

Professional Conduct Undertakings

Guidance

1 July 2024

Professional Conduct Undertakings

1. Introduction

- 1.1 The public places trust in Members of The Institute of Actuaries of Australia (the Institute) to hold high standards. In acknowledging that trust the Institute strives to ensure that its Members uphold the highest technical, professional and ethical standards. The Institute is committed to holding its Members accountable to those standards.
- 1.2 The Institute has a Disciplinary Scheme to address conduct which falls short of the standards expected. This helps to protect the public as well as maintain and protect the standards, professionalism and reputation of our Members.
- 1.3 We use our regulatory powers to protect consumers of actuarial services, preserve public confidence in the Institute and our Members and maintain the actuarial profession's standards. It is important that our Disciplinary Scheme's decision makers can arrive at appropriate sanctions for the Members that we regulate and that those sanctions reflect community expectations as well as serving to maintain the Institute's reputation and standards.
- 1.4 This guidance has been issued by the Council of the Institute in accordance with [clause 13.2](#) of the Disciplinary Scheme (effective April 2018) (the Scheme).
- 1.5 This guidance should be read in conjunction with the Institute's [guidance on Sanctions](#) and on [Educational Sanctions](#).
- 1.6 This guidance applies to all Complaints being considered under the Scheme as amended from time to time. For Complaints that are being considered under a former version of the Institute's Disciplinary Scheme, the version of the Guidance applicable to the former version of the Disciplinary Scheme should be applied to the extent that it is possible to do so, otherwise this guidance will apply.
- 1.7 This guidance does not override any provision of the Scheme.
- 1.8 It is for use by:

- (a) The Convenors, and any Conduct Committee, Investigating Sub-Committee, Tribunal, Appeal Board, or Panel appointed under [clause 5 of the Scheme](#), referred to in this and other guidance as the 'Scheme decision maker', to provide further detail on their powers and procedures to be followed;
 - (b) any other party so they are aware of the powers of a Scheme decision maker, and procedures to be followed; and
 - (c) Institute staff.
- 1.9 This guidance should be read in conjunction with:
- (a) the Scheme; and
 - (b) any regulations issued by the Council; and
 - (c) any other relevant guidance published by the Council.
- 1.10 Where there is any conflict or inconsistency between the Scheme and this guidance, the Scheme shall be followed. Where there is any conflict or inconsistency between regulations and this guidance, the regulations shall be followed.
- 1.11 Definitions of defined terms used in this guidance are set out in the Scheme and regulations.
- 1.12 This guidance should not be treated as legal advice. When appropriate, the Scheme decision makers may seek legal advice from the Institute's legal advisor(s) on questions of law and/or procedure, which may include advice on the use of this guidance.
- 1.13 The Council will review this guidance every five years or earlier if needed. It may be updated in the interim when circumstances require a change.

2. Aim

- 2.1 This guidance aims to promote transparency and consistency in the approach of the Convenors, the Conduct Committee, Investigating Sub-Committees, and Tribunals and the Institute staff when considering and agreeing to a Professional Conduct Undertaking.
- 2.2 This guidance:
- (a) explains the factors that should be taken into account when considering whether a Complaint is capable of being resolved by way of a Professional Conduct Undertaking;
 - (b) sets out the process for proposing a Professional Conduct Undertaking;
 - (c) explains the approach to preparing a proposed Professional Conduct Undertaking;
 - (d) explains the approach a Scheme decision maker should take when considering a proposed Professional Conduct Undertaking.

3. Deciding whether a Professional Conduct Undertaking is appropriate

- 3.1 It is a matter for the Convenor of the Conduct Committee to decide whether a Complaint is capable of being resolved by way of a Professional Conduct Undertaking. The Convenor of the Conduct Committee may seek the views of the Investigations sub-committee if one has been established.
- 3.2 A Respondent may ask the Convenor of the Conduct Committee for their case to be dealt with by way of a Professional Conduct Undertaking. If the Convenor of the Conduct Committee does not agree, the Convenor of the Conduct Committee should give reasons for their decision.
- 3.3 Professional Conduct Undertakings can be used where the Respondent accepts that the disciplinary allegations amount to Misconduct. Professional Conduct Undertakings are available for less serious cases of Misconduct and will usually be used at the early stages of an investigation, before a determination is made.
- 3.4 If the Convenor of the Conduct Committee and the Convenor of the Tribunal think that the case may be suitable for a Professional Conduct Undertaking they will contact the Respondent.
- 3.5 The Scheme sets out when in the Scheme process, and who is/are the relevant decision makers who are able to decide whether a Complaint is capable of being resolved by way of a Professional Conduct Undertaking. In considering whether the Complaint is capable of being resolved by way of a Professional Conduct Undertaking, the Convenor of the Conduct Committee or the relevant Scheme decision maker must consider the following criteria:

Whether it is in the public interest for the Complaint to be dealt with by way of a Professional Conduct Undertaking.

- 3.6 Professional Conduct Undertakings will usually be appropriate for less serious cases of Misconduct where the Complaint and its elements are clear and simple. It will be in the public interest for these cases to be dealt with quickly and efficiently. Examples of cases that may be appropriate for a Professional Conduct Undertaking include:
 - (a) communication issues
 - (b) less serious conduct issues in a Respondent's non-professional life.
- 3.7 It is not in the public interest for more serious cases to be dealt with by way of a Professional Conduct Undertaking. For example, where the allegations are complex, the alleged conduct is serious and/or the matter involves a criminal conviction, it is likely to be in the public interest for such cases to be determined by a Tribunal. For these more serious cases some relevant matters might only be identified by carrying out a full investigation and holding a Tribunal hearing which will ensure that the case is assessed in a fair and transparent manner.

Whether there has been an appropriate level of investigation into the Complaint to conclude that a Prima Facie case of Misconduct may exist.

- 3.8 The purpose of a Professional Conduct Undertakings is to allow Complaints to be resolved in a timely and efficient manner, bearing in mind that the Respondent is under no obligation to accept the Professional Conduct Undertaking. A full investigation into the Complaint is therefore not required before a Professional Conduct Undertaking can be proposed. Professional Conduct Undertakings will usually be proposed in the early stages of the Complaint and disciplinary process, and in any event can only be used prior to a formal determination being made.
- 3.9 It is sufficient for the Convenor of the Conduct Committee to be satisfied that a prima facie case of Misconduct may exist. The Convenor of the Conduct Committee does not need to be satisfied that the Tribunal would probably make a finding of prima facie Misconduct. However, the Convenor of the Conduct Committee should be satisfied that Tribunal may make a finding of prima facie Misconduct. In considering whether there may be a prima facie case of Misconduct, the Convenor of the Conduct Committee should consider the definition of Misconduct and may also take into account how similar cases have been dealt with under the Scheme.
- 3.10 It is open for the Convenor of the Conduct Committee to include in a proposed Professional Conduct Undertaking some, rather than all, of the matters included in a Complaint. For example, a Convenor of the Conduct Committee may set aside some matters if there is insufficient evidence to support some of the matters and issues arising or if it is unlikely that sufficient evidence could be obtained or if a matter would not amount to Misconduct (or contribute to an overall finding of Misconduct) even if proved. If the Convenor of the Conduct Committee does not intend to proceed with some of the matters included in a Complaint, the Convenor of the Conduct Committee should set out their reasons for this.

Whether there are any possible breaches of the Institute's Actuarial Professional Standards, or non adherence to any Professional Guidance Note, and/or Technical Papers, or possible non-compliance with the requirements of other regulatory authorities such as APRA and ASIC

- 3.11 Cases involving breaches of the Institute's Professional Standards or non adherence to its other Professional Guidance, Technical Papers or regulatory requirements that may amount to Misconduct will usually be more complex and may require expert evidence. It is more appropriate for these cases to be considered by a Tribunal. This will allow a number of actuary Members on the Tribunal to assess the evidence and technical issues before it.

Whether the Complaint, if proven, would likely result in a low-level sanction

- 3.12 The sanctions available for inclusion within a Professional Conduct Undertaking are those at the less severe end of the spectrum. More serious cases which attract more severe outcomes should be dealt with by a Tribunal.
- 3.13 The Institute's guidance on [Sanctions](#) and [Educational Sanctions](#) will assist in determining the appropriate sanction or combination of sanctions. The Convenor of the Conduct Committee and any other relevant Scheme decision maker should have regard to these when considering whether the low-level sanctions are adequate to address the Complaint(s).

Whether the Professional Conduct Undertaking will offer an appropriate level of public protection

- 3.14 The purpose of the Scheme is to protect members of the public, maintain the reputation of the profession and to uphold proper standards of conduct and competence.
- 3.15 The Scheme decision maker should be assured that the sanction forming part of the Professional Conduct Undertaking will appropriately protect the public. The Convenor of the Conduct Committee should also be satisfied that sufficient investigation has been carried out such that it is unlikely that the case is more serious than it might initially have appeared, having discussed with and approved by the Convenor of the Tribunal Panel. The Convenor of the Conduct Committee should also consider whether there is any reason to believe that concluding the matter more quickly through a Professional Conduct Undertaking might make it more likely that the Respondent might commit similar acts of misconduct in the future; the Convenor of the Conduct Committee should consider the nature of the Respondent's engagement with the disciplinary process when assessing this.

4. Proposing a Professional Conduct Undertaking

- 4.1 When considering a proposed Professional Conduct Undertaking the Conduct Committee should have regard to the importance of concluding cases fairly and expeditiously.
- 4.2 If the Scheme decision maker considers that a Complaint could be resolved by way of a Professional Conduct Undertaking, they will write to the Respondent to ask whether they would agree, in principle, to this. The Convenor of the Conduct Committee should set out why they think the case is suitable for a Professional Conduct Undertaking, to allow the Respondent to make an informed decision.
- 4.3 The Respondent must respond to the Convenor of the Conduct Committee's proposal within 14 days. If the Respondent requires additional time to consider the proposal, they should request an extension and provide reasons for this.

5. Preparing and agreeing a Professional Conduct Undertaking

- 5.1 When preparing a proposed Professional Conduct Undertaking, the Scheme decision maker is required to set out the proposed outcome. In considering the appropriate outcome to propose, the Convenor of the Conduct Committee should follow the approach taken in determining sanctions, as set out in the [guidance on Sanctions](#). The Convenor of the Conduct Committee may also have regard to previous determinations made under the Scheme.
- 5.2 The proposed Professional Conduct Undertaking shall include:
- (a) a summary of the relevant facts;
 - (b) the details of the allegation(s) against the Respondent;
 - (c) the proposed Misconduct finding(s) to be agreed between the Institute and the Respondent;
 - (d) the details of any allegation(s) which do not form part of the proposed Professional Conduct Undertaking, and the reasons why they do not (if appropriate);
 - (e) the proposed outcome(s);
 - (f) the proposed costs;
 - (g) the details of the proposed publication of the Disciplinary Order; and
 - (h) reporting and accountability
 - (i) any other relevant matters.
- 5.3 The proposed costs to be included in a proposed Professional Conduct Undertaking is five times the annual Membership fee for Fellows. This fixed sum is a contribution to the Institute's costs in investigating and determining a Complaint and should be applied to all Professional Conduct Undertakings.
- 5.4 The proposed publication arrangements to be included in a proposed Professional Conduct Undertaking should be in accordance with the [guidance on Publication](#).
- 5.5 A Respondent may agree to resolve the case by way of a Professional Conduct Undertaking but at the same time provide comments on the factual matters set out in the proposed Professional Conduct Undertaking. When finalising the proposed Professional Conduct Undertaking to be served on the Respondent the Scheme decision maker should consider these comments, but any decision to revise the proposed Professional Conduct Undertaking is solely at the discretion of the Convenor of the Conduct Committee. The Scheme decision maker should only revise the proposed Professional Conduct Undertaking if satisfied that it will result in a more accurate or clearer account of factual matters.

6. Approval, variation or rejection of a proposed Professional Conduct Undertaking

- 6.1 By signing a proposed Professional Conduct Undertaking, the Respondent accepts that the matters set out in the proposed Professional Conduct Undertaking are true. The Conduct Committee should treat the proposed Professional Conduct Undertaking as an admission of Misconduct.
- 6.2 A Scheme decision maker should approve a proposed Professional Conduct Undertaking where:
- (a) it is in the public interest to do so; and
 - (b) the criteria set out for a Professional Conduct Undertaking have been met.
- 6.3 In making this assessment the Scheme decision maker should consider section 3 of this guidance.
- 6.4 A Conduct Committee may decide to vary a proposed Professional Conduct Undertaking, for example:
- (a) where they consider that the outcome included in the proposed Professional Conduct Undertaking is not adequate, or is too severe, having regard to the Sanctions Guidance; or
 - (b) to make a material improvement to the wording of the Professional Conduct Undertaking.
- 6.5 The Scheme decision maker may decide to reject a proposed Professional Conduct Undertaking, for example:
- (a) where they and the Respondent cannot agree on the terms as set out in section 5.2.
 - (b) where they consider that Complaints which do not form part of the proposed Professional Conduct Undertaking would amount to Misconduct if proven (and which might be capable of being proven).
 - (c) where they consider that the conduct disclosed by the facts falls materially short of Misconduct.

Document control

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Disclaimer

This guidance has been prepared by the Institute to assist persons who wish to make a Complaint about the conduct of an Institute Member. This document is not legal advice and is not a substitute for the Scheme. Where there is any conflict or inconsistency between the Scheme and this guidance, the Scheme shall be followed. Where there is any conflict or inconsistency between regulations and this guidance, the regulations shall be followed.

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