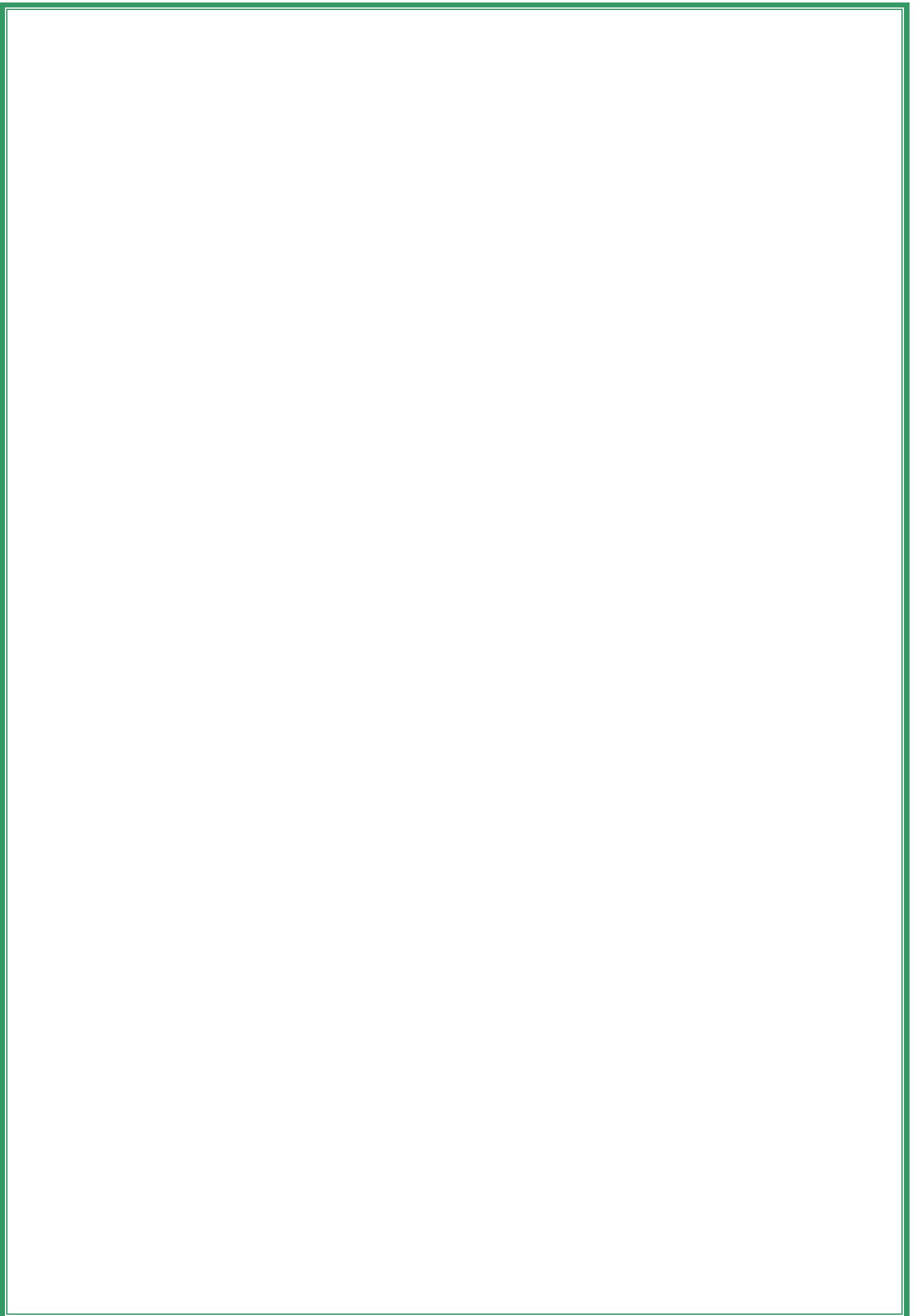


# A Framework for Compliance

## Under Professional Standards Legislation





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# 1 INTRODUCTION

## 1.1 DEFINITION OF A COMPLIANCE PROGRAM

- 1.1.1 A compliance program is a program designed to assist an organisation to meet its obligations and to reduce the risk of the organisation breaking the law. The **Australian Standard on Compliance Programs AS 3806-2006** says that a compliance program will result in an organisation “being able to demonstrate its commitment to compliance with relevant laws, including legislative requirements, industry codes, organisational standards as well as standards of good corporate governance, ethics and community expectations”. The Standard also cautions “on numerous occasions the courts have considered an organisation’s commitment to compliance when determining the penalty to be applied for contraventions of relevant laws.”<sup>1</sup>
- 1.1.2 According to AS-3806, an effective compliance program is supported by the following twelve principles:<sup>2</sup>

### Commitment

- I. Commitment by the governing body and senior management to effective compliance that permeates the whole organisation.
- II. The compliance policy is aligned to the organisation’s strategy and business objectives, and is endorsed by the governing body.
- III. Appropriate resources are allocated to develop, implement, maintain and improve the compliance program.
- IV. The governing body and senior management endorse the objectives and strategy of the compliance program.
- V. Compliance obligations are identified and assessed.

### Implementation

- VI. Responsibility for compliance outcomes is clearly articulated and assigned.
- VII. Competence and training needs are identified and addressed to enable employees to fulfil their compliance obligations.
- VIII. Behaviours that create and support compliance programs are encouraged, and behaviours that compromise compliance are not tolerated.
- IX. Controls are in place to manage the identified compliance obligations and achieve desired behaviours.

### Monitoring and measuring

- X. Performance of the compliance program is monitored, measured and reported on.
- XI. The organisation is able to demonstrate its compliance program through both documentation and practice.

### Continual improvement

- XII. The compliance program is regularly reviewed and continually improved.

## 1.2 IMPORTANCE OF A COMPLIANCE PROGRAM

- 1.2.1 Compliance programs are important elements of corporate governance in Australia. Legislators are initiating the inclusion of comprehensive compliance obligations in laws. Courts have indicated that the cost of the absence of a compliance program can and should be significant<sup>3</sup>. Therefore, it is recognised that a compliance program provides an opportunity to not only improve an organisation’s performance, but also reduce the cost of failing to meet legal and other obligations.

<sup>1</sup> Australian Standard on Compliance – AS 3806 – 2006. Foreword.

<sup>2</sup> Australian Standard on Compliance – AS 3806 – 2006. Compliance Principles.

<sup>3</sup> *ACCC v MNB Variety Imports Pty Ltd* 1998 ATPR ¶41-617 at 40,758

1.2.2 In short, legal compliance has become a top priority. The importance of a compliance program for the Professional Standards Councils (the Councils) derives from the fact that they have the responsibility of administering professional standards legislation across all states and territories. A robust compliance program is needed to ensure that occupational associations (associations) and their members comply with their obligations under the relevant professional standards legislation (the Acts) and that instances of non-compliance are addressed by enforcement or other action.

1.2.3 The Acts are:

- *Professional Standards Act 1994 (NSW)*
- *Civil Law (Wrongs) Act 2002 (ACT)*
- *Professional Standards Act 2003 (Vic)*
- *Professional Standards Act 2005 (Tas)*
- *Professional Standards Act 2004 (SA)*
- *Professional Standards Act 1997 (WA)*
- *Professional Standards Act 2004 (NT)*
- *Professional Standards Act 2004 (Qld)*

Please refer to section **6.6 Statutory Compliance Requirements** for information about compliance contained in the legislation.

1.2.4 The purpose of the compliance program is threefold:

- to enable the Councils to meet their obligations under relevant laws;
- to help associations and their members to comply with their statutory obligations; and
- to enhance consumer protection.

## 2 METHODOLOGY FOR DEVELOPING THIS COMPLIANCE PROGRAM

### 2.1 PRINCIPLES GOVERNING THE SELECTED METHODOLOGY

2.1.1 The following three principles were followed in developing this compliance program:

- Compliance programs must be relevant and proportionate to the importance of their desired outcomes.
- Programs to verify compliance must, therefore, be efficient and proportionate to members' costs and burden, without compromising desired outcomes.
- Costs of ensuring compliance must be proportionate to the benefits of compliance.

### 2.2 THE METHODOLOGY

2.2.1 AS-3806 has long been regarded as a benchmark for compliance systems; it is believed that systems based on the Australian Standard are far more likely to be readily accepted, and to work, than those that are not<sup>4</sup>. Hence, AS-3806 has been followed in developing this compliance program.

2.2.2 The compliance issues were identified by listing and discussing with the associations several compliance areas:

- the specific compliance requirement;
- the consequences of non-compliance;
- likelihood and severity of non-compliance;
- perceived level of existing compliance;
- possible reasons for non-compliance; and
- existing compliance controls and their strengths and weaknesses

2.2.3 The mandatory requirements under the Acts were given due consideration in the selection of these compliance areas. The risk rating methodology contained in the **AS/NZS 4360:2004 Risk Management Standard** was used for prioritising each compliance area.

2.2.4 Further deliberations enabled identification of one or two strategies in each prioritised compliance area that would be the most effective and efficient to implement from the viewpoints of both the Councils and the associations.

2.2.5 Each compliance strategy was rated on a scale of 1 to 5. The ratings were calculated to determine the highest rated strategies corresponding to a particular compliance area. Each strategy was then considered, together with some other qualitative factors, such as the likelihood of direct involvement of associations in the implementation of compliance program and strategies being already in place, to finally choose a strategy.

2.2.6 The identified compliance areas for associations and their members - and their corresponding strategies for implementation - are:

- I. Compliance with **disclosure policy**: a generic monitoring program by associations.
- II. Compliance with **trademark**: a generic monitoring program by associations.
- III. Compliance with **risk management reporting**: reporting annually against the associations' 5-year risk management plan.
- IV. **Insurance standards** including business assets, insurance monitoring and compliance with excess: a generic system of reporting for insurance standards and business assets monitoring (this would typically be included in risk management reporting, consistent with the Councils' statutory responsibility to monitor associations' compliance with their risk management strategies).

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<sup>4</sup> Sharpe B, Australian Legal Compliance: Making It Work (Sydney: CCH Australia 1999)

V. **Fees, audit and interest monitoring:** develop an annual calendar for payments and provision of audit certificates to the Councils.

- 2.2.7 Following the principles enunciated in 2.1.1 above, to reduce compliance costs, the systems to monitor and enforce compliance rely on the adequacy of associations' existing systems regarding data collection, auditing and reporting.
- 2.2.8 The compliance program was developed in direct consultation with associations that have *Cover of Excellence*<sup>®</sup> schemes (schemes).

## 3 SELECTED STRATEGIES FOR COMPLIANCE BY ASSOCIATIONS

### 3.1 COMPLIANCE WITH DISCLOSURE POLICY

- 3.1.1 Scheme participants are required under the Acts to disclose their limited liability status in all documents given to a client or a prospective client that promote or advertise their occupation. It is an offence not to disclose.
- 3.1.2 The Councils should have access to information on compliance with, or violation of, disclosure policy. Associations must monitor the status of disclosure in some form, details of which monitoring must be reported to the Councils. Only scheme participants can disclose that they are covered by a *Cover of Excellence*<sup>®</sup> scheme. The disclosure should be proper, adequate and made only by participants in the scheme.
- 3.1.3 Disclosure is to inform the potential consumers of service providers' limited liability, and an occupational association and the Councils should have information on whether the scheme participants are disclosing their liability properly or not. The disclosure of limited liability informs an existing or prospective client that the service provider has limited liability, thereby establishing a transparent and fair relationship between the client and the service provider.
- 3.1.4 Associations must educate scheme participants as to their obligations regarding disclosure and must report to the Councils any non-compliance with the disclosure policy, as well as the unauthorised use of the disclosure statement. Non-compliance should be remediated by disciplinary action by the association. Inadequate monitoring and enforcement by the association will be subject to Council action.
- 3.1.5 A recommended method for associations is detailed at the end of **Section 3**. It is generic and applies to the first three strategies.

### 3.2 USE OF THE COVER OF EXCELLENCE<sup>®</sup>

- 3.2.1 The *Cover of Excellence*<sup>®</sup> conveys to clients a commitment to providing a high standard of professional service and consumer care. The trademark signifies to the client that the professional is a part of an occupational association that has a scheme approved by the Professional Standards Councils. However, the *Cover of Excellence*<sup>®</sup> does not replace the requirement that disclosure be provided to clients. The *Cover of Excellence*<sup>®</sup> is a trademark of the Councils. The Councils authorise scheme participants to use the trademark under license, a condition of which is that it is used according to the General Terms and Conditions of Use (including that the trademark is displayed in accordance with the Style Guide).
- 3.2.2 The Councils promote the proper use of its *Cover of Excellence*<sup>®</sup> logo by the license and Style Guide. Use of the trademark is not mandatory. Associations must monitor compliance with the trademark requirements and report non-compliance to the Councils.
- 3.2.3 The use of logo must conform to prescribed placement, colour and size requirements. As the logo is a trademark of the Professional Standards Councils, only scheme participants may use it, in accordance with the General Terms and Conditions of Use. This compliance strategy is designed not only to promote the proper use of the logo, but also to detect any non-compliance with the requirements and prevent any unauthorised use of the logo. Non-compliance should be remediated by disciplinary action by the occupational association. The Councils will prosecute breaches of the trademark.

### 3.3 COMPLIANCE WITH ANNUAL RISK MANAGEMENT REPORTING

- 3.3.1 Associations with *Cover of Excellence*<sup>®</sup> schemes are required to report annually to their Council(s) on the implementation of the five-year risk management plan that formed part of their original application for a Scheme, detailing the effect of their strategies in mitigating risks, improving standards and enhancing consumer protection. The Councils recommend that associations apply the **AS/NZS 4360:2004 Risk Management Standard** and its companion volume **Risk Management Guidelines**, published by Standards Australia, when developing their plan.
- 3.3.2 Risk management strategies are the actions undertaken by an organisation to ensure that it is conscious of the potential risks it faces, makes informed decisions in managing these risks, and identifies and harnesses potential opportunities for development. The Acts do not define risk management strategies; however, they list various elements that could be relevant in the development of a risk management plan that focuses on the development and maintenance of high professional standards. Based on the legislation, the Councils have identified six principal areas of potential risk that underpin the professional standards of associations:
- I. membership entry requirements;
  - II. continuing occupational education;
  - III. codes of ethics and practice;
  - IV. complaints and discipline of association members;
  - V. quality assurance and audit including, for example,
    - o continuing occupational education;
    - o insurance standards;
    - o business assets;
    - o analysis of the cost and availability of insurance;
    - o analysis of nature and level of claims;
    - o disclosure of limited liability;
    - o use of the *Cover of Excellence*<sup>®</sup> logo; and
  - VI. risk management required by the association of its members.
- 3.3.3 The Councils are particularly interested in the relationship between claims, complaints, and continuing education for members, towards furthering the objects of the Acts. Therefore, regardless of the strategies adopted and reported on, the Councils require that all associations report each year on:
- continuing occupational education for members;
  - complaints and discipline of members;
  - claims and insurance monitoring (see also **section 3.4**); and
  - disclosure and use of the *Cover of Excellence*<sup>®</sup> logo (see also **sections 3.1 & 3.2**).
- 3.3.4 Associations must report on the number, amount and nature of claims, together with the cost and availability of insurance, for the current year. The association should also comment on the anticipated costs and availability of insurance for its members for the next reporting period. The Councils are aware that associations may experience difficulty in obtaining claims information from the insurance industry. If no data are available, associations are advised source this information directly from their members – for example, an association’s compliance program could collect the information as part of the annual membership renewal process.
- 3.3.5 For the purpose of reporting claims, an association should undertake to provide:
- The sources of data (for example, the insurance industry, member surveys, and other sources).
  - The number and the dollar amount of claims.
  - The types of claims, causes of claims, and demographic information.
  - Identification of trends, and conclusions that may be drawn from the claims data.

- A report on the effectiveness of existing risk management strategies in relation to containing claims, and any proposed (or implemented) changes to the strategies.

3.3.6 For the purpose of reporting on insurance costs and availability, an association should undertake to provide:

- The average cost of insurance within a range of indemnity limits relevant to the scheme.
- The availability of insurance for those indemnity limits.

3.3.7 It is important for an association to understand why claims occur, in order to implement strategies that equip its members with knowledge and skills that contribute to effective prevention or reduction of specific types of complaint. Collection and analysis of complaints data will highlight areas where strategies can be developed to equip association members with the skills or knowledge to protect themselves against future complaints. The systematic and strategic analysis of complaints data may contribute to a reduction in number or magnitude of claims. The association should analyse all types of complaints, including complaints that have been dismissed. If no claims have been lodged for a particular reporting period, the association should report on the strategies it has in place ensure that the complaints system is accessible to and understood by consumers.

3.3.8 For the purpose of reporting on complaints and discipline, an association should undertake to provide:

- The total number of complaints received.
- The nature or type of complaint.
- The cause of the complaint.
- The total number of dismissed complaints.
- The number of complaints resolved without disciplinary action.
- The number of complaints that resulting in disciplinary action.
- The average length of time for resolution of complaints.

3.3.9 “Continuing occupational education” is the expression used in the legislation: it is synonymous with continuing professional development (CPD). Associations should describe new and existing education programs and, if relevant, explain the relationship of the program to identified trends in claims and complaints.

3.3.10 Reporting ensures that an occupational association makes constant and timely improvements to its practices, to the benefit of consumers of its services. The obligation to report is a statutory requirement and is fundamental to the monitoring role of the Professional Standards Councils in all jurisdictions. Examining the strategies and risks of professional associations allows the Councils to further consider whether a limitation on occupational liability requires adjustment, in consequence of changes in risks faced or undertaken by members of an association. It also provides the Councils with the opportunity to assess the long-term impact of professional standards legislation from the perspective of their stakeholder associations.

3.3.11 The reporting period for *Cover of Excellence*<sup>®</sup> schemes is 1 January to 31 December, with the report required to be submitted to Council by 31 March the following year. In some cases this will mean part-year reporting. Each Council reports on the performance of the participating associations in relation to such risks each year in the Professional Standards Councils’ Annual Report. A suggested pro-forma risk management reporting template is provided in **Appendix 6.2**.

## 3.4 COMPLIANCE WITH INSURANCE AND BUSINESS ASSETS MONITORING

3.4.1 Professional standards legislation provides that insurance and/or business assets can be used to cover the amount of cap. Members of associations enjoy the benefit of a scheme only if they can

satisfy a court that they have insurance business assets and/or insurance (which in value is not less than the amount limited liability specified in the scheme).

- 3.4.2 Insurance and business assets are a key part of schemes. Associations must monitor members' compliance with this fundamental aspect of participating in a scheme – for example, as part of annual membership renewal - and report to the Councils
- 3.4.3 The Councils refer associations to the *Policy Statement on Professional Indemnity Insurance* on the Councils' website ([www.psc.gov.au](http://www.psc.gov.au)) for information as to the Councils' accepted standards of insurance.
- 3.4.4 This compliance strategy aims to ensure that all participants in a scheme are adequately covered for their capped liability.

### 3.5 COMPLIANCE WITH AUDIT CERTIFICATE REQUIREMENTS

- 3.5.1 Associations pay an annual fee to the Councils. This fee is calculated on the number of members within an association to whom the scheme applies at a specified date. The annual fee must be paid not later than the end of the relevant quarter as prescribed under Regulations.
- 3.5.2 If any amount of the annual fee (including fees payable on additional members who join the scheme throughout the year) is not paid within 30 days of the due date, simple interest at the rate of 0.05% per day is payable to the Councils on the outstanding balance until the balance is paid. The proper administration of the Acts and schemes depends on the adequacy of the self-funding arrangements that apply. These fees, including accrued interest, are public money and the Councils will ensure that all fees are paid.
- 3.5.3 The Councils monitor accuracy of payments by obtaining an independent audit certificate from the associations. It should be in a format that allows the Councils to determine the number of members to whom the scheme applied in each quarter.
- 3.5.4 The Councils' *Policy Statement on Annual Fees* provides in clause 11 that audit certificates should include *"the number of occupational association members to whom the scheme applied for the subject annual fee period, the fee payable and the dates and amounts paid to the Council for the annual fee period"*. It also requires that the audit certificate should record the quarterly position, as the Regulations require payment within the financial year quarter within which the scheme commenced, and quarterly thereafter for the remainder of the period. The audit certificate should also report the interest payable for the annual fee period, if any, showing the quarterly position, the dates and amounts paid.
- 3.5.5 The independent audit certificate will be the methodology adopted to secure compliance with their obligation to pay all fees and interest due, unless an occupational association can provide a satisfactory alternative. It must be in the specified format. The Councils will pursue unpaid fees (including interest) and take remedial action for non-compliance with payment and audit requirements. A proforma audit certificate is provided in **Appendix 6.1**.

### 3.6 A RECOMMENDED METHODOLOGY FOR COMPLIANCE

- 3.6.1 The method for achieving compliance will be a sampling methodology that is statistically representative for the purposes of gathering sufficient and appropriate data concerning requirements for disclosure, *Cover of Excellence*<sup>®</sup>, and insurance and business assets.
- 3.6.2 An association must require participating members to declare their compliance annually, and the association must audit a portion of that sample. A random sampling technique is considered to be

statistically representative if an appropriate sample size is selected, based on the number of members in a scheme. Unless compliance behaviours vary widely, 10% of the self-declaring members need to be selected randomly for auditing. However, if the number of scheme participants is less than 10, all members must self-declare and be audited.

- 3.6.3 If the members covered have the same characteristics, 10% of the members or 10 members (whichever is greater) must be sampled. If however, the members have differing characteristics that need to be captured in a survey, the Councils will work with the individual associations to develop an appropriate methodology.
- 3.6.4 The method above is the recommended minimum. Associations may check 100% of their members for compliance in some areas. If an association can collect information on 100% of its population or can devise a cost effective and representative method, use of such a method may be accepted, provided the Councils deem the information thus collected and reported to the Councils' satisfactory.

## 4 THE COMPLIANCE AND ENFORCEMENT POLICY STATEMENT

### 4.1 GENERAL POLICY STATEMENT

- 4.1.1 The Professional Standards Councils are committed to compliance with all applicable laws, regulations, codes and organisational standards. These statements of policy have been prepared to reiterate the Councils' ethos that all its stakeholders (eg employees, scheme participants and scheme administrators) be aware of their responsibility to comply with professional standards legislation and conduct themselves with the highest level of integrity. The Councils are committed to fostering and supporting voluntary compliance through education and consultation while ensuring that enforcement, when required, is fair, foreseeable and consistent.
- 4.1.2 An appropriate combination of the following options will be used to achieve these objectives with the powers and authorities set out in the applicable legislation:
- promotion and communication
  - education
  - other voluntary means
  - compliance resources
  - enforcement action
- 4.1.3 The general policy stated in this document does not constitute a new regulation and operates on the premise that associations and the Councils share a mutual goal to respect legal requirements and achieve the objectives of professional standards legislation.

### 4.2 ENFORCEABLE LEGISLATIVE OBLIGATIONS

- 4.2.1 Associations with a scheme are required under professional standards legislation to provide the Councils with representative data annually. They must also report to the Councils any reported/observed violation of the requirements of professional standards legislation by participants and non-participants alike. In particular, areas of compliance risk that have been identified through audits or monitoring must be immediately reported to the Councils and addressed. Associations are obligated to create an adequate structure to facilitate this process. Reporting requirements (annual, compliance and audit reporting) are enforceable obligations that carry penalties for non-compliance.
- 4.2.2 Individual professionals whose liability is limited under the legislation are required to disclose this limitation on all business-related documents. This requirement is also enforceable through statutory penalties for non-compliance.
- 4.2.3 Note that there are State/Territory-specific variations regarding these obligations and the penalties for non-compliance with them; refer to **Appendix 6.6** for detailed legislative references.
- 4.2.4 It is also a requirement of professional standards legislation that scheme participants hold insurance/business assets to a certain level. However, non-compliance with this requirement results in the individual no longer having their liability limited under the scheme, without further penalty.

### 4.3 PROCEDURES FOR MONITORING COMPLIANCE

- 4.3.1 Associations report, by 31<sup>st</sup> March, on the previous year's compliance with disclosure and insurance/business assets by their members. Such information is to be collected as part of the associations' Annual Risk Management Report. The Annual Risk Management Report process map is shown in **Appendix 6.3**. Because the submission date for the association's audit certificate falls after the final quarterly adjustment to membership numbers, compliance with the deadline for

the submission of the Risk Management Report and the audit certificate will be monitored separately. Compliance with the audit certificate is the direct responsibility of associations, while compliance with disclosure and insurance/business assets is the direct responsibility of scheme participants. The associations are responsible for putting proper systems in place to encourage compliance with disclosure, and taking disciplinary actions against non-compliant participating members.

- 4.3.2 A flowchart illustrating procedures for monitoring members' compliance with statutory requirements is given in **Appendix 6.5**. Associations must report to the Councils on any non-compliance with mandatory requirements and take appropriate disciplinary action against the non-compliant members.

## 4.4 ENFORCEMENT

- 4.4.1 The Councils' enforcement policy is designed to ensure that:

- Affected parties are aware of how compliance activities are carried out;
- Fair and reasonable approaches to enforcement are used;
- Approaches are consistent, effective and efficient; and
- Graduated measures are used to deal with non-compliance.

- 4.4.2 The Councils will attempt to obtain the co-operation of associations to provide information regarding compliance on the part of both associations and individual professionals covered by schemes. Where appropriate, Council/s may issue written notice under the relevant Act(s) requiring the association to provide information regarding compliance with legislative requirements. Such a letter will refer directly to the legislative provision under which the obligation to comply arises, and will provide a deadline for meeting the request.

### **Non-compliance by an occupational association:**

- 4.4.3 If no response is received to a request for information (regarding risk management strategies, compliance by members, or any information that the Council/s reasonably require/s to exercise its functions), then a further letter will be sent, reiterating the statutory basis for the obligation to comply, and advising of the penalty for failure to comply under the relevant Act(s).
- 4.4.4 At this stage the Council/s may also consider revocation of the relevant scheme(s) as a consequence of non-compliance. If Council/s resolve to consider scheme revocation, the association will be advised of this also in the follow-up letter described in the previous step.
- 4.4.5 If the response to this follow-up letter is considered by Council/s to be unsatisfactory, Council/s will then consider seeking prosecution of the relevant offence and/or revocation of the relevant scheme(s).
- 4.4.6 Prosecution of any offence(s) will be pursued through the relevant State/Territory Government Solicitor's Office.
- 4.4.7 Revocation of any scheme(s) will be pursued through public notification, Ministerial approval and gazettal, in accordance with the relevant Act(s).

### **Non-compliance by individual professionals – disclosure of limitation of liability:**

- 4.4.8 The Council/s will seek the co-operation of the association (whether or not the association was the source of the original report of non-compliance) in assessing the scope of non-compliance and determining appropriate disciplinary action.

- 4.4.9 The Council/s will take into consideration any disciplinary avenues available and/or pursued by the association regarding the non-compliant individual, and the results of any disciplinary action.
- 4.4.10 The Council/s will then consider whether to seek enforcement of the statutory requirement/s regarding disclosure of limited liability via prosecution of an offence under the relevant Act(s).
- 4.4.11 If Council/s resolve to pursue prosecution of an offence under the relevant Act(s), Council/s will write directly to the individual professional, advising them of the alleged non-compliance, of the statutory requirements, of the statutory penalties for non-compliance, and of the intention of Council/s to pursue prosecution if compliance is not achieved through other means.
- 4.4.12 If the response to this is considered by Council/s to be unsatisfactory, prosecution of any offence(s) will be pursued through the relevant State/Territory Government Solicitor's Office.

### 5.1 RECOMMENDED ACTIVITIES FOR DEVELOPING AN ASSOCIATION'S COMPLIANCE PROGRAM

- 5.1.1 An association must establish systems to enable it to meet its compliance obligations. Steps for such a compliance program are outlined in this section. This section is not a substitute for a compliance program guide similar to AS 3086. Therefore, factors, like the top management commitment to compliance is assumed but not listed. However, in following a format similar to the AS 3086 in developing a compliance program, an association needs to perform a number of activities - some of which are preparatory - to meet the Councils' requirements. This section aims at listing some of the activities that facilitate the development of a compliance program. Other areas, such as claims monitoring, are also of high importance and will be taken up in the subsequent development of the compliance program. Once an association sets up its compliance program with listed activities in place, an extension of the program to cover other areas should be fairly simple.
- 5.1.2 A diagram for developing a compliance program to meet the Councils' requirements is given in **Appendix 6.5**. A list of important activities and various steps in the development of a compliance program are outlined below.

#### **Step 1: Understand the Councils' requirements- types of activities**

- Read, understand and interpret the professional standards laws, regulations, and policies.
- Familiarise yourself with the Councils' compliance and enforcement policies.

#### **Step 2: Analyse your association's existing compliance system**

- Analyse the existing organisation-specific rules, directives and enterprise policies against the professional standards Regulations.
- Identify gaps in the current systems.
- Determine what needs to be done to close the gaps.
- Work out methods to adapt the existing systems of capturing information on scheme participants to the format required by the Councils.

#### **Step 3: Design compliance system**

- Develop a budgetary estimate for compliance and seek commitment of funding.
- Assign responsibilities so that each section of the organisation dealing with the Councils knows who is doing what in the compliance effort.
- Get the Scheme Administration Committee to oversee and guide the compliance effort.
- Organise a team to track and manage your activities.
- Develop a strategic plan so that everyone responsible for activities in the organisation understands the compliance effort.
- Confirm the scope and establish the due diligence documentation method and repository.
- Develop a project management environment.

#### **Step 4: Implementation**

- Conduct awareness training for relevant employees and members.
- Document and promote compliance strategies among the scheme participants and affected employees.
- Develop a system to help employees and members who raise concerns of any kind stemming from possible non-compliance.
- Develop formal policies and procedures to deal with non-compliance in cooperation with members.
- Consider needed additions to the compliance program, if other important areas of compliance are identified.

### **Step 5: Monitoring and evaluation**

- Collect and analyse compliance, complaints and disciplinary data.
- Take periodic representative sampling to determine the level of compliance with requirements.
- Analyse sampled data.
- Audit periodically to confirm consistency between declarations and observations.
- Investigate in response to people's complaints.
- Analyse compliance failure and take measures to rectify the situation.

### **Step 6: Improvements**

- Effect changes as a result of lessons learnt from experience, monitoring and evaluation exercises.
- Effect changes from the feedback of the Councils on the standards and the adequacy of compliance with the Councils' requirements.
- Effect changes as a result of new compliance requirements.

### **Step 7: Report to the Councils**

- Association's compliance plan.
- Methods of implementation of compliance plan.
- Systems for monitoring and evaluation of compliance program.
- Results of the analysis of self-declared forms and audit outcomes.
- Non-compliance and disciplinary action if any taken.
- Unauthorised use of the Councils' trademark and disclosure statements.
- Effectiveness of the existing compliance plan.
- Changes to the compliance plan and reasons for such changes

## 6.1 A PROFORMA AUDIT CERTIFICATE

(An association with a scheme in NSW is used in this example)

### Audit of [Occupational Association] Scheme

#### Scope

We have audited the attached returns for the [name of Occupational Association] for the annual fee period<sup>5</sup> [ to ]. The [name of Occupational Association] is responsible for the preparation and presentation of the returns and the information they contain. We disclaim any assumption of responsibility for any reliance on this report or on the returns to which it relates to any person other than the NSW Professional Standards Council; or for any purpose other than that for which it was prepared.

We have conducted an independent audit of the returns in order to express an opinion on them to the NSW Professional Standards Council. Our audit has been conducted in accordance with Australian Auditing Standards. Our procedures included examination, on a test basis, of evidence supporting the amounts and other disclosures in the returns. These procedures have been undertaken to form an opinion whether in all material respects, the attached returns are presented fairly in accordance with the Council's requirements.

#### Audit Opinion

The audit opinion expressed in this report has been formed on the above basis. In our opinion the information contained in the attached returns and detailed in the table below is presented fairly and in accordance with the underlying records of the [name of Occupational Association].

Quarter	Cumulative no. of members to whom Scheme applies	amount due to PSC <sup>6</sup>	amount paid	date paid	interest due <sup>7</sup> to PSC (if any) as at audit date	interest paid	date paid
1 <sup>8</sup>							
2 <sup>9</sup>							
3							
4							

[SIGNATURE OF AUDITOR]

[DATE OF AUDIT]

<sup>5</sup> Each period of 12 months beginning on the date on which the scheme commenced and on each anniversary of that date - *Professional Standards Regulation 2004* (NSW), clause 3.

<sup>6</sup> List amounts due per quarter, not cumulatively. Requirements for the payment fees are specified in the *Professional Standards Regulation 2004* (NSW), part 2 and specifically clause 6. See also the Council's Policy on the Payment of Fees; for audit certificate requirements see clause 10 of Council's Policy

<sup>7</sup> *Professional Standards Regulation 2004* (NSW), clause 7. Rate is 0.05% per day

<sup>8</sup> Number of members covered at any time during the quarter

<sup>9</sup> Number in quarter 1 plus any additional members covered at any time during the 2<sup>nd</sup> quarter and so on for quarters 3 & 4. See *Professional Standards Regulation 2004* (NSW), clause 7(2).

## 6.2 A PROFORMA RISK MANAGEMENT REPORT

### <Association Name> <Year> Report against 5-year Risk Management Plan <20XX-20XX>

Risk management area: <CONTINUING OCCUPATIONAL EDUCATION>	
Risk no. (risk no. in previous year's report)	
Statement of risk	
Risk ranking (likelihood vs consequences – see	eg matrix, below, or refer to AS/NZS 4360:2004)
Subordinate/related risks	1. 2. 3. (etc)
Risk owner (responsibility allocated within association)	
Impact of risk on association (consequences of failure to mitigate risk)	
Strategic objective of controlling risk (desired outcome)	
Existing control(s)	1. 2. 3. (etc)
Control rating (inadequate/adequate)	
Additional controls needed	1. 2. 3.
Risk treatment plan for next reporting period (actions to implement some/all additional controls identified)	1. 2. 3. (etc)
Status of strategic objective (effectiveness of controls)	
Risk no.	
Statement of risk	
Risk ranking (likelihood vs consequences)	
Subordinate/related risks	1. 2. 3. (etc)
Risk owner (responsibility allocated within association)	
Impact of risk on association (consequences of failure to mitigate risk)	
Strategic objective of controlling risk (desired outcome)	
Existing control(s)	1. 2. 3. (etc)
Control rating (inadequate/adequate)	
Additional controls needed	1. 2. 3.
Risk treatment plan for next reporting period (actions to implement some/all additional controls identified)	1. 2. 3. (etc)
Status of strategic objective (effectiveness of controls)	

The template is simply replicated for each risk identified under the areas of risk in 3.3.2, above

The matrix below suggests a method of ranking risks as low, moderate, high or extreme:

CONSEQUENCE	LOW	MEDIUM	HIGH	VERY HIGH
LIKELIHOOD	<p>A <b>minor impact</b>, which should be possible to be handled at the operational level. It could involve such things as:</p> <ul style="list-style-type: none"> <li>• Minor delays in providing services or achieving performance targets.</li> <li>• Minor reductions in system quality.</li> <li>• Minor dissatisfaction of clients.</li> <li>• Minor adverse financial impact.</li> <li>• Minor breach of accountability requirements.</li> </ul>	<p>A <b>moderate impact</b> which could involve such things as:</p> <ul style="list-style-type: none"> <li>• Significant delays in providing services or achieving key organisational objectives.</li> <li>• Limited dissatisfaction of clients.</li> <li>• Exposure to minor criticism and/or adverse publicity.</li> <li>• Minor damage to reputation.</li> <li>• Moderate adverse financial impact.</li> <li>• Moderate breach of accountability requirements.</li> </ul>	<p>A <b>major impact</b> which could involve such things as:</p> <ul style="list-style-type: none"> <li>• Major delays in providing services or achieving key objectives.</li> <li>• Significant dissatisfaction of clients.</li> <li>• Exposure to significant criticism and moderate adverse publicity.</li> <li>• Moderate damage to reputation.</li> <li>• Significant adverse financial impact.</li> <li>• Breaches of contractual or legislative obligations.</li> <li>• Major breach of accountability requirements.</li> </ul>	<p>An <b>extreme impact</b>: if the risk occurs, the organisation would not be able to effectively perform core activities. It could involve such things as:</p> <ul style="list-style-type: none"> <li>• A critical business failure.</li> <li>• Extensive loss of clients.</li> <li>• Exposure to extensive criticism and adverse publicity.</li> <li>• Extensive damage to reputation.</li> <li>• A major adverse financial impact.</li> <li>• Extensive breaches of contractual or legislative obligations</li> <li>• Extensive breach of accountability requirements.</li> </ul>
<b>VERY HIGH</b> (almost certain) It is almost certain that the event or described result will occur.	MODERATE	HIGH	EXTREME	EXTREME
<b>HIGH</b> (probable) There is a strong possibility that the event or described result will occur	LOW	MODERATE	HIGH	EXTREME
<b>MEDIUM</b> (could happen) While it is not certain, the event or described result could occur.	LOW	MODERATE	HIGH	HIGH
<b>LOW</b> (unlikely) While it is still possible, it is unlikely that the event or described result will occur.	LOW	LOW	MODERATE	HIGH

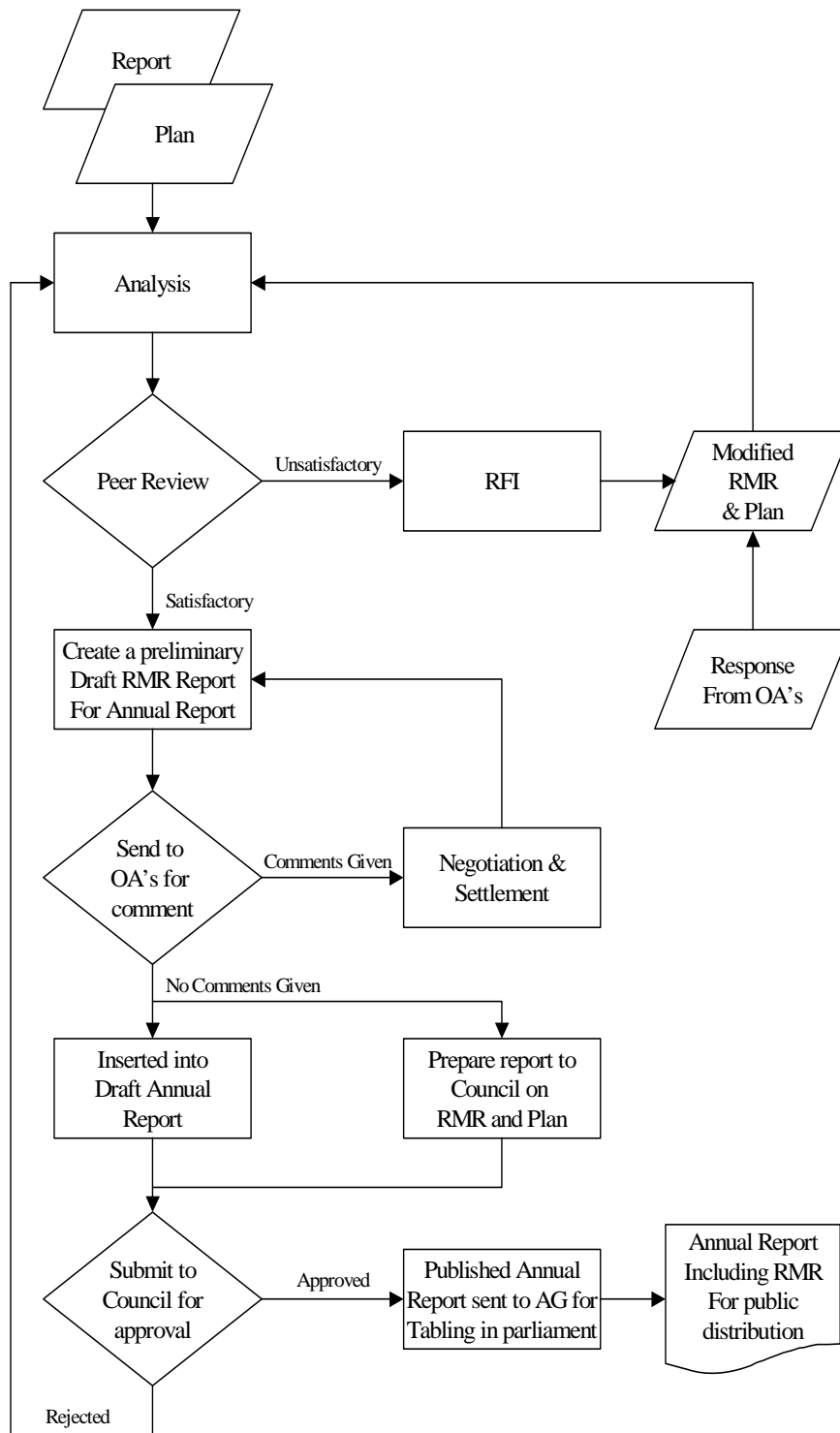
**Claims information** should be summarised in a separate table, such as the one provided below:

No.	TYPE OF CLAIM (type of work; underlying complaint)	AMOUNT CLAIMED	STATUS OF CLAIM (tick one)				AMOUNT PAID	SOURCE OF DATA (tick one)	
			notified	outstanding	court award	settlement		insurance industry	member report

Associations should also provide some narrative, commenting on any apparent trends, and including commentary on the availability and cost of insurance, as reported by members of the association. It is important to relate the data to risk treatment plans that are intended to reduce claims against association members. Data collected by the Councils is always de-identified.

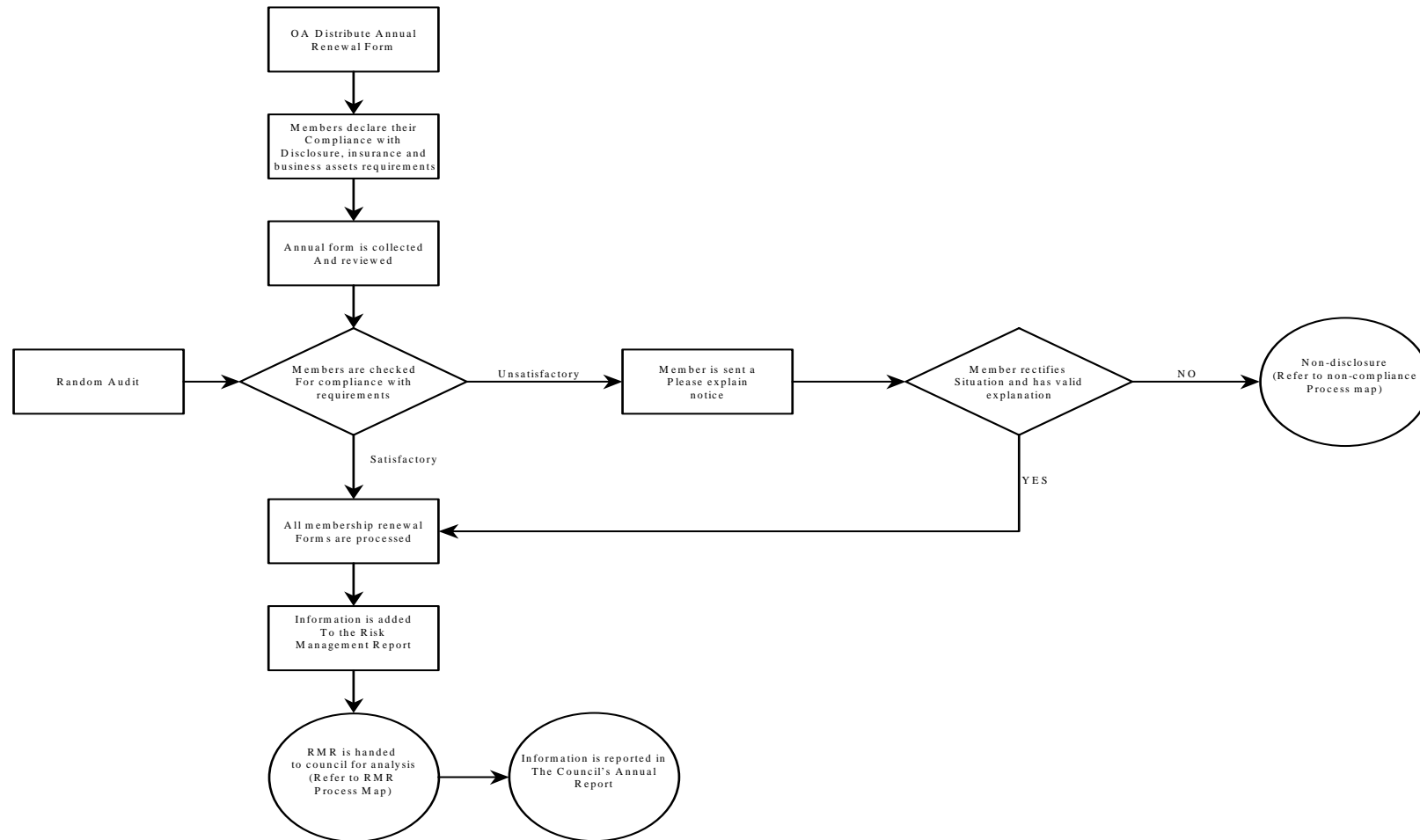
**Appendix 6.3** shows an idealised process map for associations' annual risk management reporting. It is intended that feedback should be provided to associations at different points in the process, to ensure that their reports meet the requirements of the Councils, and to allow associations to comment on the material proposed by the Councils to be included in the Professional Standards Councils' Annual Report, which is a public document.

## 6.3 ANNUAL RISK MANAGEMENT REPORT PROCESS MAP

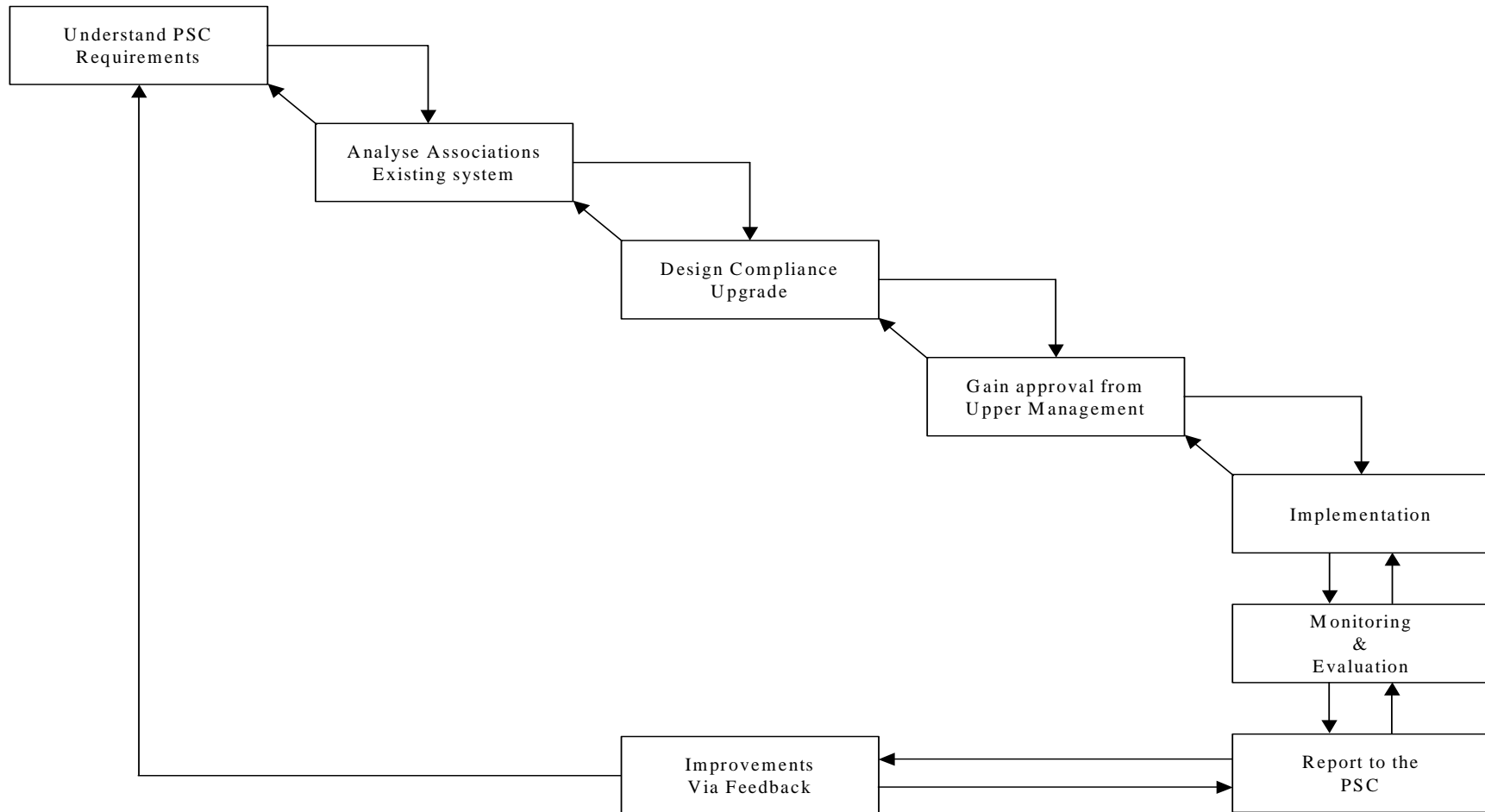


Key: OA = occupational association RFI = request for further information RMR = risk management report AG = Attorney General

## 6.4 COMPLIANCE WITH DISCLOSURE, INSURANCE AND BUSINESS ASSETS PROCESS MAP



## 6.5 ASSOCIATION ACTIVITY DIAGRAM FOR COMPLIANCE



## 6.6 STATUTORY COMPLIANCE REQUIREMENTS

**Note that the following comparisons of compliance requirements under professional standards legislation are provided for general information purposes only and do not constitute legal advice.** Please refer to the relevant Act in your jurisdiction and seek legal advice where necessary.

### DISCLOSURE OF LIMITATION OF LIABILITY

**Relevant sections of legislation: NSW s33, ACT s4.29, Vic s35, Tas s36, SA s35, WA s45, NT s34, Qld s34**

In all jurisdictions, where a person's liability is limited under the legislation, all documents (except business cards) that promote or advertise the person or the person's occupation, which are given by the person to a client or prospective client, must carry a statement that the person's liability is so limited.

- In South Australia, the provision relates to documents that promote the person's "business", not "occupation".
- In all jurisdictions except Queensland, South Australia and Western Australia, non-compliance is an offence that is punishable by 50 penalty units.
- In Queensland, non-compliance is an offence that is punishable by 65 penalty units.
- In South Australia, non-compliance is an offence that is punishable by \$20,000.
- In Western Australia, non-compliance is an offence that is punishable by \$5,000.

In addition, in the Australian Capital Territory, Northern Territory, Queensland, South Australia, Tasmania and Victoria, if a person's liability is limited under the legislation, the person must give (or cause to be given) a copy of the scheme limiting that person's occupational liability to a client or prospective client when requested to do so by the client or prospective client.

- In the Australian Capital Territory, Northern Territory, Tasmania and Victoria, non-compliance is an offence that is punishable by 50 penalty units.
- In Queensland, non-compliance is an offence that is punishable by 65 penalty units.
- In South Australia, non-compliance is an offence that is punishable by \$5,000.
- In the Northern Territory and South Australia, "client" means a person engaging another person to carry out work. If that person acts on behalf of a third party, that person, rather than the third party, is the client.
- In all jurisdictions except Queensland, references to documents include official correspondence ordinarily used by the person in the performance of that person's occupation, and similar documents.
- In Queensland, "document" refers to business correspondence and other similar documents ordinarily used by the person in performing that person's occupation.

- In South Australia, any website that is maintained by or on behalf of the person to promote the person's business must also carry such a statement.
- In all jurisdictions, the legislation provides that regulations may prescribe the form of statement and that a person does not commit an offence if the statement is in the prescribed form.
- In New South Wales, Queensland, South Australia and Western Australia, regulations are in force prescribing that the statement must be "Liability limited by a scheme approved under Professional Standards Legislation." In Victoria (Sch 4, Clause 7) and the Northern Territory (Sch 4, Clause 7), the relevant legislation also requires that the statement be in this form.
- In addition, in New South Wales, Queensland and Western Australia, regulations prescribe that statements must be printed in a size not less than the face measurement of Times New Roman typeface in 8 point. In Victoria (Sch 4, Clause 7) and the Northern Territory (Sch 4, Clause 7), legislation also requires that the statement be in this form.

Note: In the Northern Territory, Queensland, Tasmania and Victoria, a failure to disclose that a person's liability will mean that the person's liability will not be limited under the scheme.

## REPORTING ON RISK MANAGEMENT STRATEGIES

**Relevant sections of legislation: NSW s37, ACT s4.33, Vic s39, Tas s40, SA s39, WA s49, NT s38, Qld s38**

In all jurisdictions, an occupational association must provide the Council with information regarding its risk management strategies if the Council requests such information.

- In Tasmania (s. 40(1)), this also applies to information regarding the occupational association's occupational standards.
- In all jurisdictions, the occupational association must also provide the Council with an annual report about its implementation and monitoring of risk management strategies, the effect of those strategies and changes made or proposed to be made to those strategies.
- In Tasmania (s40(2)), the annual report must also be provided to the Minister if requested by the Minister.
- In all jurisdictions, the occupational association's annual report is incorporated into the Council's annual report in a form determined by the Council.
- In all jurisdictions except New South Wales and Western Australia, the occupational association's annual report must include details of findings or conclusions by a committee established by the occupational association under the relevant provision about monitoring claims.

## COMPLIANCE AUDITS

**Relevant sections of legislation: ACT s4.34, Vic s40, Tas s41, SA s40, NT s39, Qld s39**

In all jurisdictions except New South Wales and Western Australia, there are provisions dealing with compliance audits.

- A compliance audit is an audit of compliance by members, specified members, or a specified class or classes of members, of the occupational association with the occupational association's risk management strategies.
- In Tasmania (s. 41(1)), this includes compliance with the occupational association's occupational standards.
- In all jurisdictions except New South Wales and Western Australia, a compliance audit may be conducted at any time by the occupational association or Council. However, the occupational association must conduct a compliance audit on Council's request.
- If the Council conducts the compliance audit, the occupational association must provide any information or copies of documents reasonably requested by Council relating to conducting the audit (and ensure that its members provide such information).
- In addition, Council must give a copy of the compliance report to the occupational association.
- In Tasmania (s. 41(2)(b)), the Council must also provide the Minister with a copy of the compliance report if the Minister requests it.
- In all jurisdictions except New South Wales and Western Australia, if the occupational association conducts the compliance audit, it must give Council a copy of the audit report.
- In Tasmania (s. 41(3)), the occupational association must also provide the Minister with a copy of the compliance report if the Minister requests it.

#### REQUIREMENT OF OCCUPATIONAL ASSOCIATION TO PROVIDE INFORMATION

**Relevant sections of legislation: NSW s44, ACT s4.50, Vic s47, Tas s48, SA s47, WA s13, NT s46, Qld s60**

In all jurisdictions, the Council has power to, by written notice, require an occupational association whose members are either subject to an existing scheme, or which seeks Council's approval (or, in the Australian Capital Territory, recommendation) for a scheme, or an amendment or revocation thereof, to give the Council information that the Council reasonably requires to exercise its functions.

- In Queensland, notice of this requirement must be signed and specify a time (at least seven days) within which the information must be provided.
- In New South Wales, the Australian Capital Territory and Northern Territory, non-compliance with this requirement is an offence.
- In Queensland, the occupational association must not contravene the notice without reasonable excuse.
- In South Australia, Victoria and Western Australia, legislation simply states that an occupational association must comply with the notice.
- In Tasmania, there is no equivalent provision.
- The penalty for non-compliance is as follows:

- New South Wales, the Australian Capital Territory and Victoria - five penalty units.
- Northern Territory – 20 penalty units
- Queensland – 35 penalty units
- South Australia - \$10,000
- Western Australia - \$500.

## 6.7 GENERAL TERMS AND CONDITIONS OF USE OF TRADEMARKS

### Definitions

In the licence, the following definitions apply:

*Authorised User* means persons to whom a scheme applies and for so long as a scheme applies to that person.

*Council* means a Council constituted pursuant to professional standards legislation and includes the NSW Council.

*NSW Council* means the body constituted pursuant to s39 of the *Professional Standards Act 1994* (NSW).

*Occupational Association* means an association for which a scheme under professional standards legislation is in force from time to time.

*Person* means an individual, a group of individuals or an incorporated body.

Professional standards legislation means one or more of the following:

- *Professional Standards Act 1994* (NSW)
- *Civil Law (Wrongs) Act 2002* (ACT)
- *Professional Standards Act 2003* (Vic)
- *Professional Standards Act 2005* (Tas)
- *Professional Standards Act 2004* (SA)
- *Professional Standards Act 1997* (WA)
- *Professional Standards Act 2004* (NT)
- *Professional Standards Act 2004* (Qld)

*Scheme* means a professional standards scheme published in the Gazette under professional standards legislation.

*Trade Mark(s)* means the Trade Mark(s) set out in Schedule 1.

### Ownership and authority to license use of the Trade Marks

The NSW Council is the owner of the registered Trade Marks COVER OF EXCELLENCE and Device® (registered Australian trade mark no.814346) and COVER OF EXCELLENCE® (registered Australian trade mark no. 1000604) set out in Schedule 1.

The NSW Council has licensed each Council to use and to sub-license (including by sublicensing occupational associations to use and to sub-license) the use of the Trade Marks to Authorised Users.

### Persons with authority to use

Authorised Users are hereby granted a royalty-free non-exclusive licence to use the Trade Marks in the usual conduct of their business or profession, subject to the terms of use set out in the licence.

### **Acceptance**

Any use by an Authorised User is deemed to be acceptance of the terms of the licence.

Any use of the Trade Marks other than in accordance with the terms of the licence (whether used by the Authorised User or where the Authorised User has permitted or suffered such use), shall constitute:

- (a) an infringement of the Trade Mark by the Authorised User; and
- (b) a breach of the licence by the Authorised User entitling the Council to terminate the licence in accordance with clause 6.

### **Terms of use**

The Authorised User acknowledges that the NSW Council owns all intellectual property rights in the Trade Marks and is the registered owner of the Trade Marks in Australia and undertakes not to take any action which might:

- (a) impugn, invalidate or put in dispute the NSW Council's title to the Trade Marks;
- (b) oppose any application for registration or renewal of registration of the Trade Marks or invalidate or challenge the registration of the Trade Marks;
- (c) support an application to remove the Trade Marks as registered trade marks; or
- (d) cause any Registrar of Trade Marks to require a disclaimer of a monopoly in any trade mark or part thereof, used or applied for by the NSW Council,

nor will the Authorised User assist any other Person directly or indirectly in any of the above acts.

The Authorised User acknowledges and agrees that the Council will exercise quality control over the use of the Trade Marks and that the Trade Marks must only be used in accordance with the terms of the licence.

Without limiting clause 5.2, the Authorised User must use the Trade Marks strictly in accordance with:

- (a) the terms of use set out in Schedule 2;
- (b) the style guide set out in Annexure A to the licence; and
- (c) all such reasonable directions as are from time to time notified to the Authorised User by the Council.

From time to time but in any case not less than once every twelve months, the Authorised User may be requested to submit to the Council (directly or via its Occupational Association), at its own expense, samples of all promotional material, advertising and stationery in or on which Trade Marks are used. Where such a request is made the Authorised User must submit the materials in such form and within such time as is reasonably specified in the request.

If the Authorised User suspects any infringement or threatened infringement of any of the Trade Marks or any misleading or deceptive conduct relating to the Trade Marks it must immediately notify the Council by giving full particulars of all relevant circumstances. The

Authorised User must at its own expense provide all information and assistance, which the Council may reasonably require in any proceedings commenced by the Council arising from the infringement or threatened infringement.

Regulations made under the Professional Standards Legislation prescribe a statement of words for practitioners to use to ensure that consumers are aware of practitioners' participation in a professional standards scheme, being:

"Liability limited by a scheme approved under Professional Standards Legislation".

The statement must be printed in a size not less than the face measurement of Times New Roman typeface in 8 point. Failure to include this statement on all documents, except business cards, given by the person to a client or prospective client that promote or advertise the person or person's occupation, including official correspondence ordinarily used by the person in the performance of the person's occupation and similar documents, results in sanctions under the Professional Standards Legislation.

For the avoidance of doubt, note that the use of the Trade Mark COVER OF EXCELLENCE<sup>®</sup> and Device does NOT replace the requirement for a disclosure to be provided to clients. The Trade Mark COVER OF EXCELLENCE<sup>®</sup> and Device is an optional image to indicate high standards of service and consumer care.

### **Termination**

The Council may terminate the licence with immediate effect by written notice for any reason whatsoever, including but not limited to non-compliance with any of the above terms by the Authorised User.

On termination or expiration of the licence the Authorised User will immediately and permanently cease all use the Trade Mark(s) or any marks substantially identical with or deceptively similar to the Trade Mark(s).

Termination of the licence is without prejudice to any accrued rights or remedies of the Council.


### **Notices**

A notice under the licence will be deemed to be served:

- (a) in the case of delivery in person - when delivered to the recipient's address specified in the licence;
- (b) in the case of delivery by post - within three business days of posting;
- (c) in the case of delivery by facsimile - at the time of dispatch if the sender receives a transmission report which confirms that the facsimile was sent in its entirety to the facsimile number of the recipient; and
- (d) in the case of delivery by email - on receipt of confirmation by the sender that the recipient has received the email.

## Schedule 1

### Trade Marks

Trade Mark	Registration Number	Date of Registration	Classes	Goods and Services
COVER OF EXCELLENCE and Star Device®  	814346	18 November 1999	35, 42	Class: 35 Providing management advice and assistance to occupational associations concerning codes of ethics, quality management, risk management, resolution of complaints by clients, discipline of members, and continuing occupational education  Class: 42 Certification of occupational liability insurance and professional standards for the purpose of limiting occupational liability of associations and their members
COVER OF EXCELLENCE®	1000604	5 May 2004	35, 42	Class: 35 Providing management advice and assistance to occupational associations concerning codes of ethics, quality management, risk management, resolution of complaints by clients, discipline of members, and continuing occupational education  Class: 42 Certification of occupational liability insurance and professional standards for the purpose of limiting occupational liability of associations and their members

## Schedule 2

### Trade Marks - Terms of Use

The use of the COVER OF EXCELLENCE® Trade Mark (registration number: 1000604) in the text of correspondence must at all times include the registered (®) symbol.

The Authorised User must ensure that a legend in the form as set out below appears whenever the COVER OF EXCELLENCE® or the COVER OF EXCELLENCE & Device® Trade Marks are used:

*“Cover of Excellence® and Cover of Excellence and Star Device® are registered Trade Marks of the NSW Professional Standards Council.”*