SECTION 12

PRIVATE PRACTICE

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SECTION 12 - PRIVATE PRACTICE

12.1 Professional Responsibilities

A surveyor becoming established in private practice needs to be aware of the responsibilities which this entails to:

- the profession
- the public
- employed staff

12.1.1 Statutory Responsibilities

A surveyor registered under the Surveyors Act 1978 is required to comply with the provisions of that Act and its regulations whether in private practice or not.

A practitioner needs to comply with all other obligations emanating from both State and Federal legislation and regulation concerned with the establishment and carrying on of a business.

12.1.2 Ethical Practice

Whilst a practising surveyor need not be a member of the Association of Consulting Surveyors, such membership is recommended and provides an excellent means of keeping up to date with all facets of good practising procedure.

The Association’s objects and rules form a good basis for ethical practice. For example the following statement is issued to the public in its "member firm list".

"Each principal listed is a surveyor principal of his respective firm and is a member of the Institution of Surveyors thereby agreeing to be bound by the Code of Ethics of the profession and the Institution”.

What are these duties?

Rules of the Association of Consulting Surveyors (Victoria) Inc. are published by that Association and are available from its office.

Rule 5 governs the Conditions of Membership and reads as follows:

RULE 5 - CONDITIONS OF MEMBERSHIP

(a) Member Firm

(i) Member firms may be:
   (a) sole practitioner firms, or
   (b) a partnership of two or more individuals/ or
   (c) a company.

(ii) The member firm may be represented on the Association by:
   (a) the sole practitioner/ or
   (b) the partners of the firm/ or
   (c) the directors of the company.

(iii) The member firm representatives shall:
   (a) be eligible for membership as a Corporate Member of The Institution of Surveyors/ Australia/ and
   (b) Private Practice shall occupy the greater part of the representatives working hours/ and
(c) shall be honest, diligent, efficient, courteous and behave with decorum and propriety in the provision of a service to the public reflecting credit on the profession, and

(d) shall abide by the rules of the profession concerning the Guide for Survey Fees and Code of Ethics.

(iv) The member firm shall maintain a proper office and the name displayed or under which the practice is conducted shall not, in the opinion of the Executive be misleading or objectionable.

(v) The member firm shall hold and maintain a professional indemnity insurance policy satisfactory to the Executive and supply proof of such policy to the satisfaction of the Executive with each membership application and annual subscription.

(vi) At the discretion of the Executive, Sub-Clause 5 (a) (iii) (a) may be waived, upon the provision to the Executive of evidence, satisfactory to the Executive, that such waiver is in accord with the Objects of the Association and in the best interests of the profession of surveying.

The Guide for Survey Fees referred to in Rule 5 (iii) (d) is published annually by the Association of Consulting Surveyors (Victoria) and is endorsed by the Executive of The Institution of Surveyors, Victoria. Its application is covered in this Section (see Section 12.3.6).

The code of Ethics of the Institution also forms part of the above rules and it is set out in full in Section 2.5.4.

12.1.3 Obligations to Staff

A practitioner's obligations to employed staff are covered by various legal requirements affecting all employers. These obligations include provision for superannuation, workers' compensation insurance (Workcover), group and payroll tax, annual, long service and other leave entitlements and adherence to award conditions and salaries.

Specific requirements of industrial awards affecting the surveying industry are set out in Section 12.5.

12.2 Establishment of a Practice

12.2.1 Ownership Structure

When commencing a business it is important to consider the form of the entity the business should take. Four basic entities which are used by small business are outlined below:

(a) Sole Trader - trading in his/her own right where only one person is the proprietor.

(b) Partnership - where two to twenty people are the proprietors (except for certain professional categories).

(c) Proprietary Company - two to fifty shareholders.

(d) Unit Trust.

The following comments are a brief outline of these four entities. Before commencing business it is advisable you consult your solicitor or accountant to obtain advice as to which structure best suits your situation.

12.2.2 Sole Trader

A sole trader carries on business in his/her own right, either in his own name or under a registered business name (Business Names Act 1962).
If a trader uses his own surname and given names and/or initials he does not have to register the name. If further words are added, the business name will have to be registered, for example, Vie Brown Basement Bargains.

A sole trader is liable to taxation in his own right as an individual and will be required to declare the income from the business in his own personal tax return, and to pay income tax at personal tax rates and will also be liable to pay provisional tax. The assets of the business are normally owned by the sole trader in his own right, although this is not necessary.

His liability is unlimited and will extend to his total personal assets including his share of those assets. Should the business be dissolved, an excess of liabilities over the sole trader's assets will possibly result in the sole trader being declared bankrupt.

**12.2.3 Partnership**

If a business is formed as a partnership, it carries on business in the name of that partnership, e.g., Jones & Brown. The name of the partnership will be registered under the *Business Names Act* 1962, unless it is composed of the surnames and given names or initials of the partners.

A partnership is covered by the provisions of the *Partnership Act* 1958. It is preferable for a Partnership Deed to be drawn up by a solicitor to govern the partnership, although this is not absolutely necessary. If no partnership deed is drawn up, certain governing sections of the *Partnership Act* would apply.

The assets of the partnership are beneficially owned by the individual partners in the proportions set out in the partnership agreement (if no agreement, then as set out in the *Partnership Act*). The liability of the partnership is joint and several and is unlimited. The personal assets of the individual partners may be called upon to pay the liabilities of the partnership if it is unable to pay its own debts.

A partnership may be dissolved in accordance with the partnership agreement or the *Partnership Act*. It is automatically dissolved on the death of one of the partners.

A partnership is required in most instances to lodge an income tax return, however, the taxable income of the partnership is distributed to the partners in the proportions designated by the partnership deed (or if no deed, equally between the partners). The partners are thus liable individually for personal income tax on their proportions of the income (after allowing for any salaries paid) and they would include their share of the income in their individual tax returns. They would individually be subject to provisional tax.

**12.2.4 Proprietary Company**

A business being conducted by a company is done so in the company's name. The Companies Code governs the legal aspects of the running of a company and imposes certain duties on the officers of the company and provides penalties for non-compliance. The current Victorian Act should be consulted.

It is normal for a company to be incorporated by a solicitor. It has a Memorandum of Association setting out its powers and Articles of Association governing the carrying out of those powers. These documents must be lodged with the Corporate Affairs Office.

A company has shareholders who are the owners of the company and directors who run the company. The shareholders are, in most cases, permitted to act as directors.

Most incorporated small businesses (those operating as companies) are proprietary companies. They have from two to fifty shareholders (exclusive of employees) and transfer of the shareholdings is restricted.

The liability of the shareholders is limited to the total issued share capital of the company and therefore a company structure is advantageous in a high risk business.
Should a company fail, it is dissolved by liquidation and a liquidator would only be able to call upon the assets of shareholders to the extent of any unpaid calls on shares and on personal guarantees.

The company is subject to taxation in its own right, presently at the rate of 33% of taxable income. For decades, the company was charged high tax and the shareholders full normal tax on the dividends. That double tax has been eliminated and the shareholders are now taxed on the gross income from which the dividends were drawn and are allowed a tax rebate for that portion previously paid by the company. In other words, the dividends are fully franked by the company and the shareholders receive a franking rebate for the full amount of the dividend.

The main advantages of a limited liability company over a partnership can be summarised as follows:

(a) Greater flexibility is achieved in the introduction of members and in the settling of affairs of deceased members.

(b) Limited liability of the shareholders of the company although decreasing in importance still remains a major reason for converting a business into one owned by a proprietary company.

(c) A company can be used to benefit one's wife and children in a much more flexible manner, particularly in regard to income tax, than is permitted with a partnership.

(d) It is easier to provide for one's retirement with a superannuation fund if a company is used.

(e) Continuity is preserved. A company will last forever unless liquidated. It can die only through the process of liquidation as set out in the *Companies Act*.

(f) Control of an enterprise can be more readily devised and maintained.

(g) Companies provide a more workable method of giving employees an interest in the business.

(h) A company is more flexible than a partnership in that its constitution may be more easily altered.

12.2.5 Unit Trust

A unit trust may be set up with a corporate trustee. The unit trust will operate under the name of the corporate trustee and will also be protected by limited liability should the business fail. In addition to the advantage of limited liability a trust structure is capable of providing the maximum flexibility in management and administration.

Generally the terms of the unit trust will provide that the unit holders will be entitled to rateable proportions of the capital and income of the fund and will also be entitled to vote at meetings of unit holders that may be held for various purposes as provided in the deed, such as the removal and appointment of a new trustee. However, more sophisticated unit trusts may provide various classes of units with different rights attaching to those various classes of units. In some cases, the entitlement of unit holders to receive the income and/or the capital of the trust fund may be subject to the rights of other unit holders or alternatively, subject to the trustee exercising its discretion in favour of the holders of that class of units.

Practitioners should seek professional advice when considering setting up practice using a unit trust as there are differing opinions on how principals should be involved in order to satisfy the Australian Taxation Office that tax avoidance is not the main criterion for using a unit trust.

12.3 Contracts

"A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognises as a duty"

12.3.2 Client/Principal Relationship

The surveyor in private practice must realise that he enters into a contract every time he accepts an instruction from a client

This means that he has an obligation to perform certain duties and his client has an obligation to make payment for the completion of the agreed service, be it the placement of marks on the ground, the preparation of a plan or any of the many services provided by the consulting surveyor

It is a prudent action by any practitioner to specify in writing exactly what services will be performed for a particular fee

It is much better to ascertain a client's reaction to the costs prior to carrying out the work than to indulge in debate after work is completed

12.3.3 Formal Contracts

It is unusual for a practising surveyor to be required to enter into formal contracts for the performance of surveying functions

There have been occasions, however, especially by Government or Semi-Government organisations to formally call tenders and enter into detailed contracts with the successful tenderer

In these circumstances it is essential to carefully study all clauses of the contract particularly those which incur penalties for non-performance, especially relating to completion dates For large involved contracts it would be wise to seek a legal opinion before execution of the documents

12.3.4 Contract Administration

In certain circumstances a practising surveyor may be involved in the administration of a contract between a client and for example, a contractor carrying out construction works on a development project

This situation is common in other States but not so in Victoria Usually the administration of contracts relating to construction of civil engineering works on a development would be carried out by an engineer. Similarly administration of contracts relating to the construction of buildings would be handled by an architect

In multi-disciplinary practices a principal being a surveyor could become involved in the performance of such contracts In these circumstances the principal consultant has a two-fold obligation He must at all times look after the interests of his client and he must also ensure that the contractor is treated fairly regarding the performance of his works and particularly in relation to legitimate claims for extras and variations to the specified works

12.3.5 Tendering

It has become common practice for organisations both public and private to request quotations from surveyors for the performance of survey duties in all fields of practice
The Institution of Surveyors, Victoria, has a declared policy in relation to tendering, which is as follows:

“The Institution of Surveyors, Victoria, is totally opposed to tendering for cadastral work under any circumstances.

If the principle of tendering in special cases is accepted: e.g.

(a) large engineering projects;
(b) work where licensed surveyors are not necessarily required to be involved;
(c) other specified cases when tendering could be considered to be appropriate;

Then the following guidelines should be applied:

• Full and adequate job specifications be provided;
• All conditions of contract be known including insurance, conditions of employment for staff, period of the contract, details of payment, variations in the specification or errors;
• Results of tenders be supplied to all unsuccessful tenderers;
• Employees of contractors will be paid salaries as recognised by the Association of Consulting Surveyors (Victoria)

Notwithstanding this policy many practising surveyors will find that they will be expected to quote or "tender" for many projects, or otherwise not be considered for the project.

Unfortunately for the profession, this activity sometimes leads practitioners into submitting a quotation at a fee well below that required to carry out the work properly and return a profit to the practice.

It is sometimes of benefit to outline at an interview with the organisation calling for a quotation or "tender" why a fixed price is so difficult to determine. A quotation based on hourly rates is often much fairer to both parties.

12.3.6 Guide for Survey Fees

The Institution of Surveyors, Victoria previously published a Guide for Survey Fees each year. Suggestions and input were predominantly from the Association of Consulting Surveyors (Victoria). In 1994, the Guide for Survey Fees for Consulting Surveying Services was published by the Association of Consulting Surveyors (Victoria) Inc. with an endorsement from the Executive Committee of The Institution of Surveyors, Victoria.

The Guide has been developed from much research carried out over many years by experienced practitioners to determine a fair and reasonable fee which should be charged in order to afford the client the required services without compromise.

12.3.7 Settlement of Disputes

The Institution has an established facility to solve disputes between members and their clients.

In general terms this is a simple and economical method of resolving such disputes, and a voids lengthy and expensive court proceedings.

Clause 4 of Part A of the Guide for Survey Fees for Consulting Surveying Services as published by the Association of Consulting Surveyors (Victoria) reads as follows:

"Should a dispute arise between a Consulting Surveyor and a client, it may be referred by one or both parties to the Secretary of The Institution of Surveyors, Victoria. The President may refer the dispute
to the Committee of Victoria Division for a decision, or advise that the matter may be referred to a mutually agreed upon independent arbitrator”.

Where the dispute is one concerning fees charged by a Consulting Surveyor to a client. Rule 45 of the Articles of Association of The Institution of Surveyors, Victoria applies. This rule states:

"Board of Reference for Disputed Charges.

In the case of any account of a member of the Institution for professional services being disputed by a client, the Committee may act at the request of the contending parties and appoint a Board of Reference to inquire into and make recommendations on the case, provided that:

(a) the case shall be stated in writing by the applicant and lodged with the Secretary, together with a fee calculated at five per centum of the account claimed, with a minimum fee of ten dollars;

(b) an agreement is lodged by the contending parties to the effect that the decision of the Committee shall be final and binding; and

(c) the contending parties agree if called upon by the Board, to attend with their witnesses and produce evidence”.

12.4 Professional Indemnity Insurance

12.4.1 Background

From the turn of the century until the late thirties it would be safe to assume that Professional Indemnity Insurance was of little concern to the practising surveyor. The type of work performed at the required accuracy of those times probably warranted insurance cover for errors or mistakes, but no doubt many surveyors would have considered such insurance cover as an affront to their professionalism.

Any Professional Indemnity Insurance would have been difficult to obtain without some historical facts as background to determine the insurable risks. Hence surveyors and insurers would have had to work on facts obtained from other similar professional bodies.

Whatever the reasons for the apparent lack of insurance cover there would appear to be few cases on record, or of common knowledge, where legal action had been taken against a surveyor for professional negligence. Perhaps this was due to the “hands on” approach that surveyors of the earlier years had in relation to the art of surveying.

The immediate post-war years of the forties and fifties saw a growth of development throughout Australia which put heavy demands on the surveying profession, and surveyors generally became more aware of the risks involved in the practice of surveying. The pressure to satisfy client needs and complete the required work on time added to the problems and risks, and made insurance cover a necessity for the consulting surveyor. Even so, there would appear to be very few cases of professional negligence involving surveyors during these two decades.

The next twenty years heralded the growth in high-rise buildings and structures, together with large scale residential developments and brought the surveyor into more direct contact with the construction and building industry with its associated problems. The incidence of claims for professional negligence rose and insurers were hesitant in continuing to provide the insurance cover necessary.

The Association of Consulting Surveyors Australia realised the problems which were appearing within the profession. The lack of uniformity of the conditions and premiums of the insurance policies available to the practising surveyor caused the Association to take action to remedy the situation.

12.4.2 Contemporary Situation
The Australian Consulting Surveyors Insurance Society Limited was formed in 1984 and registered in Canberra to negotiate with appropriate brokers and underwriters for satisfactory proposals for Professional Indemnity Insurance which would serve the needs of the members of the Association, and also contribute some minor benefit to the Association in the long term.

The scheme is managed by directors drawn from the State sections of the Association of Consulting Surveyors Australia, and a representative of the brokers. The directors of the Society in conjunction with the brokers act together to obtain the best conditions from the insurance market for an insurance package for the benefit of the members.

The Society accepts insurance cover from surveyors in practice with a pre-requisite that such surveyor is firstly a member of the Society, and secondly, a member of the Association of Consulting Surveyors Australia. Non-members of the Association and non-professional surveyors are also eligible to be covered under the insurance scheme subject to certain other criteria.

12.4.3 Settlement of Claims

The functions of the Society are managed through the brokers and all claims or potential claims (alerts) are notified to them. Any direct evidence that a claim may arise or is likely to arise is considered an alert, and should be notified to the brokers as soon as the possibility of a claim exists.

Generally each State has a Claims Panel consisting of senior members of the profession to which the broker refers the claim for examination and report. The Panel members individually, or as a group, will investigate the situation giving rise to the claim to assist the member and the claimant to achieve a satisfactory result.

A report is then forwarded to the brokers who will consider what action is to be taken to acknowledge or defend the claim as thought best. A number of alerts never reach the claim stage, and most of the claims are settled without court action.

Not many of the claims are directly related to cadastral survey; the greater majority are related to level and set-out problems. It would appear that about one-third of all claims are dishonest, inflated or implicate the consulting surveyor in an action to which he is not a primary part. The dishonesty element often relates to clients in difficulties and who are seeking to use a successful insurance claim to improve their situation.

Professional Indemnity Insurance is a necessity for the consulting surveyor in order that he be protected from possible negligence, errors or omissions and unscrupulous clients. However it should never be relied upon as a tool to aid the provision of a lesser standard of service or as a back-stop in the lessening of performance.

In an era when computers, calculators and surveying instruments give greater accuracy and precision to the work of the surveyor, the number of claims for professional negligence appears to be on the increase. Perhaps this is due to the current business atmosphere where litigation against professionals in all spheres is becoming a daily fact of life.
12.5 Industrial Relations

12.5.1 Background

Surveyors in private practice had little contact with industrially based associations and unions prior to 1985. In that year the Association of Draughting Supervisory and Technical Employees (A.D.S.T.E.) which in later years became part of the union presently known as the Automotive, Food, Metals and Engineering Union, applied to the Industrial Relations Commission of Victoria for a Board to be established to set wages and conditions for Professional Surveyors, Technician Surveyors and Technical Assistants employed in private industry in Victoria. The Commission established the Land Surveyors Conciliation and Arbitration Board in March 1986 and granted seats to employer and employee representatives. The Board comprises four employer and four employee members with an Industrial Relations Commissioner as chairman. The employer members comprise three members nominated by the Association of Consulting Surveyors Victoria Inc. and one member nominated by the Housing Industries Association (Victorian Division); the employees are represented by two members each from the Association of Professional Scientists of Australia (A.P.S.A.) and A.D.S.T.E.

Both A.P.S.A., now A.P.E.S.A. (Association of Professional Engineers and Scientists of Australia) and A.D.S.T.E. served a Log of Claims on Victorian surveyors in order that the Board establish an award covering Professional Surveyors, Technician Surveyors and Technical Assistants working in private industry. Similar awards had been established in Western Australia, Queensland and New South Wales, Awards have since been established in Tasmania and South Australia.

Negotiations began with the two associations, based on their ambit claim, which like all ambit claims was excessive and neither side treated it as a serious proposition. Exhaustive negotiations between the parties and finally arbitration by the Commissioner resulted in an award being set for surveyors in private industry. The operative date for the commencement of the award, the Land Surveyors Award No.1 of 1987, was set at 1 November 1987.

The award is a "minimum rates award" and as such sets out the minimum salaries and conditions applicable to all Professional Surveyors, Technician Surveyors and Technical Assistants employed in private industry in Victoria whether they are union members or not. The award is binding on the employers and reduction in salaries or conditions as set could result in prosecution.

12.5.2 Contemporary Situation

Through legislative changes which became effective in March 1993, all State awards, including the Land Surveyors Award, were abolished and replaced by workplace agreements. However, as has subsequently occurred generally throughout the workplace, pushes made by the respective unions have placed employees under Federal awards which operate beyond the Victorian legislation. In the case of surveyors employed in private industry, those awards are the Land Surveyors Interim Award 1993 and the Professional Surveyors Award - APESA. These awards provide for the majority of the conditions which existed in the State award prior to its abolition. It is anticipated that these two Federal Awards will merge in the near future.

12.6 Quality Assurance

Government bodies are beginning to follow trends from overseas to urge industries and professions to improve the quality of their services and products. This improvement in quality and the prevention of quality related problems can be achieved through Quality Assurance.

The Association of Consulting Surveyors Australia publication Aim for Perfection gives a good guide to each firm, large or small, for the development of a system which best meets their needs and requirements. As well. Standards Australia puts out a number of publications which can be used as guidelines in developing a workable system. The AS 3900 series which are the international Quality Standards adapted for Australia, and the AS 2990 series which are Quality Systems for engineering and construction projects are relevant.
The benefits of Quality Assurance will undoubtedly be seen throughout both the private and public sector. It will encourage the involvement and improvement in skills of both principals and employees resulting in the enhancement of the professional image of the firm. It will greatly reduce the risk of problems and errors which may result in major loss or litigation, and it will save time and money in the processing of information through a range of authorities.


12.6.1 Quality System Accreditation

For some years now, international standards on quality management have been in place. Details of those standards are set out in Section 10.3 of the Survey Practice Handbook, Part 2. In the marketplace, there exist a number of third party accreditors who provide certification to organizations which meet and maintain those nominated standards. One such accreditation body is the Consulting Surveyors Quality Corporation.

12.6.2 Consulting Surveyors Quality Corporation

After some twelve months research by The Association of Consulting Surveyors Australia, the Consulting Surveyors Quality Corporation (CSQC), was formally established on 12 August 1993. The CSQC is based in Canberra at National Surveyors House. Although the certification programme is presently conducted from Adelaide, it is anticipated that the Corporation will eventually have staff in other capital cities. It has been established as a separate company with ownership being vested in The Association of Consulting Surveyors Australia.

Its objectives are:

- to promote ongoing improvements in professional services offered by ACSA member firms;
- to offer an independently recognized certification service, with a high degree of technical credibility, to surveyors and allied professions;
- to promote organisations which are certified by the CSQC both within Australia and overseas.

The Corporation is overseen by a Board of seven members representing the survey profession, regulatory bodies, government and quality management professionals. The Corporation employs a surveyor on a full time basis to manage the certification programme and to undertake the quality system assessments together with assistance drawn from a firm of quality management consultants.

The certification offered by the CSQC provides independent recognition that a firm has in place a quality system which conforms to a nominated standard. The programme offered is designed to comply with all the requirements of firstly, the relevant Australian and European standards and secondly, The Joint Accreditation Scheme - Australia and New Zealand (JAS-ANZ), the peak body established by the respective governments of Australia and New Zealand to oversee and to regulate certification organizations.