamental tenet of the regulatory framework and therefore critical to uphold in order to maintain the credibility of that framework.
189. We find Contention 3 is established.
190. We have given very serious consideration to this issue because a finding that a person is not a fit and proper person to remain registered is not lightly made, however the facts here demonstrate a fundamental disregard on Mr Hill's part for observance of a most basic obligation of his office, that if he is prepared to attest to information that is complete and accurate to the best of his knowledge he must be aware of and take steps to verify the information being provided.

Appropriate orders

Sanctions Hearing

191. On 11 November 2014, the Panel held a hearing in relation to what orders, if any, should be made under s1292(1) of the Act in relation to Mr Hill, having regard to our determination that Mr Hill contravened s1292(1)(a)(ia)[second], failed to carry out or perform adequately and properly the duties of an auditor and is not a fit and proper person to remain registered as an auditor under s1292(1)(d) ("the Sanctions Hearing"). Mr Hill was represented by counsel Mr Tim Castle. ASIC was represented by counsel, Mr Andrew Connolly.

Summary of Mr Hill's evidence and submissions on sanction

192. Mr Hill's counsel submitted that a cancellation of Mr Hill's registration would be disproportionate to the errors made by Mr Hill and made the following points:
 - (a) There was no finding of dishonesty or recklessness against Mr Hill;
 - (b) Mr Hill did not defraud anyone;
 - (c) Mr Hill's conduct did not cause a single member of the public any loss; and
 - (d) No member of the public was reliant upon the correct filing of any of the documents that Mr Hill erroneously completed.
193. Mr Hill's counsel further submitted that the following matters were relevant for the Board to consider:

- (a) The only party with access to the offending Annual Statements was ASIC and it was already aware of the information Mr Hill had not included, did nothing about it at the time and produced no evidence to suggest that anyone was even monitoring the statements lodged;
 - (b) ASIC Registration Conditions (a)-(c) on Mr Hill's registration were uncertain in their operation;
 - (c) Mr Hill acknowledged from the outset of the proceedings that he had breached registration condition (d) to report annually to ASIC on his compliance with the conditions imposed;
 - (d) A failure by ASIC to respond to Mr Hill's attempts to engage in discussion about the nature of conditions to be imposed and in relation to Mr Padarath's letter of 11 October 2013 is relevant to the exercise of the Board's discretion and ought to be taken into account;
 - (e) Mr Hill has had a long and successful period of thirty years in practice with only one prior issue with ASIC which Mr Hill readily disclosed to the Board in these proceedings;
 - (f) The strong supportive references from a range of well-respected individuals in the accounting, business and commercial community;
 - (g) Mr Hill's explanation that the lapses were a result of his workload at the relevant times and that since the determination he has undertaken a compliance review to minimise the risk of future breaches by him or his firm; and
 - (h) The factors set out in *Rich v ASIC* 2004 (HCA) 42 as to the Board's exercise of discretion in determining an appropriate sanction.
194. Mr Hill filed a further statement in the proceedings annexing;
- (a) a report from Korda Mentha dated 4 November 2014 making recommendations for a compliance plan for Mr Hill's firm to address the areas of concern identified by the subject matter of these disciplinary proceedings; and
 - (b) references from Mr Ian Ferrier AM, Ms Allison Stanfield, Mr Philip Kelso, Dr Keith Hartmann AM and Mr Frederick Kempson.
195. Mr Hill indicated in his statement that an Operational Compliance Plan ("OCP") had been prepared and introduced to the firm and that he would be prepared to provide an undertaking that Korda Mentha conduct 6 monthly reviews of the firm's compliance with the OCP over the next two years. He said he would also be prepared to provide an undertaking that he identify and attend independence and ethics training at a suitable tertiary institution in the first semester of 2015.

Summary outline of ASIC's submissions on sanction

196. ASIC referred the Board to the summary of principles applicable in a case under s1292 of the Act set out by the Board in the decision of *ASIC v Fiorentino* [1005] and [997] namely:
- (a) The principal purpose of the proceedings is protective rather than punitive and the guiding principle is protection of the public;
 - (b) The protection of the public includes ensuring that those who are unfit to practise do not continue to hold themselves out as fit to practise;
 - (c) The protection of the public includes deterrence;
 - (d) It also includes the maintenance of a system under which the public can be confident that practitioners will know that breaches of duty will be appropriately dealt with and that the regulatory regime applicable to liquidators (and in ASIC's submission auditors) is effective in maintaining high standards of professional conduct;
 - (e) The impact of the Board's orders on the practitioner is to be given limited consideration, as the prime concern of the Board is the protection of the public;
 - (f) Relevant matters include the respondent's recognition and acceptance of the breaches of duty, attitude to compliance generally and willingness to improve. Genuine acceptance of failure, contrition and remorse are necessary requirements to rehabilitation; and
 - (g) If a respondent is considered not fit and proper, suspension is not appropriate unless the Board can be confident that the respondent would be fit and proper after the period of suspension.
197. ASIC submitted that the protective function of a sanction in this case is clear because legislative compliance by a registered auditor protects the public and the profession. ASIC referred to the observation in *ASIC v McVeigh* (at paragraph [12.7]) that "*the protection of the public includes the maintenance of a system under which the public can be confident that the relevant practitioner and all other practitioners will know that breaches of duty will be appropriately dealt with*". If the conditions regime under s1289A and regulation 9.2.08 of the Corporations Act Regulations is not enforced, the protection of the public and the profession afforded by the regime will be undermined. Accordingly, it is appropriate to protect the public and the profession both by cancelling Mr Hill's registration as a protection against his personal deficiencies, and as deterrence from similar laxity and gross carelessness by other registered auditors.
198. ASIC further submitted that:

- (a) Mr Hill's lapses are serious and persistent and cancellation can be the appropriate sanction, notwithstanding the absence of a finding of dishonesty (*ASIC v Fernandez* at 358);
- (b) Where there is a finding that a person is not a fit and proper person, there needs to be some reason why suspension, rather than cancellation, is the appropriate order, and an order for suspension must be based upon a view that at the end of the period of suspension the practitioner will no longer be unfit to practise; and
- (c) ASIC submitted that the Board could not have confidence that Mr Hill would no longer be unfit to practise at the end of the period of suspension because:
 - (i) he failed to comply with conditions which were imposed on his registration as a result of his prior failure to comply with statutory requirements;
 - (ii) he has still not fully complied with the conditions and has not undertaken to do so;
 - (iii) even when his failure to comply with the April 2011 conditions was brought to his attention in November 2013 he was still capable of the gross negligence that resulted in an incorrect return being lodged in December 2013;
 - (iv) Mr Hill failed to give the Board any confidence that he had taken the imposition of the April 2011 conditions seriously (paragraph 98 above); and
 - (v) Mr Hill was not prepared to acknowledge non-compliance and his explanation of the errors demonstrate a failure to take his obligations seriously. His failures cannot be attributed to ignorance or inexperience, he repeatedly demonstrated a fundamental disregard for observance of a most basic obligation of his office and in all the circumstances there is no basis on which the Board could conclude that Mr Hill would be fit at the end of a period of suspension to resume his registration.

Decision on sanction

199. The function being performed by the Board in exercising powers under s 1292 was described by the Full Court of the Federal Court in *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2006) 233 ALR 37 at page 47 as follows:

“The purpose or object of the inquiry undertaken by the board, in exercising the power conferred by s1292(2), is not the ascertainment or enforcement of any legal right, but the determination whether, in the view of the board, taking into account past failures of duties, a defeasible right should continue

into the future. No punishment is imposed by reason of any conclusion that duties or functions have not been carried out or performed adequately and properly. Rather, upon being satisfied of past failures of duty, the board is empowered to deal with the continued existence of a statutory right. The question of the adequacy and propriety of the carrying out or performance is to be judged by the board by making an evaluative or subjective determination. Having made that evaluative or subjective determination, the board will consider whether the rights of the registered liquidator as to the future are to be changed by the exercise of the power under s1292(2) in the light of all the considerations before it that are considered relevant."

The principle which guides the Board in exercising those powers is protection of the public. This involves two aspects: first, protection of the public from the actions of a person found not to be a fit and proper person and secondly, protection of the public by encouraging other auditors to adhere to proper standards (see the decision of this Board in *ASIC v McVeigh* at paragraph [12]).

200. The relevant factors underpinning our exercise of power under s1292 of the Act and referred to in past matters were usefully summarised in the *Fiorentino* decision and we adopt that summary which was referred to by ASIC in its submissions and is set out in paragraph 196 hereof.
201. In this matter the Board has found that Mr Hill contravened s1292(1)(a)(ia)[second] by breaching a condition of his registration and failing to perform adequately and properly the duties of an auditor under s1292(1)(d)(i). The Board has also made a finding that Mr Hill is otherwise not a fit and proper person to remain registered as an auditor under that sub-section.

Not Fit and Proper Finding

202. Once a person is found not to be a fit and proper person to remain registered as an auditor, cancellation may be seen as a logical consequence, however it is clear that the discretion under s 1292 is not constrained in its terms and suspension for a period may also be an appropriate sanction having regard to the factors set out in relevant precedents.
203. In the Board's decision in *Fernandez*, it was held that an order for cancellation following a finding that Mr Fernandez was not fit and proper to remain registered, was the appropriate order, even though there was no conscious dishonesty or misappropriation of property. Mr Fernandez's failures were found to be serious, and the Board in that matter was unable to conclude that Mr Fernandez would be fit after a period of suspension. The Board in its decision noted that Mr Fernandez' conduct, his explanations and a prior appearance before the Board, were not conducive to drawing a conclusion that Mr Fernandez would be fit after a period of suspension.

204. Mr Hill's conduct did not involve the highest level of seriousness as there was no finding that he had engaged in conscious dishonesty or recklessness. Nevertheless where a finding is made that a person is not a fit and proper person to remain registered, there does need to be some reason why suspension, rather than cancellation, would be the appropriate order. As Reynolds JA said in *Law Society of New South Wales v McNamara* (1980) 47 NSWLR 72 at 76:

"An order for suspension must be based upon a view that at the termination of the period of suspension the practitioner will no longer be unfit to practice because, subject to any limitation imposed on the issue of a practising certificate, his name will then be on the roll of solicitors and he may resume his practice."

205. Consequent upon our finding that Mr Hill is not fit and proper to remain registered as an auditor, we proceed on the basis that Mr Hill should not resume practice as a registered auditor unless there is some real basis for thinking that he will be fit to resume practice at the end of a period of suspension. In *Fernandez* it was noted that in making a difficult judgment about such a future prognosis, the Board should adopt a clear test which minimises the potential for further risk to the public. In that decision (at paragraph [369]) it was said that the Board should not contemplate a respondent continuing to practice unless it could be confident that he would be fit and proper at the time.
206. We therefore turn to the matters before us relevant to deciding whether cancellation or suspension would be the appropriate sanction.
207. Mr Castle relied on three matters in submitting that the Board could be reasonably satisfied that Mr Hill would be fit to resume practice, after a period of suspension:
- (a) The written character references;
 - (b) The undertakings referred to in Mr Hill's supplementary statement;
 - (c) The active demonstration of Mr Hill's remorse for the contraventions seen in the steps he took immediately following notice of the Board's determination to have a compliance review of his practice undertaken by external consultants Korda Mentha.
208. The Board was provided with written references from Messrs Ian Ferrier AM, Philip Kelso and Frederick Kempson, Ms. Alison Stanfield and Dr Keith Hartmann AM. Each of those persons expressed the view that in respect of their dealings with him, Mr Hill had consistently performed properly and competently.
209. The reference from Mr Ian Ferrier disclosed that Mr Ferrier has known Mr Hill in a professional capacity for about ten years following the introduction by a mutual friend. Based on that professional association Mr

Ferrier has formed the view that Mr Hill is extremely competent and is fit and proper to be a Company Auditor.

210. The reference from Ms Alison Stanfield, a Director of e.Law, stated that she has known Mr Hill for approximately 18 months in his role as her company's accountant. She states that she has found Mr Hill to be diligent and honest in his dealings with her and has shown excellent attention to detail in the work he has performed for her company. She states her belief that he is a fit and proper person to act as an auditor and accountant.
211. The reference from Mr Philip Kelso, CEO of Bounty Oil and Gas NL states that he has known Mr Hill since 1994. Over that time Mr Hill has conducted a number of audits of companies with which Mr Kelso has been involved. He states that Mr Hill has acted in strict compliance with relevant legislation and standards in so far as they apply to audits of public resource companies. Having dealt with numerous registered auditors he expressed his view that Mr Hill is a very good auditor who is now very concerned to ensure that there is no failure by him to comply with training standards and declarations in the future. Mr Kelso was also of the view that Mr Hill is a fit and proper person to retain registration as an auditor.
212. The reference from Dr Keith Hartmann states that he has known Mr Hill professionally and personally since 1983. Professionally their associations have included:
 - (a) Mr Hill's role as financial adviser to the Sisters of Mercy North Sydney when Dr Hartmann was a Director on the Board of the Mater Hospital North Sydney;
 - (b) The provision by Mr Hill's firm of pro bono accounting services to the Friends of the Mater Foundation which Dr Hartmann chairs.
213. In Dr Hartmann's view Mr Hill is a competent, trustworthy and completely reliable professional who has demonstrated a significant commitment to assist others through the provision of pro bono professional services by his firm.
214. The fifth reference was from Mr Frederick Kempson who has known Mr Hill for 15 years. He states that he is aware Mr Hill has made regular visits to Papua New Guinea which have been very time consuming and he assumes this was a factor. He provided an example of circumstances where he directly experienced Mr Hill's focus and attention to detail while on the verification committee for a prospectus in 2007/8. Mr Kempson finds Mr Hill to be trustworthy and in his role as company secretary of Victor Group Holdings Ltd, (of which Mr Kempson is a Director) he has found Mr Hill to be careful and attentive. He has recommended Mr Hill to his business contacts, which he would not do if he had doubts regarding Mr Hill's fitness, propriety or character.
215. While we do give weight to the references provided, none of the witnesses are, or asserted that they were, expert in the functions and duties of an

auditor. Their views therefore as to whether Mr Hill is fit and proper to remain registered as an auditor must be weighed in that context. One common theme that emerged from all the referees was Mr Hill's trustworthiness and professionalism. Mr Hill's good character in these respects, as attested to by his referees, has been an important factor considered by the Panel in forming our view as to whether the Board can be confident Mr Hill will be fit and proper to remain registered as an auditor following a period of suspension.

216. In his supplementary statement, Mr Hill said that he would be prepared to provide undertakings as already set out in paragraph 195. In our view Mr Hill's offer to give undertakings to the Board demonstrates both a recognition by him that his conduct was found wanting under s1292 of the Act and a willingness on his part to improve by actively addressing the issues identified and to ensure that he has a framework in place to prevent similar conduct occurring in the future.
217. At the hearing Mr Hill was also provided with an opportunity to address the Board. He said that any period of suspension or cancellation would be catastrophic for him and he reiterated the seriousness with which he has taken the Board's findings and the steps he has taken to address the issues identified as well as acknowledging that he was wrong, but that there were extenuating circumstances at play. His focus now is to address the issues raised and move on.
218. In the circumstances of this matter, we have formed the view that suspension rather than cancellation of Mr Hill's registration is appropriate as the Board is confident that following an appropriate period of suspension Mr Hill will be fit to resume practice as a registered auditor. The matters which have persuaded us to exercise our discretion under s1292 to suspend rather than cancel Mr Hill's registration as an auditor include:
- (a) Mr Hill's demonstrated willingness to take steps to implement compliance controls within his practice and his counsel's submission that this is a demonstration of Mr Hill's remorse for his conduct;
 - (b) Mr Hill's statements to the Board, both written and oral particularly his acknowledgement that his conduct was wrong;
 - (c) the evidence that there were some extenuating circumstances at play during the period when the contraventions occurred that we are confident Mr Hill will now address;
 - (d) our belief that Mr Hill's trustworthiness and professionalism as attested to by his referees will ensure that Mr Hill will make the most of an opportunity to address issues raised by the Board's findings appropriately and ensure that he is fit at the conclusion of a period of suspension. In particular, we have taken on board the submission by his counsel that Mr Hill is very concerned to uphold

the respect with which he is regarded by his referees (and others no doubt), and would be very careful to ensure that that trust is not undermined by any further issues in relation to the conduct of his practice and in particular his regulatory obligations as a registered auditor.

219. We turn now to a consideration of an appropriate period of suspension and other sanctions.

Appropriate Sanction

220. Even though we accept that Mr Hill's conduct did not involve the highest level of seriousness as there was no finding that Mr Hill engaged in conscious dishonesty or recklessness, nevertheless, we do not agree with Mr Castle's characterisation of Mr Hill's conduct as amounting to a series of errors. That characterisation of the conduct found to be established does not accord with our view of the seriousness of the findings made with respect to Mr Hill's conduct. The fact that in respect of three successive annual returns Mr Hill was found to be grossly negligent in not disclosing that his registration was subject to conditions is a very serious matter particularly given that he attested to the completeness and accuracy of the content of the annual statements without fully checking them. Likewise, not complying with conditions imposed on his registration is also a serious matter. The effect of not disclosing that his registration was conditional in each of the relevant years had a direct impact on ASIC's capacity to undertake its regulatory oversight role and was directly related to ASIC not detecting Mr Hill's non-compliance with the conditions of his licence. ASIC in Regulatory Guide 180, makes it clear that it relies on the information provided in the annual returns as one of its tools for regulatory oversight. The submission by Mr Hill's counsel that it is relevant to the Board's consideration of the appropriate sanction that ASIC produced no evidence that anyone was monitoring the statements lodged is not well founded.
221. In reaching our view on the appropriate sanction we have considered each of the matters set out by Mr Hill's counsel as relevant for the Board to consider and taken those matters into account. Mr Hill's counsel referred to the factors set out in *Rich v ASIC* 2004 HCA 42 as relevant to the Board's exercise of discretion in determining an appropriate sanction. That case concerned the question of whether the statutory consequences of s180 of the Act were in the nature of a penalty so as to involve the application of penalty privilege. In the judgments of the High Court the distinction between "punitive" and "protective" sanctions was discussed and in the judgment of Gleeson, Gummow, Hayne, Callinan and Heydon JJ this distinction was described as "*at best.....elusive*" (at [32]). In a separate judgment McHugh J said that if the civil penalty provisions in the Act were purely protective the only issue for the court would be whether the defendant is now or will in the future be a fit and proper person to manage corporations (at [42]). We have considered the dicta which followed in McHugh's judgment regarding the factors relevant to a court's exercise of discretion under the disqualification provisions of the Act and referred to

by Mr Castle. In our view those factors are not inconsistent with the matters we have taken into account in exercising the administrative power of the Board under s1292(1). However, we question the direct relevance of the *Rich* decision given the question which was being determined and the provisions and exercise of power which were being considered. The High Court has confirmed that the power exercised by the Board is "*an evaluative and discretionary power in the protection of the public*" (see *Albarran* at [29]).

222. In order to address the issues identified by our findings and fulfil our protective role, the sanction we impose must serve to support public confidence by supporting a regime that is effective in maintaining high standards of conduct. In order to achieve this, we propose to order in addition to a period of suspension, that Mr Hill provide undertakings to the Board pursuant to our power under s1292(9)(b) of the Act. The undertakings we propose will require Mr Hill during the period of suspension and therefore before resuming practice as a registered auditor to:
- (a) undertake independence and ethics training as agreed with ASIC;
 - (b) implement and embed within his firm an appropriate OCP that is regularly reviewed. In this regard we note that at the sanctions hearing there were some reservations expressed by ASIC as to the soundness of the OCP implemented by Mr Hill following the Board's determination. We agree that there appear to be some shortcomings to the substantive drafting of the OCP which need to be addressed as between Mr Hill and ASIC, in order to provide the appropriate level of confidence that the OCP and its implementation within Mr Hill's practice will provide a robust control framework to prevent future breaches occurring;
223. Mr Hill has stated to the Board that the effect of any suspension or cancellation will be catastrophic to him personally and professionally. We are guided by the principle that the personal circumstances of the practitioner are to be given limited consideration in deciding an appropriate sanction, the objective of which is protection of the public. We must have objective regard to the seriousness of the conduct established and the suitability of the sanction to address the concerns raised by the conduct and the circumstances giving rise to it. As already noted, we do regard the conduct as serious and we do not accept that there is a valid distinction to be made between Mr Hill's conduct regarding the "personal" side of his practice and the "client" side of his practice as submitted by his counsel.
224. An important element of public protection is the deterrent nature of the sanction both in respect of the practitioner in question as well as practitioners generally. We believe it is important not to lose sight of the fact that the conditions placed on Mr Hill's registration as an auditor were as the result of a prior breach of the auditor rotation requirements under the Act and it is therefore important that the sanction imposed for not

observing the ASIC Registration Conditions is seen to uphold the integrity of the legislative framework in place while sending a clear message to practitioners that compliance with any conditions that may be imposed by ASIC on registration is mandatory in order to maintain registration under the Act.

225. We note that in the case of *ASIC v Topp* (15 April 2014) CALDB proceedings 06/NSW13, the period of suspension deemed appropriate was six months. We have formed the view that the conduct in this matter was more serious, particularly because of the finding of lack of fitness and propriety, and a significantly longer period is justified.
226. For the reasons set out above, we have formed the view that an order for suspension of Mr Hill's registration for a period of twelve months together with the provision of undertakings to the Board as set out in paragraph 232 below is an appropriate sanction to be imposed in this matter.

Current Status of Conditions on Mr Hill's Registration

227. There was one other matter which arose at the sanctions hearing requiring comment in this decision. Some confusion arose, initially amongst the Panel, as to the current status of the conditions imposed on Mr Hill's registration as an auditor. This was due to a reference in the Korda Mentha report attached to Mr Hill's supplementary statement that Mr Hill had been unable to obtain a copy of the conditions on his registration to provide to Korda Mentha as ASIC's register of auditors does not record details of conditions placed on registration as a matter of course. ASIC explained that although details of conditions were not available on the public register Mr Hill's registration was still subject to the conditions which had been imposed on 11 April 2011.
228. ASIC submitted that a condition on registration that requires an act to be done by a specified time does not lapse if the auditor fails to comply with the condition within the relevant time. Otherwise the registration of a non-compliant auditor would have no different status from that of an auditor who had never had a condition imposed or who had complied with an imposed condition. If an auditor fails to comply with a condition and ASIC raises that non-compliance in proceedings before the Board, the Board's decision may have the effect of rendering the condition ineffective e.g.: through cancellation, but otherwise the condition will subsist and it will be a matter for ASIC to revoke or vary the condition pursuant to its power under s1289A of the Act.
229. We agree with this analysis of the effect and subsistence of the conditions imposed on Mr Hill's registration on 11 April 2011. We note further that the temporal element of the condition imposed did not relate to the condition itself but to a period within which Mr Hill must undertake additional professional education. Quite clearly, ASIC's current practice in relation to its register of auditors is not to record publicly details of any conditions that may be placed on an individual's registration, and that

practice does not affect the status of any conditions it may impose under s1289A in accordance with Corporations Regulation 9.2.08.

230. Following the debate on this issue at the sanctions hearing, Mr Castle, adopting the stance that the conditions on Mr Hill's registration had in fact lapsed, referred to the Board's finding in relation to Mr Hill's 2013 annual statement noting that that annual statement had been completed by Mr Hill at a time when the ASIC Registration Conditions had expired. He submitted that Mr Hill's declaration that there were no conditions on his registration in the Annual Statement in December 2013 was in fact accurate, contrary to the findings made by the Board on this issue (see paragraph 166 above). For the reasons stated above, we do not hold the view that the conditions on Mr Hill's registration have lapsed either now or immediately following the two year period referred to in the letter dated 11 April 2011 that imposed the conditions and we do not therefore accept Mr Castle's submission as correct on this point. It is now a matter for ASIC to deal with those conditions as it sees fit and having regard to this decision, pursuant to its power under s1289A of the Act.
231. Even if the Panel is incorrect in respect of our finding that Mr Hill's registration as an auditor following 11 April 2013 remains conditional, Mr Castle's submission would still be incorrect. The December 2013 annual statement completed by Mr Hill clearly states on the first page that the declaration being made applied for the period 03/12/2012 to 02/12/2013 and therefore covers a period of at least four months when on either view, Mr Hill's registration was subject to conditions that should have been disclosed in the 2013 annual statement he lodged with ASIC.

Orders

232. We order as follows:

- (a) The registration of Richard Langley Stewart Hill as an auditor be suspended for a period of twelve months from the date this order takes effect on 23 December 2014 which will be 14 days from the date hereof;
- (b) Mr Hill is required to give the following undertakings to the Board in writing within 14 days after this order takes effect;

That Mr Hill will do the following acts:

- (i) in addition to the normal minimum annual requirement for continuing professional education to which he is subject, Mr Hill will at his own expense successfully complete by 30 November 2015 at least 25 hours of professional training in independence and ethics covering the current APES 110 requirements and any additional requirements of the Act and other relevant legislation. This course/s must involve face to face teaching and be approved in writing in advance by ASIC. An especially tailored course prepared by an independent

consultant commissioned by Mr Hill at his cost, and approved in advance by ASIC, is capable of meeting the requirements of this undertaking. Mr Hill is to notify ASIC in writing of successful completion (supplying supporting third party documentation) by no later than four weeks before the end of the suspension period;

(ii) within 30 days of the date hereof, submit to ASIC for its written approval a detailed compliance plan in relation to:

- (1) fulfilment of the normal requirements for continuing professional education to which Mr Hill is subject by virtue of his membership of Chartered Accountants Australia and New Zealand (and/or any another professional accounting body);
- (2) the completion and lodgement of Forms 912A; and
- (3) fulfilment of the auditor rotation requirements under the Act,

and he will implement the approved compliance plan within his firm as soon as it is approved in writing by ASIC;

(iii) at his own expense engage Korda Mentha or another suitable service provider approved by ASIC in writing in advance:

- (1) to provide training to all affected staff within his firm in the procedures set out in the approved compliance plan within 60 days of ASIC's approval of the compliance plan;
- (2) to conduct at least one six-monthly written review of Mr Hill's observance of the approved compliance plan within the next twelve months to be provided to ASIC within 30 days of the review occurring.

Mr Hill is required to give the following further undertakings in respect of acts to be done by him following resumption of his status as a registered auditor:

- (iv) to engage, at his own expense, Korda Mentha or another suitable service provider approved by ASIC in writing in advance to conduct 6 monthly reviews of Mr Hill's observance of the approved compliance plan for a period of 2 years following resumption of his registration as an auditor. Each review is to be in writing and must be provided by Mr Hill to ASIC within 30 days of the review occurring.

In order to give effect to these undertakings, ASIC will notify Mr Hill of a nominated contact within 7 days of the date of this order (and at least 7 days before any proposed change of that contact person during the period

of these undertakings) to whom Mr Hill is to submit any plan or course for approval or any certifications or reviews as required by these undertakings.

Notice

233. Within 14 days of the date hereof, formal notice of this Decision will be given to Mr Hill under s1296(1)(a) of the Act, a copy of that notice will be lodged with ASIC under s1296(1)(b) and the Board will cause to be published in the Gazette a notice in writing setting out the Decision.

Maria McCrossin
Panel Chairperson

9 December 2014

