

**Restructuring Insolvency and
Turnaround Association of
New Zealand Inc.**

Code of Professional Conduct

FOREWORD

As part of its commitment to building professional excellence, the Restructuring Insolvency and Turnaround Association of New Zealand Inc. (RITANZ) is proud to release its Code of Professional Conduct. The Code is the fundamental building block upon which the insolvency and restructuring profession sets and manages standards of professional conduct.

The Code is a living document. It will continue to be amended from time to time to reflect changes and developments in insolvency and restructuring law and practice. RITANZ welcomes feedback on the Code and its operation from all stakeholders.

EFFECTIVE DATE

This Code comes into force on 1 July 2018.

It applies to Appointments where a Member is appointed on or after that date, and, in relation to the Fundamental Principles set out below only, to a Member's conduct after that date on any existing Appointment:

Principle 1 (Integrity, Objectivity, Impartiality and Professional Behaviour)

Principle 3 (Communication)

Principle 4 (Timeliness)

Principle 5 (Dealing with Property)

Principle 7 (Transitioning or Parallel Appointments)

Principle 8 (Competence)

Principle 10 (Adequate Resources, Expertise and Capacity)

Principle 11 (Quality Risk Assurance)¹

Principle 12 (Compliance and Risk Management)

Principle 13 (Complaints Management)

ACKNOWLEDGEMENTS

RITANZ acknowledges the contribution and assistance of the Australian Restructuring & Turnaround Association in producing this Code, which is substantially based on the Third Edition of the ARITA Code of Professional Practice.

RITANZ also acknowledges Chartered Accountants of Australia and New Zealand - some of the provisions of the July 2013 version of its Insolvency Engagements Standard (IES) are reproduced in the Code.



John Fisk
Chairman
RITANZ

DISCLAIMER

No liability attaches to RITANZ or any person that prepares, issues or distributes this Code. The obligation to comply with the Code rests solely on each Member, as does any liability arising from any failure by that Member to do so.

¹ Paragraph 11.2 of Fundamental Principle 11 will only apply to existing Appointments where it is necessary to document the work performed on the Appointment following implementation of the Code.

PART A: INTRODUCTION

I. Purpose and Application of the Code

The primary purposes of the Code are to:

- set standards of conduct for those involved in formal insolvency and restructuring assignments which protect the integrity of the insolvency system and are fair, effective, practical and readily understood;
- inform and educate RITANZ Members as to the standards of conduct required of them in the discharge of their professional responsibilities;
- provide a reference for stakeholders and disciplinary bodies against which they can gauge the conduct of RITANZ Members; and
- facilitate the carrying out of insolvency and restructuring processes efficiently, effectively and with integrity.

Under the Rules, Members are required to comply with the Code. Failure to do so may result in disciplinary proceedings in accordance with the Rules.

The Code is in four parts:

Part A introduces the Code.

Part B sets out the Fundamental Principles of professional conduct.

Part C contains guidance to assist in applying the principles.

Part D contains Practice Standards that should be adopted for use in practice.

1.1. Interaction with Legislation

The Code is meant to complement and be additional to any statutory obligations and the regulatory requirements that Practitioners have in carrying out their responsibilities.

The Code is not a simple restatement of Legislation and judicial decisions. It is a set of principles and guidance about the standards of conduct expected of Members. Some standards imposed on Members are higher than existing legal requirements. Where the law is silent or ambiguous, the Code introduces principles to clarify understanding of the desired behaviour.

If there is any conflict between a Member's legal obligations and the requirements of this Code then, to the extent the Member is unable to reasonably avoid or otherwise mitigate that conflict, the Member must give priority to compliance with their legal obligations.

1.2. Principles based

The practice of insolvency and restructuring is often complex and varied. It is impossible to conceptualise and codify every possible situation or scenario. Accordingly, the Code establishes broad principles that can be applied to every situation. The use of principles avoids the prospect of loopholes being used to justify conduct by distinguishing the particular situation from restrictions set down in a prescriptive list. As statements of principle are necessarily general, explanatory guidance is provided.

The guidance will also assist stakeholders in understanding the limits of the principles so that they do not have unreasonable expectations of what Practitioners are required to do.

Practitioners are expected to use their professional and commercial judgment and when they have doubt should seek legal or other advice, or the assistance of the Court, before proceeding.

1.3. ***Must, should and may***

The Code uses a three level hierarchy of wording to describe and explain its requirements:

- mandatory requirements (must / must not);
- recommended behaviours (should / should not); and
- permissive statements (may).

Where a Member decides not to follow a recommendation (should / should not), the Member will need to be able to justify why the recommended course of action was not taken and why the course taken was within the spirit and intent of the relevant principle. In these situations, the Member should:

- record the reasoning used for diverging from the Code;
- state the rationale used to determine that the action followed is not proscribed by the Code; and
- be able to explain that the path taken results in an equal or better outcome for stakeholders.

1.4. ***Regulator and courts***

The insolvency and restructuring profession is partially regulated by the Registrar of Companies. The conduct of Practitioners is also subject to review by the relevant disciplinary bodies and review or supervision by the Court.

It is anticipated that the Code will be used by the Regulator (to the extent it has jurisdiction), disciplinary bodies and courts to assist them in enforcing acceptable insolvency and restructuring practice and proper professional standards.

At the same time, the Code remains subject to the views of the Court, which may decide not to accept or follow particular requirements or guidance in the Code. If this happens, the Code will be amended to properly reflect the law. Also, a Member may obtain Court directions or orders that differ from requirements or guidance in the Code, for example in relation to Independence. The Code always remains subject to the law and the Court.

1.5. ***Interrelationship with other professional standards and with professional obligations***

Most Members are also members of other professional associations. The requirements of other professional associations will, in many areas, be similar to those in the Code - for example the Insolvency Engagements Standard issued by Chartered Accountants Australia and New Zealand.

The Regulator may also in the future release regulatory guidance that applies to insolvency and restructuring practitioners. Practitioners must have regard to such guidance.

To the extent that the Code imposes a higher standard on Practitioners than requirements from other associations or the Regulator, the Code will prevail.

However, to the extent compliance with the Code would result in a Member breaching other professional standards or professional obligations by which they are bound, those professional standards and obligations will prevail.

1.6. **Application of the Code**

The Code applies to all Members of RITANZ insofar as they conduct or are involved in the administration of insolvencies and Restructurings. The Code therefore applies not only to insolvency and restructuring practitioners, but also to lawyers, accountants, financiers and others who are Members of RITANZ. These obligations are addressed in the Code to 'Members'. The definition of "Member" in the Code includes, unless otherwise indicated, the Member's Firm, partners or staff where those people are involved in restructuring and insolvency work.

Some parts of the Code apply only to Members who are insolvency and restructuring practitioners appointed to, or contemplating appointment to, any Appointment (that is, a formal insolvency or Restructuring engagement). These obligations are addressed in the Code to 'Practitioners'.

Members who are practising in the field of insolvency or restructuring outside of New Zealand are bound by any requirements in the Code, unless in direct conflict with the laws of the jurisdiction in which they operate.

Within the definition of Practitioners, the Code refers to, and treats, liquidators, administrators, and Receivers as broadly within the one category, primarily as fiduciaries responsible to creditors and fulfilling the role that requires the exercise of statutory powers. However, Receivers, although Practitioners, do not have the same fiduciary duties to all creditors as liquidators and administrators have. Where appropriate, the Code makes separate mention of Receivers and excludes them from certain requirements of the Code which apply only to Practitioners.

The Code does not apply to Solvent Liquidations.

Any examples provided within the Code are for illustrative purposes only and Members must consider the particular facts of each case when determining how the Code applies to them. The fact that a situation or relationship encountered by a Member is not specifically covered in an example given in the Code does not mean that the situation or relationship would be acceptable under the Code.

Members must always have regard to and comply with the spirit and intent of the Code.

A Member who becomes aware of any other Member failing to comply with the Code (or with relevant laws and regulations) in a manner which is likely to bring discredit to RITANZ must report that Member to RITANZ within an appropriate timeframe.²

Practitioners should also ensure that their acts, dealings and decision making processes are transparent, understandable and readily identifiable unless to do so will conflict with any legal or professional obligation.

Practitioners should inform those appointing them, the Body of Creditors, and if applicable any Approving Body and/or creditors generally, at the earliest opportunity that they are bound by the Code when carrying out all professional work relating to an Appointment.

The table below identifies which of the Fundamental Principles applies to Members and Practitioners.

² Accredited Insolvency Practitioners will also be bound by the NZICA Code of Ethics, including the duty to self – report unethical behaviour as contemplated in section 140.11 of the NZICA Code of Ethics.

Application of Fundamental Principles

No.	Principle	Practitioners	Members
1	Integrity, Objectivity, Impartiality and Professional Behaviour	x	x
2	Independence	x	
3	Communication	x	x
4	Timeliness	x	x
5	Dealing with Property	x	x
6	Competition and Promotion	x	x
7	Transitioning or Parallel Appointments	x	
8	Competence	x	x
9	Remuneration - reasonable, disclosure and approval	x	
10	Adequate Resources, Expertise and Capacity	x	
11	Practice Quality Assurance	x	x
12	Compliance and Risk Management	x	x
13	Complaints Management	x	x

For the avoidance of doubt the principles applying to Practitioners apply when they are acting as Appointees. Where a Member who routinely takes Appointments is involved in an insolvency or Restructuring engagement, but is not acting as the Appointee, the Member's conduct must be measured against the principles applying to Members.

2. Definitions and Interpretation

2.1. Construction

The meanings of the words *must/must not*, *should/should not* and *may* are explained at paragraph 1.3 of Part A. These words are used throughout the Code and indicate the standard of conduct required of the Member.

2.2. Defined Terms

The following defined terms are used throughout the Code, shown commencing in capitals. Unless otherwise indicated or the context otherwise requires, the terms have the meanings below.

Accredited Insolvency Practitioner The same meaning as in the Rules.

Alternate The Practitioner nominated to replace the Incumbent.

Appointment The formal appointment of a Practitioner as:

- (a) a Receiver;
- (b) a liquidator or interim liquidator under the Companies Act (other than in a Solvent Liquidation);
- (c) an administrator or a deed administrator under Part 15A of the Companies Act;
- (d) an administrator, supervisor, monitoring accountant or similar role pursuant to an appointment arising under Part 14 or Part 15 of the Companies Act;
- (e) a trustee of a personal creditor compromise proposal under Part 5(2) of the Insolvency Act;
- (f) a statutory manager under the Corporations (Investigation and Management) Act 1989, under Part 4 of the Insurance (Prudential Supervision) Act 2010 or section 117 of the Reserve Bank of New Zealand Act 1989; and
- (g) a manager, controller or supervisor of an Insolvent under any other Legislation.

The word "Appointee" has a parallel meaning.

Associate For Appointments to companies or their assets, Associate means a person or Entity referred to in section 298(1) of the Companies Act. For personal insolvency administrations, Associate is a Relative of the Insolvent, or the spouse or life partner or dependant of a Relative, and any Entity with which the Insolvent or any of the persons previously mentioned are associated.

<i>Approving Body</i>	The body with authority to approve or review Remuneration or a course of conduct and/or to which the Appointee must report, being the appointor, the Court, or other entity as required by Legislation or agreement, as detailed further in Part 4 of Practice Standard I.
<i>Body of Creditors</i>	The creditors of a company subject to an Appointment.
<i>CA ANZ</i>	Chartered Accountants Australia and New Zealand.
<i>Co-Appointments</i>	Where more than one Practitioner is appointed to an Appointment, either jointly or jointly and severally.
<i>Code</i>	This Code as amended from time to time.
<i>Companies Act</i>	Companies Act 1993.
<i>Conflict of Interest</i>	Any circumstance, relationship or other fact relevant to the Member's or Firm's (or any of its partners, directors or managerial employees) own financial, business, property or personal interests which in reality will, or reasonably may, impair the rendering of objective insolvency and restructuring services.
<i>Declaration</i>	The Declaration of Independence, Relevant Relationships and Indemnities described in detail in Fundamental Principle 2 (Independence).
<i>Disbursements</i>	Necessary and reasonable financial outlays incurred or paid by the Practitioner in the Appointment. The term includes expenses, costs and disbursements and is discussed further in Part 2 of Practice Standard I.
<i>Entity</i>	A body corporate, a partnership, an unincorporated body, an individual or a trust, including in relation to a trust, the trustee.
<i>Expert</i>	A person or firm possessing special skill, knowledge and experience in a particular field including accounting and insolvency and restructuring.
<i>Firm</i>	<p>(a) a sole practitioner, partnership, corporation or other entity through which a Member may undertake Appointments.</p> <p>and for the purposes of Fundamental Principle 2 (Independence) and the definition of Material Interest;</p> <p>(b) an entity that controls such parties through ownership, management or other means;</p> <p>(c) an entity controlled or influenced by such parties through ownership, management or other means; or in which they share in the profits; or</p> <p>(d) practices operating under the same or substantially the same business, whatever the financial arrangement or business name.</p>
<i>Incumbent</i>	The Practitioner acting as the Appointee.
<i>Indemnity</i>	Any arrangement, either directly or indirectly, to make a payment to the Practitioner for the purposes of meeting Remuneration or Disbursements

of the Practitioner, but does not include indemnities under legislation.

<i>Independence</i>	Independence of mind and Independence of appearance.
<i>Independence of appearance</i>	The avoidance of facts and circumstances that are so significant that a reasonable and informed third party would be likely to conclude, weighing all the specific facts and circumstances that a Practitioner or Firm's integrity, objectivity or professional scepticism has been compromised.
<i>Independence of mind</i>	The state of mind that permits the expression of a conclusion without being affected by influences that compromise professional judgment, thereby allowing a Practitioner to act with integrity and exercise objectivity and professional scepticism.
<i>Independent</i>	Having Independence.
<i>Insolvency Act</i>	Insolvency Act 2006.
<i>Insolvent</i>	Entity which is insolvent or likely to become insolvent, whether or not it is yet subject to an Appointment.
<i>Legislation</i>	The legislation referred to in the definition of Appointment together with any other relevant legislation, and includes regulations made pursuant to such legislation. The term also refers to other legislation under which formal appointments to Insolvents or their assets can be made.
<i>Material Interest</i>	Any legal, equitable or beneficial interest which is material to either the owned Entity, or material to the Practitioner, his or her partners, Firm, staff, or their respective Relatives; or an interest in an Entity in which the Practitioner, his or her partners, Firm, staff or their respective Relatives has any management involvement whatsoever.
<i>Member</i>	Members in any capacity of RITANZ, and, unless otherwise indicated, includes the Member's Firm, partners and staff where those people are involved in insolvency and restructuring work.
<i>NZICA</i>	New Zealand Institute of Chartered Accountants.
<i>Practitioner</i>	A Member (who must be an Accredited Insolvency Practitioner) who acts under an Appointment, or is considering accepting an Appointment as an Appointee, and, unless otherwise indicated, includes the Practitioner's Firm, partners and employees.
<i>Professional Relationship</i>	Any Professional Service under which the Appointee or a partner in his or her Firm, has given professional advice in accounting, restructuring, insolvency, financial advice, tax or other such areas for the Insolvent and includes an Appointment.
<i>Professional Services</i>	All work undertaken by a Member or a Member's Firm.
<i>Receiver</i>	Has the same meaning as in the Receiverships Act.
<i>Receiverships Act</i>	Receiverships Act 1993.

<i>Referring Entity</i>	An Entity that has provided a Practitioner's contact details to a director(s), Insolvent or creditor for the purposes of the director(s), Insolvent or creditor seeking specialist insolvency advice that may result in an Appointment.
<i>Regulator</i>	The Registrar of Companies, appointed under the Companies Act.
<i>Relative</i>	In relation to any person, means: <ul style="list-style-type: none"> (a) any parent, child, brother, or sister of that person; or (b) any spouse, civil union partner, or de factor partner of that person; or (c) any parent, child, brother, or sister of a spouse, civil union partners, or de facto partner of that person; or (d) a nominee or trustee for any of those persons.
<i>Remuneration</i>	The monies claimed by a Practitioner on account of work performed or to be performed by the Practitioner in an Appointment. Also referred to as 'fees'.
<i>Restructuring</i>	Includes voluntary administrations and Deeds of Company Arrangement under Part 15A, compromises under Parts 14 and 15 of the Companies Act, compromise proposals under the Insolvency Act and informal work outs and compromises.
<i>RITANZ</i>	Restructuring Insolvency and Turnaround Association of New Zealand Incorporated.
<i>Rules</i>	The Rules from time to time of RITANZ.
<i>Secured Creditor</i>	Includes any creditor whose debt is secured by a security interest under the Personal Property Securities Act 1999, a mortgage over real property or other charge which entitles the creditor to realise the security for the purpose of repaying their debt.
<i>Solvent Liquidation</i>	The liquidation of an entity that satisfies the requirements of section 243(8) and section 243(9) of the Companies Act (modified as necessary for entities that are not companies).
<i>Special Purpose Liquidator</i>	A liquidator who is appointed either by the Court or a liquidator to carry out a specific function in the liquidation of a company in circumstances where it is necessary or desirable that the function is not performed by the acting liquidator.
<i>Upfront Payment</i>	Any payment to a Practitioner prior to the Appointment for the purposes of meeting future Remuneration or anticipated Disbursements of the Practitioner.

PART B: THE FUNDAMENTAL PRINCIPLES

Conduct

- Principle 1 In addition to the obligation to comply with the law, Members must exhibit the highest levels of integrity, objectivity and impartiality in all aspects of Appointments and practice management, and must act professionally.
- Principle 2 When accepting or retaining an Appointment the Practitioner must at all times during the Appointment be, and be seen to be, Independent.
- Principle 3 Members must communicate with affected parties in a manner that is accurate, honest, open (subject to commercial and strategic imperatives of the Appointment), clear, succinct and timely to ensure effective understanding of the processes, and their rights and obligations.
- Principle 4 Members must attend to their duties in a timely way and in accordance with their professional obligations.
- Principle 5 A Practitioner must not purchase any assets under the administration of a Practitioner.
- Principle 6 When promoting themselves, or their Firm, or when competing for work, Practitioners must act with integrity.
- Principle 7 When dealing with other Members in transitioning or parallel appointments, Practitioners must be professional and co-operative, without compromising the obligations of the Practitioner in their own particular Appointment.
- Principle 8 Practitioners (and Members, where relevant) must maintain professional competency in the practice of insolvency and Restructuring and carry out any Appointment with due care and diligence.

Remuneration

- Principle 9
- (1) A Practitioner is entitled to claim reasonable Remuneration, and Disbursements, in respect of necessary work, properly performed in an Appointment.
 - (2) A Practitioner must provide sufficient, meaningful, open and clear disclosure of their Remuneration or Remuneration claim to the Approving Body or Body of Creditors (as applicable).
 - (3) Where under Legislation or the terms of the Appointment, a Practitioner's claim for Remuneration must be approved, the Practitioner is only entitled to draw Remuneration once it is approved and according to the terms of the approval. In other cases the Practitioner may draw Remuneration for work performed at a time the Practitioner determines.

Practice Management

- Principle 10
- When accepting an Appointment the Practitioner must ensure that their Firm has adequate expertise and resources for the type and size of the Appointment, or the capacity to call in that expertise and those resources as needed.
- Principle 11
- Practitioners must implement policies, procedures and systems to ensure effective quality assurance.
- Principle 12
- Practitioners must implement policies, procedures and systems to ensure effective compliance management and risk management.
- Principle 13
- Practitioners must implement policies, procedures and systems to ensure effective complaints management.

PART C: GUIDANCE

Test of compliance with the Code

The Code sets out principles and guidance for the conduct of Members and/or Practitioners (as applicable). The test for compliance with the Code is objective; that is, whether a reasonable and informed third party on the information available (or which should have been available) at the time would be likely to conclude, weighing all the specific facts and circumstances, that the Member and/or Practitioner has, in reality, complied with the Code. Conduct which does not meet this test will be a breach of the Code unless otherwise stated.

The test is to be applied:

- on the facts reasonably available at the time of the relevant conduct by the Member and/or Practitioner;
- when circumstances change or become known to the Member and/or Practitioner, which are relevant to the compliance of the conduct with the Code; and
- not retrospectively with the benefit of hindsight in relation to facts and circumstances that could not reasonably be expected to have been known or discoverable by the Member and/or Practitioner at the time of the conduct.

I. Principle I: Integrity, Objectivity, Impartiality and Professional Behaviour

In addition to the obligation to comply with the law, Members must exhibit the highest levels of integrity, objectivity and impartiality in all aspects of Appointments and practice management, and must act professionally.

I.1. Integrity

Members are required to show high levels of integrity in the conduct of their practices and Appointments by:

- being straightforward;
- being honest;
- being truthful; and
- not making false or misleading statements (including any statements which are false and/or misleading by omission, or furnished recklessly).

I.1.1. Structuring of financial affairs

A Member must not advise an Entity (nor, if the Entity is a company, its directors) on how to structure its financial affairs to defeat creditors in a manner prohibited by law.

I.1.2. Confidential information

A Member who acquires confidential or personal information in the course of an Appointment must not use that information for any purpose other than the proper performance of the Appointment. A Member shall not disclose confidential or personal information to a third party without appropriate authority, unless there is a legal duty or professional obligation to disclose (including where the Member considers that doing so is necessary to facilitate the proper performance of the Appointment).

Where a Member intends to disclose confidential or personal information to facilitate the proper performance of the Appointment, the Member must ensure that there is no breach of a fiduciary relationship or professional obligation and if in doubt must obtain external legal advice.

I.2. Objectivity

Members must be objective. This requires Members to exercise their judgment with professional scepticism and free from:

- bias;
- Conflict of Interest; and
- undue influence of others.

I.3. Impartiality

When exercising their judgment, Members must be impartial by taking care to ensure that they:

- are not influenced by personal feelings, prejudice or difficult relationships with individual stakeholders;
- are making decisions based on the known facts and applicable law;
- have no direct personal interest; and
- except to the extent the law may permit them to do so, are not favouring one person or side more than another when applying the law.

Before exercising their judgment, Members should take reasonable steps to ascertain the necessary facts to ensure that a sound judgment can be made in accordance with reasonable standards of commercial practice.

1.4. ***Professional Behaviour***

Members must act professionally at all times and avoid conduct that could bring discredit to RITANZ.

2. Principle 2: Independence

When accepting or retaining an Appointment the Practitioner must at all times be, and be seen to be, Independent.

Independence is critical because of the nature of the role of the Practitioner.

Stakeholders need to have confidence in the Practitioner's conduct and decision making. They need to be able to regard the Practitioner as fair, unbiased and not acting from self interest or other inappropriate influences when exercising his or her professional and commercial judgment.

A Practitioner must not accept an Appointment if the Practitioner will not be Independent, and must not form a view as to whether to accept an Appointment without considering all relevant facts in relation to the Appointment.

The requirement for Independence as described in the Code and the other provisions of this section does not apply to Receivers who are appointed by a secured creditor and have a contractual relationship with the appointor. Nor does it apply to liquidators appointed to a Solvent Liquidation, unless that liquidation ceases to be a Solvent Liquidation for the purposes of the Code. There may nevertheless be independence issues that arise for Receivers and liquidators appointed to Solvent Liquidations under the Legislation or the rules or codes of conduct of other professional bodies.

Although a Practitioner may meet the requirement for Independence as described in the Code, they may still require leave of the Court before accepting an Appointment, or may be prohibited by Legislation from accepting an Appointment.

In some circumstances, it may be possible and/or appropriate for a Practitioner to accept an Appointment but take steps to ensure their Independence, for example by appointing a Special Purpose Liquidator in connection with their own Appointment,. Relevant principles for such an appointment may include:

- whether it would be beneficial to the administration of the Appointment and the interest of the relevant creditors for the work envisaged for the Special Purpose Liquidator to be undertaken;
- whether the Appointment should be made by the Court or ratified by the creditors; and
- whether recoveries would benefit creditors as a whole.

For all Appointments (excluding appointments as a Receiver) at the earliest practical opportunity, the Practitioner must provide a Declaration to creditors. The Declaration is further discussed in paragraph 2.4 of this Part C.

2.1. *The Test of Independence*

A Practitioner must be independent of mind and independent in appearance - they must act and conduct the Appointment without being affected by influences that compromise professional judgment, integrity, objectivity and professional scepticism.

A Practitioner must not accept an Appointment, if the Practitioner has a Conflict of Interest or is aware that a Conflict of Interest may arise or for other reasons they might not be Independent.

2.1.1. *Not a State of Mind*

While Practitioners may consider that their personal integrity and skill makes them immune to the influences of conflicts, this is not the test. This is not a reflection on the integrity of the Practitioner; it is a consequence of the need to preserve Independence.

Contact between the Practitioner and the Insolvent, directors, creditors or advisors to them before the acceptance of the Appointment does not in itself create a threat to Independence. What is important is the nature of the contact and of the relationship between the Practitioner and the various stakeholders.

2.1.2. *Possible Conflicts – Actual or Perceived?*

The mere possibility of a conflict is not a bar to accepting or continuing an Appointment. The Practitioner must be proactive in anticipating, identifying and uncovering the circumstances that may give rise to a Conflict of Interest, and not to simply address the issue when the conflict arises.

2.1.3. *Referrals from other Professionals and Creditors*

A Practitioner must not accept any referral that contains, or is conditional upon:

- the giving or receiving of referral commissions, inducements or benefits;
- the giving or receiving of spotter's fees;
- the giving or receiving of recurring commissions;
- understandings or requirements that work in the Appointment will be given to the referrer; or
- any other such arrangements that restrict the proper exercise of the Practitioner's judgement and duties.

2.2. **Upfront Payment for Remuneration**

Practitioners may accept monies to meet the costs of the Appointment, prior to the acceptance of the Appointment, provided that:

- the Practitioner does not prejudice the outcome of the Appointment;
- the monies are held on trust;
- there are no conditions on the outcome of the Appointment attached to the monies (i.e. achieving a certain outcome); and
- full disclosure is made to the creditors in the Indemnities and Upfront Payments section of the Declaration.

Monies held on trust must only be drawn as Remuneration in the same manner as normal Remuneration claims and accounted for as funds of the Appointment. Monies should be paid from the Trust account into the Appointment bank account prior to being drawn for Remuneration.

2.3. **Independence processes and documentation**

Practitioners must actively seek to identify any risks to Independence before accepting an Appointment.

As a minimum, every Firm must document and implement policies and processes that:

- recognise the importance of Independence;
- establish clear criteria to identify and categorise threats;
- standardise the steps of investigation, enquiry, reporting and resolution;
- require education of principals and staff on the process;
- include a process of consultation with senior staff for difficult cases;
- provide guidance as to courses of action to be taken if a threat to Independence is identified after an Appointment is accepted; and
- monitor adherence to the process.

Practitioners must ensure that for every Appointment, a written record is maintained which demonstrates compliance with the Firm's Independence processes and provides a working paper (which may be in electronic form) to support the completed Declaration.

An effective process will help to embed in the Firm culture an understanding that Independence issues are significant and important. It will also provide a consistency in approach and a commitment to reducing risk.

The Practitioner:

- may delegate to staff the task of gathering information on which the decision is based; but
- is responsible for ensuring adherence to the process; and
- cannot delegate the decision on Independence.

2.4. *The Declaration of Independence, Relevant Relationships and Indemnities (Declaration)*

For all Appointments (excluding appointments as a Receiver) at the earliest practical opportunity, the Practitioner must provide a Declaration to creditors.

The provision of a Declaration is a process for identifying relationships that are *not* threats to Independence, but need to be disclosed to creditors to ensure transparency.

Completion of the Declaration required under any Legislation and the Code is a step that is taken once the Practitioner has determined that he or she is Independent and takes the Appointment.

2.4.1. Format and content of Declaration

The Declaration must comprise three components:

- A. Declaration of Independence;
- B. Declaration of Relationships, which includes:
 - i. Circumstances of Appointment;
 - ii. Relevant relationships with the Insolvent and known Associates of the Insolvent (excluding relatives, except where the relative has a business relationship with the Insolvent) in the previous 2 years;
 - iii. Prior professional services with the Insolvent or known Associates of the Insolvent in the previous 2 years;
 - iv. A declaration that there are no other relationships to declare; and
- C. Declaration of Indemnities and Upfront Payments.

Any relationships, Indemnities or Upfront Payments disclosed in the Declaration must not be such that the Practitioner is no longer Independent. The purpose of components B and C of the Declaration referred to above is to disclose relationships that, while they do not result in the Practitioner having a Conflict of Interest which disqualifies the Practitioner from accepting an Appointment, ensure that creditors are aware of those relationships and understand why the Practitioner nevertheless remains Independent.

A Practitioner only needs to declare a relationship once in the Declaration. The Practitioner should select the most appropriate section of the Declaration for the declaration to appear.

The Practitioner must include in the Declaration a statement as to who the declarations in the Declaration relate to. The Practitioner should include a brief explanation of the purpose of the Declaration.

A. *Declaration of Independence*

A declaration that the Practitioner:

- has undertaken a proper assessment of risks to Independence in accordance with the law, Code and applicable professional standards;
- has determined that the assessment identified no real or potential risks to Independence; or
- has evaluated the significance of any real or potential risk to Independence and taken such action as is necessary to preserve the Practitioner's Independence; and
- in all cases, is not otherwise aware of any impediments to taking the Appointment.

B. *Declaration of Relationships*

i. *Circumstances of Appointment*

A declaration setting out the circumstances of the Appointment by way of explaining:

- whether advice was provided to the Insolvent, officers of the Insolvent (if the Insolvent is a company) and/or their advisors prior to the Appointment;
- a summary of the general nature of the issues discussed;
- the amount of any Remuneration received for this advice;
- the Appointee's reasons for believing that such meetings and/or advice do not result in a Conflict of Interest;
- the Referring Entity (name, firm/organisation and, if applicable, connection to the Insolvent), if applicable; and
- that no other information or advice, beyond that outlined in the Declaration, was provided to the Insolvent, officers of the Insolvent (if the Insolvent was a company) or their advisors.

ii. *Relevant Relationships (excluding professional services to the Insolvent)*

A Declaration setting out business relationships which the Practitioner or Firm has had in the preceding 2 years with:

- the Insolvent;
- a known Associate of the Insolvent (excluding relatives, except where the relative has a business relationship with the Insolvent);
- a former insolvency practitioner appointed to the Insolvent;
- a person who has a charge on the whole of or substantially the whole of, the Insolvent's property.

As a minimum, the Practitioner must state:

- who the relationship is with;
- the nature of each relationship;
- the Appointee's reasons for believing that the relationship does not result in a Conflict of Interest; and
- the significance of the relationship to the Practitioner's Independence and the action taken to preserve the Practitioner's Independence.

iii. *Prior Professional Services to the Insolvent*

A declaration setting out any professional services (if any) provided to the Insolvent by the Practitioner or Firm in the preceding 2 years, including:

- the nature of the professional service;
- when the professional service was provided;
- what period the professional service was provided over;
- the fees paid for the professional service; and
- the Appointee's reasons for believing that the professional services disclosed do not result in a Conflict of Interest.

iv. *No other relevant relationships to disclose*

A declaration that there are no other relevant relationships, including business and Professional Relationships, from the previous 2 years with the Insolvent, a known Associate of the Insolvent (excluding relatives, except where the relative has a business relationship with the Insolvent), a former insolvency practitioner appointed to the Insolvent or any person or entity that has a charge over the whole or substantially whole of the Insolvent's property that should be disclosed.

C. *Indemnities and Upfront Payments*

A Declaration of Indemnities and Upfront Payments disclosing:

- whether the Practitioner has obtained an Indemnity or Upfront Payment;
- the identity (name and relationship with the Insolvent) of each indemnifier or provider of an Upfront Payment;
- a statement about where the funds are being held (if applicable);
- a statement about when and how the funds will be applied (if applicable); and
- a statement that there are no other indemnities or upfront payments to be disclosed.

Because disclosure of Indemnities is only required in order to identify relationships that do not in fact create a lack of Independence and to ensure transparency, and because disclosure of these confidential arrangements may be contrary to the interests of creditors, Practitioners are not required to disclose Indemnities provided in connection with the funding of litigation or investigations, unless required by law.

2.4.2. *The nature of explanations / disclosures in the Declaration*

Disclosures in the Declaration are aimed at providing an explanation to creditors of relationships with the Insolvent and other relevant party and the reasons why these relationships do not result in a lack of Independence on the part of the Practitioner. Therefore, the disclosures should focus on providing this information.

All declarations and explanations must be clear, concise, meaningful and in terms that the creditors can understand.

Statements such as:

- I do not have a conflict;
- this relationship is allowed under RITANZ's Code; or
- my firm has a contractual relationship with the Secured Creditor;

do not provide a meaningful explanation of the relationship or the Practitioner's reasons for believing why it does not result in a Conflict of Interest.

2.4.3. *Signing of the Declaration*

Except in exceptional circumstances which must be documented on the file and disclosed to creditors, where two or more Practitioners have been appointed to an Insolvent, each Practitioner must sign the Declaration as it is a declaration made by each Practitioner in its own individual capacity.

In a situation where one Appointee signs the Declaration on behalf of another Appointee, each Appointee is equally responsible for the content of the Declaration. Due enquiry must be made by both Appointees as to the accuracy of the Declaration and the completeness of the declarations made.

The Co-Appointee who has not signed the Declaration must do so as soon as possible. The Practitioners must ensure that creditors are advised of this in the next communication to them.

2.4.4. *Timing*

The Declaration must:

- be provided with the first communication to creditors;
- be provided no later than with the notice of the first meeting of creditors (if applicable); and
- be tabled at the first meeting of creditors (if applicable).

The tabling of the Declaration must be included as an agenda item and in the minutes of the relevant meeting.

2.4.5. *Replacement Appointees*

The requirements in relation to a Declaration also apply to any Practitioner accepting a replacement appointment.

All replacement Practitioners must:

- if applicable, table a copy of the Declaration at the meeting prior to the casting of the vote regarding their appointment; and
- provide a copy of their Declaration to all creditors with their next communication to creditors.

2.4.6. *New Information*

If a Practitioner becomes aware that the Declaration has become out of date or there is an error, the Practitioner must update the Declaration and notify creditors in a timely manner, and in any event within 20 Business Days of becoming aware of the new information. The Practitioner must also table the Declaration at the next meeting of creditors (if any).

2.5. ***Post Appointment Actions – threat to Independence Identified***

If information comes to light about relationships and threats to Independence that were not known at the time of the acceptance of the Appointment, or the circumstances materialised after the Appointment commenced, then the following applies.

2.5.1. *Non-precluded Relationships*

Where the relationship or threat to Independence is identified and it is one that would not have precluded the acceptance of the Appointment, then, if:

- the Practitioner has followed the requirements of the Code;
- the Practitioner has adequate policies, systems and processes;
- the situation was a result of inadvertence; and
- it was not reasonable to know or anticipate the situation at the time of accepting the Appointment;

the omission is not a breach of this Code and the Practitioner may continue with the Appointment subject to amending the Declaration and sending the amended Declaration to creditors.

2.5.2. *Precluded Relationships*

Where a relationship, or Conflict of Interest is identified and the relationship or conflict was one where the Appointment should not have been accepted if the circumstances had been known at the time, then the following applies.

The Practitioner must take the circumstances seriously. As soon as practicable after the circumstances or facts are identified, the Practitioner must work quickly and efficiently to undertake the following course of action in the appropriate order (taking into account the circumstances relating to the Insolvent):

- to ensure the nature of the relationship and conflict is sufficiently documented;
- seek appropriate advice (whether from within the Practitioner's organisation, and/or external legal advice) in relation to the circumstances;
- identify the entities which the Practitioner needs to inform and/or seek approval from in order to continue and complete the Appointment; and
- undertake any other action would be reasonably considered to be necessary or appropriate for the circumstances in question.

In the event it is determined that the circumstances of the precluded relationship do not require resignation of the Practitioner, the Practitioner must prepare and deliver an updated Declaration to creditors within an appropriate timeframe, setting out the rationale for the Practitioner retaining the Appointment and detailing the steps taken to mitigate any conflict.

3. Principle 3: Communication

Members must take care to communicate with affected parties in a manner that is accurate, honest, open (subject to commercial and strategic imperatives of the Appointment), clear, succinct and timely in order to ensure their effective understanding of the processes, and their rights and obligations.

Need for Effective Communications

Effective communication in insolvency and Restructuring is essential because of the:

- legal and commercial complexity of the processes;
- legal and commercial implications of letters and reports;
- high emotions surrounding financial loss and loss of livelihood; and
- lack of knowledge and expertise in the insolvency or restructuring process, and its language and terminology, of most stakeholders.

Accordingly, communications from Members should be:

- clear, concise and written where possible in plain English (avoid the use of jargon or technical terms except when communicating with sophisticated creditors and advisors);
- objective and meaningful;
- responsive;
- timely; and
- expressed in a professionally courteous tone and manner.

Members should take care to ensure that all communications, including reports, whether issued personally or by delegation, are accurate and free from false or misleading statements; do not contain any statements or information furnished recklessly; do not omit, or obscure information required to be included or relevant to users of the communication; and preserve confidential, commercially sensitive or private information where necessary, unless such disclosure is authorised or required by legislation.

When a Member becomes aware that they have been associated with false, misleading, obscure or recklessly furnished statements or information, the Member must take steps to be dissociated from that information or to provide a modified communication.

Practitioners should carefully exercise their professional judgment when balancing the needs of individuals for information or responses to inquiries with the overall efficiency and costs of the Appointment, subject to commercial and strategic imperatives of the Appointment, and legal or professional privilege. Practitioners must have regard to any legislative requirements relating to responses to creditor requests for information.

Practitioners should display sensitivity in dealing with individual creditors who will have suffered a financial loss that may be small in the broader context, but may be significant to them.

Clarity in explaining the various rights, obligations, processes and timeframes can diffuse feelings of animosity wrongly directed to the Practitioner. The timely reply by the Practitioner to inquiries from creditors may assist in diffusing animosity and concern that they are not being heard.

Communicating with the Insolvent, directors, creditors and others involved in the insolvency or Restructuring may require firm and forthright communication, particularly in situations where there is a refusal to co-operate, and belligerence, or where examinations or litigation are involved.

3.1. **Tailoring reports**

In providing information in a report, the Practitioner should as a matter of good practice:

- provide information that is specific to the Appointment, rather than generic;
- ensure, where possible, that the level of information is proportionate to the size and complexity of the Appointment;
- try to assist creditors by highlighting the key components of the report and any areas that creditors are likely to view as contentious;
- provide a summary of high-level information;
- explain that further levels of detail are available at the meeting or (unless precluded by Legislation) on request; and
- explain the steps, if any, the recipient of the report need or are entitled by Legislation to take;

in each case subject to commercial and strategic imperatives of the Appointment, and legal or professional privilege.

3.2. **Issuing notices**

Practitioners may be required to issue notices to specific recipients in connection with an Appointment, including to the following recipients:

- creditors and other parties regarding voidable and other antecedent transactions;
- secured creditors under section 305 of the Companies Act;
- persons holding information, under section 261 of the Companies Act; and
- counterparties, under the power to disclaim in section 269 of the Companies Act.

In issuing any such notices, the Practitioner should ensure that it:

- holds sufficient information to have a proper basis for sending the notice;
- gives the recipient of the notice the information they reasonably require in order to understand the notice and take appropriate steps (noting that the Practitioner is not advising the recipient);
- gives the recipient all information that the law requires them to be given; and
- presents the information in the notice in a fair and balanced manner.

4. Principle 4: Timeliness

Members must attend to their duties in a timely way and in accordance with their professional obligations.

The insolvency of a company or individual has an immediate effect on the rights of the Insolvent, the creditors and other stakeholders. There is an inherent need to have those rights resolved as quickly as possible. It is therefore important that the insolvency process is managed as quickly as is commercially and reasonably possible.

4.1. Statutory Time Limits

Practitioners must comply with statutory time limits.

4.2. Minimising Negative Emotion

Insolvency is stressful and traumatic for those involved. Prompt, clear and courteous communications and replies to queries all reduce angst and improve trust in the Practitioner. Many complaints have their origin in the sense of the complainant being ignored rather than in technical or substantive acts or omissions of the Practitioner.

4.3. Duty to Advise

Practitioners must ensure that stakeholders are clearly advised of time limits that impact on them and the consequences of not meeting those time limits.

4.4. Policies, Processes and Education

Practitioners must implement policies and processes, and educate staff, to minimise the risk of failing to meet deadlines. The processes should include:

- checklists or other systems;
- training; and
- auto-reminder schedules (software).

4.5. Extensions of Time

If an extension of time is required, the Practitioner should:

- apply to the applicable body to approve such an extension; and
- give reasons for the need for additional time e.g. if the issue being addressed is complex.

A Practitioner may claim Remuneration and costs of applying for an extension of time, subject to any order from the Court. However, a Practitioner must not claim Remuneration and costs for applying for an extension of time if the reason for the failure to meet the deadline was attributable to the poor conduct of the Practitioner such as:

- inattention to the passage of time;
- lack of knowledge of the time limits;
- poor processes; or
- inadequately trained or supervised staff.

4.6. *Timely responses*

A Member must respond in a timely manner to any request for a response from RITANZ, CA ANZ or any other authority or regulator to which that Member may be accountable in connection with that Member's involvement in insolvency and restructuring work.

5. **Principle 5: Dealing with Property**

A Practitioner must not purchase any assets under the administration of a Practitioner.

5.1. *Requirement to Establish Policies*

Practitioners must ensure that their Firm establishes policies and procedures which prohibit the Firm's partners and staff, their respective Relatives and Entities that any of those parties have a Material Interest in from acquiring or deriving a benefit from dealing with any assets which come under the administration of a Practitioner or staff member under an Appointment, except as permitted by the Code.

5.2. *Prohibition on Acquiring or Selling Assets*

Except as provided below:

- a Practitioner must not purchase any assets under the administration of the Practitioner; and
- a Practitioner must take all reasonable steps to ensure that that Practitioner does not knowingly sell assets under the administration of the Practitioner to his or her partners, Firm, staff, their respective Relatives and Entities that any of those parties have a Material Interest in those assets.

The following exemptions apply to this paragraph 5.2 of Part C:

- unless precluded by Legislation, where those assets are available to the general public for sale and where no special treatment, information or preference over and above that granted to the public is offered to or accepted by the Practitioner, his or her partners, Firm, staff, and respective Relatives and any Entities that any of those parties have a Material Interest in; or
- with the prior approval of the Court, to which full facts must be disclosed.

6. Principle 6: Competition and Promotion

When promoting themselves, or their Firm, or when competing for work, Members must act with integrity.

6.1. Introduction

Insolvency and Restructuring is a competitive profession. The flow of work to Members is dependent on referrals from creditors such as financial institutions and from advisors to companies and individuals such as accountants and lawyers. Work is also referred directly in response to Member marketing and advertisements.

The standards of competition and promotion that apply in the wider community may not be acceptable in a profession that must be seen to have high levels of integrity and Independence.

Members will be held responsible for the form and content of any advertisement, publicity or solicitation:

- where expressly or impliedly authorised by the Member; or
- which is placed or undertaken personally, or by another person on behalf of a Member or their Firm.

6.2. Advertising, publicity and solicitation

Members may promote their business through general and targeted advertising using the full range of media and marketing techniques including through websites, the internet, print, direct mail and brochures. Any advertising, publicity and solicitation is subject to the operation of any relevant privacy legislation and relevant membership body rules.

6.2.1. Call Centres

Members must ensure that follow up communications, including calls under the direction of the Member by third parties and call centres, are terminated when the recipient has so requested either directly to the Member, a third party working on behalf of the Member, or through RITANZ, other professional bodies or the Regulator. Any continued contact is a breach of this Code.

6.2.2. Statutory Advertisements

Advertisements required to be placed by Legislation which are paid for from funds in the Appointment are not an appropriate place to promote the Practitioner or the Practitioner's Firm.

Statutory advertisements may not contain:

- slogans;
- claims about the Firm;
- logos; or
- other promotional materials.

6.2.3. Other Appointment Advertisements

Advertisements relating to the Appointment, other than statutory advertisements (ie. to sell the Insolvent's assets or business) must comply with the same restrictions as statutory advertisements; however, they may include the Firm's logo.

6.3. Restrictions on Advertising and Promotional Content

The tone of all advertising and publicity must be professional.

In addition to adhering to any statutory requirements (including Fair Trading legislation), Members must not:

- make claims in marketing material and then substantially change the arrangement unless there is fully informed consent in accordance with the relevant professional obligations;
- make negative remarks about another Member or their Firm as to their competence, professional practices or fees charged;
- claim endorsement of RITANZ except as may be permitted from time to time under the Rules;
- create false or unjustified expectations of favourable results in an Appointment;
- imply the ability to influence any court, tribunal, Regulator or similar body or official; or
- make self-laudatory statements that are not based on verifiable facts or which contain unidentified testimonials or endorsements or contain representations that would be likely to cause a reasonable person to misunderstand or be deceived.

6.4. Charge-out Rate and Value Comparison

When providing charge-out rates, Members must provide adequate disclosure of the:

- qualifications; and
- experience of staff levels,

and not simply compare rates by title (the scope of a role may differ between Firms).

6.5. Relationship Marketing - Inducements

Members must not offer or provide any inducements to any person or entity with a view:

- to improperly securing the Member's own appointment or nomination to an Appointment; or
- improperly securing or preventing the appointment or nomination of some other person.

This prohibition extends to all forms of Appointment.

6.6. Sponsorship

Sponsorship of an event, venue, industry body or interest group as a means of a Member promoting their business is acceptable. However, that sponsorship must not create any obligations to or by those who are responsible for making appointments or referring Appointments.

6.7. Replacing an Incumbent

A Practitioner may be requested by creditors to consent to act as an Alternate to the Incumbent. There may be other practitioners also put forward as the Alternate.

Members (including any Alternate addressing a meeting of creditors) must not make negative statements which are not statements of fact about other Practitioners or a Member who is about to take an Appointment, or who has taken an Appointment, make false comments, nor directly or indirectly request solicitors, creditors or their own staff to make such statements, or laudatory

comments in support of a Practitioner's election as the Alternate – a statement that the Practitioner is an Accredited Insolvency Practitioner does not breach this requirement.

Any claims made on a Practitioner's behalf by others which are contrary to the Code or to guidance issued by the relevant professional bodies or Regulators and which are known to the Practitioner at or before the meeting of creditors, must be corrected by the Practitioner at the meeting of creditors or in writing to creditors before the meeting. The fact that such claims may be made not by the Practitioner but by others on the Practitioner's behalf is no excuse. A Practitioner is responsible for the professional behaviour and statements of their staff, consultants or contractors.

6.7.1. *Notice*

The Alternate must provide the Incumbent with not less than one business day's notice in writing of the Alternate's consent to act, except where the request to consent occurs within one business day before the meeting. In this circumstance, notice to the Incumbent must be given immediately after the consent is determined by the Alternate.

6.7.2. *Solicitation*

Practitioners may solicit a nomination from a creditor in order to replace an Incumbent.

However, once nominated, the proposed Alternate should be subject to the same restrictions and rules as the Incumbent (for example, see regulation 24 of the Companies Act 1993 Liquidation Regulations 1994) and must not, directly or indirectly, solicit proxies from creditors for the purposes of replacing an Incumbent or, in the case of an Incumbent, retaining an existing Appointment.

6.7.3. *Conduct at the Meeting*

The Incumbent must allow any Alternate(s) the right to address the meeting.

The Alternate must provide the meeting with:

- a Declaration;
- the Remuneration basis as set out in the Code eg. a schedule of the hourly rates or details of an alternative method of charging fees; and
- full details of their relationship with the creditor, if any, nominating them as an Alternate.

The Alternate may provide the meeting with:

- details as to why, in its opinion, the creditors should appoint the Alternate to act in place of the Incumbent;
- details of its proposed approach following Appointment; and
- any other information which it considers material to its nomination.

The Alternate, or those speaking on the Alternate's behalf, when addressing the meeting of creditors, must remain factual and avoid making any statements that cannot be fully substantiated, or may be considered false, misleading or deceptive.

7. Principle 7: Transitioning or parallel appointments

When dealing with other insolvency practitioners in transitioning or parallel Appointments, Practitioners must be professional and co-operative, without compromising the obligations of the Practitioner in their own particular Appointment.

An Insolvent may be subject to two or more types of insolvency, either in parallel – for example a voluntary administration and a receivership – or in sequence (transitioning) – for example a voluntary administrator replaced with a different liquidator at the watershed meeting.

Both transitioning and/or parallel Appointments will benefit from the experience and knowledge in insolvency law and practice being professionally applied by each insolvency practitioner.

A Practitioner who is requested by a creditor to attend a meeting as their representative or advisor should notify the Appointee that they are going to attend.

An Incumbent who is replaced by a new Appointee should assist in a timely and efficient manner with the transfer of records and information, without compromising their own legal position.

8. Principle 8: Competence and Professional Obligations

Practitioners (and Members, to the extent mentioned below) must maintain professional competence in the practice of insolvency and Restructuring and carry out any Appointment with due care and diligence.

A Practitioner's competence and the exercise of due care is an essential cornerstone to the proper conduct of Appointments. It is important that not only are Practitioners competent in insolvency and Restructuring at the time they become an Accredited Insolvency Practitioner, but that they maintain their knowledge and skills throughout their professional career.

This obligation extends beyond that of Practitioners to all Members to the extent that they are providing support services in Appointments.

A Practitioner should take steps to ensure that those working under their authority in a professional capacity have appropriate knowledge, skills, training and supervision. A Practitioner may be held accountable for compliance with this Code by persons associated with the Practitioner or working under their authority.

A Practitioner must exercise due care and diligence in relation to an Appointment. An exercise of due care implies careful planning of the Appointment, its performance in an efficient and effective manner, and assurance on the quality of the work performed. Diligence also encompasses the responsibility to carry out the Appointment in accordance with all applicable Legislation, standards and/or guidance.

8.1. *Continuing professional development*

The maintenance of professional competence and the exercise of due care requires a continuing awareness and an understanding of relevant technical, professional and business developments. Continuing professional development develops and maintains the capabilities that enable a Member to perform competently within the professional insolvency and restructuring environment.

A Member must ensure that they fulfil their relevant professional bodies' obligations, including those of RITANZ, for continuing professional education.

Members are encouraged to take every opportunity to improve and extend their knowledge on insolvency and Restructuring issues, including attending relevant training and conferences offered by RITANZ.

Members should also provide opportunities and encouragement to their staff to attend appropriate insolvency and Restructuring training and training on other skills complementary to the practice of insolvency.

8.2. *Specialisation*

A Practitioner may specialise in a particular aspect of insolvency or Restructuring. If a Practitioner chooses to specialise in a particular type of Appointment, the Practitioner should not seek Appointments outside of this specialisation without taking steps to ensure that he or she is technically competent in the area outside of their specialisation.

8.3. *Use of specialist services*

A Practitioner may seek the assistance of experts in situations where the Appointment relates to a business with particular industry issues and the Appointment would benefit from the involvement of an expert in that area.

9. Principle 9(1): Reasonable Remuneration

A Practitioner is entitled to claim reasonable Remuneration and Disbursements in respect of necessary work, properly performed in an Appointment.

A Practitioner's right to be paid is recognised under Legislation and at general law and is given a high priority of payment from the Insolvent's funds.

A Practitioner must ensure that Remuneration claimed is reasonable, and is in respect of work done that was necessary for the Appointment and was properly performed.

All time spent for necessary work properly performed should be recorded against the Appointment using an appropriate system. Before claiming Remuneration, the Practitioner must identify any work and time that should not be claimed.

Prior approval of fees does not remove the obligation to ensure that the work was necessary and properly performed and that the Remuneration drawn was reasonable.

A Member, or any member of their Firm, shall not directly or indirectly derive any pecuniary interest arising from any dealings in respect of any Appointment other than through the Practitioner's entitlement to Remuneration. However, a Practitioner may obtain non-insolvency or non-restructuring professional services (including debt collection and asset realisation services) and litigation or working capital funding from parties associated with the Practitioner or their Firm (including another practice within a federated practice structure or an associated practice) provided this does not breach other provisions of this Code, the cost of those services or funding is disclosed as a subcategory of Remuneration in remuneration reports to the Approving Body, and the remuneration is commensurate with market rates – this category of Remuneration does not require approval of the Approving Body.

9.1. Reasonable

Remuneration is reasonable when it is proportionate to the nature, duties, complexity and extent of work undertaken.

Market forces will to a large extent determine the reasonableness of remuneration and ensure that, in time based charging, a Practitioner sets appropriate standard hourly rates which are generally applied to Appointments. However, a Practitioner should ensure the appropriateness of these standard hourly rates is specifically considered for each Appointment. Factors that may result in a variation of the standard hourly rates include:

- complexity of the Appointment;
- risk associated with the Appointment;
- the specialised nature of the Appointment (if any); and
- any legal or regulatory compliance requirements relating to the Appointment.

9.1.1. Necessary Work

Before a decision is made to claim for Remuneration, the Practitioner must ensure that work that was done, by him or herself, or by staff members, was necessary. Necessary work means work that was:

- connected with the Appointment; and
- done in furtherance of the exercise of the powers and performance of the duties (including the Declaration) of a Practitioner under or required by the Legislation, the general law, the Code and applicable professional standards.

A Practitioner may claim for work that may not have produced a positive outcome provided there was a proper exercise of professional judgment in the Practitioner deciding to do the work at the time the work was undertaken. The work will remain 'necessary' for the purposes of a Remuneration claim, even if subsequent events show that the work was not necessary.

9.2. Properly performed

In order to claim reasonable Remuneration for necessary work, the Practitioner must ensure that the work was properly performed, – and performed in an efficient and effective manner.

Work done poorly or, at worst, improperly, or work needing to be reworked should not be charged.

Where there is a change in the staff or Appointee within the Practitioner's firm during an Appointment, the Practitioner must exercise professional judgement as to what time can be claimed as Remuneration for the new person, staff member or Appointee getting up to speed. Factors to consider include the reason for the change, the length of the Appointment and the nature of the role being taken on. Work that is truly duplication should not be charged.

9.3. Deciding what work to undertake

The Practitioner should exercise professional and commercial judgment in considering what work is to be performed.

In a liquidation where there are no or very little funds available a Practitioner must carefully consider the steps they need to take in order to fulfil their statutory obligations as liquidator. Consideration should also be given to any potential sources of funding that may be available for investigations, including from creditors. In an Appointment, a Practitioner is not required to undertake or procure the undertaking of litigation unless the Practitioner considers they or the Entity will be able to meet the costs of litigation (including any adverse costs award). If a Practitioner has any doubt about what they may be required to do, they should seek legal advice.

Outsourcing

A Practitioner may outsource work subject to the restrictions on delegation (e.g. decision making and exercise of judgment remain the Practitioner's responsibility and cannot be delegated or outsourced).

The decision to outsource is a matter of commercial judgment for the Practitioner, based on such considerations as:

- geography and location (the business may have its operations spread throughout the country and it may be commercially necessary to appoint local agents to deal with particular tasks);
- time constraints; or
- costs considerations (the external source may be able to attend to an urgent task quickly, or more cheaply).

If work is outsourced, the Practitioner's obligations under this Code remain the same as if the Practitioner or members of staff had performed the work.

For guidance on whether outsourced work is Remuneration or a Disbursement refer to Part 2 of Practice Standard I.

9.4. Work that cannot be remunerated

If a Practitioner seeks to be remunerated for work that is outside the scope of the role or powers of the Practitioner, approval must be sought from the Court.

It is not sufficient in itself to obtain approval from a committee or from the creditors. These restrictions are a threshold test before applying the '*necessary and properly performed*' test.

An exception is where there is a transitioning Appointment and the Legislation allows Remuneration relating to the prior Appointment.

9.5. Further Guidance

For guidance on the treatment of costs of claiming remuneration and costs of communicating with the Regulator or professional bodies refer to Part I of Practice Standard I.

9.6. Disbursements

Disbursements may only be claimed if they are reasonable and were necessary and properly incurred. Practitioners are permitted to charge a reasonable percentage of their fee or a reasonable fixed amount to cover office services such as photocopying and telecommunications. Practitioners must not add a mark up to the actual cost incurred with third or related parties.

In incurring Disbursements, a Practitioner must use their commercial judgment, adopting the perspective of, and acting with the same care as, a reasonable person exercising care and skill would act in incurring expenses on their own behalf. Practitioners must assess the incurring of a Disbursement in an Appointment in terms of the interests of creditors (and/or if applicable other stakeholders) and their fiduciary responsibilities.

Travel should be bought on reasonable commercial terms and the style of travel and accommodation should be appropriate for the trip being undertaken having regard to the urgency of the travel, the duration of the trip, and the Practitioner's reasonable obligations to his or her staff. While Practitioners must account to stakeholders for Disbursements, the reimbursement for the payment of Disbursements does not require creditor or other approval before being drawn. Thus, the categorisation of activity as Remuneration (which may require approval before being drawn) or Disbursement is significant.

An explanation of what a Disbursement is and what types of costs are not Disbursements, and guidance on the difference between Remuneration and Disbursements, is set out in Part 2 of Practice Standard I.

9.7. Indemnification

A Practitioner acting in compliance with this Code may seek and obtain Indemnities (including from the assets of the relevant estate) for defending itself in relation to any alleged breaches of this Code or the law.

Principle 9(2): Meaningful disclosure of Remuneration

A Practitioner must provide sufficient, meaningful, open and clear disclosure of their Remuneration or Remuneration claim to the Approving Body or Body of Creditors (as applicable).

Where a Practitioner's Remuneration in relation to an Appointment is likely to be less than \$20,000, the Practitioner may provide generic short form information about their Remuneration or Remuneration claim for that Appointment.

Where a Practitioner's Remuneration in relation to an Appointment exceeds or is likely to exceed \$20,000 the Practitioner must provide information about the Practitioner's Remuneration or Remuneration claim to the relevant Approving Body or Body of Creditors at such time for each type of Appointment as is set out in Part 4 of Practice Standard I.

In relation to a receivership Appointment, the Practitioner shall only be obliged to disclose their Remuneration or Remuneration claim to the Approving Body, and not the Body of Creditors, and this Principle should be interpreted accordingly.

Approving Bodies are set out below and described in further detail in Part 4 of Practice Standard I. Remuneration disclosure requirements still apply where there is no Approving Body, as described in Part 4 of Practice Standard I.

Practitioner / Appointment	Approving Body
Receiver - appointed pursuant to deed or agreement	Appointor
Receivers - Court appointed	Court
Liquidator - Court appointed	Court
Liquidator - shareholder appointed	None
Liquidator - appointed by any other entity	Appointor
Voluntary Administrations	None
Deed Administrator under a Deed of Company Arrangement pursuant to Part 15A of the Companies Act	None, unless otherwise agreed under the Deed of Company Arrangement
Appointment under Parts 14 or 15 of the Companies Act	The appointor, creditors or Court (as applicable and discussed further in Part 4 of Practice Standard I)
Trustee of personal creditor compromise under Part 5(2) Insolvency Act	The appointor, creditors or Court (as applicable and discussed further in Part 4 of Practice Standard I)
Statutory management or similar	None

Regardless of the Remuneration method to be used, the Practitioner must maintain a proper record of work that was done in relation to an Appointment in order to:

- claim Remuneration; and
- report to creditors on the progress of the Appointment.

The Practitioner should maintain a system that requires staff to record:

- the period of time spent;
- the categories of the work performed; and
- details of the work being performed;

contemporaneously when the work is being done in order to maximise accuracy.

Information to be conveyed to the Approving Body or Body of Creditors encompasses a number of elements:

- a basis for calculating Remuneration;
- sufficient detail to justify the amount of Remuneration; and
- relevant timing of the information being provided.

9.8. Bases of calculation

There are several bases by which Remuneration can be calculated. The basis chosen must be appropriate and reasonable having regard to the nature of the Appointment. Practitioners must be transparent and fully explain to the Approving Body or Body of Creditors the main bases by which Remuneration can be calculated, the method used or proposed to be used in the Appointment and the reasons for selecting that particular basis.

The bases for calculating Remuneration are set out in Part 3 of Practice Standard 1.

9.9. Information to be disclosed to Body of Creditors

9.9.1. General guidance on information provision

The information provided to the Approving Body or Body of Creditors in relation to Remuneration and Disbursements must be:

- sufficient – be in enough detail for the purposes for which it is prepared and in the context of the work done in the Appointment;
- meaningful - be presented in a way that allows a reasonable and informed third party to understand what was done and why it was done;
- clear - use non-technical terms so that what is being claimed is readily understandable;
- relevant - limited to what is needed; and
- concise.

A Practitioner should:

- provide information that is specific to the Appointment, rather than generic;
- try and ensure that the level of information is proportionate to the size and complexity of the Appointment;
- highlight the key components of the Remuneration claim and any areas that may be contentious; and
- provide a summary of relevant information.

9.9.2. Initial Information to be provided

Without limiting anything in paragraph 9.9.1 of Part C, a Practitioner must provide the following information regarding Remuneration:

- if the Practitioner intends to use a method other than time-based charging to calculate Remuneration:
 - a brief explanation of the types of methods that can be used to calculate Remuneration;
 - the particular method or methods that the Practitioner intends to use in the Appointment; and
 - why the Practitioner considers this method to be suitable for the Appointment;
- details of the basis of any internally generated Disbursements that will be charged to the Appointment;
- if under Legislation or the terms of the Appointment, the Practitioner requires approval for their Remuneration, the Practitioner should clearly state the precise terms of the agreement(s) and indicate whether they will be seeking the determination of further Remuneration at some time in the future;
- the information required to be disclosed as set out in Part 3 of Practice Standard I for the particular method or methods of calculating Remuneration which the Practitioner intends to use; and
- if under Legislation, Court approval is required, any information generally required by the Court in respect of the relevant type of Appointment.

9.9.3. Information to be provided during the Appointment

A Practitioner must at the same time as providing Remuneration information provide the Approving Body or Body of Creditors with details of Disbursements paid from the Appointment, including:

- general information on the different classes of Disbursements and the amount of Disbursements by category;
- a declaration that the Disbursements were necessary and proper;
- in relation to Disbursements paid to the Firm, whether directly or in reimbursement of a payment to a third party:
 - who the Disbursement was paid to (only for externally provided professional services);
 - what the Disbursement was for;
 - the quantity and rate (only for internal Disbursements); and
 - the amount paid; and
- details of any change in the basis of charging internal Disbursements that will be charged to the Appointment in the future.

Practitioners should always support their Remuneration claims or reporting with a general report providing the Approving Body or Body of Creditors with information about the progress of the Appointment, detailing matters resolved and those matters still outstanding.

The report should be in the form, if any, required by Legislation or the terms of Appointment. The report should assist the Approving Body or Body of Creditors with understanding:

- matters that may have contributed to the Remuneration claim;
- complexities or difficulties that have been faced by the Practitioner;
- goals that have been achieved since the last report;
- outcomes including explanations as to why that outcome was better or worse than originally predicted; and

- future tasks to be undertaken and why they need to be done.

9.10. Requirements Apply Irrespective of Funding

Litigation funding from any source and funding by creditors provided for any purpose, must be paid into the Appointment bank account. Remuneration drawn from those funds must be disclosed, together with Remuneration drawn from an indemnity or an up-front payment provided for any purpose.

Principle 9(3): Drawing Remuneration

Where under Legislation or the terms of the Appointment, a Practitioner's claim for Remuneration must be approved, the Practitioner is only entitled to draw Remuneration once it is approved and according to the terms of the approval. In other cases the Practitioner may draw Remuneration for work performed at a time the Practitioner determines.

Evidence of the approval of Remuneration must be recorded and maintained on the Appointment file. If a Practitioner draws Remuneration in accordance with the default provisions under the Companies Act, this must be clearly documented on the file.

If fees have been approved prospectively, in terms that allow them to be drawn at nominated hourly rates, the Practitioner must only draw the Remuneration progressively, on completion of the work, unless it is the final Remuneration account for the finalisation of the Appointment.

In respect of percentage-based Remuneration, the Practitioner may draw his or her Remuneration from each nominated realisation, provided that there are sufficient funds available to meet higher-ranking priority debts.

In respect of a contingency arrangement, fees may be drawn on the basis approved by the Approving Body. Any conditions imposed when approving a contingency arrangement, (for example, independent assessment of the achievement of a result) must be satisfied before Remuneration is drawn.

In respect of fixed fees, the terms approved should be that the fixed amount may be drawn only at the conclusion of the Appointment; or in specified amounts at nominated milestones in the Appointment. Practitioners must not draw fixed fee Remuneration 'up-front'.

9.11. *Prospective Fee Approval*

This paragraph does not apply to Court appointed liquidators, unless the Court orders.

Where under Legislation or the terms of the Appointment, the Practitioner requires approval for their fees, a Practitioner may seek approval from the Approving Body for time based Remuneration to be determined in advance of the work to be performed.

The claim for Remuneration will subsequently be calculated on a time basis for necessary work properly performed and can be drawn without further approval of the Approving Body.

The hourly rates to be applied may be increased by an agreed formula where the escalation factors are objectively and independently determinable. If a Practitioner wants to be able to increase hourly rates that are charged on an Appointment in the future without having to obtain Approving Body approval, a specific formula must be included in the document approving the prospective Remuneration. A reference to changes in rates from time to time (or similar) must not be included in agreements to approve prospective fees.

9.12. *Monies received in advance*

If a Practitioner is provided with money in advance for the costs of conducting an Appointment and the Practitioner requires approval of their Remuneration, the Practitioner is not entitled to apply those monies against their Remuneration until their Remuneration is approved by the Approving Body.

9.13. *Remuneration drawn inappropriately*

If a Practitioner becomes aware that fees have been taken without approval, because, for example, the correct process has not been followed, the Practitioner must immediately bring this to the Approving Body's attention.

The Approving Body shall then decide the appropriate course of action, which may include the Practitioner repaying the amount in question into the Appointment account.

Fees and expenses incurred in rectifying inappropriately drawn fees must be borne by the Practitioner.

10. Principle 10: Resources, expertise and capacity

When accepting an Appointment the Practitioner must ensure that their Firm has adequate expertise and resources for the type and size of the Appointment, or the capacity to call in that expertise and those resources as needed.

In agreeing to accept an Appointment, a Practitioner must have regard to whether their Firm has the resources and expertise to properly conduct the Appointment and where those resources are located in relation to the Insolvent. This has to be assessed on information reasonably known at the time of consenting to act. The Practitioner must try to obtain enough information about the Insolvent before consenting, to enable this assessment to be made.

When making this assessment, a Practitioner should have regard to whether the Firm has adequate human and technology resources, systems and processes to effectively:

- monitor work performed on the Appointment;
- manage risks;
- monitor potential conflicts; and
- deal with complaints.

Practitioners should always have regard to their professional indemnity insurance (limits and any exclusions) when deciding whether to accept an Appointment.

Many Practitioners' Firms have arrangements that allow the firm to call upon extra resources should the need arise. Such arrangements can be taken into account by the Practitioner in deciding whether to consent.

However, a Practitioner must not consent to an Appointment that the Practitioner knows to be beyond their capacity unless they have such arrangements and their ability to obtain specialist industry and legal advice as the need arises.

A Practitioner takes a personal appointment as an Appointee. The Practitioner must not take on an Appointment if they do not themselves have adequate capacity to properly oversee the Appointment, and to supervise staff assisting them.

11. Principle 11: Practice Quality Assurance

Practitioners must implement policies, procedures and systems to ensure effective quality assurance.

11.1. Policies

Practitioners must implement policies, procedures and systems within their Firm to ensure effective quality assurance. These must reflect the requirements imposed by relevant professional bodies and any New Zealand based Regulator.

Practitioners must develop and implement policies, systems and processes that enable adherence to this Code and in particular the provisions relating to:

- Independence;
- Remuneration; and
- competition and promotion.

11.2. Maintenance of Appointment files

A Practitioner must prepare and maintain working papers that appropriately document the work performed on the Appointment. The documentation prepared by the Practitioner must:

- provide a sufficient and appropriate record of the procedures performed for the Appointment, in particular how key issues were dealt with and significant decisions that were made; and
- demonstrate that the Appointment was conducted in accordance with the Legislation, this Code and regulatory requirements.

Files may be maintained either in paper or electronically. Notwithstanding how files are maintained, Practitioners should have in place controls to ensure that files satisfy the requirements of the Code.

A Practitioner may destroy these working papers in accordance with the requirements of any applicable Legislation.

12. Principle 12: Compliance Management and Risk Management

12.1. Compliance Management

Practitioners must implement policies, procedures and systems to ensure effective compliance management and risk management.

Insolvency and restructuring is a highly regulated profession and compliance with the Legislation, fiduciary obligations and the requirements of this Code is essential.

Practitioners have extensive powers and privileges and have commensurate duties and obligations. The cost of compliance is real, but the potential impact of non-compliance on public confidence is unacceptable for the profession and the insolvency and restructuring regime.

Practitioners must ensure that:

- appropriate resources are allocated to develop, implement, maintain and improve the compliance program of the Firm and that the compliance program is regularly reviewed and continually improved;
- the objectives and strategy of the compliance program are endorsed by the partners or directors of the Firm;
- compliance obligations are identified, documented and assessed;
responsibility for compliant outcomes is clearly articulated and assigned;
- competence and training needs are identified and addressed to enable employees to fulfil their compliance obligations and noting that these are a critical competent to maintaining overall competence as an insolvency professional;
- behaviours that create and support compliance are encouraged and behaviours that compromise compliance are not tolerated;
- controls are in place to manage the identified compliance obligations and achieve desired behaviours;
- performance of the compliance program is monitored, measured and reported; and
- the organisation is able to demonstrate its compliance program through both documentation and practice.

12.2. **Risk Management**

12.2.1. *Policies*

A Practitioner must have appropriate and documented risk management policies and procedures in place. These policies and procedures should be regularly reviewed and continually improved. In addition, the Practitioner must be able to produce documentation showing adherence to risk management policies and procedures, and relevant controls should be in place to ensure the same.

12.2.2. *Identity of Director(s)/individual Insolvent(s)*

A Practitioner must make reasonable enquiries to satisfy themselves of the Insolvent and its officers prior to accepting an Appointment, and of the authority of the persons executing an Appointment to do so.

12.2.3. *Joint and Several Appointments*

Where a Practitioner accepts Co-Appointments with another insolvency practitioner, they:

- make this decision with the knowledge that all Appointees are equally responsible for all decisions made on Co-Appointments; and
- should ensure that their Firm has in place policies and procedures to ensure that all Appointees are knowledgeable about the conduct of the Appointment, even if one Appointee is leading the conduct of the Appointment.

13. Principle 13: Complaints Management

Practitioners must implement policies, procedures and systems to ensure effective complaints management.

The nature of insolvency work means that Practitioners are likely to receive complaints from stakeholders in Appointments during the course of their career. All complaints must be taken seriously and must be handled promptly and effectively.

An effective complaints management system will ensure that all complaints are properly handled and provides an opportunity to obtain feedback on the quality of work done and if used effectively it is a useful diagnostic for quality assurance.

The failure to effectively manage complaints may result in their escalation to RITANZ, Regulators or professional bodies which can be costly and time consuming to manage and may damage reputation unnecessarily.

PART D: PRACTICE STANDARD

Practice Standard I: Remuneration

This Guideline provides further direction to Practitioners in relation to Fundamental Principle 9(1)-(3) of the Code dealing with Remuneration.

The Guideline is in four parts:

- Part 1:** Costs of claiming Remuneration and of communicating with the Regulator or professional bodies
- Part 2:** Disbursements vs Remuneration
- Part 3:** Bases of calculating Remuneration, when Approving Body approval of Remuneration is required, and Information about Remuneration to be disclosed to Approving Body
- Part 4:** Approving Bodies and Reporting Requirements (after the initial Remuneration claim or report)

Part 1: Costs of claiming Remuneration and of communicating with the Regulator and professional bodies

Costs of claiming Remuneration

Practitioners may claim the necessary and reasonable costs of recording time and relevant narrations, reviewing records and preparing their fees invoices and, where required, seeking approval or determination of their claim for Remuneration.

If additional costs are incurred because of inadequacies of the Practitioner or Firm's time recording systems, or due to staff not properly recording their time, these costs would not be necessary and reasonable and should not form part of the claim for Remuneration.

Costs of communicating with Regulator or professional bodies

A Practitioner must not claim Remuneration for time spent:

- communicating with a Regulator or professional bodies regarding complaints about the Practitioner or the conduct of a particular Appointment which are upheld; or
- on Regulator surveillance of the Practitioner, professional audits or inspection of files.

Part 2: Disbursements vs Remuneration

What is a Disbursement?

Disbursements are:

- costs paid from the Appointment's bank account directly to third parties not associated with the Practitioner or their firm; or
- costs paid by the Practitioner to third parties not associated with the Practitioner or their firm and later claimed back from the Appointment; or
- costs claimed by the Practitioner for non-professional services provided by the Firm (e.g. phone calls, photocopying & printing, stationery, data room hosting) and/or outlays incurred by their staff in the proper conduct of the Appointment.

A Practitioner should separate Disbursements from the expenses of running their practice which may only be recovered through Remuneration (for example, in the case of time based remuneration

by factoring overheads into the hourly charge-out rate and in fixed fees, by factoring overheads into the fixed fee calculation).

What are not Disbursements?

The following are not Disbursements:

- Overheads of a Practitioner's Firm – see above.
- Late lodgement fees. Any late fee or penalty imposed by a court, Regulator or agency for late lodgement or other default should be borne by the Practitioner except where such lodgement or default arises from the conduct of the Insolvent.

What costs are Remuneration, not Disbursements?

- (a) Internal non-insolvency or non-Restructuring professional costs - this includes non-insolvency or non-Restructuring professional services provided by another practice within a federated practice structure or an associated practice. A Practitioner may engage internal non-insolvency or non-Restructuring related professional services only after proper commercial consideration to that decision has been given that the engagement is in the interests of creditors and the efficient conduct of the Administration and does not breach other provisions of this Code, and the Practitioner can demonstrate that the cost of the services is no more than the average market rate. These costs are to be treated as, or as if they were, Remuneration and each cost or group of related costs must be disclosed as a subcategory of Remuneration and, if required, approved in the same manner as the Practitioner's own fees.
- (b) External insolvency or Restructuring professional costs. If a Practitioner outsources insolvency or Restructuring tasks, the fees charged to the Practitioner will be Remuneration, notwithstanding that the fees may be payable before the claim for Remuneration can be made, and must be disclosed as a subcategory of Remuneration. The 'necessary and properly performed' test applies.

It is not always clear whether the out-sourced work is better categorised as insolvency or Restructuring work (which is claimed as Remuneration), or general non-insolvency or non-Restructuring work (which if outsourced to an unrelated third party is classified as a Disbursement). Factors to be taken into account when making this assessment include:

- was the contractor an insolvency firm?
- was there a regular resource sharing/provision arrangement?
- would the Practitioner have done the work if there had been sufficient resources?

Where the task involves standard expertise and skills of a Practitioner, the outsourced costs will be a Remuneration claim of the Practitioner. Where the task involves more general or particular skills that are not insolvency or Restructuring specific, then the outsourcing costs (if outsourced to an unrelated third party) will be a Disbursement.

When a Practitioner makes a decision that an expense of this nature is a Disbursement rather than Remuneration, the invoices received for the services should detail the work performed and it should be clear from the description that the services were not insolvency or Restructuring services.

Part 3: Bases of Calculating Remuneration, when Approving Body approval of Remuneration is required, and Information about Remuneration to be disclosed to Approving Body

This Part sets out the bases of calculation of Remuneration, and in relation to each basis, guidance on whether Approving Body approval of the Remuneration is required and additional information about the Remuneration which must be provided to the Approving Body.

Time based charging

Time based is a recognised and common form of charging. Practitioners calculate Remuneration by reference to reasonable hourly or time unit rates which are applied to the time spent on necessary work properly performed.

Except to the extent required by Legislation or the terms of an Appointment:

- there is no need to obtain approval for time based Remuneration from the relevant Approving Body or Body of Creditors;
- the hourly rates to be applied may be increased during an Appointment provided the increase does not breach Fundamental Principle 9(1) of the Code.

A Practitioner should regularly review the WIP on an Appointment to ensure that only time spent on necessary work, properly performed is charged. Such a review must be performed prior to issuing any Remuneration requests for approval or before preparing an invoice.

If a Practitioner is proposing to charge time based Remuneration, they must provide the Approving Body and (except in the case of receiverships) Body of Creditors with the scale of rates that will be used, including qualifications and experience generally of staff at each level in their initial communication with the Approving Body and Body of Creditors, and disclose any change in rates in their next Remuneration report.

Except in the case of receiverships, in subsequent Remuneration reports the Practitioner must also provide the Body of Creditors with:

- details of the amount of time spent;
- details of work performed broken down into broad categories;
- classification of staff engaged on the work in each category and the Remuneration claimed for each work category, broken down into hourly rate, hours and cost for each staff classification. An example report is attached as an Appendix; and
- explanation for any variances from any estimates previously given (if applicable re-estimates must be provided).

Fixed fee

A Practitioner may claim Remuneration based on a quoted fixed amount, but only with the approval of the Approving Body obtained prior to the work commencing. A fixed fee arrangement provides certainty to stakeholders about how much the Remuneration claim will be.

When seeking approval, the Practitioner must provide the Approving Body with the amount of the fixed fee proposed, the basis on which the fee has been calculated, the services to be provided for the fixed fee, the services that will not be included in the fixed fee and the basis for charging those, and the milestones as to when the Remuneration will be drawn.

Once a fee is fixed for an agreed task, set of tasks or the conduct of the Appointment, it remains fixed and a Practitioner must not seek further approval if the original estimate is wrong.

However, this does not apply if the fee was fixed subject to reasonable, clearly stated and appropriate circumstances in which the fee could be reviewed or renegotiated and that circumstance has occurred. The risk of any uncertainty or ambiguity as to when a review or renegotiation can occur is on the Practitioner.

Where the Practitioner seeks a fixed fee, Remuneration reports will focus on the progress of the work in the Appointment and the Remuneration drawn.

Percentage

A Practitioner may claim Remuneration based on a percentage of a particular factor, usually assets disclosed or assets realised, but only with the approval of the Approving Body obtained prior to the work commencing.

When seeking approval, the Practitioner must provide the Approving Body with the percentage proposed, how the fee is to be calculated, the services to be provided on this basis, work intended to be outsourced that would normally be carried out by the Practitioner and whether the outsourced work is billed separately or included in the percentage based Remuneration, the milestones for when Remuneration will be drawn, the services and tasks that will not be subject to a percentage fee calculation and the basis of Remuneration for those services and tasks.

Where the Practitioner is charging an agreed percentage fee, Remuneration reports will focus on information about the factors underlying the entitlement to claim the Remuneration (e.g. asset realisations) and the percentage taken from those realisations to pay Remuneration).

Success or Contingency Fees

A Practitioner must not seek Remuneration on the basis that they will receive a specified bonus, success fee, super-profit or additional percentage as Remuneration in the event that a specified contingent future event occurs or particular circumstances arise, if that arrangement would place the Practitioner in a position of conflict, or generate a perception of a lack of Independence.

This is based on the principles that:

- no additional incentive should be required or offered in order to have the Practitioner perform statutory duties or other required duties;
- the Independence and objectivity of the Practitioner, even if only as perceived, may be compromised by such an arrangement; and
- the arrangement must not be inconsistent with the fiduciary obligations of a Practitioner, and the interests of creditors or those paying the Remuneration must be adequately protected.

When considering whether a proposed contingency fee arrangement is reasonable, the Practitioner must consider whether the arrangement could be perceived as the Practitioner acting in his or her own interests rather than the interests of the creditors.

If a Practitioner is intending to use this type of fee arrangement, approval must be sought from the Approving Body and consent obtained prior to work commencing. When seeking approval, the Practitioner must provide the Approving Body with full disclosure as to what the arrangement is contingent upon and how achievement of the contingency will be assessed, the basis of calculating the fee, Remuneration if any if the contingency is not achieved, why a contingency arrangement is in the best interests of creditors and when the Remuneration will be drawn. The events or circumstances which will trigger entitlement to the contingency fee or parts of it must be clearly stated – the risk of any uncertainty or ambiguity is with the Practitioner.

Remuneration reports will focus on progress with the work, and whether and to what extent entitlement to Remuneration has occurred and what Remuneration has been drawn.

If an arrangement approved by an Approving Body is otherwise in breach of this Code, the arrangement will still constitute a breach.

When assessing whether a contingent fee arrangement might be a suitable fee arrangement in a particular Appointment, the Practitioner should consider:

- any restrictions that may apply under the relevant Legislation;
- funds available in the Appointment;
- funding from alternate sources such as creditors or a litigation funder;
- costs of the alternate source of funds compared to a contingent fee arrangement;
- risk associated with the tasks to be undertaken for the contingent fee;
- the appropriateness of the possible contingent fee amount considering the nature of the Appointment and the risk associated with the task to be undertaken; and
- whether a decision on whether an outcome has occurred which would trigger entitlement is to be reviewed by an appropriate third party.

Accruing WIP in advance of funds being available to pay an invoice is not indicative of a success or contingent fee arrangement.

Mixed Fee Arrangements

There will be circumstances where a Practitioner will seek approval for a different basis of Remuneration for a particular aspect of an appointment or finalisation of the appointment; the appropriate information will need to be provided at the time of seeking approval of that arrangement.

Process of obtaining approval of Remuneration, where required by Legislation or the terms of the Appointment

Approval must be obtained from the Approving Body. A Practitioner must provide the Approving Body with information in support of the Remuneration request and any additional information, and respond to any questions raised by the Approving Body.

Part 4: Approving Bodies and Reporting Requirements (after the initial Remuneration claim or report)

Receiverships

The Approving Body for receivers appointed pursuant to a deed or agreement is the appointor, if the Appointment document requires approval of fees. Remuneration drawn during the Appointment is to be disclosed at the times agreed with the appointor and, in the absence of agreement at least six monthly.

In relation to Court appointed receivers, the Approving Body is the Court. Remuneration claims or disclosure during the Appointment must be made at the time stipulated by the Court, and failing any stipulation at least six monthly.

Details of Remuneration drawn must also be adequately disclosed as an attachment to the receiver's statutory reports.

Liquidations

For Court appointed liquidators, the Approving Body is the Court. Remuneration claims must be made in accordance with the principles established by the Courts (currently these are set out in *Re Roslea Path Limited (in Liquidation)*, *Flynn v McCallum*, HC Tauranga, CIV 2005-460-611, 17.12.09 and, to the extent still applicable following that case, *Re Medforce Healthcare Services Limited (in liq)* [2001] 3 NZLR 158). Where a liquidation committee has been appointed, Remuneration disclosure should also be made to the committee at least six monthly.

Where the liquidators are appointed by any other person, the initial Approving Body is the appointor.

Where the appointor is the shareholders of the company, there is no Approving Body during the period of the Appointment. Remuneration drawn during the Appointment must be disclosed at least six monthly or at the same time as the statutory reports.

Voluntary Administration under Part 15A Companies Act

There is no Approving Body in a voluntary administration. Details of the basis of Remuneration must be disclosed at the initial creditors meeting and, Remuneration drawn up to the watershed meeting must be disclosed to creditors at the watershed meeting.

Deed Administrator under a Deed of Company Arrangement pursuant to Part 15A of the Companies Act

Unless otherwise agreed under a deed of company arrangement, there is no Approving Body for a deed administrator under a deed of company arrangement. Remuneration drawn during the Appointment must be disclosed at such times as provided in the Deed and if no provision or agreement at least six monthly.

An appointment arising under Parts 14 or 15 of the Companies Act

Where the Practitioner has been engaged by the entity to assist in preparing a proposal to the Court and/or for creditors to vote on, the Approving Body in relation to Remuneration claims for conducting this work will be the appointor. Where the role then involves monitoring or managing the implementation of the compromise or proposal, the Approving Body is the creditors (or a committee of creditors if appointed) or the Court, as applicable. Remuneration is to be disclosed as provided in the approved proposal or as agreed with the Approving Body, and if no provision or agreement at least six monthly.

Trustee of personal creditor compromise under Part 5(2) Insolvency Act

As for an appointment arising under Part 14 or 15 of the Companies Act.

Statutory management or similar

There is no Approving Body for statutory management. Remuneration is to be disclosed at least six monthly.

Practice Standard I: Remuneration

Appendix

Example of Remuneration Report for Time Based Charging

COMPANY NAME

DATE FROM to DATE TO

Time costs by Position and Work Type

	Hourly rate	Asset Realisation		Creditors		Administration		Investigation		Reporting		Total	
		Hours	Cost	Hours	Cost	Hours	Cost	Hours	Cost	Hours	Cost	Hours	Cost
Partners													
Directors													
Associate Director/Senior Manager													
Managers													
Senior Associate/Analyst													
Support Staff													
Total		0.0	\$0.00	0.0	\$0.00	0.0	\$0.00	0.0	\$0.00	0.0	\$0.00	0.0	\$0.00

Disbursements	Cost
Airfares - Domestic	
Local Travel	
General Expenses	
Staff Entertainment	
Total	

Note: Refer paragraph 9.9.3 for details about further information relating to Disbursements which must be disclosed

Detail of Work Completed

Asset Realisation	Description of activities
Creditors	Description of activities
General Administration	Description of activities
Investigation	Description of activities
Reporting	Description of activities