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## **1. Old Code Framework (Code + D&DRP) -v- Code 5 Framework (Code 5 + PCGIG)**

### **1.1. Effect on obligations, responsibilities, & entitlements**

#### **a. RCSA Members**

Members' obligations to comply with RCSA's currently authorised Professional Conduct Regime derive from the contract that exists between Members and the RCSA and Members *inter se* as a recognised legal incident of membership of a company.

To that extent they may be regarded as a condition of Membership, bringing a Member within the disciplinary jurisdiction of RCSA as set out in its Constitution - See Arts 2.2 and 2.8.

The position remains the same under the Code 5 framework, though the tone and emphasis has shifted from one of discipline to one of enhancing professionalism. Nevertheless, the disciplinary jurisdiction of RCSA with regard to its Members, established by Art 2.8 of the Constitution is still referenced and relied upon (Code 5 page 3, lines 17-18) and at PCGIG 1.3, lines 13-18).

#### **b. Clients of RCSA Members**

Clients do not have direct obligations or responsibilities under either the Old Code or Code 5. However, contractual arrangements between Members and clients may prudently require that clients do not require Members to act in a manner that would breach Members' Code obligations and responsibilities. To that extent, the less prescriptive Code 5, not being a "bright line", rules-based Code may be less clear to some clients of Members.

Against that, is the prospect that a values-based Code, such as Code 5, provides a better framework for transformative conversations about professional standards expected of Members and an improved evaluative basis for discerning the boundary between of professional conduct and unsatisfactory conduct.

On the subject of such evaluations, it may be helpful to recall the comments of the Full Court of the Federal Court of Australia in the context of a discussion about unconscionable conduct:

*It is an evaluation which must be reasoned and enunciated by reference to the values and norms recognised by the text, structure and context of the legislation, and made against an assessment of all connected circumstances.*

Here, the evaluation is made against the text of the Code and Guidance Materials. The values articulated in Code 5 reflect the view that:

*Trickery and sharp practice impede commerce by decreasing trust and increasing risk. Good faith and fair dealing promote commerce by supporting the central conception and basal foundation of commerce: a requisite degree of trust. Business people understand these things<sup>j</sup>.*

The ability of business people to understand the Code 5 “values and norms” is supported by the type of Guidance Materials contemplated by the Code 5 framework and by the enhanced pathways to help Members achieve the requisite standard of professionalism that are provided by the PCGIG.

Code 5, principle 9, *Effective Complaints Handling* improves the assurance of access to proper and robust remedies, whilst the greater range of processes provided by the PCGIG improves the assurance that RCSA Members will meet the standards of professionalism required by the Code.

### **c. Workseekers**

Workseekers’ entitlements are historically established in legislative safety net, work health & safety, consumer protection, privacy, and human rights measures, as well as other compliance obligations falling on employers. They have not historically been created or catalogued in Codes such as RCSA’s Code for Professional Conduct.

To that extent, the Code 5 framework takes no entitlements away from Workseekers. Rather, it provides a more effective assurance that RCSA Members will meet the standards of professionalism required by the Code, displaying the values which it articulates.

## **1.2. What are the obligations to comply with RCSA’s currently authorised Professional Conduct Regime; how will they operate under proposed authorisation AA1000435?**

### **a. Changes between the Old Code and the less prescriptive Code 5; and the reasons for these changes.**

#### **Obligation to comply**

The obligation upon Members to comply with RCSA’s Code (in all its iterations) derives from Arts. 2.2 and 2.8 of RCSA’s Constitution, and may be regarded as a legal incident of the contract (whether express or implied) that exists between a company and its members and between members *inter se*.

This is made clear in Part D, *Adoption*, art. 16 of Code 5:

#### **16. Contract**

*Acceptance by RCSA of a Member's statement of commitment shall create a binding and enforceable contract:*

- a. between Members and RCSA; and*
- b. between Members*

*effective upon the Member's applying for, obtaining, or retaining membership after its terms have been notified to the Member at the address for notices last noted in RCSA's records, that the Member, guided by this Code, will conform his, her or its conduct to a standard that is becoming of a Member and so as not to prejudice the interests of RCSA.*

In support of that provision, Statement of Commitment is defined in Code 5:

**Statement of commitment**

*means a statement of commitment to meet the standard of professional conduct required by the RCSA Code and to be accountable through RCSA's Professional Conduct Grievance Intervention Guidelines, which may be in the form approved by the Board of RCSA from time to time.*

There is no change in the source of Members' obligation to comply under proposed authorisation AA 1000435. The obligation remains sourced in arts 2.2 and 2.8 of RCSA's Constitution and is conceived of as stemming from the same root - namely the object for which RCSA is formed - to promote excellence, enterprise and integrity in the businesses of all Members and of individuals engaged by those businesses.

**The Old Code**

The core precept of the Old Code was the imperative to act in a manner that was becoming of a Member and, to that end, to observe a high standard of ethics, probity and professional conduct (See Old Code General Principle 1).

The Old Code, by General Principle 1, further embellished the imperative by explaining that the high standard spoken of required not simply compliance with the law; but extended to honesty, equity, integrity, social and corporate responsibility in all dealings and holds up to disclosure and to public scrutiny.

The Specific Provisions of the Old Code thereafter selectively set out some of the obligations of Members to which RCSA sought to draw specific attention.

Over the life of the Old Code, in its several iterations, RCSA received complaints or allegations - often informally and not always in respect of Members - of various forms of misconduct, which it catalogued as forms of labour market exploitation related to industry conduct in its 2017

submission to Treasury in support of a proposal that consideration be given to the development of prescribed industry code.

That conduct included:

- Baseless claims to “candidate ownership”
- Baseless claims to a right to represent employers
- Blacklisting
- Candidate and client poaching
- Charging of dubious “service” or “affiliation” fees to job seekers
- Contested multi-party fee disputes where there are no, or only dubious, grounds for maintaining a fee claim
- “Deemed” contractual acceptance or “catching” provisions
- Discrimination against work seekers
- Disguised work relationships (“sham contracting”)
- Disruptive supplier transitions
- Dubious fee arrangements - where charged to work seekers - sometimes for bogus training or job notification services
- “Employment shaping” through multi-hiring and other means to evade Fair Work entitlements
- Espionage in the form of employment services consultants posing as candidates or clients to access information about job postings and candidates;
- Exploitation of vulnerable work seekers through denial of their proper work entitlements and other means
- False documentation to procure advantageous immigration outcomes
- Fine print exclusions and exclusivity provisions
- Harassment of job seekers with unwanted phone calls, emails, and text messages
- Information asymmetries affecting job seekers - including withholding information about the remuneration on offer or providing false or misleading information
- Invasive collections of personal information
- Job scraping/ job skimming involving agency “rebranding” of job postings “owned” by an employer or another agency
- “Long tail” fee claims – relating to “introductions” alleged to have been made up to two years prior to a job being obtained

- Misleading and deceptive representations to immigration authorities to procure favourable work-related immigration outcomes
- Misleading job ads
- Non-sustainable and arguably predatory pricing
- Offshoring of practices not conforming to Australian or international standards
- "Phoenix" operations
- Poor record keeping and record destruction practices
- Poorly scoped services agreements
- Pre-emptive adverse credit reporting for non-payment of contested fees
- Professional knowledge deficits
- Refusal or failure to undertake voluntary dispute resolution processes in good faith or at all
- Restraints of trade upon work seekers in the form of undisclosed temp-to-perm or agency switching fee arrangements
- Résumé spamming
- Sub-standard work seeker representation (candidate care)
- Threatened predatory and retaliatory targeting of a customer's workforce as a means of procuring "preferred supplier agreements"
- Uncertainty about work seeker suitability assessment processes and responsibilities
- Uncertainty and equivocation about who has responsibility for payment of wages and safety matters
- Uncertainty as to the existence and scope of agreements to supply and acquire services
- Under-payment or unfair withholding of genuine pay and entitlements
- Under performance in relation to "replacement guarantees"
- Unlicensed trading
- Unprovisioned risk purchasing
- Unsolicited supply of services with invoicing for unsolicited services.

Labour market exploitation was thus identified by RCSA as a poly-centric problem that properly engages competition & consumer, equal opportunity, privacy, workplace relations, work health & safety, revenue, and immigration regulators; as well as their industry, union, and consumer stakeholders.



Whilst the Old Code was set out in prescriptive language, in reality, it was only ever a Code *for* Professional Conduct; not a Code *of* Professional Conduct. It would have been impracticable to have attempted to codify all the laws, professional standards and guidelines relevant to Members' conduct. For example, the Old Code said nothing about discrimination. Instead, there was a general command to Members to comply with all legal, statutory and government requirements relating to their Professional Practice (Old Code Principle 4.1 *Legal Compliance*). That broad requirement roped in anti-discrimination laws as well as employment agency laws, migration laws, revenue laws and so on.

Of course, the Old Code, itself, added nothing to the force of those laws and requirements, which were sufficient of themselves to bind Members and non-members alike.

What the Old Code attempted to do, by that provision, was to create a nexus between "*all legal, statutory and government requirements*" and RCSA's disciplinary jurisdiction over its Members (established under Art 2.8 of its Constitution) such as would allow RCSA, for example, to impose sanctions on a Member who had engaged in conduct unbecoming of a Member such as unlawful discrimination. As previously explained (15/2/19):

*The Old Code therefore developed as a rules-based Code, which required Members to observe "all laws" as a means of creating a point of interaction with RCSA's Disciplinary and Dispute Resolution Procedures (D&DRP).*

Whilst the Old Code did provide some guidance to Members and the public, the Old Code framework was geared to respond, reactively, to legal non-compliance. Both the Old Code and the Disciplinary & Dispute Resolution Procedures that were created to support it increasingly took on a legalistic orientation, relying ultimately upon an adjudicative model of dispute resolution (commercial arbitration) and the risk of an adverse award followed by the imposition of domestic sanctions imposed by the RCSA Board as the principal means of accountability and deterrent in relation to unsatisfactory conduct by Members.

### **A need for discernment and recalibration**

Since 2014, the key question for RCSA, as the peak industry association for an emerging profession, became one of discerning the optimal role and design of its jurisdiction over the conduct of its Members, having regard to the vast array of regulators, inquiries, task forces, and legislative reform and licensing proposals active at that time.

The need for such discernment arose because of the regulatory and legislative developments which, in recent years, have not only seen the introduction of new initiatives, such as labour hire licensing, modern slavery protections, and extended whistleblowers protections; but also, of

nationalisation and harmonisation of laws that previously operated inconsistently at state and territory level. WHS laws, workplace laws, privacy laws, and the Australian Consumer Law are clear examples.

Additionally, increases in the range of penalties in many regulatory areas - including e.g. the imposition of terms of imprisonment in labour hire and work health and safety areas; and substantially increased fines in most areas - have meant that a rules-based Code supported by voluntary domestic enforcement procedures no longer sits comfortably alongside more rigorous statutory enforcement models.

Simultaneously, industry-led initiatives in the form of tailored and specific industry certification programmes, of which RCSA's own StaffSure Standard (participation in which is open to all industry participants regardless of whether they are RCSA Members or not) is a prime example, inform users of workforce services by making 'reputable' suppliers distinct from those less so<sup>1</sup> and play an increasingly important role in standard setting for those suppliers and acquirers of workforce services, including Workseekers, who rely upon them. Nevertheless, the Migrant Worker Taskforce reported that:

*...there are concerns that StaffSure will have limited impact in correcting poor behaviour in high-risk sectors. The many small labour hire operators that operate in these sectors would have little incentive or ability to invest in meeting the rigorous certification standard while the drivers for potential unscrupulous practice remain. As such, certification alone will be unlikely to capture unscrupulous labour hire operators, including those operating in the black market, in any meaningful way.<sup>2</sup>*

There is thus a need to ensure that membership of RCSA, and adherence to a Code for Professional Conduct designed as a statement of professional values and values of operational integrity, assures a level of professionalism that extends to all Members, distinguishing them, by virtue of their membership and irrespective of certification, from suppliers who are not Members of RCSA or any comparable association.

### **The Code 5 solution**

The Code 5 solution was to recalibrate the Code for the Professional Conduct of Members as one that articulates a standard of professional conduct and calls upon Members to develop its values of personal professionalism and to embed them in the conduct of their workforce services dealings, by measures appropriate to their size and circumstances, so as to assure the operational integrity of their organisations.

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<sup>1</sup> Report of the Migrant Workers' Taskforce March 2019, page 104.

<sup>2</sup> Report of the Migrant Workers' Taskforce March 2019, page 104.

In summary, Code 5 articulates personal standards of:

- Diligence and competence
- Trustworthiness
- Respect
- Professional knowledge
- Cooperation.

It articulates operational standards of:

- Confidentiality
- Certainty of engagement
- Effective complaints handling
- Social sustainability
- Assurance
- Continuous disclosure.

Code 5 directs Members:

- to meet the Code standard of professional conduct;
- to avoid involvement in unsatisfactory professional conduct; and
- to be accountable to RCSA, through enforcement guidelines, for their conduct.

It should be apparent from the foregoing that the obligation upon Members to comply with Code 5, understood in terms of Members' accountability to RCSA for their professional conduct, continues to derive from Arts. 2.2 and 2.8 of RCSA's Constitution.

There is thus no change in the source of Members' obligation to comply under proposed authorisation AA 1000435, or in the source of Members' accountability. The obligation remains sourced in arts 2.2 and 2.8 of RCSA's Constitution and is conceived of as stemming from the same root as Members' accountability under the Old Code - namely the object for which RCSA is formed - to promote excellence, enterprise and integrity in the businesses of all Members and of individuals engaged by those businesses.

However, whereas the Old Code sought to create a nexus between legal non-compliance and RCSA's enforcement mechanisms, Code 5 seeks to create a nexus between overarching standards of professionalism and the enforcement mechanisms – or, if one prefers, to reframe non-compliant or non-conforming conduct in terms of professional standards rather than abbreviated legal rules.

**b. Changes between the DDRP and PCGIG (noting that the PCGIG provides more pathways for complaints made to RCSA, among other changes).**

RCSA's Constitution defines "Disciplinary and Dispute Resolution Procedures" as the disciplinary and dispute resolution procedures adopted by the Board and as varied by the Board from time to time.

They are defined by their function, not by their title. That is clearly indicated in Code 5:

***Professional Conduct Grievance Intervention Guidelines (PCGIGs)***  
*are the procedures approved by the RCSA Board from time to time, regardless of how they may be styled, for implementing the RCSA Code.*  
*Example: The Disciplinary & Dispute Resolution Procedures which are referred to in RCSA's Constitution would be PCGIGs.*

The PCGIG is therefore to be understood as RCSA's replacement procedure for resolving disciplinary and dispute matters. The following are some of the main changes between the old D&DRP and the PCGIG.

- designed the PCGIG to be more relational and transformative than previous versions - throughout
- adopted more of an explanatory style in place of the rule making style of previous versions - throughout.
- focused the PCGIG much more strongly on promoting professional conduct rather than upon detecting and punishing non-compliance – throughout
- reduced drift toward commercial arbitration as the destination for the resolution of grievances involving non-members - throughout
- arranged the PCGIG somewhat more logically than previous versions - throughout.
- introduced the role of the Professional Conduct Advocate – a type of support person who helps a Member to appreciate and meet their professional conduct responsibilities; PCGIG 1.6.7
- included a requirement for the Board to publish periodic statements of strategic priority and intent regarding its Professional Conduct Framework PCGIG 2.1
- added provisions for developing interpretative & operational guidance materials – which includes, for example, a transition guideline, PCGIG 2.2

- recalibrated the Industry Improvement Statement process as a Consensus Statement process able to deal with systemic issues; PCGIG 2.3
- introduced concepts of “emotional due process” and “conflict coaching” based on contemporary work in the field of conflict resolution studies. PCGIG 3(3)(b) and 6
- established a preference for the PCRC to proceed by investigative interview without the necessity for lawyers – in order to lower the tension and get to the gist of matters more quickly PCGIG 3(3)(f)
- brought forward the ability to decline a grievance intervention for valid reasons. PCGIG 5
- set up a triage point in the registry that allows grievances to be allocated to one of 4 pathways – Neutral Evaluation – Diversion & Monitoring – Registry Intervention – Investigation; PCGIG 6(1)
- introduced the notion of a “caution” which is akin to the “flag” that may be raised under StaffSure. Its detail has been developed here and is supported by a Protocol. PCGIG 6(3) and (4)
- strengthened counselling procedures by linking them to the PCRC – including PCRC linkage for conduct recommendations PCGIG 6.3.2
- introduced a summary show cause procedure that operates so that if the Member shows cause why it should not be suspended during an investigation or why a caution should not be raised against it, the investigation must terminate in favour of less intrusive and adversarial resolution methods. PCGIG 6.4.2
- recalibrated the role of the Ethics Committee (now the Professional Conduct Review Committee) to give it a more hands on role in being able to guide the conduct of members PCGIG 6.4.2

None of the changes affect Members' obligations to comply with the Constitution or the Code.

### **Confidential Examples**

**This section is provided on a confidential basis**

*[Removed from public version]*

### **c. Detailed explanations for specific changes between the Old Code and Code 5, and the DDRP and PCGIG**

**Art. 4(c) of Code 5: *The article refers to a level of continuing professional development prescribed by RCSA. Please indicate where this is prescribed.***

RCSA's Professional Accreditation Framework establishes criteria for varying levels of professional membership.

[https://www.rcsa.com.au/Web/Membership/Benefits\\_of\\_Individual\\_Membership/Accreditation\\_Framework/Web/Membership/Accreditation\\_Framework.aspx](https://www.rcsa.com.au/Web/Membership/Benefits_of_Individual_Membership/Accreditation_Framework/Web/Membership/Accreditation_Framework.aspx)

The level is dependent upon a Member's training and experience. Under the Old Code, the Members' CPD responsibility was expressed:

***Principle 7 - Professional Knowledge***

1. *Members must work diligently to develop and maintain a satisfactory and up to date level of relevant professional knowledge and, where required by RCSA's By-Laws, maintain a Continuing Professional Development program to the level prescribed by the RCSA Levels and Criteria of Professional Membership issued from time to time.*

RCSA By-Law 2.4. *Professional Renewal (other than Life & Honorary)* provides:

- a. *Each year Professional Members (other than Life and Honorary) will be required to renew their commitment to the continuing professional development program ("CPD Commitment") and demonstrate that they have maintained a Continuing Professional Development program ("CPD Maintenance") to the level prescribed by the RCSA Levels and Criteria of Professional Membership issued from time to time.*
- b. *Professional Members (other than Life and Honorary) will be sent a 90 day reminder on their CPD Commitment and CPD Maintenance requirements; and a 30 day reminder before the expiry date of their registration as a Professional Member.*
- c. *Should the required CPD Commitment not be renewed, or should the Member be unable to demonstrate that he/she has maintained the required Continuing Professional Development Program, then the Accreditation will be deemed expired and the individual may need to re-apply for assessment by the CAP.*

The CPD Commitment for Professional Members is presently set at 25 points per year. Full details are available on the website here:

<https://www.rcsa.com.au/documents/learning/CPD%20Info%20Kit.pdf>

Moreover, all Members are required to undertake RCSA Code training via the online training platform every two years.

The requirement for a satisfactory level of professional knowledge is expressed in Code 5 Part A.4 as an aspect of personal professionalism.

Under Code 5, RCSA will continue to state the CPD requirements for professional accreditation.

The Code 5 framework provides more flexibility to tailor the requirement more specifically to a Member's business model (e.g. placement services, on-hire etc) and consistently with the Board's statement of strategic priority and intent.

**Art. 12 of Code 5: How, where and when will RCSA members disclose events described in section 12?**

The Code 5 self-disclosure responsibility corresponds to Old Code, Principle 8

***Principle 8 – Good Order***

1. *A Member must bring to the attention of the RCSA at the earliest possible time any material concern, which the Member has regarding the Member's or another Member's conduct in Professional Practice.*
2. *Concerns regarding Member's conduct in Professional Practice must be referred to the RCSA Ethics Registrar to be dealt with in accordance with the D&DRP*

Under the Old Code, the concept of a *material concern*, which the Member has regarding the Member's conduct was somewhat vague.

The intent of Article 12 of Code 5 is that disclosure of any matter which could reasonably be expected to reflect adversely on the character or reputation of the Member, the Association, or the Industry should be made to RCSA. The responsibility parallels similar responsibilities in other professional and licensing settings, where self-reporting as to matters of fitness and propriety are mandated – e.g under labour hire licensing schemes (e.g. *Labour Hire Licensing Act 2017* (Qld), s.40).

The notification would be treated as a self-disclosed expression of a grievance under PCGIG 4.

RCSA has a discretion to intervene under PCGIG 5 and, if an intervention is to occur, the matter would be placed on the Pathway/s considered appropriate under PCGIG 6.

**Rule 6.4.7 5. of the PCGIG and 3.4.3 of the DDRP: Why are Arbitrators no longer able to recommend sanctions or awards?**

The recommending of sanctions would have involved a two-stage process somewhat in the nature of finding of contravention followed by a "sanctions hearing", in which submissions on sanction might be made to the arbitrator in order to ensure that any recommendation was properly considered.

The process was considered unduly lengthy and expensive when conducted as a commercial arbitration - most especially because there was no requirement on the Board to adopt the recommendation, the imposition of sanctions being viewed always as a governance matter for the Board.

PCGIG 6.4.7.5 avoids the additional delay and cost of a "sanctions hearing" conducted before a commercial arbitrator, who has no power to impose sanctions and reserves to the Board the power to deal with the imposition of sanctions.

PCGIG 6.4.7.5 also acknowledges the potential for an arbitrator's non-binding inquiry and recommendations about sanctions to affect the conduct and the outcome of related criminal, civil, or statutory proceedings and seeks to avoid that further risk.

**Rule 3. 2. of the PCGIG and 9.2 of the DDRP: *Why are non-member participants to grievances now required to comply with the Guidelines when they previously needed only to comply with directions from the Ethics Committee?***

The reason is that, under the PCGIG, non-Member participants may participate in pathways other than just Professional Conduct Review Committee (Ethics Committee) investigations. For example, a non-Member participant may participate in a monitored complaints-handling (PCGIG 6.2.2) or corrective action (PCGIG 6.2.3) diversion; or in a Registry directed intervention process of structured listening (PCGIG 6.3.1) or mediation (PCGIG 6.3.3). The PCRC (EC) would not be engaged in those processes and would not have issued any directions. Participation is therefore conditioned on compliance with the Guidelines.

**Rule 1.6.2. c. of the PCGIG: *What are "Grievance Intervention Protocols", a term that does not appear to be defined or used again throughout the application or its attachments?***

Grievance intervention protocols are protocols and procedures that have been developed, or are to be developed, to support the operation of the PCGIG. For example, the PCGIG (and the D&DRP) refer to the giving and acceptance of undertakings in satisfaction of RCSA's professional conduct interest in a Member's conduct that gives rise to a grievance.

An accompanying protocol was developed to ensure rigour and transparency in the process. A copy is attached (**Attachment A – Code 5 Guideline – Undertakings**). If authorisation is granted to the Code 5 framework, it would be reviewed and incorporated into the Code 5 regime as a Grievance Intervention Protocol. (see PCGIG 6.2.4.2)

***Please explain these protocols and describe the role they would play in RCSA's Professional Conduct Regime.***

As mentioned above, Grievance Intervention Protocols support the operation of the PCGIG. They provide the flexibility necessary to develop



detailed procedures for applying the PCGIG to various situations that may occur. RCSA has developed these protocols now and attach them here as examples (**Attachment B – Professional Conduct General Protocol**).

For example, PCGIG 6.3 and 6.4 speak of "cautions" that may be raised on the register. The concept was developed with the ACCC's power to issue "public warnings" under s. 51ADA in mind.

The PCGIG establishes a show cause procedure (PCGIG 6.4.2) but does not provide guidance to a Professional Conduct Review Committee about *when* or *how* it should exercise its discretion to direct that a caution be noted against a Member on the Register. A Grievance Intervention Protocol fills that gap.

***Please provide a copy of these Protocols***

- Undertaking Protocol (**Attachment A – Code 5 Guideline – Undertakings**)
- Cautionary Notification Protocol (**Attachment B – Professional Conduct General Protocol**)
- Regulatory Referral Protocol (General) (**Attachment B – Professional Conduct General Protocol**)
- Protocol for Continuous Disclosure (**Attachment B – Professional Conduct General Protocol**)

Any additional protocols would be developed consistently with the manner in which Professional Conduct Grievance Interventions are to be generally conducted (see PCGIG 3.3) and subject to review by the Professional Conduct Council, whose role is relevantly described at PCGIG 1.6.6(a):

- a. reviews periodically the Code, these Guidelines, significant governance advice and protocols, performance reports, training resources and their usage, and Code determinations, and makes recommendations to the Board for the further development of RCSA's Professional Conduct Framework;*

**Rule 1.6.3. of the PCGIG: Why has RCSA removed a significant portion of the CEO's responsibilities from 3.3. of the DDRP?**

RCSA has not removed any of the CEO's responsibilities. The CEO's responsibilities are sourced from his/her position description and instruments of delegation as referred to in RCSA's Constitution, article 6.1 of which provides:

**6.1 Chief Executive Officer**

- (a) The Directors may appoint a person as a Chief Executive Officer for any period and on any terms (including as to remuneration) as the Directors resolve.*

- (b) *The Directors may delegate any of their powers (including the power to delegate) to the Chief Executive Officer.*
- (c) *The Directors may revoke or vary:*
  - i. the appointment of the Chief Executive Officer; or*
  - ii. any power delegated to the Chief Executive Officer.*
- (d) *The Chief Executive must exercise the powers delegated him or her, in accordance with any directions of the Directors.*
- (e) *The exercise of a delegated power by the Chief Executive Officer is as effective as if the Directors exercised the power.*

Neither the D&DRP nor the PCGIG is a position description or an instrument of delegation. They are descriptive only of roles which the CEO (and the Board) exercises within their respective frameworks.

The Code 5 framework describes a higher level of engagement for the Board than was described in the D&DRP. In particular, the PCGIG at rule 1.6.2 explains that, the Board:

- a. is responsible for the governance of RCSA;*
- b. develops and maintains the Code;*
- c. directs the development of the governance framework within which the Code operates including the development and publication of Grievance Intervention Protocols and Regulator Liaison Guidelines;*
- d. publishes statements of strategic priorities for the promotion and advancement of Members' Professional Conduct;*
- ...*
- f. may endorse Professional Conduct Recommendations to guide standards of Member conduct in particular cases;*
- ...*
- i. may refer a Professional Conduct Grievance to any method of grievance intervention provided for in these Guidelines, and may appoint a person to have carriage of the Professional Conduct Grievance on behalf of RCSA;*

The intent is to integrate the Code 5 framework more securely into RCSA's strategic and governance processes.

Once it is appreciated that the Board determines what roles the CEO performs and that it acts through delegation to the CEO and others who perform functions under the PCGIG, it should become apparent that the PCGIG does not "remove" any responsibilities from the CEO in the sense that the CEO is divested of any of the responsibilities that a CEO would have in a public company limited by guarantee such as RCSA.

PCGIG 1.6.3 goes only to the level of detail considered necessary to provide a fair description of the CEO's role under the Code 5 framework, without descending into matters of procedural detail, which are distributed throughout the operational provisions of the PCGIG. For example: rule 2.2(c) provides that Code guidelines may be developed on instruction from RCSA's CEO whenever RCSA perceives a need to do so. Other procedural provisions that expressly engage the CEO may be found in PCGIG 3(4); 3.2.1(b); 5(2); 6(3); 6(5); 6.3.2(1); 6(4); 6.4.1.1(a); 6.4.2.1; 6.4.4.3(b); 6.4.4.4; 6.4.5.2 and 6.4.6.

## **Code 5 Framework (Operation)**

### **1.3. In-depth explanation of how RCSA envisages the Code 5 Framework operating under authorisation AA1000435**

#### **a. The 12-month transition period for Code 5 (and why RCSA has not sought a transition period for the PCGIG).**

RCSA wants the new enforcement element (PCGIG) to take effect now because:

- it is more effective and efficient;
- it integrates better with external and regulatory enforcement procedures;
- it is kinder to all parties; and
- Members will have time to become familiar with it and it will already be in place and operating smoothly when the new Code element commences.

RCSA already has training available to Members on the PCGIG. The Webinar can be accessed at <https://app.livestorm.co/workaccord/ode-35> and is available free and on demand.

The PCGIG and the Old Code are able to work together because they both stem from the same root - namely the object for which RCSA is formed - to promote excellence, enterprise and integrity in the businesses of all Members and of individuals engaged by those businesses.

The Old Code largely demonstrates a selective focus on legal compliance as the means of achieving that objective; the New Code demonstrates a preference to focus on professional values to achieve the objective.

Likewise, the old D&DRP and the new PCGIG both stem from the same root - namely RCSA's objective of fostering ethical and procedural best practice among Members and the need to operationalise the means of doing so beyond the formal arbitration procedure provided by the Constitution.

Moreover, the processes of grievance intervention, counselling, conduct recommendation, conduct review, investigation, determination, resolution

by undertaking, and arbitration already contained in the D&DRP are all found in the PCGIGs. They are just configured differently, and with more of a focus on early resolution.

RCSA wants to defer the date for commencement of the new Code element to allow time for Members to become familiar with the new Code and to provide opportunities for Members to be trained in its provisions.

RCSA also wants to allow sufficient lead time to let the Board make a statement of strategic priorities and intent so that Members can begin to establish and adapt practices and procedures to meet the operational standards set by the Code.

Additionally, RCSA recognises that some clients may have adopted provisions of the old RCSA Code - e.g. the Transition Schedule - as a basis for their dealings with Members (and in some cases even with non-Members). Deferral of the date for commencement will give such clients time to update the basis of their dealings with Members should they choose to do so.

**b. Flow chart of the paths complaints may take under the PCGIG, including pathways for referral to a statutory regulator, commission or tribunal and referral to Members' complaints handling processes or corrective action procedures.**

A flowchart is attached (*Attachment C – PCGIG Flowchart*).

The Commission and parties interested in the authorisation application are invited to view it in conjunction with the webinar, which can be accessed at <https://app.livestorm.co/workaccord/ode-35> and is available free and on demand

**c. Scenarios and jurisdictions (i.e. states or territories) where RCSA would investigate alleged breaches under Code 5 and the PCGIG in the first instance and not refer to regulators.**

It is necessary to appreciate that, under the PCGIG, RCSA may refer a matter to a regulator and conduct its own intervention simultaneously.

Regulatory referral under PCGIG 6.2.1 does not preclude RCSA, as a domestic body, from conducting its own intervention. There is no rule that a domestic body must adjourn its proceedings in deference to possible, likely, or even actual future proceedings of a civil or even a criminal enforcement body (Forbes JRS (2014) *Justice in Tribunals 4th ed*, Federation Press, Sydney at [12.37]). For example, many people would be familiar with the practice of sporting bodies conducting interventions and disciplinary proceedings whilst civil and even criminal proceedings are pending. Nevertheless, proceedings of a domestic body will often be adjourned as a matter of practicality and to avoid prejudice.

In many cases, there will be aspects of a multi-faceted grievance that do not fall within the jurisdiction of a statutory regulator, or which may not warrant referral.

It is also necessary to understand that the referral pathway under the PCGIG 6.2.1 is not one of referral and *abandonment*, but rather of referral and *monitoring*. For example, RCSA would have a continuing interest in monitoring the cooperation shown by its Member in its dealings with the relevant regulator. See Code 5 Principle 5(a)(i). To that end, being seized of a grievance, RCSA may continue to support a Member's co-operation through a process of counselling as contemplated under Code 5 Principle 5(a)(ii) and provided for under PCGIG 6.3.2.

Additionally, it ought to be noted that an investigation is not necessarily a "first instance" response. RCSA would not seek to visit an intrusive investigation upon a Member under PCGIG 6.4 if an alternative diversionary or registry pathway were available under PCGIG.

Against that background, RCSA is happy to provide the following examples of where RCSA would investigate alleged breaches of the Code under PCGIG 6.4 without regulatory referral under 6.2.1

### **Examples**

RCSA referral to a regulator would not be anticipated in any case where:

- the conduct complained of was not a matter that fell within the jurisdiction of a statutory regulator - e.g. a complaint of rudeness (Code 5 principle 3(a)(i)), a failure to communicate responsively in a manner consistent with a value promise made (Code 5 principle 7), or a privacy/confidentiality grievance, exempted by the employee record exemption (s. 7B(3) of the *Privacy Act 1988* (C'th)) (Code 5 principle 6); or a failure to maintain an effective complaints handling procedure (Code 5 Principle 9).
- a Member voluntarily self-disclosed to regulator - e.g. in order to claim a marker - and a professional conduct grievance intervention was able to proceed in parallel;
- the conduct amounted to a failure to demonstrate a satisfactory level of relevant professional knowledge (except perhaps in Queensland and the ACT, where private employment agent regulation requires agents to demonstrate such knowledge - though, so far as RCSA is aware, the relevant provisions of those jurisdictions' statutory Codes of conduct have never been enforced);
- the conduct was not of such a serious or systematic nature as to warrant referral - e.g. the conduct did not fall within the enforcement priorities of the regulatory agency;

- a regulatory body had already declined to act on the grievant's complaint - e.g. referring the complainant, instead, to a right to pursue civil remedies;
- a grievance was in relation to some ambiguity in the scope of a Member's terms of business amounting to a failure to meet the standard of certainty set out at Code 5 principle 8(a)(i).

The examples given above are not exhaustive; but will serve to indicate that there will be a range of professional conduct matters that properly engage RCSA's interest but which do not have regulatory enforcement analogues.

**d. Situations where RCSA would decline to intervene as provided by rule 1.4 of the PCGIG, including the criteria that would determine whether a matter falls outside current strategic priorities and statements of intent for RCSA.**

The discretion to decline to intervene - referenced at PCGIG 1.4 - is further dealt with at PCGIG 5.3, where a number of exceptional circumstances are set out.

**5. Discretion to Intervene**

*See Also: Mediation (Deferral for Mediation), Jurisdiction to Intervene (Intervention)*

1. *RCSA reserves a discretion to intervene or to decline to intervene in a Professional Conduct Grievance.*
2. *The discretion may be exercised by the Board or by its duly appointed delegate - (e.g. the CEO or Professional Conduct Registrar).*
3. *RCSA may decline to intervene in a Professional Conduct Grievance (or the continuation thereof) for any reason it considers proper, including the reason that:*
  - a. the grievance is, or has become, frivolous or vexatious;*
  - b. the grievance does not disclose an important issue about a Member's Professional Conduct;*
  - c. resources available to RCSA as a voluntary body are not suitable for the investigation of the grievance;*
  - d. investigation of the grievance may prejudice proceedings in a court or statutory tribunal, a law enforcement investigation, or the investigation of a statutory authority;*
  - e. delay in raising the grievance may prejudice its investigation*
  - f. the grievance arises from previously closed intervention;*

*g. the Board has accepted a written undertaking from the Member in whole or partial satisfaction of RCSA's professional conduct interest in the conduct giving rise to the grievance*

A statement of strategic priority and intent indicates that it is likely that RCSA would intervene - there being no exceptional circumstances.

The criteria that would determine whether a matter falls outside current strategic priorities and statements of intent for RCSA is therefore simply that the matter is of a type that is not included within the statement.

For example, if the Board's statement of strategic priority for 2020 focussed on privacy and age discrimination (mature age barriers to workforce participation) and a grievance was presented against a Member on the basis of alleged breach of a candidate's privacy (failure to cull), discrimination on the basis of age, and a blacklist of mature aged unemployed candidates alleged to be operating between Members and non-Members within the industry, the statement of strategic priority and intent would indicate that the intervention should be accepted and ought to focus on any professional conduct failures contributing to the privacy and discrimination grievances (Code 5 principle 3(a)(ii) and 6(a)); but would not indicate that the grievance alleging a blacklist should be accepted for intervention. Instead, the blacklist grievance may be declined or alternatively (in the case of Members) referred to a regulator under PCGIG 6.2.1 and deferred under PCGIG 5.4.

**e. Options available to RCSA if it refers a matter to a (i) statutory regulator, commission or tribunal, or (ii) a Member's complaints handling processes or corrective action procedures; and the regulator or Member does not either investigate a complaint, or RCSA considers the action taken inadequate.**

It is necessary to reiterate that referral of a matter under the PCGIG to a regulator (or any other diversionary referral under PCGIG 6.2) does not preclude RCSA, as a domestic body, from conducting other forms of intervention simultaneously - most notably, in this context Registry interventions under PCGIG 6.3 or Investigations under PCGIG 6.4). Referrals would also be closely monitored. If the action is deemed inadequate, or there is a lack of action, the matter would be reviewed and alternative pathways under the PCGIG identified and implemented.

**(i) statutory regulator, commission or tribunal,**

As highlighted above, regulatory referral under PCGIG 6.2.1 does not preclude RCSA, as a domestic body, from conducting its own intervention.

RCSA would have the option to proceed with its own intervention (including an investigatory intervention) following deferral pending completion by the regulator of its inquiry (resulting in this scenario in the regulator's determining to take no action) PCGIG 5.4(a.)

**(ii) a Member's complaints handling processes or corrective action procedures**

RCSA would have the option to proceed with its own intervention (including an investigatory intervention) following deferral pending completion by the Member of its complaints handling or corrective action procedures (resulting in this scenario in an inadequate outcome) PCGIG 6.2(2).

A failure in the adequacy of a Member's internal complaints handling process is itself grounds for intervention (Code 5 Principle 9 *Effective Complaints Handling*). The full range of interventions - including counselling and the making of Professional Conduct Recommendations (PCGIG 6.3.2) would be available.

A failure to take corrective action is likely to be a non-conformance under the relevant certification programme - see PCGIG 6.2.3. The non-conformance is likely to have consequences (suspension or withdrawal) of certification or accreditation.

**f. Does the Professional Conduct Regime or other RCSA documentation outline principles and/or processes to assist members conduct independent, ethical and fair complaints handling processes or corrective action procedures? If so, what are they? Please provide relevant documents.**

The Code 5 framework does not outline principles and/or processes to assist Members conduct independent, ethical and fair complaints handling processes or corrective action procedures.

In many instances, the requirements for such processes and procedures will be established by contract (e.g. with customers and independent contractors), award (e.g. with employees), certification requirements (e.g. ISO 9001, RCSA Service Delivery Standard, and StaffSure).

In the absence of such requirements, the process of structured listening under PCGIG 6.3.1 provides a default mechanism, which is robustly supported by the PCGIG 6.3.2 counselling process once a grievance is accepted by RCSA for intervention.

RCSA would regard ISO 10002: 2018 *Customer Satisfaction, Complaints Handling* as establishing "best practice", noting that it also contains an appendix geared to small businesses.

Whatever procedure is adopted, the other Code 5 values e.g. Trustworthiness, Respect, Knowledge, Co-operation, Confidentiality, Care and Accountability must still be met - such that the procedure can be evaluated qualitatively against the interior values of the Code.

That is to say, Code 5 principle 9 *Effective Complaints Handling* does not stand alone, but is integrated into a comprehensive framework for assuring the personal professionalism and operational integrity of RCSA Members.



## 1.4. Outline of the process for the appointments of the Professional Conduct Registrar and Professional Conduct Review Committee, including any qualifications or expertise that is required to fulfil these roles

### a. Professional Conduct Registrar

The Professional Conduct Registrar is the Code 5 name for what is presently the Ethics Registrar. Terms of Reference for the Ethics Registrar explain that:

#### *Ethics Registrar*

*The Ethics Registrar is not a member of an Ethics Committee but exercises responsibilities under RCSA's Disciplinary & Dispute Resolution Procedures.*

*The Ethics Registrar may engage the assistance of outsourced registry support but may not delegate any of the Ethics Registrar's decision-making responsibilities.*

The Ethics Registrar is an internally appointed staff position, given to a senior manager with appropriate experience, industry knowledge, and seniority. RCSA's Professional Conduct Registrar (currently Ethics Registrar) is Ms Robin Shepherd. Ms Shepherd is part of RCSA's Senior Management team and is also its General Manager – Operations & Member Services.

The relevant responsibilities are:

- Oversee the effective management of the RCSA Ethics portfolio (including Code for Professional Conduct and the Disciplinary & Dispute Resolution Procedures)
- Effectively and efficiently manage all complaints received by RCSA in accordance with the Code
- Maintain the Ethics Register for reporting and record keeping
- Support and contribute to the Professional Practice Council, Ethics Panel, ad hoc Ethics Committees as required

### b. Professional Conduct Review Committee

The Professional Conduct Review Committee is the Code 5 name for what is presently the Ethics Committee.

Ethics Committees are presently convened from a panel (the Ethics Panel). The Panel is appointed by the Board from amongst experienced accredited professional Members (MRCSA or FRCSA). Terms of Reference for the Ethics Panel are attached (**Attachment D – Ethics Panel and Ethics Committee Terms of Reference**).

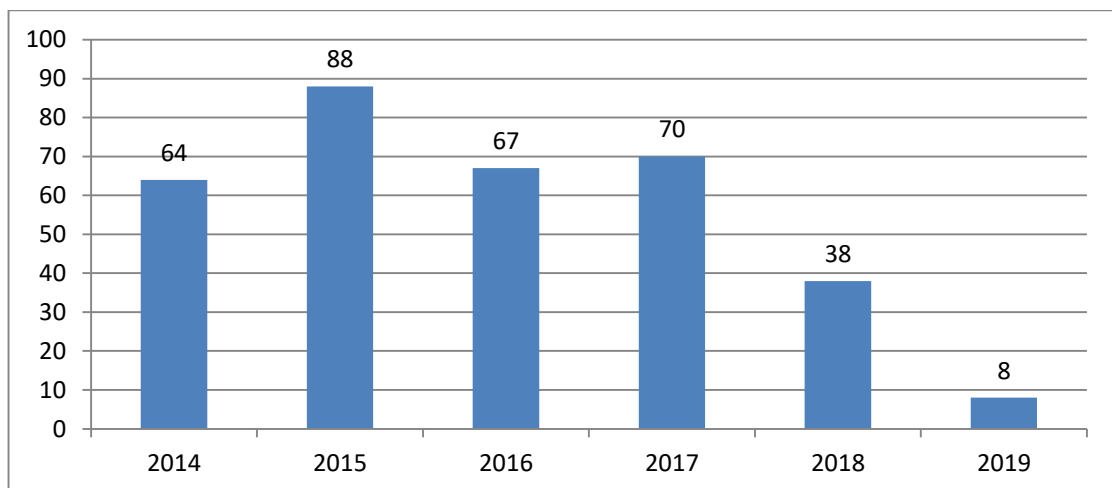
## 2. Effectiveness of Old Code Framework

The requested information is de-identified and provided detail in the attached spreadsheet - this is provided confidentially to the ACCC (**Attachment E – RCSA Ethics Enquiries 2014-2019**). Some of this information predates the current Ethics Registrar and the current system of maintaining the Ethics Registry records. Therefore, there may be gaps in older information. However, RCSA considers that it conveys a substantially accurate and fair account of the effectiveness of the Old Code Framework.

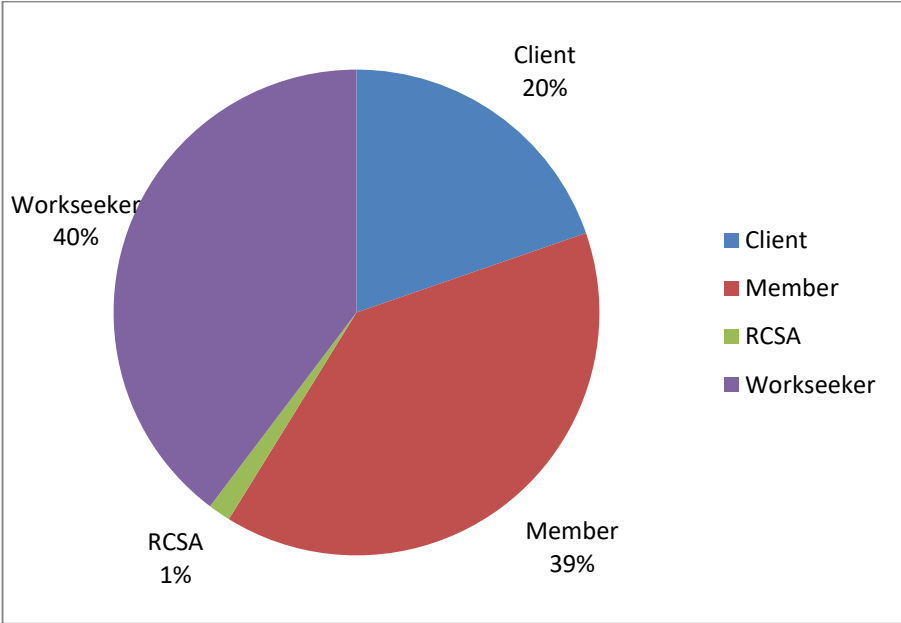
Note: this data records all ethics related enquiries, not just grievance level complaints or higher. Therefore, it shows many enquiries that are received against non-members which do not continue higher. We still provide guidance in these matters if we can, in terms of other places that the enquirer may seek assistance, or information about expectations of professional standards in the industry.

In the past five years, no sanctions have been issued at the Board level against members. We believe this is indicative of improvements in the DDRP that allowed for resolution of matters prior to reaching this stage. We anticipate that the new improvements in the PCGIG will continue this trend, and in fact allow for faster and smoother resolution giving the increased pathways and ability to facilitate several pathways simultaneously.

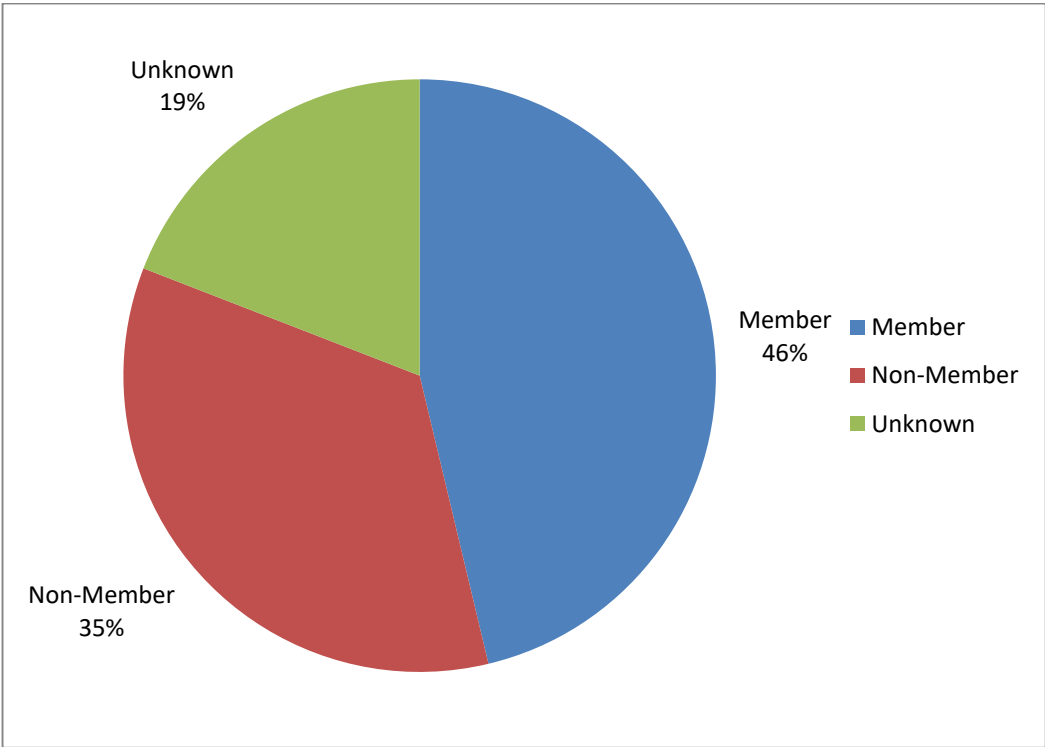
### Numbers of enquiries, grievances and complaints 2014-2019



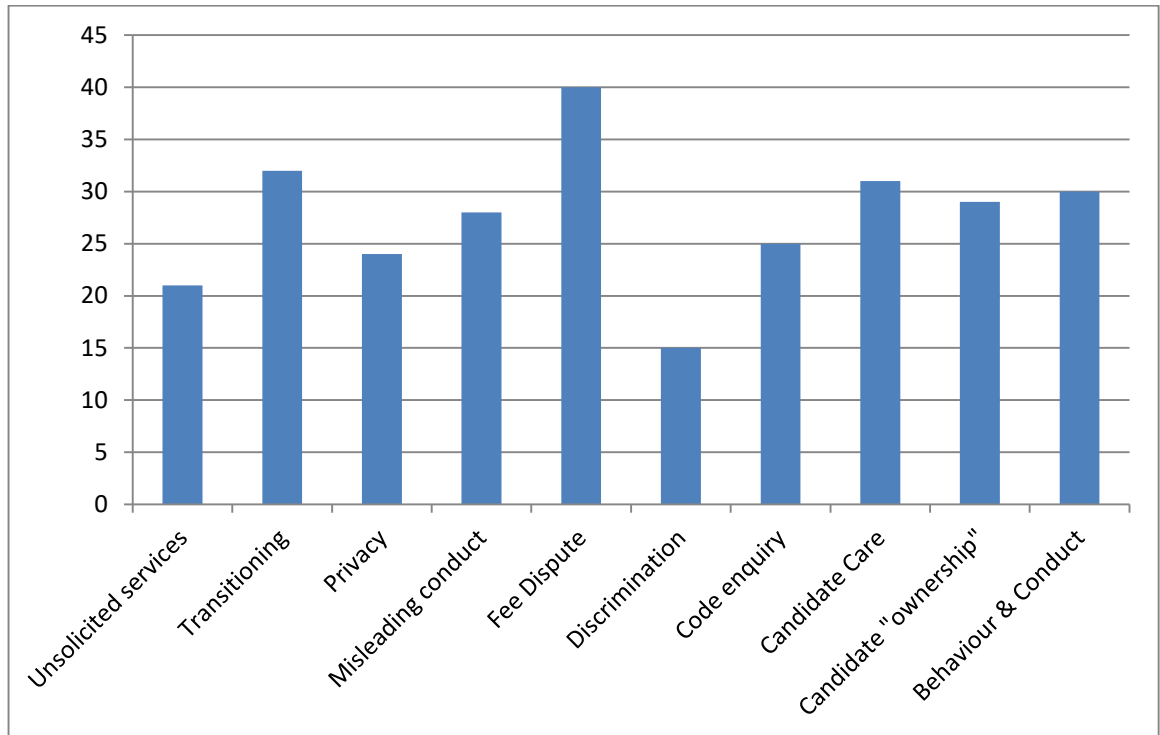
**Who makes enquiries and complaints? 2014-2019**



**Who is being complained about? 2014-2019**



### Top Ten subjects of enquiry and complaint 2014-2019



### What were the final outcomes? 2014-2019

Outcome of matter	Number
Guidance	288
Not resolved at Grievance Intervention but not escalated to Ethics Committee	12
Matter still open	11
Resolved through Grievance Intervention	10
Regulatory intervention/deferred for regulator investigation	6
Undertaking	4
Ethics Committee declined matter	3
<b>Total</b>	<b>335</b>

### 3. Regulator Liaison & Consultation

The PCGIG includes a pathway that allows RCSA to refer conduct to a statutory regulator, commission or tribunal where RCSA has established a Memorandum of Understanding (MOU) or liaison program, and a governance protocol.

RCSA has established a Regulatory Referral Protocol of general operation. A copy is attached (**Attachment B – Professional Conduct General Protocol**).

RCSA's StaffSure Programme also makes provision for public interest disclosures to appropriate bodies in order to prevent and redress exploitation should it be encountered in the audit and certification process.

"Exploitation" has a defined meaning under Code 5, which RCSA would apply to disclosures and referrals made under the regulatory referral pathways established by the PCGIG.

RCSA also notes the recent extensions to Whistleblowers' protections as a factor to be considered in the design of any referral/ public interest disclosure procedure.

**a. Statutory regulators, commissions and tribunals to whom RCSA intends to refer conduct.**

**Workplace**

**See Also:** [Labour Hire Licensing](#), [Human Rights](#)

The regulatory jurisdiction includes a wide variety of work rights, not limited to safety net provisions, but extending to a range of adverse action general protections under the *Fair Work Act* and personal grievances under New Zealand's *Employment Relations Act*.

The jurisdiction is often shared with other bodies - e.g. human rights, equal opportunity and anti-discrimination bodies.

**Australia**

Australian RCSA Members are for the most part national system employers. RCSA has already established a formal memorandum of Understanding with the FWO.

However, independent contractors often fall through the safety net. Although rights exist under the *Independent Contractors Act 2006* (C'th), those rights are most usually enforced through civil court proceedings.

The ACCC is seen as an alternative regulator providing, in many cases, a more accessible regulatory and enforcement framework - particularly in matters involving:

- unfair contract terms (noting the recommendations to extend powers in this area)
- misleading job ads
- unconscionable conduct;
- collective bargaining (noting the possibility of a small business class exemption).

## ***New Zealand***

RCSA has reached out to Employment New Zealand within the Ministry of Business, Innovation and Employment (Hīkina Whakatutuki).

## **Competition & Consumer**

**See Also:** [Spam](#), [Employment Agency Licensing & Regulation](#)

Matters that might be referred, if a Member declines to voluntarily self-disclose, could include:

- Serious competition breaches - see for example the UK Office of Fair Trading's 2009 prosecution of six recruitment firms for involvement in a cartel of eight firms that were found to have engaged in fixing prices and boycotting a competitor.
- Unconscionable conduct - for example of the type prosecuted in *Australian Competition & Consumer Commission v Zanok Technologies Pty Ltd* [2009] FCA 1124; and *Australian Competition and Consumer Commission v Clinica Internationale Pty Ltd (No 2)* [2016] FCA 62;
- Serious Consumer Law breaches where a large number of consumers may have suffered damage and may seek to rely on findings in made any prosecution - e.g. jobs and employment scams;
- Complex multi-party matters beyond the capacity of RCSA to investigate - e.g. due to the involvement in contravening conduct by non-Members.

## ***Australia***

The Australian Competition & Consumer Commission.

## ***New Zealand***

- Ministry of Business Innovation & Employment (Consumer Affairs)
- New Zealand Commerce Commission (Te Komihana Tauhokohoko)

## **Employment Agency Licensing & Regulation**

**See Also:** [Competition & Consumer](#)

The ACT, South Australia and Western Australia remain licence states.

NSW has retained a prohibition on charging fees to workseekers. It appears in its *Fair Trading Act 1987* Part 4 Div 3.

Queensland has abandoned private employment agents licensing but has a comprehensive (but little used) negative licensing scheme under its *Private Employment Agents Act 2005* and *Private Employment Agents (Code of Conduct) Regulation 2015*.

Conduct that offends under this type of regulation may also offend under the Australian Consumer Law (e.g. misleading job ads).

### **Australia**

- Minister for Justice, Consumer Affairs and Road Safety - Justice and Community Safety Directorate (ACT)
- Safe Work (SA)
- Consumer Protection WA
- Fair Trading (NSW)
- Department of Industrial Relations (Qld)

### **New Zealand**

WorkSafe New Zealand (Mahi Haumaru Aotearoa)

### **Human Rights**

See Also: [Workplace](#), [Labour Hire Licensing](#)

### **Australia**

Australian Human Rights Commission

### **New Zealand**

Human Rights Commission (Te Kāhui Tika Tangata).

### **Immigration**

RCSA has liaised on an *ad hoc* basis with the Department of Immigration in the past and was a significant contributor to the Migrant Worker Taskforce (Department of Jobs) review.

### **Australia**

Department of Home Affairs

### **New Zealand**

Ministry of Business Innovation & Employment (Immigration New Zealand)

### **Labour Hire Licensing**

See Also: [Revenue](#), [Work Health & Safety](#), [Workplace](#), [Human Rights](#)

Only two states (Qld and Vic) have labour hire licensing schemes. Qld has issued over 3,000 licences to date. Victoria's scheme does not commence until 29 April 2019.

South Australia had a labour hire licensing scheme, but it has been defunct following the last state election in S.A.

If labour hire schemes are developed in other states or territories, or if a scheme should be established federally, RCSA would seek to establish a liaison program.

RCSA was a significant contributor to the labour hire licensing inquiries of all states and presently liaises informally with LHL(Q) to provide Members with information about the scheme's operation.

RCSA is also in close contact with the Victorian Labour Hire Licensing Authority in the lead up to the Victorian scheme commencing application process in April 2019.

Labour hire licensing schemes require licence holders to comply with a wide range of relevant laws. The jurisdiction thus overlaps with that of many other regulators.

### ***Australia***

- Department of Industrial Relations (Labour Hire Licensing Qld)
- Labour Hire Authority (Victoria)

### **Privacy**

Privacy has not been recognised as a workplace right within the meaning of the FWA. (see *Austin v Honeywell* (2013) 277 FLR 372). As Members control and process large amounts of personal information, there is a need to establish liaison with the lead privacy regulators.

### ***Australia***

Office of the Australian Information Commission

### ***New Zealand***

New Zealand Privacy Commissioner (Te Mana Matapono Matatapu).

### **Revenue**

**See Also:** [Labour Hire Licensing](#)

RCSA presently liaises informally with the Commonwealth, State and Territory revenue regulators. RCSA was a significant contributor to the Black Economy Taskforce review and holds a position on the Black Economy Taskforce Advisory Committee.

### ***Australia***

- Australian Tax Office
- State & Territory Revenue Offices (payroll tax)

### ***New Zealand***

Inland Revenue ( Te Tari Taake)



## **Spam**

**See Also:** [Competition & Consumer](#)

Resume spam is a practice that continues to give rise to complaints within the industry. The practice is related to the unsolicited supply of services.

### ***Australia***

Australian Communication & Media Authority

### ***New Zealand***

Department of Internal Affairs (Te Tari Taiwhenua)

## **Work Health & Safety**

**See Also:** [Labour Hire Licensing](#)

### ***Australia***

- SafeWork NSW
- Workplace Health and Safety Queensland
- WorkSafe Victoria
- WorkSafe ACT
- SafeWork SA
- NT WorkSafe
- WorkSafe WA
- WorkSafe Tasmania

### ***New Zealand***

WorkSafe New Zealand (Mahi Haumarua Aotearoa)

## **b. Timeline and an explanation of when RCSA intends to effect these regulatory referral programs.**

RCSA has already initiated outreach to key regulatory bodies operating at federal or national level.

At this stage, RCSA, being a national body has prioritised outreach to state and territory regulators, whose jurisdiction does not overlap with federal regulatory counterparts - e.g. RCSA has reached out to the AHRC, but not to the separate state and territory human rights, equal opportunity and anti-discrimination bodies.

That is not to deny the importance of those bodies - in many cases they exercise a jurisdiction that is wider than that of the AHRC - but unless and until the Code 5 framework is authorised RCSA has preferred to focus its

attention and resources on establishing ongoing relations with key federal and national bodies.

Nevertheless, RCSA has advised state and territory regulators of its intent, has advised them of the application and has sought indications of interest from any who may wish to establish closer liaison with RCSA regardless of the outcome of the authorisation application.

**c. Summary of liaison to date between RCSA and relevant statutory regulators, commissions and tribunals regarding establishing regulatory liaison programs.**

Whilst RCSA liaises extensively with commonwealth, state, territory and national regulators on a wide range of policy issues, liaison in relation to professional conduct matters involving Members has historically occurred only on rare occasions. That is primarily because RCSA disciplinary proceedings have been regarded, up to now, as confidential domestic matters internal to RCSA.

It is anticipated that the Code 5 framework, with its additional PCGIG pathways, will provide the basis for a more effective liaison and co-regulatory approach between RCSA and relevant regulators.

RCSA has established a formal MoU with the Fair Work Ombudsman. A copy is attached (**Attachment F – RCSA-FWO MOU**). No matter has yet been referred between the FWO and RCSA.

RCSA had informal and *ad hoc* liaison with the Department of Immigration in one matter, which proceeded simultaneously as an investigation by the Department of a Member, which resulted in cancellation by the Department of the Member's labour agreement, and a D&DRP proceeding which resulted in expulsion from RCSA for a period of 5 years.

RCSA was involved in the development by Queensland Industrial Relations Department of that *State's Private Employment Agents (Code of Conduct) Regulation 2005* (renewed in 2015) and was a participant on the Employment Agents Advisory Committee established under s. 7 of the *Private Employment Agents Act 2005* (Qld) up until the time when the Committee was recommended to be abolished under that State's Red Tape reduction programme. The liaison contributed to the Department's referring a number of complaints against private employment agents to RCSA despite the fact many of the agencies referred were not Members. So far as RCSA is aware, Queensland has never launched a prosecution of a member or non-member under the *Private Employment Agents (Code of Conduct) Regulation*.

RCSA is presently "tracking" a matter proceeding under the auspices of the OAIC, which involves a Member and is simultaneously being dealt with by RCSA's Ethics Committee. However no formal liaison program exists with the OAIC.

RCSA has written to advise federal, state and territory regulators of its intent, has advised them of the application and has sought indications of interest from any who may wish to establish closer liaison with RCSA regardless of the outcome of the authorisation application.

**d. Explanation of the scope and any likely limitations on these MOUs/liaison programs.**

RCSA considers that the MoU, which RCSA has with the FWO serves as the yardstick for future Memoranda of Understanding and Liaison Programmes.

Notably, the MoU expressly states that it:

*... is not intended to restrain the RCSA or the FWO in the way it investigates any matter, or how they take decisions to pursue matters to court, or other outcomes, such as code of conduct proceedings.*

Additionally:

*5.1 The RCSA and the FWO acknowledge that from time to time the other may be unable to fully comply with all the requirements of this memorandum due to constraints imposed by laws (including but not limited to Commonwealth and State privacy legislation). Each party agrees to use its best endeavours to exchange information to the extent permissible by law.*

As regards confidential information, the MoU states:

***Confidential information***

*9.1 With respect to any information designated as confidential (e.g. relating to a company) and supplied by one party to the other in connection to this memorandum, each party agrees to:*

- protect the confidential information in a reasonable and appropriate manner and in accordance with any applicable professional standards*
- use and reproduce confidential information only for purposes set out in this memorandum*
- not disclose or otherwise make available confidential information other than to its personnel who have a need to know the information to give effect to the purpose set out in this memorandum.*

RCSA considers that those provisions are appropriate to protect the regulatory and operational independence of the FWO and RCSA respectively and envisages that similar safeguards would form part of any future MoU or Liaison Programmes.

**e. RCSA's existing MOU with the Fair Work Ombudsman**

A copy is attached - **Attachment F – RCSA-FWO MOU**. Note this is also available publicly on the FWO website:

<https://www.fairwork.gov.au/ArticleDocuments/725/recruitment-and-consulting-services-association-memorandum-of-understanding.docx.aspx>

**Will the operation of this MOU change under Code 5 and the PCGIG?**

No. The MoU will not change. The PCGIG provides the framework within which it will be able to be actioned.

**4. Service Delivery Standard**

This is provided confidentially to the ACCC. A copy is attached – **Attachment G – RCSA Service Delivery Standard**.

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<sup>i</sup> *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50.

## RCSA Code Governance Advice 2018\_004

### Undertakings in Satisfaction of RCSA Code Grievances & Complaints

#### Background

1. Rule 10 of RCSA's *Disciplinary & Dispute Resolution Procedures* ("**D&DRP**") allows a Member to tender to the Board a confidential undertaking, which the Board may accept in whole or partial satisfaction of RCSA's professional conduct interest in the Code Grievance or Complaint to which the Member is responding.
2. Undertakings, and their acceptance or rejection, may affect important legal rights. They may give rise to difficult questions about confidentiality, use and disclosure, and the extent to which their contents may be considered to be "without prejudice" in subsequent legal proceedings. They may additionally impact on rights and interests of third parties and of liability insurers.
3. The Board's acceptance or rejection of a Member's Undertaking may trigger a dispute that leads to costly and time-consuming arbitration under the D&DRP.
4. The Board's acceptance of a Member's Undertaking is also a circumstance that an RCSA Ethics Committee may consider in declining to proceed further with a Complaint referred to it for investigation, hearing or determination.
5. The Ethics Committee's declining of a Complaint that has been referred to it may also trigger a dispute that leads to costly and time-consuming arbitration under the D&DRP.
6. RCSA therefore wishes to establish a rigorous protocol for the tendering and acceptance of Members' Undertakings under the D&DRP.
7. This Code Governance Advice presents a draft for such a protocol.

#### Key Terms

##### Certification Body –

is a body that is authorised to certify compliance with International, Australian or New Zealand standards held by a Member who tenders an Undertaking and includes certification bodies for StaffSure and RCSA's Service Delivery Standard.

##### Code –

is the RCSA Code for Professional Conduct.

**Complaint and Complainant –**  
are defined by the RCSA D&DRP.

**Grievance and Grievant –**  
are defined by the RCSA D&DRP.

**Law Enforcement Body –**  
is a body that has statutory responsibility for enforcement of laws and includes any enforcement body within the meaning of the *Privacy Act 1988* (Cwth).

**Occupational Licensing Body -**  
is a body that has statutory responsibility for the issuing of occupational licences including labour hire licences and employment agency licences.

## **Protocol (DRAFT)**

### **Purpose**

- 1) The purpose of a Member's Undertaking tendered under the D&DRP is to provide an assurance, satisfactory to the Board, that:**
  - a) in respect of past professional conduct that is the subject of the Grievance or Complaint, the Member will take all appropriate measures to ensure that the Grievant has access to remedies, as provided by law, and to credible grievance mechanisms, without fear of recrimination or discrimination (c.f. WEC Code Principle 10: *Respect for Remedy*); AND**
  - b) the Member will conform its future professional conduct to the requirements of the RCSA Code.**
- 2) Members should understand that the Code extends, not only to conduct in which a Member is directly engaged; but also, to third party conduct in connection with the Member's professional practice in which the Member is knowingly concerned, or to which the Member may be considered to be an accessory.**

**NOTE: A third party might be a Member's client or business ally - regardless of whether or not the client or the business ally is an RCSA Member; and regardless of whether or not it is a related entity of the Member.**

### **Legal Advice to Be Obtained**

#### **Proponent**

- 3) Members who wish to tender Undertakings:**
  - a) must give prior written notice to RCSA's Ethics Registrar of their intention to do so. The notice is not to set out, or be submitted with, the content or details of the Undertaking.**

- b) must be provided with a copy of any *Undertaking Guidelines* approved by the Board;
- c) must be advised by RCSA:
  - i) that the Undertaking must not be presented by the Member directly to the Board; but that it must pass through RCSA's CEO or Ethics Registrar;
  - ii) that RCSA has established Memoranda of Understandings with relevant statutory regulators (e.g. the FWO) that RCSA may use to provide information about the Grievance or Complaint to the regulator;
  - iii) that the Board's acceptance of an Undertaking does not resolve any civil or statutory claim that a Grievant/Complainant may have in respect of the Member's conduct which gave rise to the Grievance/Complaint, nor any interest or proceedings of a law enforcement or occupational licensing body in respect of the Member's conduct; but merely satisfies RCSA's professional conduct interest in matters within its professional conduct jurisdiction to the extent to which the Undertaking is accepted by the Board;
  - iv) to seek legal advice from the Members' own legal representatives before tendering an Undertaking or any draft;
- d) must be allowed a reasonable opportunity to receive legal advice before the Undertaking can be presented to the Board;
- e) may be informed that Counsel Assisting RCSA has been authorised to collaborate with the Members' own legal representatives for the purpose of:
  - i) answering questions that the legal representatives have about the process of tendering an Undertaking under the D&DRP;
  - ii) providing a non-binding indication of what the Undertaking should address in order to meet the purpose for which it is tendered;
  - iii) clarifying issues of confidentiality, the extent of legal privilege, and the permitted uses and disclosures of the Undertaking.

NOTE: For example, there may be a need to disclose the Undertaking (or parts of it) to the Ethics Committee, the Grievant/Complainant, other RCSA Committees, a Certification Body, a Regulator, or the Public.

#### RCSA

- 4) Members' Undertakings that are offered under the D&DRP must be submitted to Counsel Assisting RCSA for advice and recommendation before being presented to the Board.

- 5) **Adverse recommendations and issues identified by Counsel Assisting RCSA must be communicated to the Member who tenders the Undertaking. The Member must be given a reasonable opportunity to address adverse recommendations and issues – either by amendment or by confirming that Member wishes the Undertaking to be presented to the Board notwithstanding any adverse recommendations or issues that were identified by Counsel Assisting RCSA.**
- 6) **The advice and recommendation of Counsel Assisting RCSA must be provided to the Board with the Undertaking.**
- 7) **The Board does not have to adopt the advice and recommendation of Counsel Assisting RCSA.**

### Board Decision

- 8) **The Board makes an independent decision whether to accept the Undertaking in full or partial satisfaction of RCSA's professional conduct interest in matters.**
- 9) **In making its decision, the Board will have regard to the principles of the Code and to the parties' and participants' interests in Grievance/Complaint proceedings as set out in the D&DRP (see D&DRP rule 9.3).**
- 10) **The Board impose conditions on its acceptance of an Undertaking that require a Member or Members involved in the Complaint to participate in Counselling under D&DRP Rule 5; or any other dispute resolution process contemplated by Code Principle 8.**
- 11) **When accepting an Undertaking:**
  - a) **the Board will state the extent to which RCSA's disciplinary interest in the professional conduct of its Member has been satisfied; and**
  - b) **the Board may direct that a Member or Members involved in the Complaint participate in Counselling under D&DRP Rule 5; or any other dispute resolution process contemplated by Code Principle 8.**

### Referral to Law Enforcement, Occupational Licensing & Certification Bodies and Others

- 12) **The tendering by a Member of an Undertaking, whether or not on a confidential or "without prejudice" basis, or other basis of claimed privilege, does not diminish the power or responsibility of RCSA to provide information about the Undertaking (or about the Member's professional conduct that is alleged to give rise to the circumstances in which the Undertaking is tendered) to:**
  - a) **a Law Enforcement Body;**
  - b) **an Occupational Licensing Body;**



- c) a Certification Body; or
- d) another body (including another industry association) that has authority to govern, direct, or counsel the professional conduct of the Member in respect of the Member's professional conduct that is alleged to give rise to the circumstances in which the Undertaking is tendered.

## Referral to Ethics Committee

- 13) The Board may provide information about the Undertaking and its contents confidentially to the Ethics Committee to facilitate the making by the Ethics Committee of a decision whether to accept or decline a Complaint under the D&DRP (see D&DRP rule 11.1).
- 14) The Ethics Committee should decline to investigate, hear or determine a Complaint in respect of which RCSA's disciplinary interest in the professional conduct of its Members has been satisfied by an Undertaking that has been accepted by the Board.

## Imprimatur

The Board's imprimatur to this Code Governance Advice may be given by ordinary resolution.

## Recommendations

We recommend that:

- 1. RCSA prescribe the form to be used by Members when they wish to notify their intention to tender an Undertaking under the D&DRP (see Protocol art. 3(a)).
- 2. The RCSA Board direct that Guidelines for Undertakings in Satisfaction of RCSA Code Grievances & Complaints ("*Undertaking Guidelines*"). Should be prepared for the assistance of Members and the Board.
- 3. The *Undertaking Guidelines* should include information about:
  - o The procedure for tendering and accepting Undertakings;
  - o The use of any form prescribed by the Board for giving notice of intention to tender an Undertaking (see Protocol art. 3(a));
  - o What interests are satisfied by the acceptance of an Undertaking; and what interests are not satisfied or resolved (see Protocol art. 3(c)(iii))
  - o Statements that may be included in an Undertaking – e.g. statements of agreed fact; statements of measures which a Member undertakes to implement;

- Statements that may not be included in an Undertaking – e.g. self-serving statements of contested fact; statements of self-justification, argument, or submission;
  - Requirements for clarity about confidentiality, use and disclosure of the Undertaking;
  - Reserved disclosures that may be made to the Ethics Committee, Law Enforcement, Occupational Licensing and Certification Bodies; or to another industry association (see Protocol art. 3(c)(ii));
  - What happens when an Undertaking is accepted or rejected;
  - Rights of “appeal”;
4. The *Undertaking Guidelines* be approved by the Board;
  5. RCSA make the *Undertaking Guidelines* widely known to Members; and provide a copy to Members who notify their intention to tender an Undertaking under the D&DRP.
  6. RCSA develop evaluation procedures for determining when information of concern will be referred to Law Enforcement Bodies etc (See Protocol Art. 10);
  7. RCSA make its evaluation procedures known to Members;

This Code Governance Advice, and any Protocol or *Undertaking Guidelines* adopted in consequence of it, be reviewed when the Code and D&DRP are reviewed to ensure that the content and intent which they establish are synchronised.

## Reference Documents

- **RCSA Code for Professional Conduct** – General Principle 1 (Transparency); Principle 1 (Confidentiality); Principle 8 (Good Order).
- **RCSA Disciplinary & Dispute Resolution Procedure** – Rules 5, 9, 10, 11 and 16
- **WEC Code of Conduct** – Principle 10 (Respect for Remedy)
- **StaffSure** – Program Agreement cl. 30.5 (Gateway Transparency); StaffSure Standard Part 6 (Transparency & Reporting).
- **Memorandum of Understanding between RCSA and FWO:** *Information sharing to facilitate a well-functioning labour market in Australia protecting the rights of workers and employers.*

## Related Code Governance Advices

Nil

## Status & Review

This Code Governance Advice is prepared by WorkAccord Legal. It is not legal advice. It outlines the governance issues raised by the issue that it addresses; and suggests a draft protocol consistently with the RCSA Code Governance framework.

This Code Governance Advice should be reviewed, and legal advice obtained, if RCSA contemplates any action to enforce the Code or D&DRP with respect to its content.

The Code Governance Advice should be reviewed, in any event, no later than **6<sup>th</sup> March 2019**; or earlier if there are changes to any of the reference documents on which it is based.

## Date

22<sup>nd</sup> July 2018.

Ends

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## 1. Background

RCSA has established a Professional Conduct Framework, which includes a Code for Professional Conduct ("**Old Code**") and Disciplinary & Dispute Resolution Procedure ("**D&DRP**") which are presently authorised by the ACCC under interim authorisation AA1000435\_1 (28/02/2019) (together the "**Old Code Framework**").

RCSA has developed and applied for authorisation of a replacement Professional Conduct Framework, which includes a Code of Professional Conduct ("**Code 5**") and Professional Conduct Grievance Intervention Guidelines ("**PCGIG**") (together the "**Code 5 Framework**").

Both the Old Code Framework and the Code 5 Framework provide for continuous disclosure by Members to RCSA of conduct that may fall short of the standard required.

The Code 5 Framework additionally provides for:

- precautionary notifications of conduct of concern to be recorded on the Register of Members ("**Cautions**"); and
- pathways for referral of conduct of concern to appropriate regulatory authorities ("**Regulatory Referrals**").

(together, the "**Code 5 Framework Enhancements**").

The Code 5 Framework Enhancements are modelled broadly on procedures, which RCSA has developed in connection with its StaffSure Certification Programme and under a Memorandum of Understanding which it has with the Fair Work Ombudsman (Australia).

RCSA now wishes to develop a protocol for use with regard to:

- Members' obligations of disclosure;
- Precautionary notifications of conduct of concern; and
- Regulatory referrals.

## 2. Simplified outline

**Section 3** explains the meanings of some common terms used throughout this protocol

**Section 4** provides that RCSA Members should disclose notifiable conduct to RCSA's Ethics Registrar – now to be called "Professional Conduct Registrar" as soon as practicable upon becoming aware of it. Reports of Notifiable Conduct from Members are treated as Grievance Notifications to

be dealt with under either the D&DRP or PCGIG, whichever is applicable at the time of RCSA's receipt of the disclosure.

**Section 4.1** explains what type of conduct amounts to notifiable conduct.

**Section 4.2** outlines exceptions to the requirement to disclose notifiable conduct.

**Section 4.3** sets out the disclosure process in detail covering such matters as timing, notification, handling of disclosure, interactions with other procedures and matters about which RCSA may provide further guidance.

**Section 5** provides for the circumstances in which Registrar, in consultation with the CEO, may note a caution on the Register of Members against a Member in respect of whose conduct it intervenes under the PCGIG.

**Section 5.1** provides that cautions are notifiable only under the PCGIG.

**Section 5.2** sets out the caution process in detail covering such matters as timing, notification, evaluation, interactions with other procedures, and matters about which RCSA may provide further guidance.

**Section 6** establishes the governance protocol for determining when conduct of a Member should be the subject of a regulatory referral.

**Section 6.1** explains that the protocol applies to the referral to regulators of Member conduct accepted by RCSA for Professional Conduct Intervention and defines important terms such as ***referral arrangement*** and ***regulator***.

**Section 6.2** sets out the regulatory referral process in detail, covering such matters as important governance arrangements including authority to establish referral arrangements; documentation required; timing; notification; conduct that must be referred; evaluation of other conduct for referral; interactions with other procedures; and matters about which RCSA may provide further guidance.

**Section 7** explains that as much of the protocol as is consistent with RCSA's authorised professional conduct framework takes effect upon adoption by the Board and that the Protocol is to be reviewed within 6 months of the ACCC's final determination in Application for Authorisation AA1000435.

### **3. Interpretation**

the **Association** – means RCSA.

the **Code** – unless expressly stated otherwise, any reference to the Code in this Protocol is a reference to the Code for Professional Conduct under the

Old Code Framework or the Code of Professional Conduct under the Code 5 Framework, whichever is applicable to the circumstances.

the **Industry** – is a fluid concept that refers the recruitment, staffing and workforce solutions industry, as it is conceived and described by RCSA from time to time, including all categories of workforce services.

a **Professional Conduct Intervention** (or, more simply, an **Intervention**) – means any action taken or intervention made by RCSA under the Constitution, the D&DRP, or the PCGIG in relation to the professional conduct of a Member.

the **Registrar** – unless expressly stated otherwise, any reference to the Registrar in this Protocol is a reference to RCSA’s Ethics Registrar under the Old Code Framework or RCSA’s Professional Conduct Registrar under the PCGIG, whichever is applicable to the circumstances.

## 4. Continuous Disclosure

### 4.1. Application

This section applies to **notifiable conduct**.

**Notifiable conduct** is:

- any material concern, which a Member has regarding the Member’s conduct in Professional Practice that is required to be brought to the attention of RCSA under Old Code Principle 8.1; or
- events in which Members are involved, and findings made against them, which could reasonably be expected to reflect adversely on the character or reputation of the Member, the Association, or the Industry (Code 5, Principle 12, Continuous Disclosure).

### 4.2. Exceptions

a. Notifiable Conduct should not be reported to RCSA if:

- It would be unlawful to disclose information about the conduct.

b. Notifiable Conduct need not be reported to RCSA if:

- the conduct could not reasonably be expected to reflect adversely on the character or reputation of the Member, the Association, or the Industry;
- the information comprises matters of supposition or is insufficiently definite to warrant disclosure

and a reasonable informed member of the public would not expect the information to be disclosed.

- c. Members should take proper account of any lawful circumstances of secrecy that would prevent reporting of Notifiable Conduct to RCSA.

**Example:** Members may become aware of conduct as result of assisting police or statutory regulators with investigation of offences that, for reasons of effective policing or regulatory enforcement, Members are not permitted to disclose.

### 4.3. Detail

#### 4.3.1. Timing

RCSA Members should report Notifiable Conduct to RCSA as soon as practicable upon becoming aware of it.

#### 4.3.2. Notification

- a. Members can report Notifiable Conduct by any expedient means, including in writing, via email or orally by telephone.
- b. Members should report Notifiable Conduct directly to RCSA's Registrar.

#### 4.3.3. Process

Upon receiving a report of Notifiable Conduct from a Member, RCSA's Registrar treats the report as a grievance notification under either the D&DRP or PCGIG, whichever is applicable, and thereafter manages it as provided by those processes or guidelines.

#### 4.3.4. Interactions

- a. Members should consider whether the Notifiable Conduct:
  - gives rise to any incident reporting obligations - e.g. under Work Health & Safety laws
  - gives rise to any mandatory reporting obligations - e.g. in relation to the welfare of children, or in relation to stock exchange listing requirements;
  - gives rise to any reporting or disclosure obligations under occupational licensing schemes - e.g. under a labour hire licensing scheme;
  - gives rise to any disclosure obligations under a professional registration scheme - e.g. a migration agents registration scheme or labour hire providers registration scheme;



- indicates circumstances that may or should be notified to insurers under any policy or statutory insurance - e.g. an employment malpractice insurance policy, a public or professional indemnity policy, or a workers' compensation insurance policy;
  - gives rise to any statutorily mandated corrective action procedure - e.g. a privacy data breach notification;
  - gives rise to any disclosure obligations under private or government contractual supply arrangements.
- b. Members who have whistleblowers' protection obligations should consider whether the proposed Notifiable Conduct report appropriately captures and escalates whistleblower reports.
- c. Members who hold any certification or accreditation in respect of the services they supply should consider whether the Notifiable Conduct triggers any notification, root cause analysis, or corrective action procedures in relation to the standards against which they are certified - e.g. Notifiable Conduct might trigger corrective action procedures under StaffSure certification.
- d. RDSA's Registrar considers interactions with referral and management pathways under the relevant professional conduct framework.
- e. RDSA, in determining appropriate pathways under the D&DRP or PCGIG, should give favourable consideration to any positive steps taken by a Member to disclose Notifiable Conduct under this Protocol.
- f. RDSA's Board, in any situation where it is required to consider the imposition of sanctions, should give favourable consideration to any positive steps taken by a Member to disclose Notifiable Conduct under this Protocol.

#### **4.3.5. Guidance**

RDSA may provide further guidance to Members and the public on any matter arising under this section of the Protocol including guidance about:

- what types of matters ordinarily would not need to be disclosed; or
- circumstances in which exceptions would apply.

#### **4.4. Reference Documents**

- RDSA Constitution
- RDSA Code for Professional Conduct
- Disciplinary & Dispute Resolution Procedure

- RCOSA Code of Professional Conduct (Proposed)
- RCOSA Professional Conduct Grievance Intervention Guidelines (Proposed)
- RCOSA Service Delivery Standard
- RCOSA StaffSure Certification Standard.

## 5. Precautionary Notifications (“cautions”)

From time to time, circumstances may arise, or incidents may occur that throw doubt on whether the assurance of professionalism implied by membership of RCOSA can be relied on. In those cases, it may be necessary to consider whether membership should be subject to a precautionary notification.

Precautionary notifications are not punishments. They are measures that have been designed into the Code 5 Framework to preserve the integrity of the framework for the benefit of Members and of people who have dealings with them.

PCGIG 6(3) therefore provides that if RCOSA decides to intervene in a Professional Conduct Grievance, the Registrar in consultation with the CEO may note a caution on the Register of Members against the Member in respect of whose conduct it intervenes.

PCGIG 6(4) explains that:

4. *A caution is a notation made on the Register of Members:*
  - a. *searchable by the public;*
  - b. *advising that a professional conduct issue has been raised in respect of the Member’s [broadly particularised – e.g. candidate replacement] dealings;*
  - c. *advising that the matter is being dealt with by RCOSA under confidential grievance intervention procedures;*
  - d. *emphasising that neither the notation of a caution nor the conduct of a Grievance Intervention implies that the Member has not met the standard of professional conduct required by the RCOSA Code;*
  - e. *informing the public that if they wish to know more, the Member has indicated that they can contact [AB – contact details to be provided] who has been authorised to receive and respond to proper inquiries regarding the matter; and*

- f. Informing the public that no further comment will be forthcoming from RCSA pending completion of its grievance intervention.*

PCGIG 6.4.2.1 further provides that

- 1. The PCRC may require the CEO or PCR to serve a notice in writing to any Member, whose conduct is the subject of the referral, requiring the Member to show cause either in writing or at an investigative interview held by the PCRC why:
  - a. a caution should not be recorded against the Member pending the conduct of the intervention.**

## **5.1. Application**

This section applies to cautions that may be noted on RCSA's Register of Members where RCSA is conducting an intervention under the provisions of RCSA's Professional Conduct Grievance Intervention Guidelines (Proposed) ("**PCGIG**")

## **5.2. Detail**

### **5.2.1. Timing**

- a. Upon accepting a grievance about a Member's conduct for intervention under the PCGIG, RCSA's Professional Conduct Registrar ("**PCR**") evaluates the grievance and, in consultation with the CEO, decides whether to note a caution on the Register of Members against the Member in respect of whose conduct it intervenes.
- b. A Professional Conduct Review Committee ("**PCRC**") seized of an intervention under the PCGIG may, at any time, require the CEO or PCR to serve a notice in writing to any Member, whose conduct is the subject of the intervention, requiring the Member to show cause, either in writing or at an investigative interview held by the PCRC, why a caution should not be recorded against the Member pending the conclusion of the intervention.

### **5.2.2. Notification**

- a. A caution is not to be recorded on the Register unless the Member against whom it is to be recorded is first notified in writing of the alleged conduct, the reasons why a caution might be recorded, the matters that are likely to be taken into account by RCSA, the likely terms of the caution to be recorded; and is given a reasonable opportunity to show cause why the caution should not be recorded.

- b. What amounts to a reasonable opportunity depends on all the circumstances, having special regard to the risk of harm to any person that may be occasioned by delay.

### **5.2.3. Process**

- a. A Member to whom a show cause notification has been given may choose to show cause either in writing (including email) or at an investigative interview either via phone or face-to-face.
- b. If the method of investigative interview is chosen by the Member, the interview should proceed initially by way as a "fireside chat" to get to the gist of the matter.
- c. In either case, the process is to be conducted as expeditiously and with as little cost and formality as is consistent with the requirements of fairness all round.
- d. Without limiting the factors that RCSA may take into account in deciding whether to record a caution, the PCR or the PCRC (as the case may be) is to consider:
- the nature and seriousness of the alleged conduct;
  - the strength of any evidence offered in support or rebuttal of the alleged conduct;
  - the number and circumstances of persons who may suffer harm by recording or not recording the caution;
  - the extent and nature of any harm that may be caused to the member or any other person by recording or not recording the caution;
  - whether the proposed caution appropriately captures and escalates whistleblower reports;
  - reasonable and appropriate measures for protecting privacy and confidentiality of information referred;
  - whether recording the caution might prejudice a law enforcement investigation in respect of the same or related conduct;
  - any diminution in the reliability of the assurance of professionalism implied by Membership if a caution is not recorded;
  - the content of any applicable RCSA Board statements of strategic priority and intent; and
  - alternatives to recording the caution.

- e. RCSA may inform itself about any matter relevant to its consideration whether to record a caution by any means it considers appropriate subject always to providing the Member with a reasonable opportunity to be heard in relation to such matters.
- f. If a caution is notified against a Member, RCSA is to monitor the progress of the related intervention closely to identify any change in circumstances that might warrant withdrawal or variation of the terms of the caution.
- g. Any proposed variation to the terms of the caution is to be notified in writing to the Member in the same manner as the original show cause notification.

#### **5.2.4. Interactions**

The precautionary notification may interact with RCSA's StaffSure Precautionary Flag & Suspension Protocol.

#### **5.2.5. Guidance**

A precautionary notification may be recorded in cases of uncertainty. The precautionary principle has been explained:<sup>1</sup>

*Precaution may be defined as "caution in advance", "caution practised in the context of uncertainty", or informed prudence. Two ideas lie at the core of the principle:*

- *"...an expression of a need by decision-makers to anticipate harm before it occurs. Within this element lies an implicit reversal of the onus of proof: under the precautionary principle it is the responsibility of an activity-proponent to establish that the proposed activity will not (or is very unlikely to) result in significant harm.*
- *the concept of proportionality of the risk and the cost and feasibility of a proposed action".*

RCSA may provide further guidance to Members and the public on any matter arising under this section of the Protocol.

### **5.3. Reference Documents**

- RCSA Constitution
- RCSA Code of Professional Conduct (Proposed)

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<sup>1</sup> Andrew Jordan & Timothy O'Riordan. Chapter 3, The precautionary principle: a legal and policy history, in The precautionary principle: protecting public health, the environment and the future of our children. Edited by: Marco Martuzzi and Joel A. Tickner. World Health Organization 2004. Wikipedia citation [https://en.wikipedia.org/wiki/Precautionary\\_principle](https://en.wikipedia.org/wiki/Precautionary_principle) fn 4.

- RCSA Professional Conduct Grievance Intervention Guidelines (Proposed)
- RCSA Service Delivery Standard
- RCSA StaffSure Certification Standard
- RCSA StaffSure Precautionary Flag & Suspension Protocol.

## 6. Regulatory Referrals

RCSA has a Memorandum of Understanding (“**MoU**”) with the Fair Work Ombudsman (“**FWO**”) Australia for the exchange of information relating to businesses of concern.

RCSA considers that any referral or exchange of information that is made, should be made by duly authorised officers, following careful application of evaluation procedures for determining when information of concern will be referred to the FWO.

Under the Code 5 Framework, Diversion and Monitoring is a pathway that groups several procedures by which RCSA may divert a Grievance into one or more external channels, or into a channel for resolution of RCSA's Professional Conduct interest in a Member's conduct.

If a Grievance is diverted as provided by PCGIG, RCSA may defer making any further intervention pending the outcome of the diversion provided that it monitors the progress of the diversion and remains satisfied that its Member's co-operation with the diversion meets the standard of professional conduct required by the Code.

PCGIG 6.2.1 explains

1. *A Regulatory Referral is a referral of a Member's professional conduct made by RCSA to a statutory regulator, commission or tribunal, such as the Fair Work Ombudsman (FWO), the Office of the Australian Information Commissioner (OAIC), the Australian Competition & Consumer Commission (ACCC); NZ Commerce Commission, Labour Hire Licensing Authority, or Human Rights Commission. It also includes referral to another authority such as AHRI that may exercise a concurrent jurisdiction in respect of the professional conduct of Members*
2. *Typically, a referral would be made where a grievance involves a workplace right (within the meaning of the Fair Work Act, a matter more appropriate to the making of a personal grievance to the Employment Relations Authority*

(NZ), a competition or consumer law contravention, or a privacy right.

3. A Regulatory Referral may only be made if RCSA has established a Memorandum of Understanding or liaison program with the statutory regulator, commission, tribunal or authority and a governance protocol for determining when conduct should be referred.

This section establishes the governance protocol for determining when conduct should be the subject of a regulatory referral.

### 6.1. Application

- a. This section applies to the referral to regulators of Member conduct accepted by RCSA for Professional Conduct Intervention.
- b. Nothing in this section prevents or inhibits RCSA from lawfully referring conduct of concern of non-Members to a regulator.
- c. In this section:

a **referral arrangement** is an arrangement made between RCSA and a regulator for the referral or exchange of information, or other liaison, between RCSA and a regulator about:

- the professional conduct of Members; or
- any conduct of concern engaged in by participants in the industry for the supply or acquisition of recruitment, staffing and workforce solutions industry that has the capacity to contribute to exploitation or to harm the reputation of the industry and includes:
  - i. a **standing arrangement** - e.g. the Memorandum of Understanding entered into between RCSA and the Fair Work Ombudsman for information sharing to facilitate a well-functioning labour market in Australia protecting the rights of workers and employers; and
  - ii. an **ad hoc arrangement** - e.g. the 2012 understanding reached between RCSA and the Department of Immigration and Citizenship (as then styled) regarding parallel disciplinary proceedings by RCSA and enforcement proceedings by DIAC against a Member.

a **regulator** is:

- any law enforcement body or statutory regulator (including a commission or inquiry) that has lawful jurisdiction to receive

information from RCSA in relation to the conduct accepted for intervention;

and also includes:

- i. another authority such as the Australian Human Resources Institute (AHRI), Human Resources Institute of New Zealand (HRINZ), the World Employment Confederation (WEC), that may exercise a concurrent jurisdiction in respect of the professional conduct of its Members; and
- ii. a certification or accreditation body under the auspices of which a Member holds a certification or accreditation to which the Member's conduct is relevant.

## **6.2. Detail**

### **6.2.1. Governance**

#### **1. When a referral arrangement may be established**

A referral arrangement may be established:

- a. in any case provided for in a statement of strategic priority and intent by the RCSA Board;
- b. in any case where it is consistent with an RCSA internal compliance policy;
- c. in any other case where the establishment of a referral arrangement is consistent with the objects for which RCSA is incorporated - including facilitating the operation of RCSA's professional conduct framework from time to time.

#### **2. Who may establish a referral arrangement**

- a. The Board may establish all categories of referral arrangement.
- b. The CEO may establish an *ad hoc* referral arrangement for the referral of Members' conduct and/or liaison.

#### **Examples:**

- An arrangement between RCSA and a National Supervisory Authority under the GDPR to refer conduct in relation to a cross border privacy breach.
- A liaison programme between RCSA and a labour hire licensing authority for the exchange of trend information.



- c. The Registrar may establish an *ad hoc* referral arrangement for liaison only in relation to Member conduct.

#### **Example**

- A liaison arrangement between RCSA and a regulator such as the OAIC or Labour Hire Licensing (Qld) for updating participants on the progress of parallel interventions and enforcement proceedings.

### **3. Documentation**

RCSA is to suitably document and retain:

- a. details of any referral arrangement it makes with a regulator;
- b. a record of its evaluation of Member conduct considered for regulatory referral (including its reasons for referring or not referring conduct); and
- c. a record of all steps taken to refer and monitor any referral that it makes.

#### **6.2.2. Timing**

- a. Upon accepting a grievance about a Member's conduct for intervention under either the Registrar evaluates the grievance and, in consultation with the CEO, decides whether the conduct should be referred to a regulator.
- b. At any time during the subsequent conduct of a grievance intervention, the Registrar in consultation with the CEO, on their own initiative, may evaluate the grievance and decide whether the conduct should be referred to a regulator.
- c. An Ethics Committee or a Professional Conduct Review Committee examining a matter may give a direction to the Registrar to evaluate, in consultation with the CEO, any conduct that is the subject of its Professional Conduct Intervention and to decide whether the conduct should be referred to a regulator.

**Note:** The Committee does not, itself, refer the conduct to a regulator; that is the responsibility of the Registrar in consultation with the CEO.

- d. Wherever practicable, RCSA will not make a regulatory referral of a Member's conduct without first giving the Member an opportunity to voluntarily disclose the conduct to the relevant regulator.

#### **6.2.3. Notification**

- c. Wherever practicable, RCSA, prior to referring a Member's conduct to a regulator, will notify the Member in writing of the alleged conduct, the regulator/s to which it is proposed the conduct should be referred, the reasons why a referral is to be made: and give the Member a reasonable opportunity to voluntarily disclose the conduct to the regulator/s.
- d. What amounts to a reasonable opportunity depends on all the circumstances, having special regard to the risk of harm to any person that may be occasioned by delay.

#### **6.2.4. Process**

##### **1. Conduct that must be referred**

The following conduct must be referred:

- a. conduct that is the subject of any mandatory reporting obligation;
- b. conduct that is identified by the Board in any current statement of strategic priority and intent as requiring referral;
- c. conduct that, pursuant to the terms of an applicable referral arrangement, must be referred;
- d. conduct that, pursuant to the terms of an RCSA internal compliance policy, must be referred.

##### **2. Consideration**

Without limiting the factors that RCSA may take into account in deciding whether to refer Member conduct, RCSA is to consider:

- a. the nature and extent of any mandatory reporting obligation in relation to the conduct;
- b. the nature and seriousness of the alleged conduct;
- c. the strength of evidence offered in support or rebuttal of the alleged conduct;
- d. the number and circumstances of persons who may suffer harm by referring or not referring the conduct;
- e. the extent and nature of any harm that may be caused to the Member or any other person by referring or not referring the conduct;
- f. whether the proposed referral appropriately captures and escalates whistleblower reports;

- g. reasonable and appropriate measures for protecting privacy and confidentiality of information referred;
- h. the content of any applicable RCSA Board statements of strategic priority and intent; and
- i. alternatives to recording the caution.

### **3. Monitoring**

If RCSA makes a regulatory referral of Member conduct, it is to monitor the progress of the referral (within the limits of the referral arrangement under which it is made) in order to identify developments that may have a bearing on any other pathway available to RCSA for the effective management of its professional conduct intervention.

#### **6.2.5. Interactions**

A regulatory referral may interact with RCSA's StaffSure Precautionary Flag & Suspension Protocol and with other pathways for grievance intervention.

#### **6.2.6. Guidance**

RCSA may provide further guidance to Members and the public on any matter arising under this section of the Protocol, including using de-identified case studies to publish on the website.

### **6.3. Reference Documents**

- RCSA Constitution
- RCSA Code for Professional Conduct
- Disciplinary & Dispute Resolution Procedure
- RCSA Code of Professional Conduct (Proposed)
- RCSA Professional Conduct Grievance Intervention Guidelines (Proposed)
- Memorandum of Understanding with the Fair Work Ombudsman (FWO) for the exchange of information relating to recruitment businesses of concern.

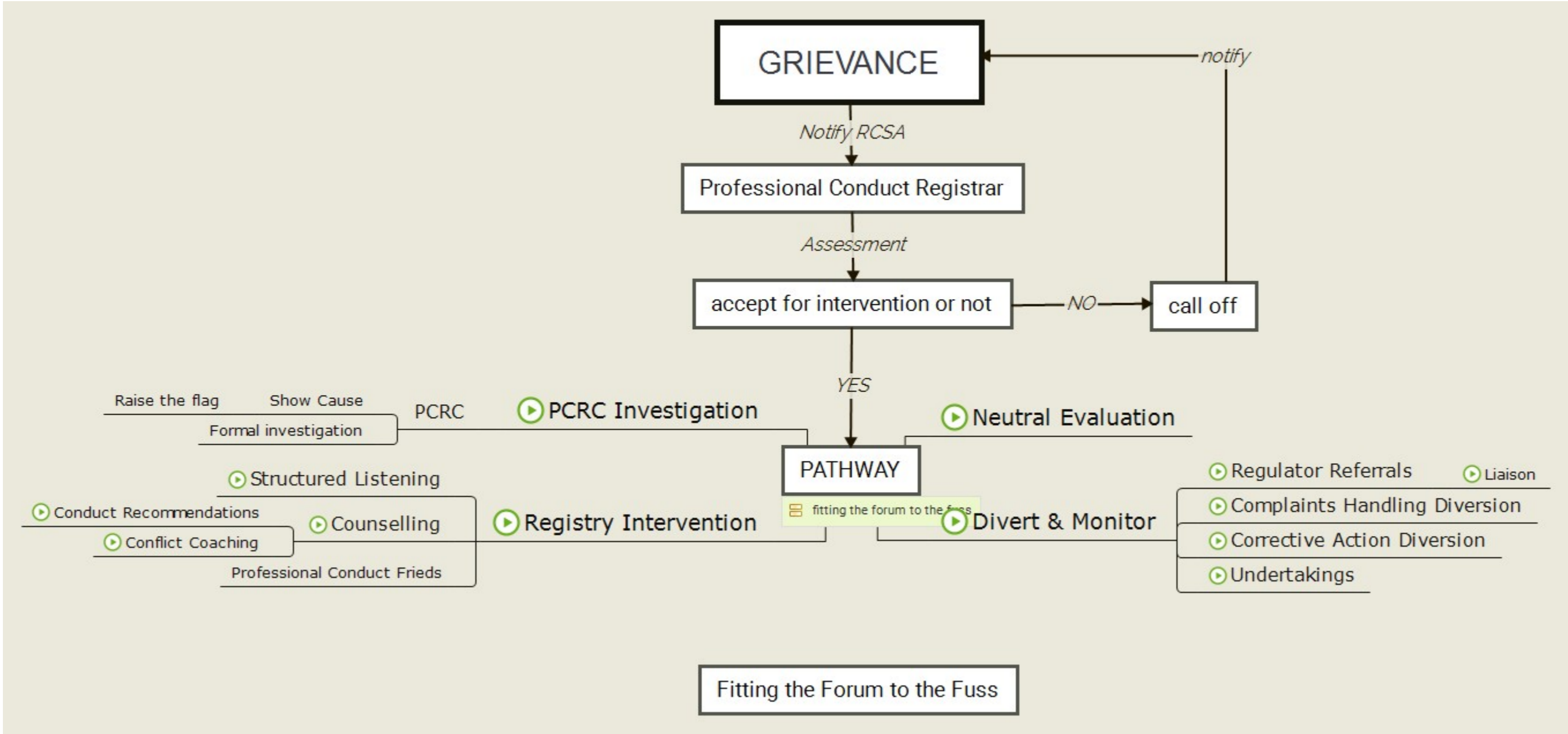
## **7. Status & Review**

- a. As much of the protocol as is consistent with RCSA's authorised professional conduct framework takes effect upon adoption by the Board.

- b. This protocol should be reviewed within 6 months of the ACCC's final determination in Application for Authorisation AA1000435.

**8. Date**

15 March 2019.



### **Aim**

The Ethics Panel is established as a source for convening Ethics Committees to hear and determine matters referred to it by the Ethics Registrar with respect to the Code of Professional Conduct and Disciplinary and Dispute Resolution Procedures.

### **Structure**

The Panel is made up of volunteers at levels of MRCSA or FRCSA with an interest in Ethics as well as nominated Life Fellows who are still active in the Association and industry.

From the Panel, volunteers are sort to convene an Ethics Committee if and when required as per complaints received under the Code of Professional Conduct and Disciplinary and Dispute Resolution Procedures.

An Ethics Committee will comprise, as a minimum:

- A Chair nominated by the Committee, after the Committee is selected
- At least one Life Fellow of the RCSA
- At least one, but no more than three other Committee Members selected from the Panel that may, or may not be Life Fellows

Attendees:

- RCSA Counsel Assisting
- RCSA Ethics Registrar

Any Ethics Committee that is merely conducting a directions hearing, or issuing directions, may comprise a single Panel Member sitting alone with the assistance of Counsel Assisting RCSA.

### **Ethics Registrar**

The Ethics Registrar is not a member of an Ethics Committee but exercises responsibilities under RCSA's Disciplinary & Dispute Resolution Procedures.

The Ethics Registrar may engage the assistance of outsourced registry support but may not delegate any of the Ethics Registrar's decision-making responsibilities.

### **RCSA Counsel Assisting**

Ethics Committees and the Ethics Registrar may be assisted by a legal practitioner acting in the role of RCSA Counsel Assisting. RCSA Counsel Assisting is not a member of an Ethics Committee.

The primary role of Counsel Assisting RCSA is to fairly assist the Ethics Committee to arrive at the truth and must seek to assist the Ethics Committee with adequate submissions of law and fact.

Counsel Assisting RCSA may also assist the Ethics Committee and the Ethics Registrar by providing advice and submissions on matters of procedure and resolution pathways that may be available under RCSA's Disciplinary & Dispute Resolution Procedures.

An Ethics Committee and the Ethics Registrar may obtain advice from Counsel Assisting RCSA within the limits of their financial delegations and budgets.

### **Eligibility and Tenure**

The Panel is made up of volunteers with an interest in Ethics as well as Life Fellows who are still active in the Association and industry. There is no set tenure.

### **Frequency of Meetings**

The Panel does not meet. Ethics Committees will be convened as and when required to determine matters referred to it by the Ethics Registrar.

## Record of Meetings

The Committee will prepare a report and make determinations on matters presented to them and provide recommendations to the Board for final action.

## Functions and Delegated Authority

- Review the information gathered by the Ethics Registrar with respect to Complaints raised against Members
- Commit the time to participate in and take advantage of educational and training opportunities that are available and are relevant to their role
- Hear and consider or dismiss complaints raised against Members
- Participate in hearings and reviewing evidence provided by the Ethics Registrar
- Make determinations on matters presented to them and provide recommendations to the Board for final action
- The Committee will not represent itself as the final determining body of the RCSA – this is the role of the RCSA Board of Directors as established by the Constitution.

### NOTE:

Councillors/volunteers have no individual authority to participate in the day-to-day management of the Association, including making any representations or agreements with member companies, suppliers, business partners, employees, or other parties or organizations unless such authority is explicitly delegated through resolution from the RCSA Board. Councillors/volunteers, independently or collectively, shall not commit the RCSA to any expense or financial commitment without first gaining the approval of the Board or the CEO.

## Memorandum of Understanding

### Information sharing to facilitate a well-functioning labour market in Australia protecting the rights of workers and employers

#### Between

FWO	Name	The Office of the Fair Work Ombudsman ("The Fair Work Ombudsman")
	Michael Campbell	Level 6 414 La Trobe Street Melbourne VIC 3000

- and -

RCSA	Name	Recruitment and Consulting Services Association
	Charles Cameron	PO Box 18028 Collins Street East Melbourne VIC 8003

## Recitals

A. The RCSA is the leading industry and professional body for the recruitment and human resources services sector in Australia and New Zealand. It represents over 3300 company and individual members.

B. The Office of the Fair Work Ombudsman (FWO) is a Commonwealth agency established by the *Fair Work Act 2009* (Cth) and is responsible for promoting harmonious, productive and cooperative workplaces and ensuring compliance with the *Fair Work Act 2009*, the Fair Work Regulations 2009 and fair work instruments.



# 1. Interpretation

1.1 For ease of description, this Memorandum uses the following terms:

**CEO RCSA** means the person appointed to, holding or acting for the time being in the position of CEO of the RCSA.

**FWO** means the Office of the Fair Work Ombudsman.

**Labour hire** (on hire employee services) means commercial services where an employment services provider, in return for a fee, assigns one or more of its employees to perform work for a customer under the customer's instruction.

**Memorandum** means this memorandum of understanding.

**Parties** means the RCSA and the FWO.

**RCSA** means the Recruitment and Consulting Services Association.

**Recruitment** (placement services) means commercial services where an employment services provider, in return for a fee, sources, presents a work seeker or provides personal information about work seekers for employment, appointment or engagement by a customer.

## 2. Purposes of memorandum

2.1 The purposes of this memorandum are:

- i. To assist the FWO fulfil its responsibilities in promoting and monitoring compliance with Commonwealth workplace relations laws including the *Fair Work Act 2009* (the Act), the National Employment Standards (NES) and relevant industrial instruments within various industry sectors.
- ii. To establish an information sharing pathway for RCSA members and other interested parties through the RCSA to the FWO. For example, this may be the identification of an illegally operating labour hire provider, serious breaches of workplace laws or the identification of serious discriminatory or otherwise illegal hiring practices.
- iii. To set out a common statement of intent and the commitment of both parties.
- iv. To send a strong message to the supply chain in any industry sector that when RCSA members become aware of illegal practices they have a direct information sharing pathway via the RCSA to the Australian workplace regulator - the FWO.

2.2 This memorandum records the parties' shared understanding and expectations about their respective roles and responsibilities in relation to:

- i. The RCSA's responsibility to their members, the wider industry they represent and their obligations under their endorsed charter and industry codes of conduct.
- ii. The FWO's role in promoting harmonious, productive and cooperative workplace relations and ensuring compliance with Australian workplace laws.

2.3 This memorandum is not intended to restrain the RCSA or the FWO in the way it investigates any matter, or how they take decisions to pursue matters to court, or other outcomes, such as code of conduct proceedings.

## 3. Obligations

3.1 The RCSA and the FWO will give effect to the arrangements and procedures set out in **Annexure A**.

3.2 Subject to legal restrictions on information disclosure, the RCSA and FWO will exchange information and respond to requests where relevant, to assist each other in their roles.

3.3 The RCSA and the FWO will establish and maintain liaison contacts to ensure the effective operation of this memorandum.

## 4. Variation and termination

### 4.1 Variation

This memorandum may be varied at any time by agreement of both parties. Any variations must be in writing and signed by both parties.

### 4.2 Termination

Either party may terminate this memorandum by providing 28 days notice in writing to the other party.

## 5. Constraints imposed by laws

5.1 The RCSA and the FWO acknowledge that from time to time the other may be unable to fully comply with all the requirements of this memorandum due to constraints imposed by laws (including but not limited to Commonwealth and State privacy legislation). Each party agrees to use its best endeavours to exchange information to the extent permissible by law.

## 6. No intention to enter legal relations

6.1 The parties:

- i. Agree that by entering this memorandum they have no intention to enter legal relations.
- ii. Confirm that this memorandum is not a legally binding document and is not enforceable as such, and neither party shall be entitled to any compensation or make any claim on the other before a court or any other person or body arising out of a breach by a party of this memorandum.

## 7. Privacy

7.1 RCSA and FWO respectively undertake that any disclosure of information, and any use, storage or transfer of such information, shall only be made to the extent permitted by law and, in particular:

- i. Assure each other that any personal information as defined in the relevant privacy legislation disclosed by one to the other in connection with this

memorandum has been collected in accordance with applicable privacy legislation.

- ii. Assure each other that the disclosure of the information to, and its use by, the organisation to which it is disclosed is authorised by the individual or by law.
- iii. Agree not to use, disclose, store, transfer or handle personal information collected in connection with this memorandum except in accordance with applicable privacy legislation.
- iv. Agree to cooperate with any reasonable request of the other relating to the protection of personal information or the investigation of complaint of personal information.

## 8. Communication

8.1 The RCSA and the FWO agree to meet when requested by the responsible officers to discuss issues arising in relation to areas of mutual interest or concern, including issues arising under this memorandum.

8.2 The exchange of information outlined in this memorandum will, unless agreed otherwise, occur at an operational level between the operational officers.

8.3 The RCSA and the FWO will publish this memorandum on their respective websites.

## 9. Confidential information

9.1 With respect to any information designated as confidential (e.g. relating to a company) and supplied by one party to the other in connection to this memorandum, each party agrees to:

- protect the confidential information in a reasonable and appropriate manner and in accordance with any applicable professional standards
- use and reproduce confidential information only for purposes set out in this memorandum
- not disclose or otherwise make available confidential information other than to its personnel who have a need to know the information to give effect to the purpose set out in this memorandum.

9.2 The above paragraph shall not apply to any information which is publically available or permitted to be disclosed to a third party without restriction.

## 10. Term

10.1 This memorandum has effect from the date it is signed on behalf of the last party to sign it for a period of three years, unless varied or terminated in accordance with paragraph 4 or by any right at law.

# 11. Contacts

## 11.1 Responsible officers

The parties acknowledge that the persons appointed to, holding, or acting for the time being in, the following positions will use their best endeavours to facilitate the efficient implementation of this memorandum.

- i. For RCSA: Ethics Compliance and Risk Manager.
- ii. For FWO: Director - Regional Services and Young Workers, Dispute Resolution and Compliance Group.

## 11.2 Operational officers

The parties acknowledge that the persons appointed to, holding or acting for the time being in the following positions will be responsible for the exchange of information at the operational level to enable the implementation of this memorandum:

- i. For RCSA: Ethics Compliance and Risk Manager
- ii. For FWO: Director - Regional Services and Young Workers.

## 11.3 Change in responsible officers and operational officers

The RCSA and FWO may change their responsible officers or operational officers by notifying the other party in writing.

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**Signing page**

)  
SIGNED by )  
Charles Cameron, Chief Executive Officer )  
Recruitment and Consulting Services Association )  
in the presence of: )  
 )  
..... )  
Signature of witness )  
 )  
..... )  
Name of witness (block letters) )  
 )  
DATED: ..... )

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)  
SIGNED by )  
 )  
Michael Campbell )  
Deputy Fair Work Ombudsman (Operations) )  
in the presence of: )  
 )  
..... )  
Signature of witness )  
 )  
..... )  
Name of witness (block letters) )  
 )  
DATED: ..... )

# ANNEXURE A

## 1. PRINCIPLES

The following general principles will apply in relation to the RCSA and FWO with respect to the sharing of mutually suitable and beneficial information in line with the agreed purpose of the MOU.

- 1.1 RCSA and FWO will exchange information, to the extent possible that will assist both organisations in the delivery of their services, enforcement of relevant laws and the advancement of productive and compliant workplace practices in Australia.
- 1.2 RCSA and FWO will provide mutual assistance and support, to the extent possible, when assessing complaints, allegations or issues raised relating to labour hire or recruitment practices by individuals, companies or industry sectors.

## 2. RESPONSIBILITIES - statutory, corporate and governance

- 2.1 **The FWO** is a statutory office created by the *Fair Work Act 2009*. Its jurisdiction under the *Fair Work Act 2009* is to promote harmonious, productive and cooperative workplace relations and ensure compliance with Australian workplace laws. It does this by:
  - providing education, assistance and advice to employers and workers
  - promoting and monitoring compliance with workplace laws
  - investigating workplace acts and practices that are suspected to be contrary to workplace laws
  - enforcing relevant Commonwealth workplace laws.
- 2.2 **The RCSA** is a voluntary membership based organisation. A condition of membership is that all RCSA members are required to abide by, and adhere to, the RCSA Code for Professional Conduct. The code provides best practice guidelines to RCSA members and, in the event of a complaint against a RCSA member, the code is supported by the RCSAs Disciplinary & Dispute Resolution Procedures (D&DRP). The RCSA Code has been authorised by the Australian Competition and Consumer Commission (ACCC) since 2003. The Code and D&DRP were re-authorised by ACCC for a further five years on 6 March 2014.

## 3. ARRANGEMENTS

To give effect to the principles outlined above:

### 3.1 Information Sharing

- 3.1.1 On a regular basis, FWO will provide information to the RCSA on significant education, compliance and enforcement activities and outcomes involving employers, industry sectors or regions of mutual interest.
- 3.1.2 On a regular basis or as suitable, RCSA will provide information to the FWO on issues relating to labour hire or recruitment businesses of concern, industry sectors or regions of concern and/or new initiatives whereby they may wish to seek the feedback or input of the FWO.
- 3.1.3 The FWO undertakes to contribute to RCSA newsletters, web content, conferences or seminars as appropriate.
- 3.1.4 Any outcomes resulting from referrals, investigations or prosecutions of incidents covered by this annexure will be made available to both parties (subject to legislated restrictions on disclosure of any outcomes resulting from investigations or prosecutions of incidents).
- 3.1.5 RCSA will provide information held on their database on a case-by-case basis on request subject to any legal requirements or restrictions.
- 3.1.6 When using information, the parties acknowledge each party's primary responsibility is to comply with the confidentiality requirements of the Acts and privacy policies under which each party operates.

## **3.2 Formal meetings**

- 3.2.1 RCSA and FWO will meet formally at least twice a year to share information and discuss strategic and operational issues concerning areas of mutual interest.