

Protecting and Enhancing Your Reputation

Strata Community Australia, Queensland

SYMPOSIUM 2013

Professionalism

- Fundamental to “Transitioning from Good to Great”
- Professionalism is about many things –
 - Academic qualifications
 - How we dress
 - How we treat our clients and our peers
 - The quality of our work
- Dictionary definition –
“the conduct, aims or qualities that characterize or mark a profession or professional person”

Professionalism

- “*conduct*”, “*aims*” and “*qualities*” = Ethics
- Ethics are “moral philosophy” determining right and wrong conduct and ensuring the practice of the former
- Ethics need to be studied, understood and built into the fabric of your business
- They reflect and enact your values
- They flow from integrity
- They are fundamental to professionalism
- They must exist at every level of a field of endeavor

Measuring Ethical Behaviour

- Must be measured against identifiable standards – usually layers of standards
- For body corporate managers –
 - Corporate “*Code of Conduct*”
 - “*Code of conduct for body corporate managers and service contractors*” (Sch. 2 BCCM Act)
 - “*Code of Professional Conduct*” (SCA Qld)
 - General ‘law of the land’
 - Community standards/expectations

Corporate Codes

- Having a Code and placing it on the notice board will not achieve ethical conduct
- May even be perceived as a token attempt
- Should be a separate document, identified and promoted as such
- Should be an aspirational document which embodies the underlying mission, values and principles of the business
- Needs to incorporate the legislative Code, the Professional Code, the relevant law and community standards
- Needs to bind the employees

Manager's Legislative Code

- Having a working knowledge and understanding of the BCCM Act
- Acting with honesty, fairness and professionalism
- Exercising skill, care and diligence
- Acting in the body corporate's best interests
- Keeping the body corporate informed of developments
- Ensuring employees comply with the Code and the BCCM Act
- Not engaging in fraudulent or misleading conduct
- Not engaging in unconscionable conduct
- Avoiding conflicts of duty or interest between Schemes
- Ensuring goods and services are supplied at competitive prices
- Complying with requests to demonstrate the keeping of particular records

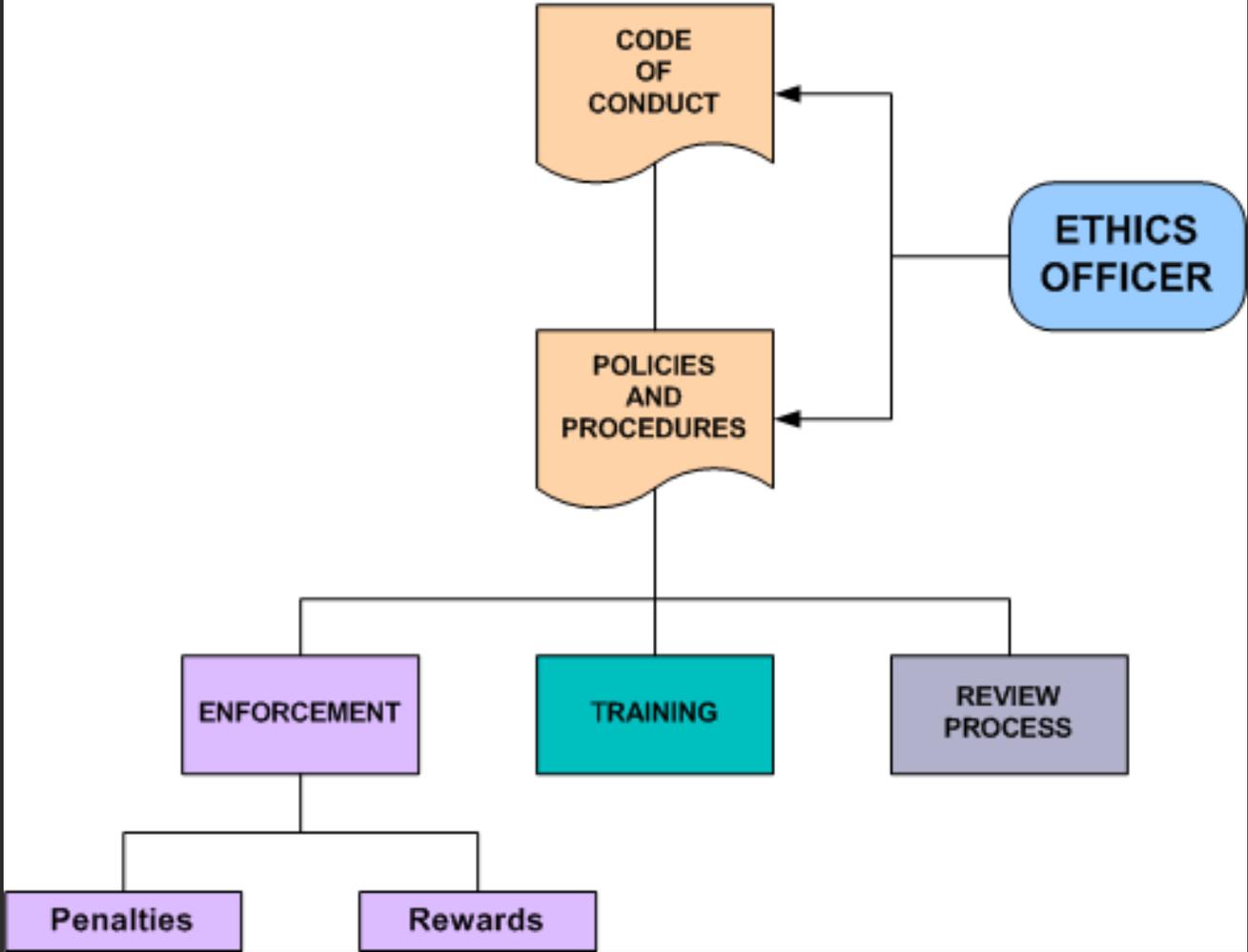
Industry (SCA) Code

- To be straightforward, honest and sincere
- To be fair and avoid prejudice
- To respect the confidentiality of information
- To work to relevant technical and professional standards
- To maintain an appropriate level of competence
- Not to directly or indirectly pay or accept a secret commission
- To accept the STA's disciplinary procedures
- To comply with rules regarding display if the SCA logo
- To refrain from discreditable conduct
- Not to induce or attempt to induce a breach of a body corporate management contract
- Not to denigrate another member
- To produce and transfer records (including electronic records) when required
- To comply with advertising standards
- To comply with standards and requirements for searches of body corporate records
- To observe certain practice requirements
- To comply with technical standards prescribed by SCA
- To satisfy continuing professional educational requirements

Conduct Related Laws

- Often overlap with the various Codes
- Good example – secret commissions
- Another example - unconscionable conduct (clause 7 SCA Code and section 22 *Australian Consumer Law*)

Managing Ethical Standards



High Risk Areas

- Breach of the fiduciary relationship
- Not acting in the best interests of the body corporate
- Not acting honestly, fairly and professionally
- Secret commissions

The “fiduciary relationship” Common Law

- Body corporate/manager relationship is a principal/agent relationship
- In law it is a “fiduciary relationship”
- A special, very demanding relationship
- Agent must act with the utmost good faith and provide undivided loyalty to the principal
- Made more onerous by the status of the manager as a “delegate”

Demands of the Relationship

- Personal interests must not be put before duty
- Agent must not profit (money or kind) unless “informed consent”
- Consent must be voluntarily given with knowledge of all circumstances and after independent legal advice to the principal
- Personal interests and fiduciary duty must not conflict
- One fiduciary duty must not conflict with another fiduciary duty

Examples of breaches

- Placement of insurance cover in a way that achieves the best commission outcome for the body corporate manager
- Placement of the body corporate's bank account with a Bank that is providing favourable finance facilities to the body corporate manager
- Favours a developer owner in relation to a waiver of penalty interest so as to maintain a good relationship with the developer

Not acting in “best interests” Clause 4 Schedule 2

- May occur in the absence of any personal benefit

Example: Favouring a contractor in circumstances where another contractor may be more beneficial (price or quality) for the body corporate

- Decision making test –

*Is this decision in the best interests of the body corporate?
Is there another option that may be more beneficial to the body corporate?*

Not acting honestly, fairly and professionally

Clause 2 Schedule 2

- A very demanding requirement
- Effectively mandates “ethical behaviour” in the way the BCM carries out their functions
- Examples of unethical behaviour –
 - Withholding information relevant to a decision
 - Covering up a mistake
 - Favoritism
 - Doing free or discounted work for a developer to obtain a management appointment

Secret Commissions

Clause 6 SCA Code + Criminal Law

- Overlap between the law and the Code
- Code requires member not to *“directly or indirectly pay or accept a secret commission in any form”*
- Law is much more comprehensive

Section 442B Criminal Code

“Any agent who corruptly receives or solicits from any person for himself or herself or for any other person any valuable consideration—

- (a) as an inducement or reward for or otherwise on account of doing or forbearing to do, or having done or forborne to do, any act in relation to his or her principal’s affairs or business; or*
 - (b) the receipt or any expectation of which would in any way tend to influence the agent to show, or to forbear to show, favour or disfavour to any person in relation to his or her principal’s affairs or business;*
- commits a crime.”*

Other Secret Commission Offences

- Gifts or offers of secret commissions to an agent
- Secret gifts received by parent, spouse, child, partner, etc. of agent
- False or misleading receipt or account
- Secret commission for advice given
- Offer or solicitation of secret commission in return for advice given or to be given

Acquiescence

Under the *Criminal Code* it is a criminal offence for any director, manager or officer of a company, or any person acting for another, to knowingly take part in or be in any way privy to the doing, or the attempt to do, any act or thing without authority which, if authorized, would be in contravention of any of the secret commission provisions (emphasis added).

Consequences

- Adverse impact on reputation (brand) of the organization (internally and externally)
- Termination of a management contract for breach of the legislative Code (section 118 of the BCCM Act)
- Criminal proceedings against the company, a staff member or even a non-participating director for acquiescence
- Disciplinary proceedings under the SCA Code, which could lead to expulsion from SCA
- Order to account for profits made on breach of fiduciary duties
- Liability for compensatory damages for breach of fiduciary duties

Take-Away Points

- Ethical business practices are the key to enhancing your professional reputation
- A comprehensive Code of Conduct for employees, supported by enforcement infrastructure, is the key to establishing and maintaining ethical business practices and thus protecting your professional reputation
- The Code needs to be carefully drafted to take account of any underlying industry code, legislative code, general law and community standards
- Staff needs to be contractually bound by the Code and thoroughly trained in its requirements

Thank You

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