

RESPONSE TO ACCC FURTHER REQUEST FOR INFORMATION

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Introduction

The purpose of this submission is:

- to address several matters raised by the Commission in its email outline of information sought dated 27/3/19;
- to amplify points made in the course of discussion with the Commission on 27/3/19 March 2019;
- to respond to further requests for information made by the Commission on 28/3/19
- to expand on comments made about the direction and intent of the Code 5 framework, including the PCGIG; and
- to acknowledge and respond briefly to the submission made by APSCo Australia on 18/3/19.

Matters raised by the Commission 27/3/19

On 27 March 2019, the Commission advised its interest in exploring with RCSA several matters as follows:

For context, the ACCC team understands that RCSA did not impose any sanctions under A91388. We are considering whether RCSA's Professional Conduct Regime, which we understand aims to set higher standards of behaviour than are required by law, can achieve those higher standards when it appears the sanctions process hasn't been applied. In the context of RCSA's move away from a rules-based to a principles-based approach to governance, and given RCSA has noted it is unlikely it will impose sanctions going forward, we are keen to understand:

- *the types of behaviours RCSA's Professional Conduct Regime intends to address*
- *the types of behaviour that leads RCSA to escalate complaints, and how RCSA determines what level of intervention is appropriate*
- *the degree to which forms of 'softer' intervention (compliance measures other than sanctions) ensure that members are incentivised to comply with the Code and to operate at a higher standard than what is required by law*
- *specific types of behaviour where RCSA would consider a sanction appropriate*

- *further detail for the complaints data provided by RCSA.*

RCSA wishes to correct one misconception that may have arisen. RCSA has never said that it is “*unlikely that it will impose sanctions going forward*”. What it said, in its submission of 21 March 2019, was:

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.

RCSA was merely indicating that it anticipated that the improvements made in the PCGIGS would continue the trend of allowing for matters to be resolved prior to reaching the sanctions stage. RCSA was not making any prediction about whether sanctions would be applied, nor was it suggesting in any way that the deterrent of sanctions could be dispensed with.

On the contrary, RCSA has contended consistently that the ability of the Board to impose sanctions confidently without fear that they will be challenged as anti-competitive is the very reason it is seeking authorisation.

Types of behaviours RCSA’s Professional Conduct Regime intends to address

In brief, the behaviours may be summarised as:

- conduct that is not becoming of a Member or in the interests of RCSA as provided for by RCSA’s Constitution cl. 2.8.
- conduct of the type set out at pages 7 and 8 of RCSA’s submission of 21 March 2019;
- “regulatory aftermath” – i.e. dealing with the professional conduct consequences of adverse findings made by regulatory authorities, courts and statutory tribunals etc. An example is given at page 38 of RCSA’s submission of 21 March 2019. Other examples would include licence disqualifications, cancellations and suspensions. RCSA recently had occasion to follow up a Member whose Queensland labour hire licence was suspended. The matter was resolved, and the Member was restored to the list of licence holders.

Types of behaviour that leads RCSA to escalate complaints

In brief, the behaviours may be summarised as:

- conduct that is not becoming of a Member or in the interests of RCSA as provided for by RCSA’s Constitution cl. 2.8.
- conduct of the type set out at pages 7 and 8 of RCSA’s submission of 21 March 2019;

- recalcitrant behaviour – i.e. behaviour of a Member who may be unwilling to exercise guided self-regulation in order to meet the Code standard of professional conduct. When we speak of “self-regulation” in this context, we are speaking of behavioural self-regulation in accordance with professional values, rather than the “closed shop”, anti-competitive type of industry self (interested) regulation with which the Commission would be familiar;
- conduct that requires a fact-sensitive inquiry within RCSA's capability as a domestic body.

If "escalation" means regulatory referral, we respectfully refer the Commission to the circumstances set out at Attachment B, pages 61 – 63 of RCSA's submission of 21 March 2019.

How RCSA determines what level of intervention is appropriate

RCSA would regard this as a technical dispute resolution question, the answer to which depends on the nature of the grievance.

In practice, RCSA takes Counsel's advice and commissions “pathway summaries” – examples of which may be found in the Case Samples extracted from real case files for the Commission's confidential information.

The degree to which forms of ‘softer’ intervention (compliance measures other than sanctions) ensure that members are incentivised to comply with the Code and to operate at a higher standard than what is required by law

In RCSA's respectful submission, it is important to remember that RCSA is a voluntary association whose Members operate under market conditions. That means that, in most instances:

- Members WANT to be part of a professional association;
- Members WANT to be recognised for their professionalism;
- Members WANT their membership of RCSA to attest to their professionalism;
- Members WANT their membership of RCSA to carry weight in the market;
- Clients & Workseekers WANT the assurance of professionalism that has accountability and redress measures arising from membership of RCSA.

Those matters, of themselves, are sufficient to incentivise Members to join RCSA and to meet the standard of conduct expected of Members.

Beyond that, however, the so-called “softer” approaches to securing to conforming conduct provided under the PCGIG are a more attractive option for Members than harder alternatives of regulatory referral, registry caution, or sanctions.

Specific types of behaviour where RCSA would consider a sanction appropriate

- Conduct that is not becoming of a Member or in the interests of RCSA.
- Conduct of the type set out at pages 7 and 8 of RCSA's submission of 21 March 2019.

Further detail for the complaints data provided by RCSA.

The Commission elaborated on its request by email of 28 March 2019:

We would appreciate if you could provide further detailed information on complaints that reached a higher stage than enquiry and involved an RCSA Member respondent.

- *What was the complaint and was it repeat conduct?*
- *How was the complaint resolved or any steps to date?*

We address these matters in the table below, recross-referencing the line numbers in the original spreadsheet provided on 21 March 2019.

It will be helpful to bear in mind that complaints received by RCSA often contain several separate elements. The cases mostly do not involve Members repeating the same conduct.

However, some of the Respondent Members have also been respondents in other Grievances. In that context, it is important to keep in mind that some Members run very large operations with many offices across Australia and New Zealand and undertake thousands of transactions per day. While the Respondent in these cases may be the same corporate member, the cases do not show repeat patterns in subject matter, nor any concerning level of severity of nature.

RCSA values the ethical integrity of our Code of Professional Conduct above all financial considerations of membership fees. Even the fees paid by our largest corporate members are only a tiny fraction of overall income of the Association. There would be no hesitation to impose sanctions should these be required, no matter what size the member was.

Complaints handled prior to September 2017 were handled internally by staff whom have since left RCSA. It has not been possible, in every instance and in the time available, to collect the full detail to respond to the Commission's request. Brief information is provided here that hopefully clarifies to some degree the detail on the nature and context of the complaint. Should the Commission require additional information about any other Grievances which have not been used as case studies, RCSA would undertake a further search of its records including off-site archiving at a storage facility.

In September 2017, RCSA outsourced the handling of Grievance Interventions under D&DRP rule 4 to WorkAccord, whose personnel, including a nationally accredited mediator, have been involved in designing RCSA's Professional Conduct Regime

since 2003 and have been involved in designing the Code 5 framework based on first-hand experience of conducting Grievance Interventions under D&DRP rule 4.

The documentation of Grievances, since that time, has been thorough and substantial. For example, in the matter at lines 307-308 in the spreadsheet provided on 21 March 2019 (CASE CL_1) more than 300 pages of Grievance Intervention material were compiled for the referral papers provided to RCSA's Ethics Committee.

The redaction of the entire record would take considerable time. RCSA has therefore prepared the summary in the table below and provided the Commission with sample of the key documentation in six matters conducted since December 2017.

The material will provide the Commission with what RCSA considers to be a fair representation of the type on matters handled, their complexity and the extent of consideration given to them under the D&DRP.

We have also included some indications that may assist the Commission to better appreciate the reasons why RCSA is proposing the Code 5 Framework, now put forward for authorisation.

If the Commission would like further information, RCSA would be most happy to oblige.

TABLE CONFIDENTIAL TO ACCC

~~Case Samples~~

~~CASE STUDIES CONFIDENTIAL TO ACGC~~

APSCo Australia Submission

RCSA acknowledges and appreciates the support indicated by APSCo Australia for the Code 5 Framework and acknowledges that some industry participants are Members of both Associations.

With regard to the comment:

APSCO Australia considers the opportunities for individuals to raise concerns and understand the process may be somewhat more difficult.

Firstly, it will be no more difficult for a Grievant to pick a phone or send an email under the Code 5 Framework, than it is under the present Code framework. No part of that process will change from the perspective of someone looking to raise a concern.

Secondly, RCSA recognises that whilst there may be differences in the level of understanding demonstrated by informed and uninformed users of the Code 5 Framework and especially the PCGIG process, the PCGIG is essentially for the internal guidance of RCSA itself in managing professional conduct grievances. It is not like a set of court rules that parties might “game” in order to secure best advantage in adversarial proceedings.

The PCGIG is designed for informed users of the process – and in particular those who have governance and management responsibilities in respect of it.

It is a technical array in the sense that the instruments laid out on a dentist’s tray are a technical array. The patient may not know what they are all for, but it should be of some comfort to know that they are not all for pulling teeth.

That said, RCSA has already prepared education materials relating to the PCGIG – including the free on-demand webinar access to which has been provided to the Commission and to any member of the public who may be interested in following the links in the submissions made to the Commission to date.

It is of course, RCSA’s intention to provide extensive training available to all Members and the Public once the Code 5 Framework has been authorised. RCSA has already explained that the reason why it has staged the transition process with the PCGIG to commence prior to the new Code is so that the processes will be well-bedded down before the new Code takes effect.

Finally

RCSA has greatly appreciated the interest and consideration shown by the Commission in this matter.

The Code 5 framework is admittedly novel. As recognised by APSCo Australia, it has been designed as a professional conduct framework that is capable of sitting comfortably alongside increased regulation through state and federal jurisdictions.

RCSA trusts that it has sufficiently answered the Commission's requests for information and has explained the direction and intent of the Code 5 Framework. RCSA now looks forward to the Commission's determination.