



## SUPERANNUATION PRACTICE COMMITTEE

### Information Note: Conflicts of Interest in Superannuation

July 2013

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## **A. Purpose and status of Information Note**

1. This Information Note was prepared by the Superannuation Practice Committee ("SPC") of the Actuaries Institute ("Institute"). It specifically relates to how Members deal with the potential for conflicts of interest in superannuation. It is intended to supplement the Institute's Code of Professional Conduct ("Code") which sets out the minimum standards of professional conduct to be observed by Members. Among other things, the Code includes sections on the responsibility of Members in serving the public interest, professional conduct, impartiality, conflicts of interest and confidentiality. In particular, the Code requires a Member to disqualify him or herself from providing a Professional Service where there is a conflict of interest that cannot be managed.
2. The SPC hopes that this Information Note will be a useful tool for Members needing to assess whether a conflict exists and, to the extent possible, how to manage it professionally and appropriately. It does not represent a Professional Standard or Practice Guideline of the Institute. It has been prepared for the purpose of providing Members with a number of high level principles on how to deal with conflicts of interest in superannuation. Members are encouraged to consider how those principles should be applied to specific practical examples. Again, if a conflict exists that cannot be managed, then the Member must disqualify him or herself from providing the Professional Service.
3. The information contained in this Information Note is commentary and general information only. It should not be relied upon in substitution for legal advice.
4. Members' attention is also drawn to the Institute's 'Note to Members concerning Potential Conflicts between a Member's Duties under the Rules of the Institute's Rules and Employment or Retainer Agreements' (June 2006), which may be found [here](#). The note provides a suggested form of wording for inclusion in such agreements to deal with potential conflicts of this kind.
5. Feedback from Institute Members is encouraged and should be forwarded to the Convenor of the SPC, Andrew Boal ([andrew.boal@towerswatson.com](mailto:andrew.boal@towerswatson.com)).
6. This is the first version of this Information Note.

## **B. Background**

7. In May 2012, the SPC released a Discussion Note ("An Update on Conflicts of Interest in Superannuation") to raise awareness, stimulate discussion, share the SPC's preliminary views, and to solicit feedback from Members on:

- (a) the potential for conflicts of interest in superannuation; and
- (b) various issues to consider when deciding the appropriate course of action to manage them.

Among other things, the Discussion Note provided background information on how the actuarial profession in the United Kingdom was dealing with conflicts of interest. In June 2012, the Professional Regulation Executive Committee in the UK released a guide for actuaries on conflicts of interest. The Pensions Standards Committee in the UK also approved Actuarial Professional Standard APS P1 (Duties and Responsibilities of Members Undertaking Work in Relation to Pension Schemes) with an effective date of 1 July 2013, which specifically deals with conflicts of interest in section 5.

8. In releasing the Discussion Note, the SPC formed the view, having regard to the developments in the UK, that it would be timely for the Institute to consider providing additional guidance to its Members to supplement the requirements of the Code in this regard.
9. In August 2012, the Australian Prudential Regulation Authority ("APRA"), in its capacity as the regulator of Registrable Superannuation Entities ("RSEs"), sent a submission to the Institute indicating an interest in seeing that all conflicts of interest in superannuation are identified and appropriately managed.
10. In November 2012, APRA released 11 final prudential standards for the superannuation industry ("SPSs"). As part of its submission to the Institute, APRA specifically mentioned the following matters from the then draft SPSs:
  - ▶ actuaries appointed for the purposes of the Superannuation Industry (Supervision) Act 1993 (Cth) ("SIS Act") will be responsible persons under SPS 520 (Fit and Proper); and
  - ▶ the RSE licensee must maintain a register of relevant duties and interests of responsible persons under SPS 521 (Conflicts of Interest) and, accordingly, an actuary who is advising both the employer sponsor of an RSE and the RSE licensee would need to be listed on the register.
11. The fit and proper criteria to be a responsible person includes a requirement that the person either has no conflict of interest in performing the duties of the position or, if the person has a conflict of interest, it would be prudent for the RSE licensee to conclude that the conflict will not create a material risk that the person will fail to perform properly the duties of the position.

12. The Board of an RSE licensee must take all reasonable steps to ensure that all of the entity's responsible persons, including the actuary, clearly understand the need to identify all potential conflicts of interest and the circumstances that might give rise to a conflict. The Board must also have procedures in place to require an incoming actuary to disclose all relevant duties and relevant interests. The Board must also keep an up-to-date register of all relevant duties and relevant interests as part of its conflicts management framework to provide reasonable assurance that all conflicts are being clearly identified and either avoided or prudently managed.

### C. Identifying conflicts of interest

13. The first step in effectively dealing with conflicts of interest is to identify whether or not a conflict exists. For this purpose, the following three phases may be useful for Members:
- ▶ identify your interests in the particular circumstances – who do you work for, who are your clients, do you have a personal interest in the matter?
  - ▶ assess whether your personal or professional interests (including your professional responsibility to serve the public interest) or your client interests create a conflict which might make it difficult for you to act impartially; and
  - ▶ evaluate whether your interest is so remote or generic that it will not interfere with your ability to act impartially or be seen to be acting impartially.
14. Whether a conflict exists or not in any given situation will, of course, depend on the specific circumstances. Members will need to take account of those specific circumstances, including the purpose of the proposed work as well as any established industry practices, in deciding whether a conflict exists or not.
15. The following table sets out some practical examples of conflicts of interest that Members might experience. The list is not intended to be exhaustive and new and unforeseen conflicts may develop as circumstances change.

Example	Potential sources of conflict
1. Client versus client, or versus former client	(a) Duty owed to one client may impact on duty to another. For example, the interests of the trustee and an employer sponsor of a superannuation fund may not be aligned in relation to the funding of the defined benefits, the investment of the defined benefit assets, or any other matter that has a

Example	Potential sources of conflict
	<p>bearing on the defined benefits payable to members of the fund and therefore the cost of those benefits to the sponsoring employer (such as pension commutation factors or benefit changes). Another example would be determining the basis on which to offer defined benefit members the opportunity to convert to defined contribution style benefits, where the interests of the employer, trustee and the members may not be aligned.</p> <p>(b) Confidential information gained from one client may benefit another. For example, two clients that are separately advised by the same actuary become involved in a corporate transaction such as a merger and acquisition (M&amp;A) deal, or the employer sponsor of a superannuation fund may have confidential information it is not ready or willing to share with the trustee of the fund.</p> <p>(c) Knowledge gained from a former, or existing, client may be of advantage to another client. Of course, this is only an issue in relation to information that is not already in the public domain.</p>
<p>2. Client versus the actuary's firm</p>	<p>(a) Advice given by an actuary to a client may be sound but unpalatable to the client and risk jeopardising the relationship between the client and the firm in other areas. For example, an actuary may provide advice to a client that will increase its costs in the short term and the client, who produces significant revenue for the actuary's firm, is unhappy with the advice provided.</p> <p>(b) The actuary's advice is affected by the opportunity to bring in more income for the actuary's firm. For example, in order to maintain a good working relationship with the client, the actuary provides "favourable" advice to the client.</p> <p>(c) The actuary's advice may bring in more income for the actuary's firm but is of questionable value to the</p>

Example	Potential sources of conflict
	<p>client. For example, there may be several ways to assist the client in the circumstances and the actuary chooses the approach that produces the highest fees, even though less costly methods would have produced similar value to the client. Another example might be where the method by which the actuary's firm is paid is not aligned to the client's interests (for example, commissions on insurance premiums).</p>
<p>3. Client being conflicted</p>	<p>(a) A company officer (for example, finance director) who is also a trustee director might ask the superannuation fund's actuary to provide advice to the trustee that is favourable to the company.</p> <p>(b) The trustee directors do not want to be "difficult" and upset the company.</p>
<p>4. Personal or professional values conflict with client objectives</p>	<p>(a) The course of action proposed by the client is at odds with the values of the actuary or his/her obligations to the Institute or his/her employer.</p>
<p>5. Personal or family interests</p>	<p>(a) Where the actuary's advice could personally affect the actuary or his/her family, financially or otherwise. For example, where the actuary is also a member of the superannuation fund, or owns shares in the client's business. Where the actuary is self-employed, the examples in 2 above are also relevant.</p>
<p>6. Conflicts with own employer</p>	<p>(a) A superannuation fund actuary is directly employed by a company that is an employer sponsor of the fund.</p> <p>(b) A superannuation fund actuary advising his/her own employer gives advice that is potentially of personal benefit to the actuary.</p>

16. Employer organisations often have processes to help identify potential or actual conflicts of interest, such as:
- ▶ conflict checks (perhaps using a live client engagement database) before accepting a piece of work and on an ongoing basis while the work is being undertaken; and
  - ▶ conflicts register, to log all potential and actual conflicts, including relevant correspondence and decisions.
17. In the Appendix to this Information Note, there are some sample questions that Members might ask when seeking to establish:
- ▶ whether there are any conflicts of interest in your work, so that you can then determine what action you need to take (if any) in order to manage or eliminate those conflicts; or
  - ▶ what protection is already in place to manage or eliminate those conflicts so that, if necessary, additional protection mechanisms can be put in place.

In this context, “manage” means averting through careful management while “eliminate” means withdrawing from one or both of the client engagements. The list of sample questions is not meant to be exhaustive, nor will they be relevant to all situations.

#### **D. Duties of confidentiality and disclosure**

18. Advisers have a duty to keep the affairs of their clients and former clients confidential, except where disclosure is permitted or required by law. Members should therefore ensure that information which is confidential to their client remains protected at all times. This obligation continues after the termination of any agreement or client relationship.
19. Confidential information is typically private or sensitive in nature and is communicated in confidence (that is, it was not already in the public domain or readily available from another public source and was shared in circumstances where the person giving the information could reasonably expect that it would not be shared with others).
20. There is a range of circumstances where disclosure of information, which might otherwise be confidential, is permitted by law, including where disclosure is made:

- ▶ with the consent of the person to whom the information would otherwise be confidential; or
  - ▶ to the extent that it is justified in the public interest or is a statutory requirement (for example, this would include any statutory “whistleblower” obligations).
21. Advisers also have a duty to disclose relevant information to a client, at least two of which might arise in this context:
- ▶ the primary duty is to disclose all information relevant to the matter in which you are engaged with your client, because you have a duty to act in the best interests of your client; and
  - ▶ the secondary duty is to disclose the existence of a conflict, in the event that one arises.
22. Your duty of disclosure is limited to information of which you are aware or ought reasonably to be aware, but is not limited to information obtained while acting on your client’s matter. As to relevance, if you think the information might reasonably affect your client’s decision on the engagement, then it is likely to be relevant information, rather than just information which might be of general interest to your client.
23. While this is the general position regarding your duty of disclosure, there are also examples where disclosure to your client is prohibited by law, such as tipping off your client about an investigation by a regulator or other authority.
24. Your duty of confidentiality to one client may, in some circumstances, conflict with your duty of disclosure to another and you will then be in a position where you cannot satisfy both duties. In general, you should not breach your duty of confidentiality, but this will likely mean that you are unable to act for one or both clients, unless the conflict can be appropriately managed. One way of managing such a conflict, if appropriate in the circumstances, may be to ensure that the engagement terms make it clear that you will keep your client’s information confidential from other clients and your client accepts that you will not disclose another client’s information to them.
25. In summary, you should:
- ▶ keep your clients’ affairs confidential, unless disclosure is permitted or required by law;
  - ▶ disclose all relevant information to your client, regardless of the source of that information, unless there is a conflicting duty of confidentiality; and



- ▶ identify and disclose any conflict of interest which arises and either manage it, if this is possible and appropriate, or cease to act for one or both clients.

## **E. Managing client conflicts of interest**

26. In the interests of all parties involved, when a conflict of interest does emerge then, consistent with the Code, it needs to be managed appropriately through appropriate disclosure and controls, or by avoiding the conflict altogether. Potential conflicts of interest can be managed through informed consent and mutual understanding regarding the approach that will be adopted if a conflict emerges. Such an approach would allow all the parties to deal appropriately with their confidential information and seek advice from their own independent actuary should the circumstances warrant it. Whether the independent actuary is from another firm or not is up to the relevant party.
27. Effective conflict management requires appropriate processes and procedures, as well as their correct implementation in individual cases and the right attitude (that is, you have to want to be aware of, and manage, conflicts). Some good practice principles follow in relation to appropriate processes and procedures.
28. It is good practice to agree a Conflict Management Plan (approved at the appropriate level) that sets out what conflicts might exist and how they should be managed. It can be easier to deal with a conflict if this has been done before the conflict arises. This plan may form part of the engagement letter or employment contract, or be dealt with in a separate document. Generally, a Conflict Management Plan would:
  - ▶ be provided to your client at the start of the engagement;
  - ▶ be appropriate to the size and complexity of your firm and the nature of the work undertaken by you or your firm;
  - ▶ explain the extent to which information will remain confidential to your client;
  - ▶ encourage effective communication between you and your client;
  - ▶ set out effective systems and controls to ensure that you are able to identify and assess potential and actual conflicts of interest;
  - ▶ set out the steps that you will take if you believe you can continue to act for the client on the basis that you reasonably believe the conflict of interest can be managed; and

- ▶ set out the steps you will take if you cannot continue to act for a client because of a conflict of interest.
29. Where a firm has engagements with two clients with competing interests, it may be possible to manage a conflict using one or more of the following approaches:
- ▶ ensuring that the parties are advised by different client teams within the firm (although, in some cases, the more mechanical calculation work might still be undertaken for both clients by a common team - sometimes called the “Y model”). The Y model should always be used with care and may not always be an appropriate way to manage a conflict;
  - ▶ establishing and maintaining arrangements which restrict the flow of sensitive information within the firm (sometimes called an “information barrier” or a “Chinese wall”). Information barriers should be managed carefully in practice as there is always the risk of information passing inadvertently through support or other staff; and
  - ▶ ensuring the transparency and impartiality of your work through the peer review of your work. For this to be effective, the peer reviewer should be sufficiently independent and may be external to your organisation.
30. Firms should be careful not to incentivise employees in such a way that might be seen to encourage them to provide anything other than the most suitable and appropriate advice for clients. Regular training for employees also ensures that they are aware of their duties of confidentiality and disclosure and are able to identify and manage conflicts of interest. It is good practice to appoint an individual or committee to deal with issues arising from actual or potential conflicts of interest.
31. Ultimately, where there is an actual or potential conflict of interest, you will need to decide whether it is appropriate to continue to act for the client involved or whether you should resign from one or more of the engagements to resolve the conflict. To assist with this process, you could consider the following steps:
- ▶ explaining the relevant issues and risks to your clients such that you form a reasonable belief that your clients understand them;
  - ▶ assessing whether the engagement would contravene any regulatory or legal requirements, and whether you believe it is in your clients’ best interests to continue to act for them;
  - ▶ recognising the requirements of any confidentiality agreements that are in place;

- ▶ satisfying yourself that any conflicts can be appropriately managed; and
  - ▶ agreeing an appropriate Conflicts Management Plan with all parties.
32. If you intend to continue to act for two or more clients with related interests, then any potential or actual conflict should, where appropriate to do so, be disclosed to each of your clients as soon as possible.

## **F. Managing professional conflicts of interest**

33. Many of the points outlined above in relation to client conflicts of interest apply equally to professional conflicts of interest between you (as an individual or as the firm that employs you) and a client (being the person to whom your work is directed, which may also be your employer). Such conflicts can arise in a number of situations, not only by reason of personal financial interest. It may involve other relationships or interests, such as personal appointments or memberships or, in some circumstances, religious or ethical values or beliefs. Employed actuaries can face particular issues in a conflict between their professional judgment and the commercial objectives of their own employer, such as direct or indirect pressure from their supervisor or another senior person within the organisation.
34. Professional conflicts of interest may mean that your impartiality is questioned and it is therefore important that you:
- ▶ explicitly identify any conflicts of interest in the work that you do;
  - ▶ consider how to remove or decrease the likelihood that a conflict will cause problems; and
  - ▶ determine whether you are managing those conflicts appropriately.
35. There are often no simple or perfect answers, or a solution that works in all cases, but the following suggestions might help you to manage professional conflicts of interest:
- ▶ make use of internal or external peer review;
  - ▶ rotate responsibility across certain roles to help ensure continuing impartiality;
  - ▶ consult with other members of the Institute or other professionals with regard to a particular conflict to seek advice on how to manage it; and
  - ▶ introduce a gifts and hospitality policy and register.

## G. Conclusion

36. The SPC hopes that this Information Note will be a useful tool for Members needing to assess whether a conflict exists and how to handle it professionally and appropriately. Members are encouraged to consider how the high level principles set out in this Information Note should be applied to specific practical examples, and should also consider consulting with other members of the Institute or other professionals with regard to a particular conflict to seek advice on how to manage it.

## Appendix 1: Sample questions regarding conflicts of interest

### 1. Identifying conflicts

- 1.1. What advice might be sought by one client that might be detrimental to the other client?
- 1.2. What information might I receive from one client that, if disclosed to the other client, could be helpful to that client (for example, they could take some action)?
- 1.3. How significant, commercially (or otherwise), to my firm (or me) is each client relationship?
- 1.4. Do any of my different roles within the firm give rise to conflicts?
- 1.5. Are there appropriate peer review or similar procedures in place that help me to ensure that my professional obligations are not compromised due to potential conflicts arising from commercial or other pressures (as referred to elsewhere in this Information Note)?
- 1.6. Is my remuneration directly linked to the results of my work?
- 1.7. Have I been put under pressure to produce a certain outcome from my work and, if so, how have I ensured that such pressure has not unduly influenced those outcomes?
- 1.8. How would this look if it was reported on the front page of a national newspaper?
- 1.9. What conflicts are inherent to the trustee board?
- 1.10. Do certain functions reserved to the superannuation fund's actuary (for example, under the trust deed and rules or legislation) give rise to potential conflicts?
- 1.11. Does my firm advise the sponsoring companies in any material capacity?
- 1.12. In my view, could the trustee board be at risk of being unduly influenced by company management in some circumstances?
- 1.13. In what areas requiring actuarial advice are the interests of the trustee and the company not aligned?
- 1.14. Am I providing "advice" to the sponsoring company or merely communicating and explaining my advice to the trustee?

- 1.15. What conflicts within the trustee board have the potential to impact on my ability (or perceived ability) to give unconstrained advice to the trustee?
- 1.16. Do I (or members of my family) have a stake (for example, shares, employment or scheme membership) in the client I am advising or in another party with competing interests with my client?
- 1.17. Do I have more than one client in the same industry (for example, one consideration may be whether there is potential for merger between two clients).

## **2. Managing conflicts**

- 2.1. Is there a trusted individual who I can talk to about conflicts of interest that might arise in my work as an actuary?
- 2.2. Have I made appropriate disclosure of relevant potential or actual conflicts to all relevant parties?
- 2.3. Does the company use another firm of actuaries for all or some corporate advice (for example, for advice where my firm may be conflicted, such as funding)?
- 2.4. Does the trustee have an appointed investment adviser, and what role might that adviser be playing which might be significant in the management of a potential conflict?
- 2.5. Is there an independent trustee on the trustee board?
- 2.6. Has the trustee set up a conflicts register?

## Appendix 2: Sample situations involving conflicts of interest

### Case study 1

A common opportunity for a conflict of interest for actuaries in superannuation arises between the trustee of a defined benefit superannuation fund and an employer sponsor in relation to the funding of the defined benefits in the fund. In the majority of cases, after performing a series of calculations, the actuary advises the trustee on a suitable pace of funding including a recommended rate of employer contributions to the fund. This advice is then made available to the sponsoring employer to determine whether or not it will accept that advice and contribute at the recommended rate of contributions (or within the acceptable range of contributions).

The employer sponsor may want more information to assist it to understand the implications of the recommended rate of contribution, including the risks. The employer may also want to consider the implications of an alternative rate or rates of contribution, or of alternative assumptions. With the consent of the trustee, it may be reasonable for the actuary to provide this advice, particularly where the employer and trustee are working collaboratively. However, it is up to the trustee, acting on the advice of the actuary, to determine whether any alternative rate of contributions is acceptable. In some circumstances the actuary may need to decline to provide advice requested by the employer due to a conflict of interest. Examples where this may be appropriate include where the trustee prefers the actuary not to provide actuarial advice to the employer in respect of the particular issue, or where the employer prefers to receive its own actuarial advice without the trustee's knowledge.

It is important in this situation to be clear about the provision of "advice" and the potential for conflicts of interest. For example, the actuary may also perform other services for the sponsoring employer, such as calculations in relation to accounting standards for the employer's financial statements. As these calculations are performed on a basis prescribed in the accounting standards, there is little or no "advice" component in this work. However, it is important that the parties still consider the significance of any services provided for the other party and the potential for these to give rise to a conflict of interest or concerns regarding access to or disclosure of confidential information.

In these circumstances, the actuary should determine which party is his or her principal client in this situation for whom he or she would continue to act in the event of a conflict. Further, the actuary should disclose sufficient information regarding the nature of his or her work with each party so that each party can consider the potential for conflicts of interest and take any appropriate actions should the

circumstances require. In certain circumstances it would be prudent for the arrangements with the parties to be documented in a formal agreement.

**END OF INFORMATION NOTE**