

CLAYTON UTZ

Briefing Paper on the new Australian Standard
for Compliance Systems – AS3806-2006



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1. Background

1.1 The original Australian Standard on Compliance (AS3806-1998) was sponsored in part by the need of regulators in general and the Australian Competition and Consumer Commission ("ACCC") specifically to develop a benchmark standard to assess the effectiveness of an organisation's compliance system.¹

1.2 Whilst the 1998 Standard was on the whole welcomed by regulators, organisations and compliance professionals alike, it was perceived to have a number of shortcomings, as follows:-

- (a) there was a measure of reluctance by the Courts to order the full implementation of compliance systems to meet AS3806-1998.²
- (b) the 1998 standard was structured as a "stand alone" standard with only brief references to AS4269 on Complaints Handling and AS4360 on Risk Management. Both of these referenced standards have been updated since 1998 and supplemented by the Corporate Governance Standard series (AS8000-8004); and
- (c) a number of commentators and compliance professionals had suggested that it would be helpful to include within the Standard itself further practical assistance detail on how AS3806 as a compliance standard could be implemented within organisations.

1.3 The 2006 Standard was developed by Standards Australia to deal with these issues.

Whilst Clayton Utz welcomes the new 2006 Standard, time will tell whether it will overcome all aspects of the concerns noted above, particularly the Court's reluctance referred to in 1.2(a).

We will be progressively rolling out briefings and further guidance on the implementation of the 2006 Standard during 2006.

2. Overview of the New Standard

2.1 The new standard adopts a "principles approach" and seeks to identify the 12 key principles supporting compliance programs.

2.2 These principles are grouped in accordance with four key aspects of compliance effectiveness, namely,

- (a) commitment;
- (b) implementation;

¹ "Official Guide to AS3806 Compliance Programs" HB133-1999, by Brian Sharpe and Randal Dennings, Standards Australia, 1998, p4.

² For example see the decision of *ACCC v Real Estate Institute of Western Australia* (1999) ATPR 41-673 and *ACCC v Rural Press Ltd* (2001) ATPR 41-833

- (c) monitoring and measuring; and
- (d) continual improvement.

In summary, the 12 principles are:

2.3 **Commitment**

The principles supporting compliance programs that relate to commitment are:

Principle 1: Commitment by the governing body and top management to effective compliance that permeates the whole organisation.

Principle 2: The compliance policy is aligned to the organisation's strategy and business objectives, and is endorsed by the governing body.

Principle 3: Appropriate resources are allocated to develop, implement, maintain and improve the compliance program.

Principle 4: The objectives and strategy of the compliance program are endorsed by the governing body and top management.

Principle 5: Compliance obligations are identified and assessed.

2.4 **Implementation**

The principles supporting compliance programs that relate to implementation are:

Principle 6: Responsibility for compliant outcomes is clearly articulated and assigned.

Principle 7: Competence and training needs are identified and addressed to enable employees to fulfil their compliance obligations.

Principle 8: Behaviours that create and support compliance are encouraged and behaviours that compromise compliance are not tolerated.

Principle 9: Controls are in place to manage the identified compliance obligations and achieve desired behaviours.

2.5 **Monitoring And Measuring**

The principles supporting compliance programs that relate to monitoring and measuring are:

Principle 10: Performance of the compliance program is monitored, measured and reported.

Principle 11: The organisation is able to demonstrate its compliance program through both documentation and practice.

2.6 **Continual Improvement**

The principle supporting compliance programs that relates to continual improvement is:

Principle 12: The compliance program is regularly reviewed and continually improved.³

3. Points of Difference Between the Two Standards

3.1 This "principles approach" of the 2006 Standard is quite a significant departure from the approach adopted in the 1998 Standard. The 1998 Standard's approach was to focus upon the key aspects of compliance systems having regard to their structural, operational and maintenance elements.

3.2 Another key difference between the two standards are definitional having regard to their coverage.

3.3 The 1998 Standard defined compliance as "*ensuring that the requirements of laws, regulations, industry codes and organisational standards are met*".⁴

The 2006 Standard widens this concept to extend to "*adhering to the requirements of laws, industry and organisational standards and codes, principles of good governance and accepted community and ethical standards*".⁵

Thus in the 2006 Standard, principles of corporate governance, community and ethical standards are explicitly sought to be caught within the compass of the definition of compliance.

3.4 This change of focus can also be seen in the definition of compliance culture. The 1998 Standard defined compliance culture as:

*"the promotion of a positive attitude to compliance within the organisation"*⁶.

The 2006 Standard drills down further and defines "compliance culture" as:

"the values, ethics and beliefs that exist throughout an organisation and interact with the organisation's structures and control systems to produce behavioural norms that are conducive to compliance outcomes".⁷

3.5 Other significant points of difference between the two standards are:

- (a) the explicit need to measure and assess effectiveness of compliance systems. This is supplemented by a requirement that organisations must be able to prove this by virtue of demonstration in documentation and in practice (for example see Principles 10 and 11 of AS3806-2006);
- (b) the integration and alignment of compliance with an organisation's strategy and business objectives (for example, Principle 2 of AS3806-2006); and
- (c) the increased emphasis on critical control points and their pro-active testing (for example see Principle 9 of AS3806-2006).

³ AS3806-2006, page 7

⁴ AS3806-1998 see 1.4.2

⁵ AS3806-2006 see 1.3.3

⁶ AS3806-1998 see 1.4.4

⁷ AS3806-2006 see 1.3.4

- 3.6 In summary, in our view, organisations whose compliance systems were approaching "industry best practice" would find that they are unlikely to require significant changes to their systems to meet the new compliance Standard.

That being said, the requirement to be able to demonstrate the compliance system in action squarely places the need for the organisation's compliance system's "substance" to prevail over compliance "form".

What this means is that rather than an organisation merely having the various compliance documentation, policies and manuals in place, it will be necessary under the 2006 Standard to have explicit capacity to demonstrate that the various compliance measures actually work in practice.

This may require substantial work to be undertaken by organisations once they have subjected themselves to this higher standard of pro-active testing. This would particularly be the case, if it is the first occasion an organisation has undertaken any detailed and rigorous pro-active testing of this nature.

4. **What Steps Need to Be Taken to Transition to the New Standard?**

- 4.1 We would suggest that a gap analysis be undertaken by the organisation's compliance function, adopting sound change management methodologies, considering both conformance and performance issues.

- 4.2 We suggest the following steps be considered:

Step 1: Initial AS3806-2006 compliance review

We suggest that the initial review of the effectiveness of the compliance system be undertaken by an organisations' compliance function. At this point, we would encourage that the review be undertaken robustly by a rigorous application of AS3806-2006 with a view to the identification of potential gaps in the current compliance measures of the organisation. We would caution against being overly critical as to why these gaps are present but rather focus the enquiry on merely seeking to identify these gaps. An external review may be of assistance to provide an objective assessment in this regard.

Step 2: Identification of Gaps

In order to assist compliance professionals with this task we have prepared an AS3806 Upgrade Checklist of those issues which, in our experience, organisation's have found to be problematic when considering upgrading their compliance systems to the new standard. Attached as Annexure "A" is our AS3806 Upgrade Checklist.

We would suggest that after the compliance review in Step 1 has been undertaken that compliance professionals may seek to use the Checklist as an aid to satisfy themselves that these potentially problematic areas have been adequately addressed.

We will be seeking to supplement the Checklist and guidance on these issues during 2006 to capture further issues and experiences as more organisations come to grips with the practical challenges involved in upgrading their systems.

Step 3: Gap Remediation Preparation

As previously mentioned, we suggest that sound change management methodologies be considered as a part of this analysis. We particularly stress their usefulness during this step. Actions and communication messages covering off issues such as stakeholder management, identification of current organisation initiatives, synergies and obtaining board and senior management and staff support must be carefully considered, implemented and followed through.

A key deliverable for this step is an approved and funded implementation plan that has management "buy in".

The challenge is to ensure that the steps proposed are in fact (and, importantly are perceived by the organisation) to be proportionate to the legal risks and compliance gaps identified in the gap analysis.

Step 4: Gap Remediation - Implementation

Clearly, it is possible that there could be quite significant gaps identified by the above steps.

The successful implementation of the gap remediation plan will be at the heart of the success of the process.

Factors to consider include:

- consistent monitoring of roll out and evaluation of effective implementation;
- being innovative and flexible in execution (when appropriate) without losing sight of the outcomes that must be obtained;
- maintaining momentum and buy-in in the face of resistance and competing priorities;
- clear communication strategies and messages;
- maintenance of proportionate responses having regard to the priorities identified by the gap analysis;
- support for change "champions" in the "frontline" of business units;
- linking the gap remediation steps to assist in achieving other organisational goals and initiatives (particularly business improvement goals).

We strongly recommend that the integration costs and time involved in the implementation of these steps not be underestimated (particularly the ongoing training and organisation buy-in phases that will be required).

Step 5: Testing of the Compliance System Post Remediation

We suggest it is necessary to repeat Step 1. after it is felt that the gaps have been remedied. The purpose of this Step is to ensure that all the key gaps have been identified, dealt with and that the organisations' compliance system now meets the new Standard.

- 4.3 We would suggest that a vital aspect of Step 2 is to identify key compliance "targets" as objectives for the organisation in dealing with the various principles.⁸ (This was the key reason for the development of Complir8© - the Clayton Utz method of numerical assessment of the effectiveness of compliance programs, see item 5.1 below).
- 4.4 In our view, another of the key steps that can be taken that will deliver a significant improvement in compliance effectiveness is the assignment of compliance responsibilities within an organisation.
- 4.5 We appreciate that organisations and compliance professionals are seeking to deal with an ever increasing range of regulatory issues and in many instances, may be approaching high levels of "regulatory fatigue". From a practical perspective, we suggest that the prioritisation of implementation of these gap remediation efforts need to be carefully considered and the organisational benefits and outcomes documented "up front" in measurable terms.
- 4.6 A major issue for the timeframe for implementation will be the articulation by regulators of the transition periods that they will expect for compliance systems of organisations to be upgraded. Clayton Utz has submitted that a transition period of at least 18 months be allowed.

5. The new standard - the Clayton Utz Response

Clayton Utz has been involved in and closely monitored the development of the new Standard. Our previous National Compliance consultant, Brian Sharpe, was a member of both the old and new Committees of Standards Australia involved in developing the various standards.

We have been working extensively with a number of organisations in their efforts to prepare for the new Standard and the upgrading of their systems in anticipation of its release.

In order to assist compliance professionals and organisations with the transition to the new Standard, Clayton Utz has developed a number of tools including:-

- 5.1 Complir8© - the Clayton Utz method of numerical assessment of the effectiveness of compliance programs;

We believe that *Complir8©* will greatly assist organisations in the identification of gaps between the two Standards in that it facilitates assessment of targets and key performance indicators for compliance effectiveness. *Complir8©* is a "do it yourself" tool that compliance professionals can use to assist them with the upgrade process. It involves a once only cost of \$15,000 (plus GST). Attached as Annexure "B" is some further information on *Complir8©*.

- 5.2 AS3806 Upgrade Checklist

The Checklist is designed to look at those aspects of the compliance system that stereotypically may easily be "gaps" that require remediation. This Checklist has resulted from the work we have already undertaken with clients in the anticipation of the new Standard's requirements. (This Checklist is attached as Annexure "A").

⁸ (see Principle 3 and Principle 6 of AS3806-2006. Note in particular the references in Principle 6 to Key Performance Indicators for example see 4.1.2(f), 4.1.3(g) and 4.1.4(r). Also of relevance is being able to demonstrate these are being monitored and measured - see Principle 10. Note the emphasis on setting targets and development of indicators in 5.1.5 and Principles 11 and 12)).

5.3 AS3806-2006 Standard External Review

We are currently undertaking a number of "once over lightly" reviews for the purposes of identifying any gaps for organisations seeking to test their compliance programs having regard to the new Standard.

Whilst a range of options are available to be tailored to meet individual organisations' needs, we have found that in indicative terms and based on our previous experience, a useful review of a public company's compliance arrangements involving say, 3 days at a budget of approximately \$15,000.00 (plus GST) is all that is necessary to supplement existing internal assessment reviews undertaken as a part of Step 2 in 4.2 above.

6. Updates & Training Workshops

Clayton Utz will be conducting breakfast and other updates and providing ongoing guidance on the impact of the change in the Standard during 2006.

We will also be offering Clayton Utz hosted and "in-house" half day workshops to assist organisations in coming to grips with the implementation of the requirements of the new Standard. Details of these workshops can be found on the Clayton Utz website at: www.claytonutz.com (under the What's New and Training headings).

In particular, we have received many positive responses from clients as a result of our facilitation of "in-house" workshops in their offices on this topic. These "round table" participative discussions are specifically tailored to meet organisational needs during the gap identification and remediation process.

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