IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2013-485-939
[2015] NZHC 1854

UNDER	the Defamation Act 1992 and the Fair Trading Act 1986
BETWEEN	CPA AUSTRALIA LIMITED Plaintiff
AND	THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS Defendant

Hearing: 6-10 July; 13-14 July 2015

Counsel: A R Galbraith QC, N J Russell and S I Jones for plaintiff
B D Gray QC, R K P Stewart and H L Coull for defendant

Judgment: 6 August 2015

RESERVED JUDGMENT OF DOBSON J

Contents

[1] These proceedings involve two causes of action in defamation and one for breach of the Fair Trading Act 1986 (the FTA) brought by one professional body for accountants in respect of disparaging comments made by another.

The two organisations

[2] The plaintiff (CPAA) has been in existence in Australia since the 1880s. It provides a range of services to its members, including continuing education and support for accountants providing a wide range of accounting services. It also administers the certification of appropriately qualified accountants and monitors the educational content required to attain certification.

[3] CPAA has between 140,000 and 150,000 members worldwide.[1] Those members are predominantly in Australia but also in a number of Asian jurisdictions and, since about 2005, in New Zealand. When Mr David Jenkins, who is currently the New Zealand country manager for CPAA, joined the organisation in 2008 it was attracting about 15 new members a year in New Zealand. He thought that CPAA had got to 1,000 members in New Zealand by about mid 2013, and that membership had risen to about 1,800 by the date of the hearing.[2]

[4] CPAA's potential stature as a professional body in New Zealand increased from 2012 when it became accredited by the Financial Markets Authority (FMA) to license accountants who perform auditing assignments for restricted categories of audit such as those of public issuers.

[5] CPAA has a permanent office in New Zealand with staff employed to canvass for new members and provide a range of services to its members. It is also supported by personnel from its more substantial offices in Australia.

[6] The defendant (NZICA) was the only organisation in New Zealand providing services for professional accountants until CPAA set up here. The provision of a range of accounting services was, until 2012, reserved for those who were members of NZICA and its predecessors whose status was confirmed by statute. The situation

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1 Various numbers in this range were referred to during the hearing.
2 Brief of David Jenkins at [10]–[15].

was analogous to that of legal work regulated by the New Zealand Law Society. NZICA certifies those appropriately qualified to practise, formerly as public accountants and, more recently, as chartered accountants.

[7] The sequence of cause and effect in the evolving relationship between the parties is difficult to discern and, in any event, is not critical. Throughout the period between 2011 and 2013, when the statements complained of were made, NZICA perceived CPAA as competing aggressively for new members among accounting students and accountants in New Zealand. It appears that the prospect that CPAA might offer students an iPad if they joined it, and the threat of expensive television advertisements, caused concern to some at NZICA. Otherwise, no actual instances of marketing by CPAA that competed aggressively with NZICA were cited in evidence.

[8] The mere presence of another professional body attempting to set up in New Zealand, when NZICA and its predecessors had enjoyed a monopoly supported by successive forms of regulation of the accountancy profession, was likely to have been treated by the incumbent as "aggressive" competition. Certainly, the internal communications around the time of each of the statements complained of contemplated that NZICA should respond aggressively to the threat posed by CPAA.

[9] During 2013, and possibly for some time before then, NZICA explored the prospect of merging with another established membership organisation for accountants in Australia, the Institute of Chartered Accountants in Australia (ICAA). In October 2013, the existing members of both NZICA and ICAA approved the merger and, since the events directly relevant to these proceedings, the merged entity has become Chartered Accountants Australia and New Zealand (CAANZ).[3]

[10] I find on the evidence that there has been a relatively co-operative working relationship between CPAA and ICAA in Australia. I was cited examples of the two organisations working jointly on the provision of guides on independence of

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[3] I will continue to refer to the defendant as NZICA in this judgment. Nothing turns on the change in its formal constitution after the statements complained of were made.

practice, and on joint submissions about proposed changes to accounting standards.[4] The relationship between NZICA and CPAA in New Zealand has been quite combative by comparison.

The statements complained of

The flyer

[11] The first initiative for NZICA that is complained of was a single page flyer produced to give to students attending a careers fair at Massey University's Albany campus in March 2011. A copy of the flyer is annexed to this judgment as Appendix A.[5] Both CPAA and NZICA were represented at the careers fair. It is generally accepted that once accountants have joined one of the professional organisations, there is relatively little movement of members from one to the other. This means that both organisations target their membership initiatives towards accounting students. The flyer was entitled "The Facts" under a heading:

> Comparing New Zealand Institute of Chartered Accountants (NZICA) and Certified Practising Accountants Australia (CPAA).

[12] The flyer contained five categories and compared features such as the average annual salary of members of NZICA and CPAA, the number of New Zealand members and the qualifications offered. It suggested that for chartered accountants who were full members of NZICA, the average annual salary was $140,000, compared with the average annual salary for CPAA members of $100,000.

[13] In terms of numbers of members, it identified 32,000 for NZICA and 700 to 750 for CPAA. In comparing the qualifications offered, it stated there were three designations to choose from for NZICA members, but only one designation for members of CPAA.

[14] In the last category addressing "Points of Difference", the flyer invited an adverse view of CPAA by stating that:

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4 There was at least one instance of the two bodies co-operating with a third, the Institute of Public Accountants.

5 The flyer was produced in landscape format, but for convenience has been reproduced in portrait format.

- CPAA only required three years of academic study (compared with four for NZICA);

- CPAA was an Australian based qualification, new to New Zealand and not part of an international accounting alliance, whereas the NZICA qualification has international recognition and reciprocity;

- NZICA had been established in New Zealand for over 100 years; and

- graduates with NZICA qualifications were preferred by employers, including the big four accounting firms.

[15] The average salary for CPAA members was attributed to a salary guide produced by Hudson Recruitment, a firm that conducted such surveys. Although the Hudson survey did not discriminate between salary levels for members of both organisations, the flyer drew on NZICA's internal research to provide the salary figure cited for its own members. It was therefore vulnerable to criticism for not making an accurate comparison as the average salaries came from different sources, and the Hudson survey did not support any differential in the amounts.

[16] CPAA brought the terms of the comparison to Hudson's attention, and it promptly confirmed it had not given its consent to the salary guide being quoted in the manner it was. Hudson requested that NZICA cease representing its survey in that way.

[17] The evidence from Mr McDougall, who was the director of marketing at NZICA at the time, was that NZICA stopped using the flyer as soon as it received the complaint from Hudson Recruitment, and destroyed the remainder of the approximately 300 copies of the flyer that had been produced.[6]

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6 Brief of Ian McDougall at [20].

[18] In May 2011, CPAA made more detailed complaints to NZICA as to alleged misrepresentations in the flyer. In-house counsel at NZICA rejected the complaint and contended that the content of the flyer was not misleading or deceptive.[7]

The advertisement

[19] The second NZICA statement complained of by CPAA was the content of advertisements placed by NZICA in the *New Zealand Herald* and *National Business Review* (NBR) in October 2012. The form of the full page advertisement as it appeared in the *New Zealand Herald* is annexed to this judgment as Appendix B. It comprised a dark block with the logo of NZICA inset at the top, and in large print:

> IN ACCOUNTING,
> THERE'S BEST PRACTICE
> AND THEN THERE'S
> SECOND BEST PRACTICE.

[20] Beneath that in smaller type was a sequence of promotional claims for NZICA's members. It began with the statements:

> Accountants may appear similar. But your business can tell them apart. The difference is in the training, the support and the professional standards they follow….

[21] It also claimed:

> Only a member of the New Zealand Institute of Chartered Accountants has been exposed to the highest level of industry training and development. This is why the top CFOs and CEOs only employ Chartered Accountants.

[22] The bottom of the advertisement, below a printed line, claimed in bold type:

> Business does better with an NZICA Member.

[23] Mr McDougall acknowledged in evidence that NZICA was aware that CPAA was planning to hold a promotional event in Auckland in October 2012, at which time it would be announcing its FMA accreditation. That accreditation meant that CPAA would be able to license practitioners, who it had granted status as certified accountants, to undertake restricted work such as large-scale audits which had

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[7] CBD 134, 136.

previously been the sole preserve of NZICA members. The NZICA advertisement was commissioned to be published to coincide with CPAA's event and was internally labelled "Project Ambush". The intention was to diminish the attention CPAA might get when announcing its FMA accreditation. Mr McDougall saw the advertisement "simply as part of a designation campaign in a competitive market".[8]

The conference addresses

[24] The third group of statements complained of arose in addresses given in Christchurch and Wellington on 6 and 8 May 2013 respectively. The addresses were given by Ms Kirsten Patterson, in her role as acting chief executive of NZICA, at conferences called "Accountants RePublic". The conferences were organised by Ms Viv Brownrigg, a former chartered accountant who operates a business training accountants in how to enhance their businesses. The target audience for the events was accountants in public practice, particularly those in sole practice or small and medium-sized firms.

[25] When initially promoting these conferences, Ms Brownrigg characterised participation on behalf of both CPAA and NZICA as a "face off". NZICA objected to that description and noted that the brochure circulated with the registration form for the conferences was entitled "Your Clients Need You". In terms of the NZICA and CPAA contributions, they were described in the following terms:

> NZICA & CPA Australia
> Update you
> - Hear from NZICA on 'Transforming NZICA – Creating a new Institute with The Institute of Chartered Accountants Australia'
> - CPA Australia speak on 'The relevance of belonging to a professional membership body in 2013'

[26] Unbeknown to those organising and speaking at the Christchurch conference, one of the attendees made an electronic recording of the addresses given both by Ms Patterson for NZICA, and Mr Richard Jones, a business development manager with CPAA. Transcripts of those recordings have been prepared, and both were in

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[8] Brief at [27].

evidence. The recording of Ms Patterson's address was also played during the hearing.

[27] The main topic addressed by Ms Patterson was the proposed merger of NZICA with ICAA. She spoke positively about the advantages of the merger that was shortly to be voted on by NZICA members.

[28] One aspect of the environment that Ms Patterson described NZICA operating in was its competition with CPAA. She stated that she relished the opportunity of going "head to head" with CPAA and was disappointed that its chief executive from Australia was not present because she was hopeful that they might be doing "some arm wrestling". In the course of promoting NZICA, Ms Patterson made numerous disparaging remarks about CPAA.

[29] The statements that are now complained of were:

(a) "He [Alex Malley, CPA Australia's CEO] also doesn't have to offer the same education offerings because you may be aware of the designation of CPA and think 'oh, that's similar to America' but it's not. The CPA designation in the USA is different to the CPA designation in Australia. CPA Australia and United States are not brothers or cousins. We're cousins of CPA in the United States. Ourselves, the Australian Institute, Canada, Germany, USA, South Africa, the UK are all members of the GAA, the Global Accounting Alliance. That is the group of the preeminent CA based accountants around the world."

(b) "CPA Australia is not a member of the GAA because their education standards are not recognised as being the same as the one that you have worked so hard to achieve";

(c) "I can't offer new graduates a free iPad if they choose my program over their [CPA Australia's] program. But what I can offer them is the better designation. They're going to have to work harder for CA, without a doubt, they will have to work harder for our designation";

(d) "I don't have the money to be able to take out sponsorship of the entire series of CSI in prime time television in Australia for an entire series. I don't have the budget to be able to do that on 33,000 members. Nor do I think it is the best use of your spend to be fair, but that's the kind of environment that we're coming into"; and

(e) "Under the CPA model [with] CPA Australia, you can do a few modules and they'll give you a piece of paper saying that you're an accountant."

[30] Ms Patterson used a PowerPoint presentation as an aid during her addresses in Christchurch and Wellington. The slides displayed included a statement under the heading "Competition" in the following terms:

> This is changing the landscape for the Chartered Accountant designation. Alternative qualifications are cluttering the market which necessitates strengthening the value of a Chartered Accountant designation in the eyes of employers, decision makers and the public.

[31] Nobody challenged Ms Patterson on any of these criticisms during the conference in Christchurch. During the first break after he spoke, Mr Jones reported his concerns about Ms Patterson's statements by telephone to Mr Jenkins. He followed that up with an email to Mr Jenkins the same day, which paraphrased a number of the statements now complained of.[9]

[32] There is no transcript of Ms Patterson's equivalent address at the Wellington conference two days later. On this occasion, Mr Jenkins was present to speak on behalf of CPAA and he took notes of some of the comments he considered to be disparaging of his organisation.

[33] Ms Patterson spoke without notes, but it is accepted that the material content of her address would have been substantially similar to the comments as recorded in Christchurch. Ms Patterson left the Wellington conference shortly after Mr Jenkins completed his address, before he was able to raise the content of her address with her. However, he telephoned her later that day to register his concern at what he considered to be inappropriate comments.

The National Business Review article

[34] The NBR of 8 May 2013 published an article entitled "Snuggling-up accountants battle 'declining relevance'". It addressed the proposed merger between NZICA and ICAA, referring to comments made by Mr Craig Norgate who was then chief executive of NZICA. The article contained the following:

> Competition has also emerged in recent years with the arrival of CPA Australia in 2011. However, Mr Norgate plays down the threat posed by the rival group, which claims about 140,000 members worldwide.

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9 CB397.

> "We don't see it as a huge threat; competition has been coming for a long time."
>
> "They don't have the same entry standards as us but the market doesn't understand. They seem to take the chartered accountant designation for granted."

[35] The article stated that Mr Jenkins could not be reached for a comment on behalf of CPAA as to its rivals' proposal.

[36] These proceedings were commenced on 24 May 2013, shortly after the conference addresses and NBR article.

The causes of action in defamation

[37] CPAA pleaded separate causes of action in defamation in respect of each of Ms Patterson's addresses in Christchurch and Wellington. Without the full transcript of the Christchurch address, which only became available shortly before trial, the scope of the allegations depended on recollections as to what she had said on each occasion. No objection was taken to CPAA re-pleading the allegations shortly before trial to reflect the actual words used. The allegations in relation to the Wellington address were more confined than those in relation to the Christchurch address, but still alleged substantially similar defamatory meanings for some of her comments.

[38] In closing, it was conceded on behalf of NZICA that the Court could treat the allegations as if the same comments recorded from the Christchurch address were made in Ms Patterson's unrecorded address in Wellington. Accordingly, it is appropriate to deal with both of the causes of action in defamation on the basis that the same address was made to both audiences, and the defamatory meanings and innuendoes pleaded in respect of the Christchurch address are to be treated as applying at both venues.

[39] CPAA pleaded that the natural and ordinary meaning of the statements by Ms Patterson were understood to mean that:

(a) CPAA does not have affiliations with accounting bodies throughout the world ([29](a) above);

(b) the education provided by CPAA to its members is inferior to that provided by NZICA and other members of the Global Accounting Alliance (GAA) ([29](a), (b) and (c) above);

(c) CPAA was declined membership of the GAA because its education did not meet the requisite standard ([29](b) above);

(d) CPAA resorts to expensive or elaborate marketing ploys to entice accountants to become members ([29](c) above);

(e) CPAA cannot attract members without resorting to expensive or elaborate marketing ploys ([29](c));

(f) CPAA wastes or misuses membership fees to pay for expensive advertising on television ([29](d) above);

(g) CPAA's designation is a second-rate designation which has undermined and is undermining the accounting profession in New Zealand ([29](e) and [30] above).

[40] In addition to the defamatory impact alleged to arise on the natural and ordinary meaning of the words complained of, CPAA also pleaded that the attendees at the conferences would have interpreted their meaning in light of the following special facts known to the attendees:

- best practice in the accounting profession is driven by the development, adoption and implementation of high quality international standards;

- these standards are developed by international associations and federations of accounting bodies from different jurisdictions;

- membership of an international association or federation of accounting bodies is dependent upon an accounting body meeting requisite standards;

- membership of an international association or federation of accounting bodies provides the basis for mutual recognition of designations by fellow members around the world.

[41] The words complained of in [29](a), (b) and (e) were pleaded to give rise to further meanings by innuendo, which would arise for the audiences applying the pleaded special facts, to the effect that CPAA does not comply with internationally recognised standards of best practice for accountancy designations and/or that CPAA's qualifications are not internationally recognised or transferrable.

Are the pleaded meanings made out?

[42] The first step in the analysis is to consider whether the pleaded imputations arise. To do so, the Court must decide, as a matter of law, whether the statements complained of would be taken by a reasonable person to have the pleaded defamatory meaning. The reasonable person has been described by the Court of Appeal as being of ordinary intelligence, general knowledge and experience of worldly affairs.[10] The reasonable person is capable of reading between the lines, but is not unusually suspicious or naïve.[11]

[43] The Defamation Act 1992 (the Act) does not define defamation and instead relies on existing common law definitions, of which there are several. CPAA did not plead according to any particular definition of what is defamatory, and instead asserted in a more general sense that the statements complained of were defamatory. I have taken CPAA's submissions to be that the statements are false and to its discredit.[12]

[44] To succeed in an action for defamation, the plaintiff need not prove the falsity of statements complained of as defamatory. It is for the defendant to make out the truth of the statements in defending the action. I will therefore consider the truthfulness of the statements in considering whether NZICA can successfully establish relevant defences.

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10 *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 625.
11 *Lewis v Daily Telegraph Ltd* [1964] AC 234 (UKHL) at 259.
12 *Youssoupoff v Metro-Goldwyn-Mayer* (1934) 50 TLR 581 (CA) at 584 per Scrutton LJ.

[45] The first imputation pleaded ([39](a) above) is that CPAA does not have affiliations with accounting bodies throughout the world. I am not satisfied that the pleaded imputation arises from the words complained of ([29](a) above). As with each of the passages, I have assessed it in the context of the topics covered by Ms Patterson in the entire address, and more proximately to the words complained of. I have also assessed the passages by listening to the recording again, which provided the tone of the comments made.

[46] The essence of the passage complained of is that CPAA is not a member of the GAA, whereas NZICA and ICAA are. Importance is attributed to that membership because Ms Patterson described GAA as the pre-eminent group of chartered accountancy organisations around the world. That does not involve an imputation that CPAA did not have affiliations with other accounting bodies; just that it did not enjoy membership of the grouping that Ms Patterson claimed to be pre-eminent.

[47] The second imputation pleaded as arising from the first, second and third statements complained of ([29](a), (b) and (c) above) is that the education provided by CPAA is inferior to that provided by NZICA and other members of the GAA. Mr Gray QC for NZICA denied that this imputation arose on the words spoken. He submitted that contending CPAA did not have to offer the same education did not mean that its offerings were inferior, but rather that they were different from those offered by NZICA to the standard agreed among members of the GAA.

[48] I do not accept the audiences at the conferences would have appreciated the distinction between "different" and "inferior". Ms Patterson was selling the attributes of NZICA, and in a confident tone claiming its superiority over CPAA. Assessed in the context of the other comments about educational standards, I am satisfied that the reasonable imputation for the audiences would have been that CPAA provided education that was inferior to that provided by NZICA and other members of the GAA.

[49] The imputation of inferiority of CPAA's educational standards is strengthened by comments in some of the other passages complained of. These include the

proposition that CPAA is not a member of the GAA because their educational standards are not recognised as the same as those required to qualify with NZICA, and that qualifying under the NZICA programme would require candidates to work harder (inferentially to demonstrate knowledge at a higher level or to study more extensive topics, or both).

[50] The next pleaded imputation is that CPAA was declined membership of the GAA because its education did not meet the requisite standard. I consider that imputation does arise from the statement in [29](b) above.

[51] Three imputations are pleaded as arising from Ms Patterson's statement cited at [29](c).[13] The first is that the education provided by CPAA is inferior to that provided by NZICA and other members of the GAA. I am satisfied that imputation does arise for the reasons discussed above when the statement is treated in the context of the others complained of.

[52] The second imputation alleged to arise from the statement cited at [29](c) is that CPAA resorts to expensive or elaborate marketing ploys to entice accountants to become members. This arguably arises from Ms Patterson's statement that she cannot offer new graduates a free iPad if they choose the NZICA programme over "their" programme. In context, I am satisfied that "their" refers to CPAA. I am also satisfied that this pleaded imputation does arise on the words complained of from Ms Patterson's address. It is implicit in the statement that CPAA was offering new graduates the incentive of a free iPad if they chose to enrol in CPAA's programme. The sentence complained of follows immediately after Ms Patterson observed that "[CPAA have] got a marketing budget that we're really struggling to fight here in New Zealand".[14] It is another matter whether the imputation is materially adverse to CPAA's business reputation.

[53] The further imputation pleaded as arising from the statement in [29](c) above is that CPAA cannot attract members without resorting to expensive or elaborate marketing ploys.

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13 Set out at [39](b), (d) and (e) above.
14 Transcript, CB359/28.

[54] I am not satisfied that this imputation arises. There is nothing in the statement pleaded as the source of the imputation that suggests CPAA could not attract members without inducements such as free iPads, and the natural meaning goes no further than that it is one ploy CPAA was resorting to.

[55] The next imputation pleaded as arising from the statement at [29](d) above is that CPAA wastes or misuses membership fees to pay for expensive advertising on television. That allegedly arises from Ms Patterson's expression of opinion on what she considered to be other than the best way of spending membership fees. The basis for the criticism is complicated because of the amount she implied CPAA spent on television advertising in Australia. It was at least a substantial exaggeration to imply that CPAA was the sponsoring advertiser for a whole series of CSI on prime time television in Australia. By consent, I accepted into evidence a statement from the Nine Network Australia Pty Ltd confirming that CPAA had not sponsored any such programme, but the network had broadcast advertisements on six occasions during air time related to CSI episodes.

[56] I consider that the pleaded imputation does arise. It is an expression of opinion to the effect that Ms Patterson would not apply membership fees to spending of that type, and it contributes to the tone of criticisms of CPAA.

[57] The next pleaded imputation had two elements.[15] The first was that CPAA is a second-rate designation, and the second was that this designation has undermined the accounting profession in New Zealand. These imputations are said to arise from the statement pleaded at [29](e) and the PowerPoint slide detailed in [30] above. A plaintiff is required by s 37(2) of the Act to particularise the different imputations alleged. Where different imputations are pleaded, they should be particularised distinctly. I treat these as two separate imputations.

[58] The criticised statement "under the CPA model … you can do a few modules and they'll give you a piece of paper saying that you're an accountant" is seriously demeaning of CPAA's qualification. It creates an adverse contrast with claims made elsewhere in Ms Patterson's address to the effect that NZICA's qualification provides

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[15] See [39](g) above.

a better designation, being one that students have to work harder for but that will provide pre-eminence in terms of their qualification. Although there is no reference to the CPAA designation, or qualification achieved, as being "second-rate", I am satisfied that is clearly implicit so that first element of the imputation does arise.

[59] However, I am not satisfied that the second element of the pleaded imputation that CPAA's designation has undermined the accounting profession in New Zealand necessarily arises. The context of Ms Patterson's comment is emphasising the need to encourage students to take the NZICA qualification rather than the CPAA one, and to strongly promote the NZICA designation as the pre-eminent one to potential users of accountancy services. That theme is strengthened by the PowerPoint slide that refers to alternative qualifications "cluttering the market". The presence of such alternatives made it more important than previously for NZICA to distinguish its own qualifications and "brand", but maintaining its status is different from suggesting that CPAA's presence is undermining the profession.

[60] It is apparent from the transcript that Ms Patterson did not read the words of the PowerPoint slide during her oral presentation. I am not satisfied that the words used in the slide, particularly when they appear not to have been explicitly repeated in the oral presentation, add sufficiently to make out the imputation that CPAA's designation has undermined the accounting profession in New Zealand.

Innuendoes pleaded

[61] In addition to the natural and ordinary meanings alleged to be defamatory, CPAA alleged that the audiences of accounting personnel would apply special knowledge based on their familiarity with educational and professional standards for accountants to attribute an additional meaning by way of innuendo that was defamatory of CPAA. The special facts alleged to be known to the audiences were pleaded in the terms set out in [40] above. Those overlapping propositions are pleaded in relatively general terms. They attribute to the audiences an awareness that best practice in the accounting profession depends on international standards of a high quality that are developed by domestic professional bodies co-operating with

similar entities in other jurisdictions. Membership of such international associations is important to obtain mutual recognition, and attaining and retaining such memberships is dependent on the membership organisation complying with the standards set by the international body.

[62] I am satisfied that audiences comprising accountants in public practice and their professional staff would know the propositions pleaded as special facts. The words complained of as giving rise to an additional defamatory innuendo are those in [29](a), (b) and (e) and the defamatory innuendo is described at [41] above. The relevant statements attribute importance to NZICA's membership of GAA as a group of pre-eminent chartered accountancy organisations around the world, and that CPAA is not a member of that alliance because CPAA's education standards are not recognised as being the same as NZICA's.

[63] I am satisfied that, for the audiences aware of the special facts pleaded, the words complained of would have meant that CPAA did not comply with best practice for accountancy designations. This would be taken to be the view, at least of those who accepted that the GAA standards were indeed pre-eminent.

[64] The second aspect of the pleaded innuendo was that CPAA's qualifications were not internationally recognised or transferrable. I am not satisfied that this was made out. Assessing the words complained of in the context of the knowledge enjoyed by members of the audience, the criticism does not extend to treating CPAA's qualifications as not having any international recognition or not being transferrable at all. The meaning reasonably attributable to the statements goes no further than that they would not be as internationally recognised or as transferrable as NZICA's qualifications because of its membership of GAA.

The requirement to make out loss

[65] Section 6 of the Act provides as follows:

> **6 Proceedings for defamation brought by body corporate**
>
> Proceedings for defamation brought by a body corporate shall fail unless the body corporate alleges and proves that the publication of the matter that is the subject of the proceedings—

(a) Has caused pecuniary loss; or

(b) Is likely to cause pecuniary loss—

to that body corporate.

[66] In an interlocutory appeal on the permissible scope of pleadings by a corporate plaintiff alleging defamation, where the plaintiff claimed that a defendant's conduct had exacerbated its pleaded harm, the Court of Appeal commented:[16]

> Section 6 of the Defamation Act provides that a defamation proceeding [by] a body corporate will fail unless the publication caused or is likely to cause pecuniary loss. Although not entirely clear on its wording, we have no doubt that the legislative intent was to limit compensatory relief for a corporate plaintiff to pecuniary loss. That would be consistent with the previous law: *Gatley on Libel and Slander* 9th ed, para 8.16 and reflects the view of the McKay Committee, *Report of the Committee on Defamation*, 1977. Pecuniary loss to a corporate plaintiff, including of course loss in the value of its goodwill, will be a matter for proof at trial. It cannot affect the outcome of that whether or not there has been pleaded conduct exacerbating the harm to the plaintiff.

[67] As to the scope of s 6, it was submitted for CPAA that the inclusion of s 6(b) lowered the standard of proof required so that a corporate plaintiff need only prove that a defamatory utterance was likely to cause pecuniary loss. However, it was argued for NZICA that s 6(b) accommodated the different temporal consideration of loss that a plaintiff could prove was likely to occur in the future. Arguably, the alternative formulations in subss (a) and (b) address the same requirement, but in respect of past or future pecuniary loss. It would be inconsistent to treat the second situation as compromising the first, as if it read "…or … *was* likely to cause pecuniary loss". Broadening the requirement in that way could have been achieved with simpler wording.

[68] I accept NZICA's approach to the interpretation of the scope of the section. In the present circumstances where the matter has come to trial two years after the statements complained of, the onus that CPAA is required to discharge is to prove that the statements complained of have caused pecuniary loss to it, or that those statements are likely to cause it loss in the future.

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[16] *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd* [2002] 2 NZLR 289 (CA) at [12].

[69] CPAA also submitted that the nature of its onus under s 6 to prove loss was lessened because it sought only a declaration, and not any amount for damages. The prospect of a declaration is provided for in s 24 of the Act as follows:

> **24 Declarations**
>
> (1) In any proceedings for defamation, the plaintiff may seek a declaration that the defendant is liable to the plaintiff in defamation.
>
> (2) Where, in any proceedings for defamation,—
>
> (a) The plaintiff seeks only a declaration and costs; and
>
> (b) The Court makes the declaration sought,—
>
> the plaintiff shall be awarded solicitor and client costs against the defendant in the proceedings, unless the Court orders otherwise.

[70] Mr Galbraith QC's argument was that so long as CPAA could establish that defamatory statements by NZICA were likely to cause it pecuniary loss, then CPAA did not have any onus to establish that any particular loss had occurred, or the extent of such loss, where it sought only a declaration.

[71] This argument relied on the analysis in the Rural News Limited litigation. In that case, a confidential briefing for New Zealand King Salmon Limited by the defendant public relations consultancy, Communications Trumps Limited, contained advice on how to avoid publicity about genetic experiments in the production of salmon. The PR advice was leaked initially to the leader of the Green Party, and was then the subject of widespread criticism in various forms of media. Rural News ran a satirical column which included derogatory comments about the ethics and honesty of Communications Trumps Limited. Communications Trumps Limited sued in respect of that column, and also commenced defamation proceedings in the High Court against Radio New Zealand.

[72] After a trial in the District Court, Rural News's column was found to be defamatory, but the Judge did not consider damages were quantifiable and awarded the plaintiff only a declaration and costs.[17] The correctness of that approach was

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[17] *Communications Trumps Ltd v Rural News Ltd* [2001] DCR 418.

reconsidered twice, first in an appeal to the High Court determined by Anderson J,[18] and then on an application for leave to further appeal to the Court of Appeal determined by Fisher J.[19] Both judgments confirmed the correctness of the trial Judge's reasoning.

[73] In hearing the appeal, Anderson J focused on the trial Judge's reasoning in the following extract from the District Court judgment:[20]

> I consider that the defendant has merit in its submission on the issue of damages. I have held that the materials published were likely to have caused the plaintiff pecuniary loss. However, despite my conclusion that the High Court proceedings brought against Radio New Zealand is not substantially the same as the present proceedings, there was a publication of other similar articles by other news media. These publications make the assessment of the extent of that loss virtually impossible to prove. I do not think that the evidence called by the plaintiff bridges that causal gap. For this reason I do not think that in this case I can award the plaintiff damages.

[74] There had been evidence at trial of a downturn in the plaintiff's work and revenue following the adverse publicity. The plaintiff had conducted a survey of its clients which asked questions including whether the adverse publicity had affected their opinions of, or business dealings with, the plaintiff. Some clients had ceased doing business with the plaintiff within a day or two of the original press release by the Green Party, which was sometime before the publication by Rural News. The defendant had challenged the admissibility and reliability of the survey evidence adduced by the plaintiff in support of its claim of loss.

[75] The trial Judge's analysis proceeded on the basis that the nature of the defamatory statements was likely to have caused a material measure of pecuniary loss to the plaintiff. However, given the number of other defamatory comments for which the defendant was not responsible, it was impossible to quantify the loss attributable to the defendant's publication.

[76] In that context, Anderson J observed:[21]

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18 *Rural News Ltd v Communications Trumps Ltd* AP167-SW00, 4 April 2001.
19 *Rural News Ltd v Communications Trumps Ltd* AP404/167/00, 5 June 2001.
20 *Rural News Ltd v Communications Trumps Ltd*, above n 18, at [13].
21 At [14].

> Yet s 6 itself recognises the distinction and the ability to seek a declaration without claiming damages at all, provided by s 24 of the Act, demonstrates that a body corporate may obtain standing to sue on proof of the likelihood of pecuniary loss without proving actual pecuniary loss and may then obtain relief by way of a declaration and costs.

[77] Having confirmed the grounds for the trial Judge's finding of some, unquantifiable, measure of pecuniary loss attributable to the Rural News publication, Anderson J found that the onus under s 6 had been discharged.

[78] In dismissing the application for leave to appeal, Fisher J agreed with the approach the two other Judges had taken. Rural News had argued that the obligation under s 6 of the Act for a corporate plaintiff to "prove" pecuniary loss involved matching pecuniary harm to the plaintiff to the readership of the article complained of. Fisher J commented on that argument:[22]

> I would not interpret the word "proves" in s 6 in that fashion. It seems to me that on any approach to the matter the evidence demonstrated that Communications was and is a commercial enterprise relying upon public relations as the source of its business. The defamatory statement was a direct reflection upon its capacities and propensities in the way in which it went about its business. Once those items were specifically proven it was open to the Court to move on to the inference that the publication was likely to cause pecuniary loss. The fact that the word "proves" is found in the section does not in any way inhibit the Court from drawing proper inferences.

[79] That approach, with which I respectfully agree, justifies Mr Galbraith's submission that CPAA can discharge the onus of proving the likelihood of pecuniary loss for the purposes of s 6 by drawing inferences that loss would have been caused, so there is no necessary obligation to adduce direct evidence of pecuniary loss suffered as a result of the defamatory statements.

[80] However, I do not accept that the reasoning in the *Rural News* judgments supports the further proposition that, where a corporate plaintiff elects only to seek relief by way of declaration and costs, it is, in some more general way, relieved of the obligation to establish that some pecuniary loss has been suffered, or is likely to be suffered in the future. Nor does it mean that the standard of proof is in some way reduced.

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22 *Rural News Ltd v Communications Trumps Ltd*, above n 19, at [14].

[81] One rationale for s 6 is that, in contrast to human plaintiffs, corporate plaintiffs in defamation actions cannot claim relief for hurt feelings. Rather, they can only make out the necessary elements for any relief if the corporate plaintiff proves that the publication has caused, or is prospectively likely to cause, pecuniary loss. That rationale is not inconsistent with the Court of Appeal's observation in *Midland Metals*, cited at [66] above, that the intent was to limit compensatory relief for corporate plaintiffs to pecuniary loss.[23] Not only is that the limit of relief, but a finding that there has been or will be some pecuniary loss is a pre-condition to any relief.

[82] Mr Gray urged me to adopt the approach reflected in the judgment of Paterson J in *Chinese Herald Ltd v New Times Madia Ltd*.[24] The plaintiffs in that case were the directors and shareholders of a Chinese language newspaper, together with their company that published their paper. The defendant was the publisher of another Chinese language newspaper that had made statements disparaging of the plaintiffs' publication. Certain statements were found to be defamatory and the litigation was reported on the issue of whether the corporate plaintiff had made out pecuniary loss.

[83] The evidence was that the publication had been acquired by the relevant owners in 1997 for no consideration from the New Zealand Herald. The shares had been sold in tranches, before and after the defamatory publications in December 2002 and 2003, for a total price of $600,000. The Judge found that the company had not lost goodwill as a result of the publications. The circulation of the plaintiffs' newspaper had remained constant from the date of publication of the articles to the date of the hearing, notwithstanding that there had been an increase in the number of Chinese language newspapers during that period. The Judge treated the evidence as suggesting there had been an increase rather than a decrease in revenue between the date of publication of the articles and the hearing.

[84] Paterson J acknowledged the analysis of Fisher J in *Rural News* to the effect that the Court was able to draw an appropriate inference regarding the likelihood of

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23 *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd*, above n 16.
24 *Chinese Herald Ltd v New Times Madia Ltd* [2004] 2 NZLR 749 (HC).

causing pecuniary loss, and that actual evidence was not required. Paterson J observed:

> [56] … There may be cases where an appropriate inference can be drawn. This is not one of them. There are no facts on which I can draw an inference that [the corporate plaintiff] has either suffered pecuniary loss or is likely to suffer pecuniary loss because of the defamatory statements. …
>
> [57] There needs to be an evidential basis before pecuniary loss can be inferred. …

[85] In contrast, CPAA invited me to adopt a low threshold for proof of pecuniary loss, as arguably reflected in a trial ruling of Mallon J in *First Sovereign Trust v New Zealand Racing Board*.[25] That was a ruling on an application that liability issues ought not to be left to the jury on grounds that included a lack of any evidence on which the jury could find that the corporate plaintiff had suffered pecuniary loss. Predictably, the Judge adopted a cautious approach to what the jury might find sufficient as evidence of likely pecuniary loss. Any analogy drawn from the standard applied when the Judge was assessing whether the issues ought to be left to the finders of fact in that context is not helpful to the approach I adopt in determining the issue in the present case.

[86] As juries are routinely reminded, drawing inferences in the process of fact-finding cannot involve speculation. An inference can only properly be drawn by proceeding to the logical conclusion from facts that are proved.

[87] As to the evidence of loss, Mr Galbraith invited me to infer that loss had been caused because it was NZICA's intention to do just that. NZICA documents show that it intended to compete aggressively with the newcomer. After a thorough cross-examination, Ms Patterson was still comfortable that it was appropriate for her to make the criticisms she did, despite accepting that the factual premises on which some of the criticisms depended were, or may have been, wrong.

[88] Mr Jenkins gave evidence that the growth in membership numbers for CPAA in New Zealand had been slower than the organisation had hoped for and expected. He cited increased numbers of resignations, particularly among younger CPAA

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[25] *First Sovereign Trust v New Zealand Racing Board* [2012] NZHC 1784.

members, in 2013 and 2014. Although there was a healthy increase in overall membership numbers (from 937 in 2012 to 1,289 in 2013 and 1,601 in 2014), Mr Jenkins attributed the increase in the last period for which statistics were available to a period in which CPAA offered complimentary membership for those joining.

[89] Overall, the retention rate for membership has been relatively constant, as follows:

Year	Retention rate
2009	93.95%
2010	92.59%
2011	93.98%
2012	94.15%
2013	94.56%
2014	93.64%

[90] Although Mr Jenkins expressed concern that the retention rate in 2014 was the lowest it had been since 2011, the extent of the variation in a growing membership is not material.

[91] In terms of more specific initiatives, CPAA has sought to negotiate with large employers of accountants what it calls recognised employer partnerships (REP). The rationale is for CPAA to have such employers accept the CPAA designation as an equal and alternative qualification to NZICA's. CPAA entered into an REP with KPMG in December 2012 and subsequently concluded other REPs with large employers in 2013 and 2014. However, by comparison to the course of negotiating the first REP with KPMG, Mr Jenkins' opinion was that the subsequent REPs (which were in the course of negotiation when Ms Patterson's addresses were delivered and thereafter) were more difficult and took longer than CPAA might reasonably have expected.

[92] Mr Jenkins also considered that CPAA had attracted smaller audiences than it expected to promotional events it had conducted in the period after Ms Patterson's addresses.

[93] I have reflected on the likely impact of the statements on the audiences that heard them. The audiences comprised predominantly members of NZICA, with a small minority being existing members of CPAA. It is possible that a small number of attendees were not existing members of either organisation, but candidates to join at least one of them.

[94] Ms Brownrigg gave evidence in response to a subpoena issued on behalf of NZICA. Her perception as the organiser of the conferences is instructive. She treated Ms Patterson's criticisms of a competitor organisation as inappropriate and stated that her manner was aggressive. She treated the comments about CPAA as Ms Patterson:[26]

> … stray[ing] off topic at times to have a bit of a dig at CPA Australia. I didn't feel that was appropriate given what she was asked to speak about.

[95] Ms Brownrigg treated the occasion as one that gave representatives of both organisations a platform to update and sell the benefits of belonging to their respective organisations. She did not expect either representative to use the opportunity to denigrate their opposition and for that reason was surprised by some of Ms Patterson's comments.

[96] I consider that some in the audiences, irrespective of their membership affiliation, would have treated Ms Patterson's criticisms as inappropriate and unprofessional. It follows that there would, more likely than not, have been some in the audiences who treated the comments as harming NZICA's reputation, rather than damaging the reputation of CPAA.

[97] I acknowledge that there were hearsay statements in the evidence of witnesses for CPAA, Ms Bridget Pretty and Mr Richard Jones, who reported on comments made to them by other attendees at the Christchurch conference. I recorded objections to those hearsay statements at the time, allowing them to remain in the witnesses' evidence-in-chief *de bene esse*.[27] I accept that the evidence was inadmissible, and I have disregarded it. I am able to reach the view I have expressed

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[26] Brief of Viv Brownrigg at [17].
[27] Trial Ruling No 1.

in the previous paragraph from my own assessment of the range of reactions that Ms Patterson's comments would have provoked among the members of audiences of the type that she was addressing.

[98] There would also have been a range of reactions among the audiences as to how inclined they were to accept or agree with Ms Patterson's comments. The statements about CPAA were from the perspective of a former monopolist that resented the intrusion of Australian competition. Given her aggressive tone, an educated audience including practising accountants, and those aspiring to that status, would be unlikely to accept her criticisms at face value. For example, those who were already undertaking the CPAA modules, or who had researched the requirements for doing so, would be unlikely to accept Ms Patterson's derisory observation that students could do a few CPAA modules and CPAA would then give them a piece of paper saying that they were an accountant. That is not to say that the criticisms were less than defamatory, but that the lasting effects of defamatory comments should not be overstated. I also consider that the fact the comments were delivered orally lessens to a degree the impact they would have, if compared with a written statement circulated in the same terms.

[99] The CPAA representatives did not respond to the criticisms in either forum. I consider that to be a neutral factor. Although some members of the audience might treat the lack of a denial as adding credibility to the criticisms, others might equally treat their refusal to engage as a dignified or professional way to handle it.

[100] Ms Patterson's claims to superior educational standards and international connections for NZICA might have been treated as puffery – a predictable form of marketing the attributes of NZICA, in part by denigrating its competitor. Having regard to all these aspects of the context, I am not persuaded that any material component of the audiences would have taken the criticisms to heart and relied on them to change their view on the respective attributes of the two organisations.

[101] The essence of CPAA's position is that, whilst its fortunes in New Zealand have improved since the May 2013 statements, the extent of that improvement is less than it would have been without the defamatory comments. The basis for that

proposition remains speculative. CPAA's task in New Zealand, to make inroads into a very long-established monopoly, is a difficult one. The incumbent has fought hard to retain its dominant position and there is no basis for attributing the indeterminable extent to which it has succeeded in doing so entirely or substantially to the defamatory content of Ms Patterson's addresses. There is no evidentiary basis on which to rely, to draw an inference that what was said to the two audiences has caused pecuniary loss to CPAA. Accordingly, I am not satisfied that CPAA can make out that it has suffered any pecuniary loss.

[102] Mr Galbraith argued that the prospect of pecuniary loss caused by Ms Patterson's statements was likely to continue for years, given that the audience included those who were studying accountancy or were young accountants. He submitted that choices they might make about which professional organisation to belong to were likely to be made over a period of years, in circumstances where those decisions could be impacted by Ms Patterson's criticisms in May 2013. I am not persuaded that there is any sufficient prospect of pecuniary loss being caused in the future, if CPAA is unable to make out such loss on the balance of probabilities in the period of somewhat more than two years since the addresses were delivered. With the passage of time, an on-going range of alternative experiences would be available to those making choices about which professional body to belong to, so that whatever impact the statements had at the time is more likely to have dissipated than to have retained its potency when added to the mix of other influences on the choices made by potential members.

[103] In case I am wrong in deciding that CPAA cannot make out either the existence of pecuniary loss or that the statements complained of are likely prospectively to cause it pecuniary loss, it is appropriate to summarise the full gamut of defences that were argued to the claims in defamation, and indicate my view on them.

A threshold of seriousness?

[104] In addition to the numerous defences pleaded for NZICA, it raised a general objection that robust criticisms by one professional body of another did not reach a

minimum threshold of seriousness to warrant the intervention of the law of defamation. Arguably, the criticisms were part of the cut and thrust in a competitive environment, and CPAA had ample opportunities to respond with claims and criticisms of its own to the target audience. The law should not intervene to punish utterances thought to be unprofessional or in poor taste.

[105] It is well-settled in England that all definitions of what may constitute defamatory material are subject to a requirement that the material complained of has to exceed a threshold of seriousness, so as to exclude trivial claims.[28] In an extensive analysis of this issue in *Thornton v Telegraph Media Group Ltd*, Tugendhat J concluded that such a threshold applied, for two reasons.[29] First, that it was in accordance with the true interpretation of Lord Atkins' speech in *Sim v Stretch*,[30] and with the more recent decision in *Ecclestone v Telegraph Media Group* with which Tugendhat J agreed.[31] Secondly, the threshold was treated as required by the development of the law, recognised in *Jameel (Yousef) v Dow Jones & Co Inc*, that arose from the passing of the Human Rights Act 1998 in the United Kingdom.[32] Regard for art 10 of the European Convention on Human Rights and Fundamental Freedoms and the principle of proportionality both required it.

[106] In the United Kingdom, the recognition of a seriousness threshold by the courts has more recently been reflected in s 1(1) of the United Kingdom Defamation Act 2013, which provides:

> **1 Serious harm.**
>
> (1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.
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> ….

[107] Mr Gray submitted that the influence of art 10 of the European Convention recognised in the Court of Appeal decision in *Jameel*, has its equivalent in the

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28 Richard Parkes and Alastair Mullis *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at [2.4].

29 *Thornton v Telegraph Media Group* [2010] EWHC 1414 (QB), [2011] 1 WLR 1985.

30 *Sim v Stretch* [1936] 2 All ER 1237 (UKHL).

31 *Ecclestone v Telegraph Media Group* [2009] EWHC 2779 (QB)

32 *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946.

recognition of the right to freedom of expression which is in broadly similar terms in s 14 of the New Zealand Bill of Rights Act 1990 (NZBORA).

[108] Mr Galbraith resisted the adoption of any threshold of seriousness in New Zealand. He pointed out that the matter had been of sufficient concern in England for a threshold to be specified by Parliament, when there has been no such consideration given in New Zealand.

[109] Mr Galbraith also submitted that no need has been identified for such a threshold in New Zealand where, on his analysis, defamation proceedings were not frequently resorted to, and plaintiffs and their advisers were sensible in reserving proceedings for cases where any seriousness threshold would be exceeded in any event. At least anecdotally, very high awards of defamation damages are rare in New Zealand. This may contrast with the position in England, where plaintiffs' aspirations may have been excited by numerous seemingly extravagant awards. Alternatively, Mr Galbraith argued that if CPAA's causes of action had to meet some threshold of seriousness, then the matters complained of readily did so in any event.

[110] In *Thornton*, Tugendhat J cited a sequence of definitions of what constitutes defamation that was drawn from judicial analysis by Neill LJ in *Berkoff v Burchill*, and then commented on extra-judicially in Neill LJ's contribution in *Duncan and Neill on Defamation*.[33] Applying definitions that involve value judgements such as whether the words complained of would tend to lower the plaintiff in the estimation of right-thinking members of society generally, or were such as to make a plaintiff be shunned and avoided, or to deter third persons from associating or dealing with him, are factual issues that will generally be left to a jury. A difficulty in identifying the scope of possible claims in defamation is that these definitions can apply to an extremely wide range of circumstances, potentially without an objective minimum level of seriousness.

[111] As to the application of such a threshold, Gatley comments as follows:[34]

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[33] *Berkoff v Burchill* [1996] EWCA Civ 564, [1996] 4 All ER 108 at 1011, 1013, Brian Neill and others *Duncan and Neill on Defamation* (3rd ed, LexisNexis, London, 2009) at ch 4.

[34] *Gatley on Libel and Slander*, above n 28, at [2.4] (footnotes omitted).

> Whether the threshold of seriousness has been met is a multi-factorial question, that must be viewed in light of the rights in art 8 and art 10, and that will require the court to consider matters such as the nature and inherent gravity of the allegation, whether the publication was oral or written, the status and number of publishees and whether the allegations were believed, the status of the publisher and whether this makes it more likely that the allegation will be believed, and the transience of the publication. The result in each case will depend on the particular facts …

[112] Complaints of defamation that have been held not to reach the seriousness threshold include a criticism of an author whose book contained the outcome of numerous substantial interviews, where her method was criticised for giving the interviewees the right to read what the author had said, and to change it. So, too, where a publication described the author as being dismissive of the views of several well-known vegetarians in respect of their vegetarianism.[35]

[113] On the other hand, an argument that the seriousness threshold had not been reached was unsuccessful in a case where the plaintiff complained of an imputation that she had made an embarrassingly drunken spectacle of herself as she proposed to her boyfriend while singing karaoke in a pub in the early hours of the morning.[36]

[114] The New Zealand Parliament has never attempted a statutory definition of what amounts to defamation.[37] Including a seriousness threshold would provide some objective considerations helping potential claimants decide whether to sue, in circumstances where they are likely to be highly incensed and consider themselves seriously slighted when relying on an otherwise subjective assessment.

[115] The recognition of the right to freedom of expression reflected in s 14 exemplifies an aspiration that New Zealanders be more tolerant of the entitlement of others to express diverse views, including criticisms of others. Obviously, like others, that right is not unqualified and it could not provide a complete defence in respect of a statement that is otherwise made out as defamatory. However, s 6 of NZBORA requires courts to prefer an interpretation of an enactment that is consistent with the rights and freedoms contained therein, where that is possible.

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35 *Thornton v Telegraph Media Group*, above n 29, and *Ecclestone v Telegraph Media Group*, above n 31.

36 *Church v MGN Ltd* [2012] EWHC 693 (QB).

37 Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, 2013) at [16.3].

Applying a threshold of seriousness would be one way to protect against unjustified infringements of the right to freedom of expression.

[116] In many circumstances, litigating a claim for defamation is among the least efficacious forms of proceedings available for civil wrongs. Pursuit of vindication of a defamed plaintiff's rights inevitably involves revisiting the content and circumstances of the damaging utterances, and the courts are familiar with cases in which notionally successful plaintiffs are left dissatisfied with the final outcome. In an era when a focus on the substance of civil disputes generally enables them to be litigated pursuant to an agreed sequence of issues, the technical requirements of pleading for both plaintiff and defendant in defamation cases places greater emphasis on these more technical considerations: the accuracy of alleged defamatory meanings, the presence of innuendo, the justification for honest opinion or defence of matters such as qualified privilege.

[117] In a 2010 judgment, Lord Phillips observed for the United Kingdom Supreme Court:[38]

> Over 40 years ago Diplock LJ in *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 171 referred to "the artificial and archaic character of the tort of libel". Some 20 years on Parker LJ in *Brent Walker Group Plc v Time Out Ltd* [1991] 2 QB 33, 46 commented on the absurdity of the "tangled web of the law of defamation". Little has occurred in the last 20 years to unravel the tangle …

[118] In a short concurring judgment in that appeal, Lord Walker observed how the defence of fair comment (honest opinion in New Zealand) had to adapt to the vastly different conditions in which electronic media have exponentially expanded both those writing, and those reading matters of comment.[39] Although the phenomenon of the electronic media is not directly relevant in this case, it is a part of the context in which the Court should assess the appropriate approach to the recognition of actionable claims for defamation.

[119] The introduction in the Act of alternatives to a traditional determination after trial, such as the opportunity for a retraction or reply, the court's power to

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38 *Spiller v Joseph* [2011] 1 All ER 947 (UKSC) at [2].
39 At [131].

recommend corrections, and the prospect of statements in open court, suggests legislative attempts to broaden the avenues for resolving the harm perceived as following from alleged defamatory utterances.[40]

[120] I would be minded to adopt the analysis exemplified in *Thornton* and other recent United Kingdom authorities by recognising a minimum threshold of seriousness. That would require a claimant to meet an objective seriousness threshold as an element of making out the actionability of alleged defamatory statements. The approach suggested in *Gatley* appears appropriate. This threshold would apply across the various common law definitions of defamation. For instance, in the present case, CPAA would need to establish not only that the statements were to its discredit, but that these discrediting statements caused serious harm to its reputation.

[121] The existence of such a seriousness threshold is not decisive in this case because CPAA was required to establish that the publication complained of has caused pecuniary loss. In this case, that requirement poses a hurdle of similar height to any requirement for CPAA to clear a threshold of seriousness. If such a threshold is to be applied, then I would find that CPAA could not make it out, where it has been unable to establish pecuniary loss.

Defences pleaded

Truth

[122] Section 8 of the Act provides for the defence previously known as justification, and recognised in the Act as the defence of truth. The relevant parts of s 8 are as follows:

> **8 Truth**
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> …
>
> (2) In proceedings for defamation based on only some of the matter contained in a publication, the defendant may allege and prove any facts contained in the whole of the publication.

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[40] Defamation Act 1992, ss 25, 26 and 34.

> (3) In proceedings for defamation, a defence of truth shall succeed if—
>
> (a) The defendant proves that the imputations contained in the matter that is the subject of the proceedings were true, or not materially different from the truth; or
>
> (b) Where the proceedings are based on all or any of the matter contained in a publication, the defendant proves that the publication taken as a whole was in substance true, or was in substance not materially different from the truth.

[123] In this case, NZICA has pleaded truth in respect of the following imputations:

- that CPAA resorts to expensive or elaborate marketing ploys to entice accountants to become members;

- that CPAA cannot attract members without resorting to expensive or elaborate marketing ploys; and

- that CPAA wastes or misuses membership fees to pay for expensive advertising on television.

[124] Section 8(2) imposes the onus on NZICA to prove sufficient facts to justify these imputations as truthful.

[125] As to the first of these imputations, Ms Patterson explained in evidence that she had been told that CPAA explored the prospect of providing free iPads to staff members who enrolled in the CPAA programme with one large accounting firm. Mr Jenkins' evidence on this was to the effect that there had been a single exploratory discussion about such a prospect, but that it had not gone any further, and no free iPads had ever been offered. When that evidence was put to Ms Patterson, she rejected it and accepted that her stance meant that she thought Mr Jenkins was lying on the point.[41]

[126] I accept Mr Jenkins' evidence on the point. His concession that the prospect had been raised in a tentative way was entirely credible, as was his firm denial that the matter had gone any further. There was nothing in Ms Patterson's evidence or

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[41] Notes of evidence at 71/8.

the remainder of NZICA's case to justify rejecting Mr Jenkins' evidence, which was consistent and reasonable.

[127] A single, exploratory suggestion that iPads might be offered cannot be equated with CPAA resorting to that as a marketing ploy. It follows that the imputation that CPAA resorts to expensive marketing ploys to entice accountants to become members is false.

[128] As to the second imputation that CPAA cannot attract members without resorting to expensive or elaborate marketing ploys, I am not satisfied that such an imputation arises from the relevant statement complained of in Ms Patterson's speeches. Accordingly, no need arises to consider whether truth might be a defence to it.

[129] The third imputation defended on the ground of truth was that CPAA wastes or misuses membership fees to pay for expensive advertising on television. The impact of this criticism arose from Ms Patterson's statement which implied that CPAA took out sponsorship of an entire series of the CSI television programme on prime time television in Australia. On the basis of what Ms Patterson had been told by other, unidentified, persons, she still believed that to be the case at the time of the hearing. It had been denied by CPAA and I accept the statement from the Nine Network Australia Pty Ltd to the effect that CPAA advertisements appeared on a total of six occasions during or around the screening of the CSI programme.

[130] In argument, the justification for this imputation was evidence that CPAA had booked television advertising in New Zealand in the 2013 calendar year that was charged at $218,965.[42] There did not appear to be any evidence of the amount CPAA had paid for that television advertising, given the prospect of discounts from the notional charge described in the relevant schedule as the "rate card value". Ms Patterson's criticism that spending membership fees on extensive television advertising was wasteful or a misuse of membership fees was an expression of

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[42] CB3/517-522. The pleading (second amended statement of claim at 42.2.6) alleged that CPAA had a media plan for February 2012 to January 2013 that costed various forms of advertising at over A$3,000,000. There was no evidence of that, and the focus was on New Zealand television advertising.

opinion dependent on a factual statement that was not correct, at least in regard to the extent of such advertising.

[131] I am not persuaded that the placement of six discrete advertisements during the screening of a series of CSI can be treated as "not materially different" from the statement that CPAA had sponsored an entire series. I accept that the difference is one of degree rather than kind. However, some in Ms Patterson's audiences would likely have treated her criticism of CPAA using membership fees for television advertising as being justified by her emphasis on the very substantial extent of that advertising, rather than the choice to use that mode of advertising at all. Others in the audience may have treated the criticism as reflecting adversely on the use of television advertising per se, irrespective of its extent. A small number in the audiences may have recalled that NZICA had used full page advertisements in the *New Zealand Herald* and the NBR some six months earlier.

[132] The matter is finely balanced. One aspect of the criticism is about the choice of television advertising per se, which could justify NZICA defending the imputation on the basis that the underlying factual assertion was not materially different from the truth. However, the real sting in the criticism is the implied extravagance of CPAA spending as much as would be involved in sponsoring a whole series of CSI as a form of promoting itself. Because that aspect of the imputation looms larger, I am not satisfied that it is one that can be defended on the basis that the evidence established facts not materially different from the truth.

[133] NZICA also invoked the defence of truth as provided for in s 8(3)(b) of the Act by arguing that, in a review of the totality of the passages objected to, the overall message conveyed was in substance true or not materially different from the truth.

[134] Counsel for both parties drew different points on the approach to s 8(3)(b) from the decision in *Ansley v Penn*.[43] The subject matter of that case was a Listener article about a young woman who claimed to have been excluded from studying for a diploma in nursing at the Christchurch Polytechnic because she had challenged so-called politically correct content in the curriculum. The article commented

[43] *Ansley v Penn* HC Christchurch A36/98, 28 August 1998 (Full Court).

adversely on her honesty, and referred to her having been an in-patient in a psychiatric hospital and that she had not disclosed that fact in her application. The reference to her having been an in-patient was wrong and the District Court Judge found that assessments of her mental health by health professionals were not close enough to render the statement about her having been an in-patient not materially different from the truth.

[135] At the District Court trial, the Judge had apparently heard extensive evidence as to her behaviour whilst enrolled in the nursing course. The District Court Judge found that during the time of her association with the Christchurch Polytechnic she was:[44]

> … attention seeking, argumentative, disrespectful, offensive, disruptive, divisive, manipulative, threatening, intimidating and that this behaviour caused distress to others.

[136] It was in that context that the High Court on appeal had to consider the trial Judge's rejection of a plea of truth in reliance on s 8(3)(b). The Court treated that provision as affording a defence of truth where the part of the publication that the plaintiff relied on is not proved to be true, but the sting of the article as a whole is true, or in substance not materially different from the truth, so that damage to the plaintiff's reputation flows from the article as a whole, and not from the words relied on by the plaintiff.[45]

[137] Any comparison of the overall impact of a speech with the impact of component parts complained of by a plaintiff will be intensely fact-specific in each case. Here, NZICA characterised the sting of Ms Patterson's comments in relation to CPAA as the adverse comparison to her claims that NZICA has the pre-eminent designation in terms of qualifications, so that membership of NZICA was more valuable to its members than the CPAA designation would be for its members. On the premise that NZICA's defence had justified that proposition, Mr Gray argued that any different or more specific adverse imputations arising from particular passages found to be defamatory would not add to the harm to CPAA. It arguably followed

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44 *Ansley v Penn*, above n 43, at 12.
45 *Ansley v Penn*, above n 43, at 13 and 14.

that the truth of the comments overall about CPAA entitled NZICA to invoke the general form of the defence of truth as provided by s 8(3)(b).

[138] In contrast, Mr Galbraith relied on the Full Court's adoption of the trial Judge's observation in respect of the defence of truth under s 8(3)(b) in the following terms:[46]

> … if a statement makes either a separate or discrete assertion as to the plaintiff's character the rest of the publication in which that statement appears cannot be ignored because it may well give the assertion a context. However, if the allegedly defamatory assertion means that once the article as a whole has been read there is still a defamation then the defence is not proved.

[139] Given the extent to which I have found the pleaded imputations were defamatory, I consider they raise discrete defamations that are not subsumed in the more general theme of criticism which NZICA argues it can defend on the overall truth of the statements in respect of CPAA. There were disparaging remarks by Ms Patterson that, if pecuniary loss had been made out, would have been defamatory of features of CPAA going beyond the general theme of the inferiority of its educational standards. Accordingly, a general plea of truth relying on s 8(3)(b) could not succeed as a defence.

Honest opinion

[140] NZICA also pleaded honest opinion as an alternative defence in classic terms as follows:

> Insofar as the statements consisted of statements of fact, they were true in substance and in fact, and so far as they consist of an expression of opinion, they are the honest opinion of the defendant.

[141] The defence then particularised what were asserted as statements of fact, and the facts and circumstances relied on, followed by a claim that all of the pleaded meanings complained of constituted opinions, and that they were genuinely held by NZICA.

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[46] Cited in *Ansley v Penn*, above n 43, at 12.

[142] CPAA complained that the pleading did not specify which of the allegedly defamatory statements were defended as honest opinion, when the distinction was not made in NZICA's pleading between the components characterised as fact and those characterised as opinion. A defendant pleading honest opinion is obliged to identify the facts on which the defendant was commenting, and to establish that such facts were true. Mr Gray identified matters at that level of detail in his closing submissions. I am not concerned that there was a material deficiency in the pleading that caused prejudice to CPAA.

[143] To defend a comment on the basis that it is honest opinion, its terms must explicitly or implicitly indicate the facts on which it is based.[47] On the other hand, it is not necessary for a defendant to prove the truth of all the facts that are relied on, but rather sufficient of them to justify the comment made in reliance on the facts.[48]

[144] The difficulty for NZICA in pleading honest opinion is that there is a material mismatch between the facts it pleads as being true, and the component of Ms Patterson's comments that were presented as fact. For instance, the pleaded facts relied on included that NZICA is a member of the GAA whilst CPAA is not, and that NZICA has an arrangement for reciprocal membership with GAA members, whereas CPAA does not. That ignores the fact that Ms Patterson's assertions of inferior educational standards being applied by CPAA were based on the proposition that CPAA could not qualify for membership of GAA because its educational standards were different.[49]

[145] Similarly, the true facts cited as justification for the criticisms of CPAA's promotional tactics were that it had "contemplated offering new graduates a free iPad", and that it had appeared to spend over $218,000 on television advertising. That was not the substratum of fact that was relevant to Ms Patterson's criticisms. Her comment about iPads was reasonably interpreted as meaning that CPAA did offer new graduates a free iPad, not merely that it had contemplated doing so. Further, that CPAA had been the sponsor of an entire series of CSI on Australian

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47 *Spiller v Joseph*, above n 38, at [105].
48 *Mitchell v Sprott* [2002] 1 NZLR 766 (CA) at [24].
49 Which in context was reasonably interpreted as inferior.

prime time television, when the fact relied on to advance honest opinion in closing was different to that.

[146] On each of the topics of the alleged inferiority of CPAA's educational standards, and the nature and prudence of CPAA's marketing tactics, I am not satisfied that the more confined factual propositions that could be proven as true formed a sufficient basis for expressions of opinion that were defamatory. That is because the expressions of opinion were made by reference to different assertions of facts that NZICA cannot make out as being correct. That conclusion would preclude NZICA invoking the defence of honest opinion.

[147] There was considerable argument and evidence on the question of whether the education provided by CPAA is inferior to that provided by NZICA. I note that in pleading truth as a defence, NZICA did not plead as a true statement of fact that CPAA's educational standards were inferior to NZICA's.

[148] On this issue, CPAA called Professor Tony van Zijl, professor of accounting at Victoria University, and NZICA called Professor David Lont, professor of accounting at Otago University. After producing briefs, these two experts were directed to confer and produce a joint report that identified the extent of common ground on material issues, and to list the different opinions still maintained by each of them. Their evidence was given in a hot tub format after all other evidence had been completed.

[149] The experts agreed that NZICA and CPAA were well-respected as professional bodies in New Zealand and Australia, and internationally, by other accounting professional bodies, tertiary institutions and regulators. The experts treated both organisations as having long-standing accreditation processes for accounting degree programmes. Beyond that point, the experts diverged on the criteria for assessing the relative quality of the educational programmes, and whether the programmes offered by NZICA could be ranked as superior to those offered by CPAA.

[150] Professor Lont placed some weight on the existence of a post-graduate diploma issued by NZICA to recognise successful completion of the requirements to achieve registration as a chartered accountant. He also placed store on the independent ranking of the courses for that study in Australia as being at post-graduate level, whereas there is no equivalent independent ranking of the courses that are offered by CPAA. Professor Lont was critical of the substantially greater extent to which CPAA tests candidates by use of multiple choice questions, whereas more of the testing of students for the NZICA qualification was by way of written answers.

[151] Professor Lont also cited what he considered to be the invariable requirement for NZICA candidates to complete a university commerce degree before embarking on the professional study. In contrast, CPAA allows exceptions to that requirement for candidates who undertake the professional subjects before they have completed a university degree, and in some cases not a commerce degree.

[152] The experts agreed that the combined academic and professional education requirements for CPAA candidates included a minimum of one course in each of auditing and tax, whereas the NZICA requirement was for two courses in each area. Professor Lont considered that the NZICA requirement would produce candidates with a greater extent of knowledge in those important areas.

[153] The content of NZICA's curriculum has to conform with the requirements of a group convened by the GAA and known as Chartered Accountants Group of Executives (CAGE). Professor Lont saw compliance with the CAGE framework as providing another external quality assessment for NZICA's programme.

[154] Professor van Zijl held credibly to contrary views on each of these potential indicators of quality. On the existence of a separate diploma awarded for completing the course, Professor van Zijl was persuasive in his view that the decision of an institution to issue such a diploma cannot, of itself, alter the quality of the study required to earn it.

[155] As to the assessment of the level of study attributed to the Australian version of the NZICA course by an independent higher education body, Professor van Zijl was not persuaded of its relevance when the same organisation did not rank CPAA's modules on the same basis. He reasoned that there was no basis for assuming that CPAA's modules would be ranked any lower than NZICA's, when the exercise has not been undertaken by the independent organisation.

[156] CPAA does self-assess the level of its modules, which puts an overall weighting at less than eight, which is recognised as the appropriate (post-graduate) level in the independent assessment of NZICA's papers.

[157] Professor van Zijl was not persuaded that the educational standard for CPAA's modules is lower by virtue of the fact that some students may embark on them before having completed a university degree, whether in accounting or in other disciplines. His view was that the alternative offered by CPAA to non-accounting students to complete certain foundation courses to achieve the equivalence of the academic learning involved in an accounting degree is a healthy means of attracting students with learning in different disciplines, without necessarily down-grading the standards required in accounting learning to achieve the requisite qualification. On this point, Professor Lont acknowledged that NZICA has more recently relaxed the previously rigid requirement for an accounting degree as a pre-requisite to commencing study, enabling a measure of diversity to be achieved in its students.

[158] Professor van Zijl did not accept that testing students with multiple choice questions necessarily indicated that the learning involved was at a more elementary level. His point was that, depending on the skill applied in setting the questions, relatively sophisticated testing could be achieved successfully by the use of multiple choice questions. He also made the point that given the very large numbers of students sitting CPAA exams, resort to multiple choice questions was likely to be a necessity to enable efficient processing of candidates' exams.

[159] I am inclined to accept Professor Lont's view that written answers enable a more discerning assessment of the skills of students, not only to know the subject matter but to analyse and evaluate it.[50]

[160] That cannot be decisive, however, given the diverse nature of the subject matter desirably covered in competing courses. The same observation applies to the quality of study achieved by undertaking two modules of auditing and tax, rather than one. For accountants in public practice in New Zealand, additional study in those areas could reasonably be expected to enhance the skill level that those with the qualification brought to those types of work. Additional study in respect of auditing would be a matter of indifference to accountants whose work had nothing to do with auditing.

[161] Professors van Zijl and Lont also took different views on projections of the hours of study that they considered would be required to complete the courses required by each organisation. There were too many imponderables in the assumptions made for their views on that point of comparison to be substantially helpful.

[162] Having regard to the detailed analyses in the experts' respective briefs, the narrowing of their differences in the joint statement they produced, and the exchanges of views elicited during their oral evidence, I do not consider it is appropriate to make a definitive finding either that the educational courses offered by the parties are substantially similar, or that NZICA's is superior to that of CPAA. As the debate between the experts demonstrated, any such ranking would require evaluation on a number of criteria where subjective elements justify reasonable assessors arriving at inconsistent views.

[163] I am satisfied that there can be legitimately different views attributed to the weighting given to various criteria relevant to the quality of the respective qualifications. For example, the syllabus for CPAA offers greater flexibility in the range of courses and the sequence in which students can study them. It may

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[50] Professor Lont cited *Blooms Taxonomy* which postulates a hierarchy of learning starting from knowledge and comprehension at the bottom to analysis, synthesis and evaluation towards the top of the pyramid.

therefore provide a more meaningful accounting qualification for students intending to practise in jurisdictions such as Singapore or Hong Kong, where CPAA has a presence. On the other hand, for trainee accountants intending to practice in New Zealand, taking NZICA's advanced modules in tax or auditing is likely to involve a higher level of learning.

[164] If Ms Patterson's unqualified statements in relation to CPAA's educational standards being inferior were treated as statements of fact, then they would be false. I accept that in terms of the words in which this topic was addressed, and the tone in which the comments were delivered, Ms Patterson was presenting them as statements of fact. However, she was speaking to discerning audiences that would be unlikely to accept such assertions uncritically. She was obviously advocating for her organisation and the more aggressively she expressed herself, the more likely it would have been that her audiences treated her assertions as matters of opinion.

[165] Professor Lont readily justified his opinion that NZICA's qualifications were superior by applying the criteria he considered to be most important. If Ms Patterson had qualified her statements by saying, for example, that NZICA considered its qualification was superior for those wishing to practise in New Zealand, and in particular in public practice, then such comments would be defensible as honest opinion if they relied on an analysis such as that undertaken by Professor Lont.

[166] The difficulty is that the propositions Ms Patterson relied on for the unqualified statement as to inferiority were not the equivalent of Professor Lont's considerations. They were instead to the effect that CPAA was excluded from the GAA because its educational standards were inferior, and that the CPAA qualification could be obtained after students had completed a few modules. Those were not true statements of fact, so honest opinion could not avail NZICA on the sting of the defamation.

[167] In the event that I am wrong as to the inadequacy of true facts as a foundation for the opinions expressed, the additional issue of whether NZICA's opinions were genuinely held would arise. CPAA issued a notice under s 39 of the Act disputing that the opinions expressed by Ms Patterson were genuinely held. When cross-

examined, Ms Patterson maintained her belief that CPAA had sponsored a series of CSI in Australia on the basis of what she had been told by other unidentified persons. She ultimately accepted that there was no evidence that such sponsorship had occurred, and NZICA did not contest the documentary confirmation from Nine Network Australia of a far more limited extent of advertising in association with a CSI programme.

[168] Ms Patterson accepted in cross-examination that she was mistaken about CPAA not being a member of GAA because of different educational standards.[51]

[169] The genuineness of an opinion in this context is not assessed by its reasonableness.[52] Even if there is a degree of irresponsibility in the way opinions relied on have been formed, that does not necessarily mean that it was not genuine. I accept the criticisms for CPAA that Ms Patterson was inadequately briefed to express the opinions, and was cavalier in confidently asserting matters on which she was wrong. However, those criticisms are not sufficient to deprive the opinions expressed of a genuine character.

[170] Having reflected on the tone of Ms Patterson's recorded presentation, its text and the totality of her evidence, I accept that the relevant opinions she expressed were genuinely held by her for that component of the honest opinion defence. However, on my analysis it would not be available because the opinions complained of relied on facts not made out as true.

Qualified privilege

[171] The last alternative defence pleaded for NZICA is that Ms Patterson's statements were made on occasions of qualified privilege. The consequence would be that there can be no liability for statements found to be defamatory unless the rebuttal arising under s 19 of the Act applied.

[172] CPAA disputed that the Christchurch and Wellington conferences constituted occasions of qualified privilege for Ms Patterson to address the audiences on

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51 Transcript at 96, 97.

52 *Mitchell v Sprott*, above n 48, at [24].

criticisms of CPAA. Alternatively, CPAA pleaded that, if qualified privilege otherwise applied, it was not available to NZICA because s 19 of the Act applied, which provides:

> **19 Rebuttal of qualified privilege**
>
> (1) In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.
>
> (2) Subject to subsection (1) of this section, a defence of qualified privilege shall not fail because the defendant was motivated by malice.

[173] Qualified privilege will arise if the person making the communication has an interest, or a legal, social or moral duty, in making it to the person to whom it is made, and the audience has a corresponding interest or duty in receiving it.[53] The definition of occasions of qualified privilege were considered by the Court of Appeal in its second decision in *Lange v Atkinson*:[54]

> [20] A privileged occasion thus had to be an occasion in which the duty/interest test was satisfied. If in the circumstances that test was satisfied, the occasion was capable of being regarded as one of qualified privilege. But despite a communication being made between persons who might in other circumstances have a shared interest in the subject-matter it could happen that the maker and recipients of the statement did not in the particular circumstance of the publication have the necessary interest or duty to satisfy what we are calling the shared interest test.

[174] That judgment emphasises that consideration of whether the relevant occasion was one of qualified privilege, and whether the privilege was misused by the defendant, are separate inquiries. I note that although the terms of s 19(1) generally have plaintiffs assuming an onus to rebut qualified privilege by establishing that the defendant was predominantly motivated by ill-will, the concept of misuse of an otherwise privileged occasion is an explicit alternative, where a defendant has otherwise taken improper advantage of the occasion.

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53 *Adam v Ward* [1917] AC 309, at 334 per Lord Atkinson.
54 *Lange v Atkinson* [2000] 3 NZLR 385 at [20].

[175] I am satisfied that the Christchurch and Wellington conferences were occasions of qualified privilege for Ms Patterson to address the audiences on the competition NZICA perceived itself as facing from CPAA. She was invited to speak on behalf of NZICA, and did so as a senior executive. She was speaking to an audience who were either members of that organisation, members of the relevant competitor, or a potential member of either of them. NZICA's on-going status, and its merger with ICAA, were matters of important mutual interest shared by the speaker and her audiences.

[176] However, did the nature and extent of her defamatory statements take her outside the protection that qualified privilege would otherwise afford? In *Lange*, the Court of Appeal made the following observations about the misuse of an occasion of privilege:

- If the privilege is not responsibly used, its purpose is abused and improper advantage is taken of the occasion.

- A publisher who is reckless or indifferent to the truth of what is published cannot assert a genuine belief that it was true.

- While carelessness will not of itself be sufficient to negate qualified privilege, its existence may well support an assertion by the plaintiff of a lack of belief or recklessness. In this way the concept of reasonable or responsible conduct on the part of a defendant in the particular circumstances becomes a legitimate consideration.

- Recklessness as to truth has traditionally been treated as equivalent to knowledge of falsity.

- Indifference to truth is not the same thing conceptually as failing to take reasonable care with the truth, but in practical terms they tend to shade into each other. It is useful, when considering whether an occasion of

> qualified privilege has been misused, to ask whether the defendant has exercised the degree of responsibility which the occasion required.[55]

[177] Mr Galbraith submitted that Ms Patterson's conduct was influenced by NZICA's deliberate policy to compete aggressively with CPAA. He cited Ms Brownrigg's assessment as organiser of the conferences that Ms Patterson's presentations were inappropriate and that Ms Brownrigg was surprised that she used the opportunity to denigrate NZICA's opposition.

[178] Mr Galbraith also submitted that a defendant's subsequent rationale for statements complained of could be relevant to the attitude attributed to her at the time the addresses were made. In cross-examination, Ms Patterson accepted that she was trained as a lawyer, and had not undertaken accounting studies. She had depended on relatively high-level briefings from others at NZICA, whom she did not identify in her evidence, as the basis for her criticisms of CPAA. She was disinclined to withdraw criticisms despite having to acknowledge in cross-examination that she had no first-hand or reliably accurate information to support them. On her belief that CPAA had offered iPads as an incentive to students, she was prepared to reject Mr Jenkins' evidence as not being truthful without offering any foundation for doing so.

[179] In considering whether Ms Patterson abused an occasion of qualified privilege, or otherwise took improper advantage of it, it is appropriate to stand back and reflect on the broader circumstances of NZICA's agenda in communicating with members and potential members at the time. I have accepted that she was genuine in the opinions offered in her addresses that are complained of. I find that NZICA was genuine in perceiving CPAA as a major threat, and the then proposed merger with ICAA represented an important part of the strategy in meeting that threat. It follows that there was a close connection between the topics that made the occasions ones of qualified privilege, and the topics on which defamatory statements were made.

[180] On the other hand, I accept that Ms Patterson was inappropriately aggressive in criticising CPAA, where elements of those criticisms were false. I am also

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55 *Lange v Atkinson*, above n 54, at [42]–[46].

satisfied that she took substantially less care in ascertaining the state of the facts than should have occurred if NZICA was to retain the protection of qualified privilege for specific criticisms of its competitor in the course of promoting its own interests. Without more justification in terms of the advice she relied on to criticise CPAA, the level of carelessness verges on recklessness. Ms Patterson's denigration of CPAA in the criticisms she made and the overall tone contrasts starkly with the measured acknowledgements of the expert whose assessment NZICA has relied on in the proceedings. Professor Lont accepted that CPAA was a well-respected professional body in both New Zealand and Australia, and internationally.[56]

[181] A rejoinder to this is that CPAA was represented at the conferences and I infer from Ms Patterson's opening comments that she expected a robust response. If the more aggressive of her comments were wrong, such as that CPAA could not join GAA because its educational standards did not match those required, or that the CPAA designation could be obtained simply by doing a few modules, then she might well have thought that she would be challenged on the point by the speaker for CPAA. I have indicated that I think it understandable that Mr Jones did not join issue in Christchurch, but Ms Patterson was not to know that when she spoke first. Although the prospect of being corrected does not exonerate her for careless false statements, it is relevant to the issue of whether she is to be treated as having taken improper advantage of the occasion to an extent that disqualifies NZICA from claiming qualified privilege.

[182] Disqualifying NZICA from claiming qualified privilege is another finely balanced issue. In the end, I would find that the defamatory elements of her criticisms did take improper advantage of the occasion. It follows that qualified privilege would not be available to NZICA as a defence.

The Fair Trading Act claim

[183] CPAA claimed that, individually or cumulatively, the publication of the flyer in or about May 2011, the advertisement which appeared in October 2012, and the May 2013 comment from NZICA's then chief executive reported in an article in the

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[56] See [149] above.

NBR constituted misleading and deceptive conduct in trade.[57] CPAA has pleaded breach of both ss 9 and 11 of the FTA. Section 9 prohibits misleading and deceptive conduct generally, in the following terms:

> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[184] Section 11 addresses misleading conduct in relation to services and is in the following terms:

> No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services.

[185] In its 2014 decision in *Godfrey Hirst New Zealand Ltd v Cavalier Bremworth Ltd*, the Court of Appeal reviewed the level of discernment attributed to the audience for any promotional claims that are alleged to be misleading or likely to deceive.[58] The level of discernment to be attributed to the typical member of the audience was relevant in the case of a competing carpet manufacturer complaining that the defendant's descriptions in its advertisements of the warranties it would provide were misleading because they were qualified by limitations that were allegedly not sufficiently brought to the attention of readers of the advertising claims. The headline representation was "superb warranties with new synthetic ranges" whereas limits or qualifications on the scope of such warranties were in much smaller print and appeared elsewhere.

[186] The Court observed:[59]

> [43] We see no real divergence in the way all these cases have answered the question "who is the consumer?". All the formulations seem to us to encompass most of the public, where the representation is made to the public at large, or most of the consumers in any class specifically targeted. Many of the cases refer, almost interchangeably, to the "average" or "ordinary" or "reasonable" member(s) of the public or the class. That perhaps is a consequence of the High Court of Australia in *Campomar* perceiving the need "to isolate by some criterion a representative member of that class". That representative member, which the Court in *Campomar* described as "this hypothetical individual", is none other than the average or ordinary or

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57 The flyer is described at [11]–[18], the advertisement at [19]–[23] and the NBR comment at [34] and [35] above.

58 *Godfrey Hirst NZ Ltd v Cavalier Bremworth Ltd* [2014] NZCA 418, [2014] 3 NZLR 611.

59 Footnotes omitted.

> reasonable member of the class. In a similar endeavour Tipping J, as he explained in *Marcol*, used the expression "average shopper" "to try and capture the synthesis necessary to reflect our multicultural society". As we observed in [26], we think Tipping J used the word "average" as synonymous with typical, not in its mathematical sense. The same, we think, applies to the other cases. Because of the potential for confusion, "average" is a term best avoided.

[187] In summarising the approach, the Court rejected the application of the statutory criteria in s 9 and (in the case of goods) s 13 of the FTA to an "hypothetical individual". The Court concluded that "it is best and easiest to apply the two sections to the actual consumers in the target class excepting the outliers".[60] The outliers included those who are quite unusually stupid, perhaps the gullible, and those whose reactions are extreme or fanciful.[61]

[188] CPAA also invited me to apply five principles listed by the Court of Appeal in *Godfrey Hirst* as appropriate when assessing whether an advertisement is misleading or deceptive.[62] However, those principles were distilled in the particular situation where a "headline representation" was arguably insufficiently limited by later, less prominent, qualifying information. Principles such as the need to assess the overall impression of a dominant message, and rejecting an analysis of the separate effect of each representation, are appropriate where inconsistencies between a broad claim and qualifications to it are in issue. That is not a relevant feature here. I consider it appropriate to discern the attributes of the appropriate audience, and to form my own view as to whether the readers in the relevant audience would be misled.

[189] CPAA alleged the content of the flyer was misleading because it would be understood to mean that:

- NZICA members earn significantly more than CPAA members;
- CPAA's requirements for its qualification were less rigorous than NZICA's requirements to acquire its designation as a chartered accountant;

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60 *Godfrey Hirst* at [49].
61 At [47].
62 At [59].

- CPAA's training and mentoring after students completed their academic study were inferior; and

- CPAA does not have alliances and mutual recognition arrangements with other accounting bodies throughout the world.

[190] Mr McDougall accepted responsibility for the content of the flyer. His perception at the time it was produced was that NZICA members saw a need to promote their chartered accountancy designation more assertively to counteract what was seen as aggressive campaigning by CPAA. A further purpose was to address apparent confusion in the tertiary education sector as to what was involved in the two organisations' accounting designations.

[191] Although the flyer was withdrawn as soon as NZICA was challenged on the accuracy of the comparison about average salaries, Mr Gray was correct in submitting that CPAA had not proved that the projected average salary for CPAA members of $100,000 per annum was wrong, or by how much. However, the salary comparison remained misleading because it impliedly reflected a comparison of salaries that had been measured on the same basis for members of both organisations. I am satisfied that misrepresentation arose, notwithstanding that the acknowledgement of Hudson Recruitment as the source of the average salary was cited only in respect of the CPAA figure.

[192] As to the comparison of member numbers, CPAA's complaint was that the NZICA number of 32,000 included all NZICA members, irrespective of whether they were working in New Zealand or overseas. It was suggested that a material number of New Zealand NZICA members are working outside New Zealand at any given time. Arguably, they did not qualify as "New Zealand members" when working out of the country. If CPAA members were assessed on the same basis, then its worldwide membership, which was put at 133,000 at the time, would swamp NZICA's.

[193] Mr Gray argued that inclusion in NZICA's membership of those working outside New Zealand did not make the comparison materially misleading. He

argued that even assuming between 10 and 20 per cent of NZICA members were not working in New Zealand at any given time, the comparison was still valid. The focus in respect of CPAA was the extent of its membership in this country.

[194] CPAA complained that the comparison of office locations was also misleading when NZICA's reference to its 20 branch offices and 150 support staff was misleadingly compared with CPAA's staff only in New Zealand. Arguably, the reality ought to have been a comparison with 19 offices internationally.

[195] In terms of the "points of difference", the first comparison between four years' study for NZICA and three for CPAA was criticised as misleading when, by 2011, NZICA must have had plans to reduce its requirements for academic study to accommodate a three year course, making it comparable with CPAA. As to the second difference, CPAA complained of the adverse comparison on the need for face-to-face training in post-graduate study for NZICA, when CPAA's position was characterised as only "on-line training". It may be that some components of the mentoring or face-to-face training available under the CPAA requirements were optional, and the amount of face-to-face training may have been less. There may be scope for NZICA to argue that the substance of the point of difference was not materially misleading, because there was a greater extent of, or greater emphasis on, face-to-face training in the NZICA programme.

[196] The next point of difference focused on NZICA's claim to international reciprocity through GAA, linked to the claim that its chartered accountancy qualification is recognised internationally whereas CPAA was not part of an international accounting alliance, and its qualification was "Australian-based".

[197] The first of these points was objected to on the basis that CPAA does enjoy mutual recognition arrangements with a range of accountants' organisations, including IFAC, and the Confederation of Asian and Pacific Accountants (CAPA). NZICA's rejoinder is that those arrangements do not have the same standing as it derives from membership of the GAA.

[198] CPAA's general counsel in Australia protested about the misleading and deceptive content of the flyer by letter dated 5 May 2011. That complaint raised the misleading impression as to salary differential, the impression that CPAA only had a total membership of 750 whereas it was a global organisation with 133,000 members worldwide, that the CPAA designation could not be acquired with only three years' academic study and on-line training after graduation, and that CPAA had mutual recognition agreements with other accounting bodies in numerous countries.

[199] That protest was responded to by NZICA's general counsel on 17 May 2011. It appears from the content of that letter that the prompt challenge in respect of the salary comparison was to be addressed in an amended form of flyer. In other respects, NZICA disputed that the remaining aspects complained about were misleading.

[200] On their own, many of these points of difference are not materially misleading. For instance, because the comparison had a focus on New Zealand, I do not find the contrast in membership numbers misleading, nor is the contrast in office locations and the size of New Zealand domiciled staff. However, I accept that they contribute to a pattern of adverse comparisons that portrayed CPAA in a misleadingly inferior light.

[201] CPAA submitted that the misleading points of comparison were made more serious because the chart of comparisons was headed "The facts", which was likely to suggest to readers that the comparisons reflected matters of fact that were accurately stated, and could therefore be accepted at face value. While that reaction may be appropriate for a component of the audience of interested tertiary students, I am not satisfied that the claim to be citing "the facts" when assessed in the overall layout of the flyer would lead to such an audience accepting the content uncritically. I consider the preponderance of that readership would appreciate that it reflected the version of the so-called facts cast favourably from NZICA's perspective. Students taking an active interest in the competing attributes would be unlikely to make a decision if they were considering joining CPAA solely in reliance on NZICA's claims.

[202] Turning to the advertisements that appeared in October 2012, I am satisfied that this was an intentional attack on CPAA, the timing of which was to coincide with CPAA obtaining the status necessary to authorise practitioners to undertake tasks such as certain audits.

[203] I am not persuaded that the heading was misleading or likely to deceive. Readers of the NBR and the business section of the *New Zealand Herald* would, by and large, treat it as a form of puffery. I anticipate that reactions would range from accepting it as a legitimate competitive claim for NZICA to make in responding to competition from CPAA, through to a rejection of it as unethical and a regrettable departure from appropriate standards for a professional organisation. The preponderance of reactions would likely include that it was an expensive attempt by the incumbent to blunt the intrusion by a newcomer. I am not satisfied that any material part of those reading the advertisement would accept from NZICA that a competitor's designation necessarily meant that members of that competitor were "second best practice".

[204] On the other hand, I do not accept Mr McDougall's opinion that possibly only five per cent of readers went on to read the statements appearing below the heading. With respect to Mr McDougall's many years' experience in advertising, that opinion is inconsistent with the extent of effort applied in drafting and re-drafting the wording in the remainder of the advertisement. In assessing whether the advertisement was likely to mislead or deceive readers, I adopt the approach that a meaningful portion of those who saw the advertisement would have been sufficiently attracted by the large bold heading to also read the text appearing below it.

[205] Two statements in that text claimed exclusivity for members of NZICA. First, that only they had been exposed to the highest level of industry training and development, and secondly, that only NZICA members would be employed by "top CFOs and CEOs".

[206] Both claims amount to puffery, and are to be assessed accordingly. The exaggeration in any claim that "only" NZICA members enjoy the two forms of status claimed for them means that they would not be read literally. The first claim

involves a subjective judgement on undefined terms as to what comprises the "highest level of industry training and development". The second involved similarly undefined and subjective criteria as to who constitutes the "top CFOs and CEOs". The claim left unstated the range of roles for which such employers would restrict recruits to only those qualified as chartered accountants.

[207] Assessing the advertisement in the context of the likely readership of the publications in which it appeared, I am not satisfied that the content complained of made it misleading or deceptive.

[208] Turning finally to the statement attributed to Mr Norgate in the May 2013 NBR article, CPAA pleaded that it gave the misleading impression that its designation was inferior to NZICA's because CPAA had less rigorous entry requirements.

[209] The article was headed "Snuggling-up accountants battle 'declining relevance'". It addressed the proposed merger between NZICA and ICAA, and it was in that context that the comments from Mr Norgate were reported. The evidence did establish that the standards for the qualifications issued by the parties were different. The contentious issue was whether NZICA could establish that CPAA's qualifications were inferior.

[210] It follows that, in literal terms, Mr Norgate was correct to say that CPAA did not have the same entry standards as NZICA. The question is whether his reported comment would reasonably be interpreted as asserting that CPAA's standards were inferior to, as well as being different from, NZICA's. I am not satisfied that that misleading impression did arise from a reading of Mr Norgate's comment in the context in which it was reported. A theme of the article was NZICA's concern to protect the standing of the chartered accountants' qualification. His comment acknowledged that competition had been coming for a long time, and that the market seemed to take the chartered accountant designation for granted. Although some readers might infer that his concern was that the competition had lower standards, the context also suggests a concern that qualifications having different standards or different components might not be recognised as such by "the market".

[211] I am not satisfied that there was a material risk of these comments misleading readers of the NBR.

[212] CPAA also pleaded that the misleading and deceptive nature of NZICA's conduct ought to have been assessed cumulatively in relation to the flyer, the advertisement and the article. They were described as "systematic and on-going" publications.

[213] The three instances span two years, occurring in May 2011, October 2012 and May 2013. They involved different audiences, with the first being addressed to students who might qualify in accounting at Massey University's Albany campus. Although the plaintiff alleged that the flyer may have been used on additional occasions, I am not satisfied there was any more than publication of it on the single occasion.

[214] The readership of the October 2012 advertisements would be those who were exposed to the NBR and the business pages of the *New Zealand Herald*. Clearly, that is the widest audience, but I am not satisfied that it would overlap to any significant degree with the much smaller audience exposed to the May 2011 flyer. It is safe to assume that there is a substantial measure of continuity in the readership of the NBR between the advertisement in 2012 and the report of Mr Norgate's comments in May 2013. With that exception, I am not satisfied that there is any sufficient overlap in the audiences for CPAA to be entitled to have the impact of allegedly misleading or deceptive conduct reflected in them assessed cumulatively. Any cumulative impact would also be diminished by the relatively wide spread of the timing. The time lapses between the three occasions are too long to attribute lingering effect that might be assessed cumulatively.

[215] There was no evidence from witnesses who claimed they had been misled by the terms of the flyer or the advertisement or the NBR article. However, that cannot be decisive given their subject matter and the nature of each of the audiences. Certainly, on the approach to liability under s 9 applied by the Supreme Court in *Red Eagle Corporation Ltd v Ellis*,[63] proof that the claimant or others were actually

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[63] *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492.

misled or deceived is unnecessary. The inquiry is more simply whether the claimant has proved a breach of s 9, and then, before being entitled to relief, whether the claimant has established loss or damage that was caused by the conduct of the defendant in breach of s 9.

[216] For NZICA, Mr Gray relied on the Court of Appeal's early analysis of the scope of remedies under the FTA in *Taylor Brothers Ltd v Taylors Group Ltd*, which reflected on the jurisprudence on the equivalent Australian provisions at the time.[64] Consistently with the requirement he proposed for a minimum threshold of seriousness in the defamation causes of action, Mr Gray argued for the same threshold as being required in cases under s 9 of the FTA, in reliance on the following passage from *Taylor Brothers*:[65]

> Certainly the degree of impact or likely impact on consumers is important. It goes both to whether there is a real likelihood that persons will be misled or deceived and to whether the Court in its discretion should grant an injunction (or other remedy) under the Act. *The case has to be sufficiently serious to warrant a remedy.* But s 9 and the remedy sections of the Act are not limited to cases of identifiable economic loss. Members of the public have a right not to be misled about with whom they are dealing.

[217] That leads to a consideration of the range of remedies provided for under the FTA. Here there could be no possible utility in an injunction as provided for under s 41, nor is there any contractual commitment between the parties, the content of which had been influenced by misleading conduct on the part of the defendant so as to justify remedial intervention in that contract.

[218] CPAA has sought damages in the sum of $50,000 in reliance on its pleading that it has suffered, or is likely to suffer, pecuniary loss in the form of damage to goodwill, reduced applications for membership and an increase in resignations by numbers.

[219] I am not persuaded that any threshold of seriousness relevantly applied in this context. In other circumstances, that may be a relevant consideration where, for example, the Court is considering whether there was justification for an injunction or

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64 *Taylor Brothers Ltd v Taylors Group Ltd* [1988] 2 NZLR 1 (CA).

65 *Taylor Brothers Ltd v Taylors Group Ltd*, above n 64, at 40 (emphasis added identifying the passage NZICA particularly relied on).

other forms of relief provided for under the FTA. In the present context, the imposition of the ordinary onus for a claimant to make out quantifiable loss is sufficient.

[220] However, CPAA has not been able to adduce evidence of loss. Applying the same analysis relied on for my finding of absence of loss in the defamation cause of action, I am not satisfied that any quantifiable loss was suffered by CPAA as a result of any of the publications to the extent that they were misleading or likely to deceive.

[221] There is no provision under the FTA for a declaration and accordingly no relief is appropriate on this cause of action.

Summary

[222] I have found CPAA has made out elements of actionable defamation among the criticisms in Ms Patterson's addresses at the May 2013 conferences. However, as a corporate plaintiff, CPAA is required to make out pecuniary loss and I am not satisfied that it can do so. It is accordingly not entitled to the declaration it seeks under s 24 of the Act. Without it being necessary to my reasoning for the outcome, I endorse the proposition that the law ought to adopt the requirement insisted on in England for a plaintiff to make out a threshold of seriousness for actionable defamation.

[223] In the event that I am wrong on the absence of pecuniary loss, not all of the defamatory comments would be defensible as truth. Nor do I consider that the sting of the defamation as to CPAA having inferior educational standards could be defended as honest opinion. Further, I have found (by a narrow margin) that NZICA would not be entitled to invoke qualified privilege.

[224] I have found that some aspects of the May 2011 flyer were misleading in terms of ss 9 and 11 of the FTA. However, claims that the advertisement and Mr Norgate's comments quoted in the NBR were misleading for the purposes of the FTA cannot be made out. To obtain any relief under the FTA, CPAA had to make out damage following from the misleading conduct and it has failed to do so.

Costs

[225] The proceedings appear not to have been categorised for costs purposes. I am unaware of possible cost consequences of any pre-trial attempts to settle the proceedings. If issues as to costs cannot be resolved, I invite the parties to file memoranda:

(a) within 28 days of this judgment on behalf of the NZICA; and

(b) 14 days after service of that memorandum on behalf of CPAA.

[226] I identify with the view expressed by Ms Brownrigg as a subpoenaed witness who is a member of both parties that it is a matter of real regret that the dispute between them could not be resolved short of litigation. On the other hand, CPAA's complaints were understandable, and my provisional view is that the scope for criticism of the standard of NZICA's conduct is likely to reduce the justifiable quantum of costs awarded in favour of NZICA.

Dobson J

Solicitors:
Chen Palmer, Wellington for plaintiff
Izard Weston, Wellington for defendant

Appendix A

Comparing New Zealand Institute of Chartered Accountants (NZICA) and Certified Practicing Accountants Australia (CPAA)

The Facts

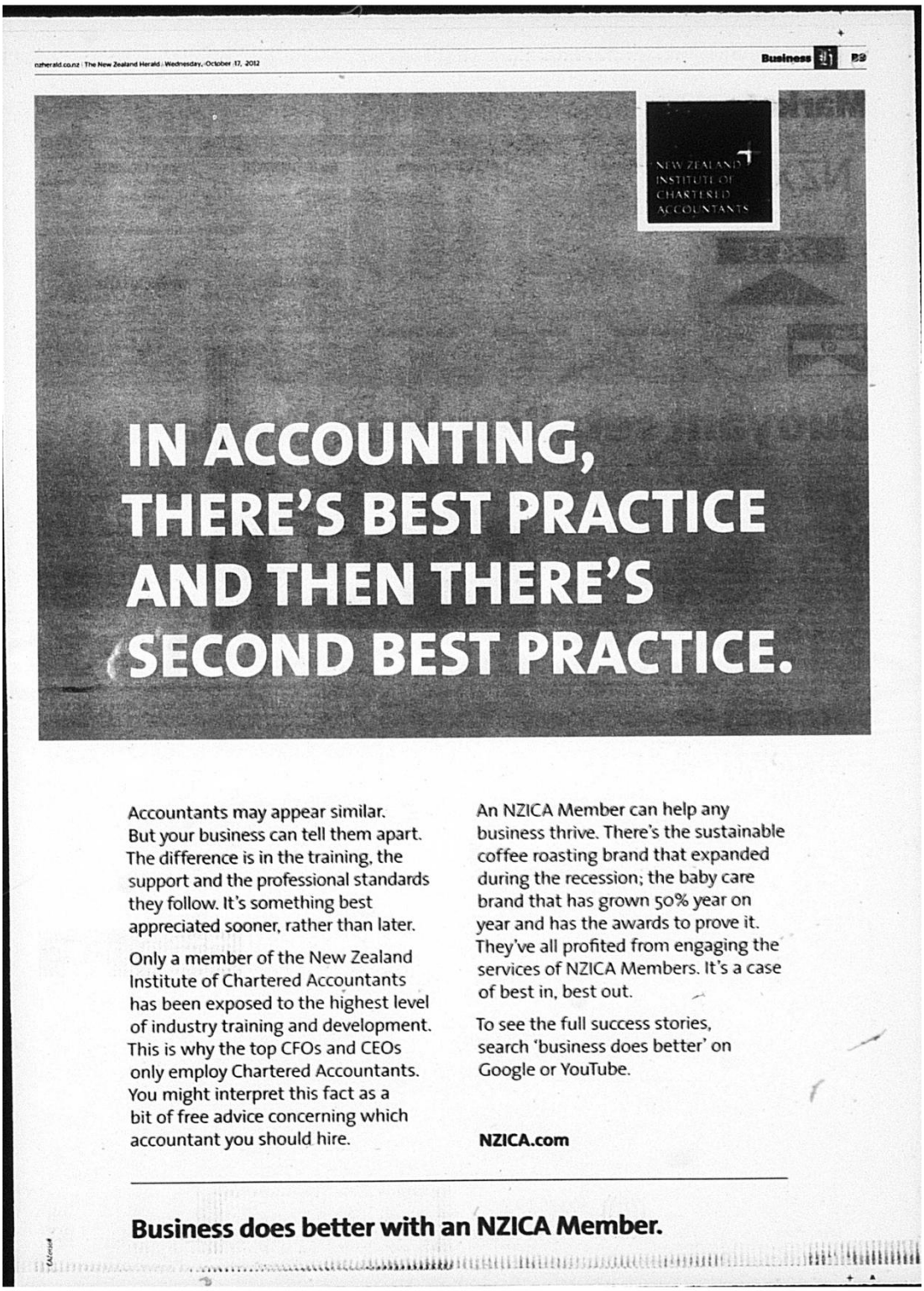
	NZICA	CPAA
Average Annual Salary of Member	$140,000 (Chartered Accountant full member)	$100,000[1]
Number of New Zealand Members	32,000	700-750[2]
Office Locations in NZ	• 20 Branch offices across the country – from Northland to Southland; local networking and professional development training • 150 support staff	• 1 office in Auckland • 3 support Staff
Qualifications Offered	3 Designations to choose from: • Chartered Accountant (CA) • Associate Chartered Accountant (ACA) • Accounting Technician (AT)	1 Designation • Certified Practising Accountant (CPA)
Points of Difference	• Requires 4 years of academic study • Face to face training and mentor programme once you graduate • CA qualification is recognised internationally • International reciprocity through Global Accounting Alliance – the network that allows you to work overseas in countries like the UK with ease • Graduates with NZICA qualifications are preferred by New Zealand employers including the "Big" 4 accounting firms • Established in New Zealand for over 100 years	• Requires 3 years of academic study • Online training once you graduate • Australian based qualification • Not part of an international accounting alliance • New to New Zealand

SO WHAT ARE YOU WAITING FOR?

To kick-start your career join NZICA as a Student Affiliate.
You can sign up at www.nzica.com/flyhigher (it's free)

[1] Source is Hudson 2010 salary guide (6+ years financial services role)
[2] Source is CPAA's advice to members

Appendix B



nzherald.co.nz | The New Zealand Herald | Wednesday, October 17, 2012

Business B9

NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS

IN ACCOUNTING, THERE'S BEST PRACTICE AND THEN THERE'S SECOND BEST PRACTICE.

Accountants may appear similar. But your business can tell them apart. The difference is in the training, the support and the professional standards they follow. It's something best appreciated sooner, rather than later.

Only a member of the New Zealand Institute of Chartered Accountants has been exposed to the highest level of industry training and development. This is why the top CFOs and CEOs only employ Chartered Accountants. You might interpret this fact as a bit of free advice concerning which accountant you should hire.

An NZICA Member can help any business thrive. There's the sustainable coffee roasting brand that expanded during the recession; the baby care brand that has grown 50% year on year and has the awards to prove it. They've all profited from engaging the services of NZICA Members. It's a case of best in, best out.

To see the full success stories, search 'business does better' on Google or YouTube.

NZICA.com

Business does better with an NZICA Member.