

Professional obligations



Professionalism Course



Professional obligations

Professional obligations

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Introduction



The purpose of these course notes is to provide an introduction to three key aspects of actuarial practice, namely:

- ▶ **obligations impacting on your conduct and advice**, both under statutory and common law, as well as those arising pursuant to your membership of the Institute;
- ▶ **risk management techniques** that not only serve the best interests of your client, but also afford some assurance and protection for you if something does go awry; and
- ▶ the key features of the **Institute's Disciplinary Scheme**.

Actuaries are subject to a number of obligations which impact on their conduct and advice, both under statutory and common law, as well as those arising pursuant to membership of the Institute.

The obligations which will be addressed in these notes are both positive and negative. They are:

Introduction



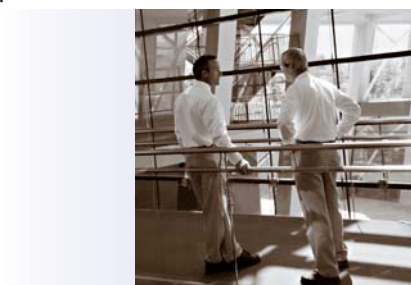
Positive obligations

- ▶ duties to act in accordance with your retainer;
- ▶ duties of care owed to your client and third parties;
- ▶ various statutory obligations;
- ▶ whistleblowing (both mandatory and discretionary duties);
- ▶ conduct yourself in accordance with the Code of Professional Conduct;
- ▶ undertake continuing professional development; and
- ▶ comply with professional standards.



Negative obligations

- ▶ not to engage in misleading or deceptive conduct;
- ▶ not to misuse information; and
- ▶ not to engage in insider trading.



Duty to act as agreed

Duty to act as agreed

The basic relationship between an actuary and their client is contractual. That contract is often called a **retainer agreement**. The retainer agreement may be oral, in writing, or partly oral and partly in writing.

The retainer agreement will:

- ▶ **set out the terms and conditions** agreed to by the parties – for example, fees and charges;
- ▶ most importantly, **set out the nature and scope of the services** which the actuary has agreed to provide; and
- ▶ **contain terms that are implied by the general law**. For example, the current view is that, in a contract for the provision of professional services, there is an implied term that the professional will exercise reasonable skill and care in the performance of the services.

Breach of a term of the retainer will give rise to a liability to the client.

A retainer may contain terms seeking to limit or disclaim liability. Such terms are of limited use. For example, a disclaimer cannot avoid statutory obligations under the Corporations Act 2001 (Cth).



Duty of care



Duty of care



Duty of care to your client

An actuary owes a duty of care to his or her clients in relation to professional advice given to, and work done for, those clients. This duty of care may be expressly set out in a retainer agreement or may be implied. The retainer agreement should set out the work that the actuary has agreed to do and that will inform the extent of the duty of care. For example, if the retainer was clearly intended not to cover a particular area, this will tend to go against the existence of a common law duty of care in that area. However, the retainer is not always so clear.

Duty of care to third parties

An actuary may also owe a duty of care to third parties – that is, people (or entities) other than his or her client. If an actuary gives advice in circumstances where the actuary knows, or ought reasonably to know, that the advice will be passed onto and relied upon by another person, or a class of people of whom that person is one, then the actuary will owe a duty of care to that person.

Standard of care

In general terms, the degree of skill and care expected of a particular actuary is that which is ordinarily exercised by a reasonably competent member of the actuarial profession. The Institute's Code of Professional Conduct will also be relevant in determining the appropriate standard of care in a particular case.

Where an actuary holds himself or herself out as possessing a special skill, or where it is reasonable to assume that the actuary possesses that special skill, that actuary will be judged by the standards of a reasonably competent qualified actuary holding that special skill.

Conversely, the law does not make any allowance for novices – the same standard of care is owed by a recently qualified actuary as that owed by a more experienced actuary.



Breach of the duty of care

In defending an action, a professional will often attempt to establish that he or she has exercised reasonable care and skill by showing that he or she has conformed to common practice. In Australia, evidence of common practice is influential in determining the standard of care, but not decisive.

Errors of judgment

Negligence needs to be distinguished from errors of judgment. An actuary may take into account all the right facts in considering a problem and come to what, with hindsight, is seen to be an erroneous judgment. Provided the actuary has exercised reasonable care and skill in coming to that view, the error of judgment will not be negligent and will not give rise to a liability in damages.



False, misleading or deceptive conduct

Claims against professionals are also brought under statutory provisions relating to false, misleading or deceptive conduct. This could include, for example, false, misleading or deceptive statements in an actuarial report (both statutory and other reports).

The main relevant provisions are:

- ▶ **section 18 of the Competition and Consumer Act 2011 (Cth)** (previously section 52 of the Trade Practices Act 1974 (Cth)) (for non financial services corporations);
- ▶ **section 42 of the Fair Trading Act 1987 (NSW)** (or other State equivalents) (for individuals other than those in the financial services area);
- ▶ **section 12DA of the Australian Securities and Investments Commission Act 2001 (Cth)** (for conduct relating to financial services); and
- ▶ **under the Corporations Act 2001 (Cth):**
 - section 1308 re documents lodged with ASIC;
 - section 1309 re information given to third parties; and
 - sections 1041E and 1041H re conduct and statements relating to financial products and financial services.



Misleading or deceptive conduct does not have to involve a positive act. An omission may be misleading or deceptive. Mere silence can be relied upon to show a breach.

Expressions of opinion or belief honestly and reasonably held may or may not be caught. If a statement is clearly a matter of opinion and recognised as such, the possibility of other conflicting opinion is admitted. A statement of opinion as to future matters will not be misleading or deceptive if the person or entity making the statement has reasonable grounds for making it.

It is often easier for a plaintiff to prove that a defendant has breached one of these statutory provisions than to prove that the defendant was negligent. To establish misleading or deceptive conduct for example, it is not necessary to prove:

- ▶ a relationship giving rise to a duty of care;
- ▶ that there was an intention to mislead or deceive. The fact that an act or omission is in fact misleading or deceptive – or likely to mislead or deceive – is enough;
- ▶ that the defendant knew, or ought to have known, that the plaintiff would rely on the advice; or
- ▶ that the statement was made negligently.

The courts have consistently held that a liability exclusion clause, however well drafted, will not defeat a claim for misleading or deceptive conduct.



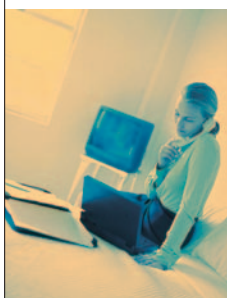
Misuse of information

Misuse of information

Common law and equitable obligations of confidentiality require an actuary not to use, misuse or communicate information that comes into his or her knowledge or possession in the course of his or her work in circumstances of confidence.

Further, an actuary working for a corporation may owe a statutory duty not to misuse information. An officer of a corporation includes not only a director or secretary of a corporation, but any person who makes, or participates in making, decisions that affect the business of a corporation or who has the capacity to affect significantly a corporation's financial standing.

An actuary employed by a corporation will often fall within that definition. Under sections 182 and 183 of the Corporations Act 2001 (Cth), an officer has an obligation not to use information gained as a result of his or her position to gain an advantage (either for themselves or for another person) or to cause detriment to the corporation.



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Insider trading / market misconduct



Insider trading

'Insider trading' is prohibited under section 1043A of the Corporations Act 2001 (Cth).

Insider trading refers to the situation where a person buys or sells relevant financial products while in possession of price sensitive information which is not generally available.

A person will be subject to the insider trading prohibition if they possess information:

- ▶ that is not generally available but, if it were, a reasonable person would expect it to have a material effect on the price or value of a financial product; and
- ▶ the person knows, or ought reasonably to know, that the information is not generally available and, if it were, it might have a material effect on the price or value of a financial product.

Such a person is potentially exposed to **three separate insider trading offences**:

- ▶ **trading offence** – subscribing for, purchasing or selling relevant financial products;
- ▶ **procuring offence** – procuring another person to subscribe for, purchase or sell relevant financial products; and
- ▶ **communicating offence** – directly or indirectly communicating the inside information, or causing it to be communicated, to another person if the insider knows, or ought reasonably to know, that the other person would be likely to:
 - subscribe for, purchase or sell relevant financial products; or
 - procure a third person to do so.

Certain defences are available – for example, where a company has a 'Chinese wall' in place.

Other market misconduct

Division 2 of Part 7.10 of the Corporations Act 2001 (Cth) enumerates various market misconduct prohibitions relating to financial products and financial services. These include: market manipulation; creating a false or misleading appearance of active trading; artificially maintaining a trading price; disseminating information about illegal transactions; making false or misleading statements; inducing persons to deal; and dishonest conduct.



Whistleblowing

Actuaries have a number of whistleblowing obligations and discretions under various legislative provisions which are generally summarised below. The following focuses on obligations and discretions to report or whistleblow to regulators, rather than other entities.

General insurance

Under section 49 of the Insurance Act 1973 (Cth), actuaries have a duty to give information to APRA when required by written notice from APRA.

Under section 49A, an actuary has a duty to give information to APRA in writing where, in relation to a relevant entity, he or she has reasonable grounds for believing:

- ▶ the entity is insolvent;
- ▶ there is a significant risk that it will become insolvent;
- ▶ it has failed to comply with the prudential standards, a condition of its authorisation or a requirement or direction under the Act;
- ▶ it has failed to comply with a requirement under the Financial Sector (Collection of Data) Act 2001 (Cth);
- ▶ an existing or proposed state of affairs may materially prejudice the interests of policyholders; or
- ▶ it has breached the Act or any other law and the breach is of such a nature that it may affect significantly the interests of its policyholders.

The Act also provides (refer section 49B) that an actuary may give information, or produce books, accounts or documents to APRA about a relevant entity if he or she considers that giving the information, or producing the books etc, will assist APRA in performing its functions under the Act or the Financial Sector (Collection of Data) Act 2001 (Cth).

The above provisions apply to a person who is or was an actuary of the relevant entity.



Whistleblowing



Whistleblowing



Whistleblowing

Section 49C provides a form of indemnity to actuaries in relation to the above provisions.

Sections 38A to 38E inclusive provide for certain protections for whistleblowers, including:

- ▶ protection from civil and criminal liability for making the disclosure;
- ▶ denial of enforcement of contractual or other rights on the basis of the disclosure against the whistleblower;
- ▶ reinstatement of employment where terminated on the basis of the disclosure; and
- ▶ protection against victimisation (including both actually causing detriment and threatening to do so).

Section 38F partially removes the privilege against self incrimination.

On similar general issues in relation to whistleblowing and duties to report see, for example:

- ▶ paragraphs 83-84 of Prudential Standard GPS 510 (Governance) which prohibit constraining or impeding a person (whether by confidentiality clauses or otherwise) from disclosing information to APRA, discussing issues with APRA of relevance to the management and prudential supervision of a regulated institution or providing documents under their control to APRA. A similar prohibition exists on constraining a person from providing information to an appointed or reviewing actuary; and
- ▶ paragraphs 42-47 of Prudential Standard GPS 520 (Fit and Proper Person) which impose requirements on insurers to have a policy in place that makes adequate provision in relation to allowing and facilitating whistleblowing if a person believes that a responsible person does not meet the fit and proper criteria or that the insurer has not met the requirements of the Prudential Standard. The policy must also require that all reasonable steps are taken to ensure that no person making such disclosures in good faith is subject to, or threatened with, a detriment because of such disclosure.



Whistleblowing



Whistleblowing

Life insurance

Under section 98 of the Life Insurance Act 1995 (Cth) the appointed actuary of a life company must draw to the attention of the company, or the directors or an officer of same, any matter that comes to his or her attention and that the actuary thinks requires action to be taken by the company or its directors to avoid:

- ▶ a breach of the Act or of the Financial Sector (Collection of Data Act 2001 (Cth)); or
- ▶ prejudice to the interests of the company's policy owners.

If the appointed actuary is satisfied that there has been reasonable time for taking the action but action has not been taken, the appointed actuary **must** inform APRA if s/he thinks that there are reasonable grounds for believing that the company or a director of the company may have breached the Act or any other law and the breach is of such a nature that it may affect significantly the interests of the company's policy owners. The appointed actuary must inform APRA in writing of his or her opinion and the information on which it is based.

If the appointed actuary thinks that:

- ▶ the directors of the company have failed to take such action as is reasonably necessary to enable the actuary to exercise his or her rights under sections 97(4) or (5) of the Act (which deal with the actuary's powers to attend meetings of directors and shareholders); or
- ▶ an officer or employee of the company has engaged in conduct calculated to prevent the appointed actuary exercising those rights of meeting attendance,

the appointed actuary **may** inform APRA of his or her opinion and the information on which it is based.

If a person becomes subject to an obligation to report something to APRA but, before doing so, the person ceases to be the appointed actuary of the life company concerned, the person remains subject to the obligation as if he or she were still the appointed actuary of the company.

See, also, section 98A of the Act re an appointed actuary's discretion to give information, or produce books, accounts or documents, to APRA.

Section 99 of the Act provides for qualified privilege for an appointed actuary of a life insurance company.



Whistleblowing

Whistleblowing

Sections 156A to 156E inclusive provide certain protections for whistleblowers, including:

- ▶ protection from civil and criminal liability for making the disclosure;
- ▶ denial of enforcement of contractual or other rights on the basis of the disclosure against the whistleblower;
- ▶ reinstatement of employment where terminated on the basis of the disclosure; and
- ▶ protection against victimisation (including both actually causing detriment and threatening to do so).

Section 156F partially removes the privilege against self incrimination.

On similar general issues in relation to whistleblowing and duties to report see, for example:

- ▶ paragraphs 26-27 of Prudential Standard LPS 320 (Actuarial and Related Matters) which provides that an appointed actuary should not disclose a report he or she has made to APRA to the life company if s/he considers that by doing so the interests of policyholders may be jeopardised or s/he has lost confidence in or mistrusts the Board or senior management of the life company;
- ▶ paragraphs 79-80 of Prudential Standard LPS 510 (Governance) which prohibit constraining or impeding a person (whether by confidentiality clauses or otherwise) from disclosing information to APRA, discussing issues with APRA of relevance to the management and prudential supervision of a life company or providing documents under their control to APRA. A similar prohibition exists on constraining a person from providing information to an appointed actuary; and
- ▶ paragraphs 35-40 of Prudential Standard LPS 520 (Fit and Proper) which impose requirements on life companies to have a policy in place that makes adequate provision in relation to allowing and facilitating whistleblowing if a person believes that a responsible person does not meet the fit and proper criteria or that the life company has not met the requirements of the Prudential Standard. The policy must also require that all reasonable steps are taken to ensure that no person making such disclosures in good faith is subject to, or threatened with, a detriment because of such disclosure.



Whistleblowing



Whistleblowing

Superannuation

Under section 129 of the Superannuation Industry (Supervision) Act 1993 (Cth), where an actuary in relation to a superannuation entity forms the opinion that certain specified contraventions may have occurred, may be occurring, or may occur in relation to the entity, and the opinion is relevant to the performance of actuarial functions, then the actuary has an obligation to report the matter to APRA (unless another person tells the actuary that they have reported the matter and the actuary has no reason to disbelieve that other person).

Section 130 of the Act makes similar provision with respect to the actuary forming an opinion that the financial position of the entity may be, or may be about to become, unsatisfactory.

Section 130B of the Act removes the privilege against self incrimination in respect of compliance with sections 129 and 130 of the Act.

Section 130A of the Act grants discretion to a person who is or was an actuary of a superannuation entity to give APRA information about the entity obtained in the course of, or in connection with, the performance of actuarial functions, if the person considers that giving the information will assist APRA in performing its functions.

Section 130C of the Act generally requires that, where an actuary in relation to a defined benefit fund forms the opinion (in the course of, or in connection with, the performance by the person of actuarial functions) that there has been a failure to implement an actuarial recommendation relating to fund contributions (which recommendation was required to be implemented), the actuary must inform APRA (unless another person tells the actuary that they have reported the matter and the actuary has no reason to disbelieve that other person).

Sections 336A to 336E inclusive provide certain protections for whistleblowers, including:

- ▶ protection from civil and criminal liability for making the disclosure;
- ▶ denial of enforcement of contractual or other rights on the basis of the disclosure against the whistleblower;
- ▶ reinstatement of employment where terminated on the basis of the disclosure; and
- ▶ protection against victimisation (including both actually causing detriment and threatening to do so).

Section 336F partially removes the privilege against self incrimination.



Whistleblowing



Whistleblowing

Private health insurance

Under section 160.30 of the Private Health Insurance Act 2007 (Cth), the appointed actuary of a private health insurer has duties to:

- ▶ draw to the attention of the insurer (or a director or officer) any matter that comes to his or her attention and which he or she thinks requires action to be taken by the insurer to avoid breaching the Act. If the actuary is satisfied that there has been reasonable time to take action but no action has been taken, then the actuary must inform the Private Health Insurance Administration Council (PHIAC); and
- ▶ inform PHIAC where he or she forms the opinion that there are reasonable grounds for believing that the insurer or a director of the insurer has breached the Act or any other law and that breach is such that it may significantly affect the interests of policy holders. The obligation to inform includes an obligation to provide the information on which that opinion is based.

Section 160.30 of the Act also provides discretion for an appointed actuary to inform PHIAC of any opinion formed by him or her that either:

- ▶ the directors of the insurer have failed to take such action as is reasonably necessary to enable the actuary to exercise his or her rights to attend certain meetings of the insurer under sections 160.25(5) and (6) of the Act; or
- ▶ an officer or employee of the insurer has engaged in conduct calculated to prevent the actuary exercising those rights,

and includes the power to provide the information on which the opinion is based.

Section 160.35 of the Act provides that a person who is, or has been, the appointed actuary of a private health insurer has qualified privilege in respect of any statement, whether written or oral, made by him or her for the purpose of the performance of his or her functions as appointed actuary of the insurer.

In addition, under Rule 13(3) of the Private Health Insurance (Insurer Obligations) Rules 2007, if an appointed actuary has not received a request for advice on a notifiable circumstance (defined in Rule 5(3)), but gives notice to the insurer that he or she believes such advice is warranted, the actuary must inform PHIAC if the insurer does not seek such advice from the actuary.



Other statutory obligations

Other statutory obligations

Corporations Act 2001 (Cth)

As the previous sections show, some legislation provides specific protection for whistleblowers. Note should also be taken of the provisions of Part 9.4AAA of the Corporations Act 2001 (Cth) (sections 1317AA to 1317AE inclusive) which provide certain protections for whistleblowers and which may be relevant in particular circumstances.

An actuary who is an officer of a corporation has duties under the Act (and at common law) to:

- ▶ exercise reasonable care and diligence (section 180); and
- ▶ act in good faith in the best interests of the corporation and for a proper purpose (section 181).

Section 180(2) sets out a business judgment rule whereby an officer of a corporation will be taken to have met the requirements of the statutory duty of care and diligence if he or she:

- ▶ makes the judgment in good faith for a proper purpose;
- ▶ does not have a material personal interest in the subject matter of the judgment;
- ▶ informs himself or herself about the subject matter of the judgment to the extent he or she reasonably believes to be appropriate; and
- ▶ rationally believes that the judgment is in the best interests of the corporation.

Section 180(2) further provides that an officer's belief that the judgment is in the best interests of the corporation is a rational one, unless the belief is one that no reasonable person in the officer's position would hold.

A similar business judgment rule exists at common law.

Section 1310 of the Act also imposes an obligation not to obstruct or hinder ASIC.



Other statutory obligations

Other statutory obligations

Practice-specific regulation

Certain legislation and prudential standards applicable in different practice areas require actuaries to produce certain reports or conduct certain investigations. Examples include:

- ▶ an obligation, under paragraph 8 of Prudential Standard LPS 320 (Actuarial and Related Matters), to investigate the financial condition of a life company at the end of a financial year and give the company a written report of that investigation;
- ▶ an obligation, under paragraph 28 of Prudential Standard GPS 310, to prepare an annual Financial Condition Report and an Insurance Liability Valuation Report for a general insurer.

It is beyond present scope to list all such obligations. However, it is worth mentioning a couple of those obligations which are relevant to the general topic of professionalism, namely:

- ▶ an obligation to comply with prudential standards (section 41 of the Insurance Act 1973 (Cth));
- ▶ an obligation to comply with prudential standards (section 96 of the Life Insurance Act 1995 (Cth)); and
- ▶ an obligation to comply with the Private Health Insurance (Insurer Obligations) Rules (section 160.20 of the Private Health Insurance Act 2007 (Cth)). These Rules include, for example, an obligation to comply with professional requirements applicable to the actuary and to apply skill and diligence in carrying out duties and exercising powers (Rule 12).



Code of Professional Conduct

Code of Professional Conduct

Code of Professional Conduct

The Institute's Code of Professional Conduct articulates the high standards and principles of professional practice for which the actuarial profession is recognised.

It is the keystone of the profession's governance regime and, broadly, requires that members act:

- ▶ with integrity, honesty and due care; and
- ▶ in a manner that seeks to maintain the reputation of the profession.

Included in the Professionalism Course materials is a copy of the Code. You should study the Code carefully and be familiar with its detailed content.

Members should also familiarise themselves with Practice Guideline 199.01 (Prescribed Actuarial Advice Reporting).

Note to members concerning potential conflicts between a member's duties under the Rules of the Institute, and employment or retainer agreements

In June 2006, the Institute issued the above note to members. Broadly, it requires that a member must not enter into an employment or retainer agreement or continue under the operation of such an agreement, if the member is aware that the agreement conflicts with, or seeks (either explicitly or implicitly) to override the obligation of a member to act in accordance with the Rules. The "Rules" of the Institute collectively refers to the Institute's Constitution, the Code of Professional Conduct, Professional Standards and other rules published by the Institute from time to time.

The note provides a sample clause for inclusion in an employment or retainer agreement to deal with such potential conflicts.



Continuing professional development

Under Professional Standard 1 (Continuing Professional Development) ("PS 1"), members have a continuing duty to develop and maintain their professional knowledge and skill.

Continuing professional development ("CPD") is a significant component of the process whereby a member maintains his or her capacity to practice in accordance with the Institute's Code of Professional Conduct and Professional Standards. As such, members are required to confirm they have complied with PS 1 as part of each membership renewal process.

Who must comply

Unless exempted, all members must comply with PS 1.

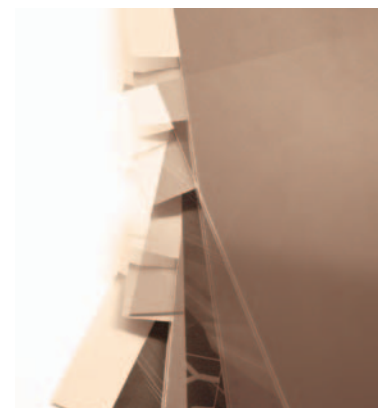
A member who is:

- (a) either retired, on extended leave, on maternity leave or has other special circumstances; and
- (b) not providing a "Professional Service",

may apply (generally, prospectively) for exemption from the requirements of PS 1. A "Professional Service" means a service provided by a member in a professional capacity, including Prescribed Actuarial Advice. A "Professional Service" includes such a service provided on a *pro bono* basis.

Council policy with respect to compliance with PS 1 is that:

- ▶ retired members of the Institute (that is, those members who have retired from all forms of employment, whether paid or not) are automatically exempted from the requirements of PS 1;
- ▶ student members of the Institute enrolled in a recognised actuarial education course will be deemed to have complied with PS 1 by virtue of such enrolment; and
- ▶ Affiliate and Associate members of the Institute who, in a given semester, sit education courses of the Institute (or exemption or qualification related courses of the Institute) are deemed to have complied with PS 1 on a pro-rata basis in respect of the relevant semester.



Continuing professional development

Amount of CPD

At any point in time, a member must have completed either:

- ▶ 40 hours of CPD in the prior calendar year; or
- ▶ 80 hours of CPD in aggregate over the prior two calendar years (provided at least 20 hours is completed in each of those calendar years).

Requirements for CPD

A member must undertake CPD in one or more of the following:

- ▶ general actuarial techniques;
- ▶ actuarial or other methods and approaches appropriate for the member's particular practice area(s) or field of operation;
- ▶ the development of his or her understanding of new techniques and approaches (either actuarial or non-actuarial);
- ▶ the business or legislative environment in which the member practises;
- ▶ professionalism, including professional and ethical standards; and
- ▶ business and management skills, including communication and negotiation skills, people management, project management and leadership skills.

CPD needs differ between members and across an individual's career. Therefore, you need to exercise your own judgment regarding the activities you undertake to develop your personal and professional skills and which of those can be recorded as CPD to meet the requirements of PS 1.



Continuing professional development

Examples of CPD activities

PS 1 provides some examples of the types of activities that can qualify to meet the requirements of the standard. The examples given are:

- ▶ participating (by presenting, attending in person or by electronic means) in seminars, meetings or workshops organised by the Institute or other professional or industry bodies – only business sessions attended may be recorded as CPD hours;
- ▶ reading technical or professional papers or journals;
- ▶ undertaking courses conducted by the Institute or by another tertiary institution leading to a degree, diploma or post-graduate qualification;
- ▶ undertaking courses presented by tertiary institutions, participating (by presenting, attending in person or by electronic means) in seminars, courses, lectures, residential schools, conventions or other technical activities presented independently or jointly by tertiary institutions, commercial educational establishments or other professional or industry bodies;
- ▶ participating (by presenting, attending in person or by electronic means) in formal training or education (in-house or external) relating to actuarial, business or industry developments;
- ▶ undertaking self-study courses, including self-study video or audio packages;
- ▶ serving on a practice committee, taskforce, technical or research committee of the Institute or other professional or industry bodies where the specific contributions of a member are consistent with the criteria described in the section above entitled "Requirements for CPD";
- ▶ serving as a lecturer, examiner, tutor or marker for the Institute or other professional, industry or academic bodies;
- ▶ writing papers for professional meetings, conventions or journals. Time spent on researching material and writing technical papers can be recorded as CPD hours, whether the final product is in the form of a textbook, article for a professional publication or the presentation of a paper at a seminar; and
- ▶ those aspects of work that directly result in the improvement and broadening of knowledge and skill and the personal and professional qualities needed for the provision of Professional Services.



Continuing professional development



CPD record keeping

Members are required to:

- ▶ maintain a personal record of the hours spent on CPD activities. That record must include sufficient detail to demonstrate the nature of the activity so as to enable the Institute to verify the member's compliance with PS 1;
- ▶ keep their CPD records for a period of five years after the end of the period to which they relate; and
- ▶ provide their CPD records in written or electronic form within 14 days of receipt of a request from the Institute.



Non-compliance with the CPD requirements

Non-compliance with PS 1 is or may be *prima facie* Actionable Conduct and may lead to penalties under the Institute's Disciplinary Scheme.

In addition to possible action under the Disciplinary Scheme, a non-compliant member may be subject to action by Council including, for example:

- ▶ issuing a warning letter to the member regarding his or her non-compliance;
- ▶ requiring the member to undertake further CPD and provide evidence of such to the Institute within a certain timeframe;
- ▶ requiring that the member provide quarterly records to the Institute of his or her CPD activities for a specified period; and/or
- ▶ issuing a warning letter to the member noting that he or she will be audited for compliance for a particular period and that, if there are repeated breaches, this may constitute Actionable Conduct under the Disciplinary Scheme.

Non-compliance with any such direction by Council may, of itself, constitute a further instance of Actionable Conduct under the Disciplinary Scheme.



Other professional standards

Other professional standards

The Institute's professional standards detail mandatory practice requirements and usually cover an established field of actuarial work. They are concerned with the technical aspects of actuarial work – not behavioural issues (these are dealt with by the Code of Professional Conduct).

Such standards play an important co-regulatory role in many areas of actuarial practice. This, combined with the fact that such standards:

- ▶ serve to enhance the profession of Actuary; and
- ▶ protect the public interest,

make such standards an important limb of the profession's governance and risk management regime.

Members are required to comply with all professional standards in force. Non-compliance with such standards may constitute *prima facie* Actionable Conduct and may lead to penalties under the Institute's Disciplinary Scheme.

All professional standards, Practice Guidelines and Guidance Notes are available on the Institute's website, including archive versions.

Professional Standards



Institute of Actuaries of Australia



Risk management

Risk management

Adopting sound risk management practices not only serves the best interests of your client, but also affords some assurance and protection for you if something does go awry.

Prevention is better than cure. Whilst nothing can prevent an unmeritorious claim, good risk management can reduce the likelihood of a claim occurring and certainly reduce the likelihood of any claim giving rise to liabilities.

A central role is played by both the Code of Professional Conduct and Professional Standard 1 (Continuing Professional Development) in achieving effective practice risk management. The importance of both these instruments is reflected in the fact that non-compliance with such may be Actionable Conduct under the Disciplinary Scheme.

More generally, good risk management is simply part of good practice and even good client relationship management. None of what follows is rocket science.

- ▶ Clearly the first step is to understand your obligations under the law as a professional. Identifying risk and areas of risk is always the first step in managing such risks.
- ▶ Keep your skills up to date. We can all learn something new.
- ▶ Develop a practical knowledge of the industry in which you work and the changes in that industry. This will help you understand the issues that your client needs to address and identify potential problems.
- ▶ Do not accept an engagement outside your area of expertise or experience. To do so in itself may be negligent. It will almost certainly lead to negligence.
- ▶ Do not over commit. If you know that you are going to be working on one project full time for the next week, explain to other clients who come to you with new instructions that you will not be able to start work until the following week.
- ▶ Develop and maintain good working habits. In particular, document your work and advice. Keep file notes at least of important conversations and meetings. Confirm advice in writing.



Risk management

- ▶ Develop good time management habits. Learn to prioritise. Keep a diary system.
- ▶ Consider implementing a peer review process.
- ▶ Develop and maintain good communication with your clients. First and foremost be clear about the terms of your engagement. Document in writing what you have agreed to do and what you are not responsible for. Consider incorporating a clause excluding or limiting your liability, but be aware it is likely to be of limited effect. Keep the client informed. Develop a good relationship with each client and get to know their business BUT remember to maintain your objectivity. Seek feedback at the end of the engagement, and act on it.
- ▶ Finally, because we all make mistakes, because even the most careful professional cannot be sure no claim will ever be made against him or her and even unmeritorious claims can be expensive, maintain appropriate insurance cover (such as professional indemnity insurance). In deciding what cover is appropriate, consider your obligations (including under the Code of Professional Conduct) and the risks you face. Consider carefully what sort of cover you need and how much. Read the policy and check its terms. What does it cover? What are the conditions? What are the exclusions? Who is the insurer? What do you know of their financial security? What is their claims paying record?

Risk management



Disciplinary Scheme



Disciplinary Scheme

One of the privileges – and responsibilities – afforded to the actuarial profession is that of self regulation. Member discipline is a key element of any such self regulatory regime.

In the Institute's case, the Disciplinary Scheme is contained, for legal reasons, in a Schedule to the Constitution of the Institute.

An important feature of the Scheme is its degree of independence from the general governance arrangements of the Institute. To the greatest extent possible, there is a separation of powers between the functional components of the Scheme and the Institute's Council. This independence helps to ensure fairness and impartiality in the operation of the Scheme, as well as minimise potential conflicts of interest.

The following section contains a brief overview of the key features of the Scheme.

About proceedings

The conduct of proceedings under the Disciplinary Scheme is not a judicial process and the rules of evidence do not apply. However, the objective is that proceedings will be conducted in accordance with the rules of natural justice, so as to achieve procedural fairness.

Actionable Conduct

There are three types of Actionable Conduct under the Scheme (whether by act or omission), namely:

1. professional misconduct;
2. unsatisfactory professional conduct; and
3. conduct likely to bring discredit upon the Institute or the profession of Actuary.

“Professional misconduct” includes:

- ▶ conduct occurring in connection with the provision of Professional Services that involves a substantial or persistent failure to reach or maintain a reasonable standard of competence or diligence;
- ▶ conduct that would (if established) justify a finding that a Member is not a fit and proper person to engage in the provision of Professional Services and includes, but is not limited to, dishonesty or misleading or deceptive professional conduct; and
- ▶ knowingly breaching, subverting or avoiding a mandatory requirement of any or all of the Constitution, Code of Professional Conduct, a Professional Standard or relevant requirements imposed under legislation including subordinate standards and rules.



Disciplinary Scheme



Disciplinary Scheme

“Unsatisfactory professional conduct” includes:

- ▶ conduct in connection with the provision of Professional Services that falls short of the standard of competence and diligence that a member of the public is entitled reasonably to expect of a member; and
- ▶ a breach or breaches of, or non-compliance with, any or all of the Constitution, Code of Professional Conduct, a Professional Standard or standards imposed by relevant requirements under legislation including subordinate standards and rules, and which is either negligent and substantial, or negligent and persistent.

Certain enumerated conduct will constitute *prima facie* evidence of Actionable Conduct by a member, namely where a member:

- ▶ is or has been convicted of an indictable criminal offence;
- ▶ has been found to have acted fraudulently or dishonestly by any court of competent jurisdiction or tribunal or equivalent professional body to the Institute in Australia or elsewhere;
- ▶ has been found by any court of competent jurisdiction or tribunal or equivalent professional body to the Institute in Australia or elsewhere to have engaged in misleading or deceptive conduct in civil proceedings;
- ▶ has been the subject of an adverse determination by a Regulatory Body in Australia or elsewhere;
- ▶ is or has become 'insolvent under administration' as defined in the Corporations Act 2001 (Cth);
- ▶ has breached a determination of a Tribunal or Appeal Board of the Scheme including but not limited to an enforceable undertaking; or
- ▶ has failed to disclose, when applying to become a member, that he or she had:
 - been convicted of an indictable criminal offence;
 - been found to have acted fraudulently or dishonestly by any court of competent jurisdiction or tribunal or equivalent professional body to the Institute in Australia or elsewhere;
 - been found by any court of competent jurisdiction or tribunal or equivalent professional body to the Institute in Australia or elsewhere to have engaged in misleading or deceptive conduct in civil proceedings;
 - been the subject of an adverse determination by a Regulatory Body in Australia or elsewhere; or
 - become 'insolvent under administration' as defined in the Corporations Act 2001 (Cth).



Disciplinary Scheme

Conduct of proceedings

Any person may make a complaint about the conduct of a member.

Once a complaint has been made, an Investigating Sub-Committee will be formed to investigate the complaint. The Committee, having investigated the matter, then makes a determination as to whether or not there is a *prima facie* case of Actionable Conduct.

If the Committee determines that the complaint is frivolous or that there is no such *prima facie* case of Actionable Conduct, then the complaint is dismissed. If not, then the Committee prepares a report for the Tribunal.

The Tribunal conducts a private hearing into the matter. At this stage, the member concerned may be legally represented or, indeed, represented by another member. The onus of proof rests with the Convenor of the Professional Conduct Committee and the standard of proof is the civil standard ('on balance of probabilities').

The enumerated determinations that the Tribunal may make are that the member has:

- ▶ not committed or been engaged in Actionable Conduct;
- ▶ not committed or been engaged in Actionable Conduct but that concern be expressed in relation to his or her conduct;
- ▶ committed or been engaged in Actionable Conduct and that he or she be given a warning in relation to such conduct;
- ▶ committed or been engaged in Actionable Conduct and that there shall be a penalty such that he or she be:
 - reprimanded;
 - suspended for such period as the Tribunal specifies;
 - directed to undertake specific action including education, retraining, or supervised practice as the Tribunal specifies; or
 - expelled.

In the event that the Tribunal, for any reason, does not make a determination, the complaint must be dismissed. The Tribunal can make orders as to costs.

The Scheme provides for certain rights of appeal to the Appeal Board, which has discretion whether to hear the appeal or not. The Appeal Board may affirm, amend, vary or rescind any determination of the Tribunal. Again, the onus of proof rests with the Convenor of the Professional Conduct Committee and the standard of proof is the civil standard. A determination of the Appeal Board is final.

The Scheme sets out various other requirements in relation to proceedings, including with respect to confidentiality, publicity and conflicts of interest.

As to publicity, the Scheme provides for such – including the names of those involved - at certain stages of the disciplinary process. Such publicity can have strong reputational impacts.

