

1.2.2 Guidance

Governance, conflicts of interest and financial arrangements

For Schemes being prepared under Professional Standards
Legislation

June 2021





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Disclaimer

This guidance is applicable only to an occupational association preparing a Scheme for approval under Professional Standards Legislation. It does not constitute legal or other professional advice and should not be relied on as such. An occupational associations should seek its own legal/professional advice to find out how the Professional Standards Legislation and other relevant laws and regulations may apply to it. For access to legislation in force in NSW, go to the official NSW Government website for online publication of legislation at www.legislation.nsw.gov.au.

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Pilot



1. Guidance Statement

A key aim of this guidance is to assist your association in completing Submodule 1.2 *Association governance, conflicts of interest and financial arrangements*. This information is mandatory for applicant associations to submit when seeking approval of the Professional Standards Councils for a Professional Standards Scheme.

You should note that all information submitted to support an application for approval of a Scheme under Professional Standards Legislation is classified as “Councils-in-confidence”. The legislation provides that your information may not be released to third parties without your consent (see section 50A of the *Professional Standards Act 1994* (NSW)). Any financial information provided is protected under these disclosure of information provisions

2. Legislative obligations

Section 10 of the *Professional Standards Act 1994* (NSW) provides that, before approving a Scheme, the Councils must consider a range of requirements, with a particular statutory emphasis on your association’s risk management strategies.

The Councils have a discretion not to approve a Scheme where the association’s capacity for supervision of its risk management strategies, the oversight of disciplinary arrangements, or representing the interests of its members, is in doubt.

Such capacity may be affected by the governance arrangements of the association, its management of actual or perceived conflicts of interest, and its financial resources – making these matters reasonable considerations of the Councils in deciding whether or not to approve a Scheme.

3. Requirements

The questions asked in the submodule are, to a large extent, modelled from Module 4.0 *Professional risk management strategies*, given the objective of integrating risk management into Scheme operations. You can use your association’s response to the risk module to inform your submission on this submodule.

The next sections of this guidance set out a brief commentary on the information being sought by the submodule.

a) Governance

Governance refers to the systems that direct and control or govern an association. In the context of the legislation, governance is about how your association interacts with other entities or related parties.

Generally, the topics of governance will canvass an association’s accountability mechanisms, its transparency and collaboration. Importantly, if your association is constituted as a public company limited by guarantee, there is a paramount requirement to conduct general meetings of the members. Under section 250N of the *Corporations Act 2001* (Cth), a public company including a ‘small company limited by guarantee’ must hold its annual general meeting within five months of the end of the financial year.

Providing relevant documents and materials relating to your association’s governance would form the basis to your responses on the ‘governance’ section.



b) Conflicts of Interest

The definition of 'occupational association' in the legislation requires that the body corporate represent the interests of persons who are members of the same or related occupational groups. The focus of examining conflicts of interest is to ensure that the association is properly set up to look after the interests of its members. Note that for applicants that are multidisciplinary associations, 'related occupational groups' does not form part of the definition of 'occupational association' in the Professional Standards Legislation for the Australian Capital Territory, South Australia, or Victoria.

Where there is potential for conflicting interests and duties within an association, this may be relevant to consideration of the threshold question of whether the entity is an 'occupational association' for the purposes of the Act because, in extreme cases, poorly managed conflicts of interests or duties have the effect that the association does not characteristically represent the interests of its members. The Councils are only empowered to approve Schemes proposed by occupational associations.

Therefore, you need to effectively manage any and all conflicts that may arise between the association's regulation of its members, pursuing commercial business, lobbying industry, or similar activities.

c) Financial arrangements

You will need to demonstrate to the Councils that, in addition to an appropriate organisational structure, your association has the appropriate resources and funds available to regulate its members. In circumstances where there are concerns about the ongoing solvency of an association, the Council(s) may request cash flow forecasting for a longer period at their discretion.

In response to the Submodule's questions, the Councils may ask to review your association's financial statements, of the type below, for the last five financial years, in the following order of preference:

- i. audited, Director signed, general purpose financial statements
- ii. audited, Director signed, special purpose financial statements
- iii. financial statements provided to a regulator, such as the Australian Securities and Investments Commission (ASIC), the State or Territory association regulator, or relevant Minister
- iv. financial statements provided to a General Meeting of the members (i.e. AGM)
- v. if the financial year end is more than six months before the date of the application, the association management accounts (which are to be signed and dated by 2 Directors, or 1 Director and 1 Company Secretary, as true and correct, to attest to their authenticity).

You will need to provide an organisational structure showing any associated companies, including parent or subsidiary entities, detailing the financial or commercial arrangements between the associated companies, and where the companies share Directors.

Evidence suggests that the strength of an occupational association's financial position determines its ability to implement risk management strategies and oversee disciplinary arrangements. Having adequate resources, including financial, human and technological



resources¹, is crucial to an association's ability to monitor improvements in professional standards and consumer protection.

The Councils must have assurance that your association has sufficient resources to administer a Scheme, including its associated compliance monitoring functions (that is, Annual Professional Standards Reporting, or APSR) over its lifecycle. A Scheme is typically approved for five years, so any financial forecasting must consider this timeframe as a minimum.

Another important consideration is the solvency. The Councils assess financial solvency according to the indicia of insolvency outlined in the ASIC's *Regulatory Guidance 217 - Duty to prevent insolvent trading: Guide for directors*². Indicators may be:

- the entity has a history of continuing trading losses
- the entity is experiencing cash flow difficulties
- The entity is experiencing difficulties selling its stock or collecting debts owed to it
- creditors are not being paid on agreed trading terms and/or are either placing the company on cash-on-delivery terms or requiring special payments on existing debts before supplying further goods or services
- the entity is not paying its Commonwealth and state taxes when due
- legal action is being threatened and has commenced against the entity, or judgements are entered into against the entity in relation to outstanding debts
- the entity has reached the limits of its funding facilities and is unable to obtain appropriate further finance to fund operations e.g. through negotiating a new limit with its current financier or refinancing or raising money from another party
- the entity is unable to produce accurate financial information on a timely basis that shows the entity's trading performance and financial position or that can be used to prepare reliable financial forecasts
- Directors have resigned, citing concerns about the financial position of the entity or its ability to produce accurate financial information on the entity's affairs
- the company auditor has qualified their audit opinion on the grounds there is uncertainty that the entity can continue as a going concern
- the entity has defaulted, or is likely to default, on its agreements with its financier
- employees, or the entity's bookkeeper, accountant, or financial controller, have raised concerns about the entity's ability to meet, and continue to meet, its financial obligations
- it is not certain that there are assets that can be sold in a relatively short period of time to provide funds to help meet debts owed, without affecting the entity's ongoing ability to continue to trade profitably.

¹ Australian Securities and Investments Commission (ASIC) *Regulatory Guidance 269: Approval and oversight of compliance schemes for financial advisers*. Issued 28 September 2018 (p. 25).

² Australian Securities and Investments Commission (ASIC) *Regulatory Guidance 217: Duty to prevent insolvent trading: Guide for directors*. Issued 28 August 2020 (p. 21).



Should the financial position of the association display one or more of these indicators of potential insolvency, the Councils may determine that the association does not have the resources to effectively operate a Scheme.

d) Auditor requirements

Any financial information provided must be audited independently by a qualified auditor, in line with Australian auditing standards³, including ethical standards⁴. An example auditor's report, which the Councils would expect to see included with audited financial information, is provided by the Auditing and Assurance Standards Board (AUASB) in ASA 805⁵.

Note that the information on the continuous improvement of your governance, conflicts of interest and financial arrangements are also linked to the Councils' annual reporting process. For details, see Module 6.0 *Annual Professional Standards Report*.

4. Related application modules

Other governance-related processes need to be assessed as part of the application process. These exist as stand-alone modules, or other modules/submodules, as indicated below:

- Professional risk management strategies
- Codes (code of ethics; code of practice)
- Resolution of complaints by clients
- Discipline of members
- Notification of limitation of liability (disclosure of the Scheme by members)
- Compliance plan for complying with the Professional Standards Legislation and corporation requirements.

³ Auditing and Assurance Standards Board (AUASB) – Auditing Standards ASA 700: *Forming an Opinion and Reporting on a Financial Report*.

⁴ Accounting Professional and Ethical Standards Board: *APES 110 – Code of Ethics for Professional Accountants (including Independence Standards)*

⁵ Auditing and Assurance Standards Board (AUASB) – Auditing Standards ASA 805: *Special considerations - Audits of Single Financial Statements and Specific Elements, Accounts or Items of a Financial Statement* (pp. 20-30).