



ROCpod episode 17 – Good governance in practice: conflicts of interest

The ROCpod was a monthly podcast focussed on the regulation of registered organisations. It shared information, tips and tools for improving compliance with legislative requirements.

The podcast was key part of the Registered Organisations Commission's (ROC) education strategy. The ROC was abolished on 6 March. The Fair Work Commission (the Commission) is now the regulator for registered organisations.

Although processes may change under the Commission, much of the podcast content is still useful.

Email any questions about anything in an episode to regorgs@fwc.gov.au.

Speaker Key

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| MG | MaryAnne Guina |

AN Welcome to ROCpod: Talking with the Registered Organisations Commission. The official podcast of the ROC about the regulation of unions and employer associations. And in this monthly podcast we'll share essential information, uncover handy hints and tips and reveal our best tools for proactive compliance with the complex legislative requirements.

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AO Hello and welcome to ROCpod – talking with the Registered Organisations Commission. In this episode we are continuing our Good Governance in Practice series. Today our focus is on conflicts of interest – how they can arise, their potential consequences, and best practice tips to manage them. We will also discuss real examples of conflicts of interest, and how they can appear in the day to day running of a registered organisation.



My name is Andrea O'Halloran and I am a Senior Adviser in the compliance team at the ROC. To help me with today's topic I have with me MaryAnne Guina. MaryAnne is the principal adviser and senior lawyer in our compliance and whistleblower team..

MG Hi Andrea. Thank you for having me.



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AO So, let's get into this issue and start with what a conflict of interest is and how it might arise. A fundamental responsibility of an officer of a registered organisation is to act for a proper purpose and in the best interests of the organisation.

MaryAnne, what is a conflict of interest, and how might it arise?

MG Conflicts of interest can occur in many contexts. It's not something that is just relevant to registered organisations. Lawyers, accountants, the corporate sector, government workers ... all sorts of professions are required to manage this issue in the course of their professional roles.

To put it simply, a conflict of interest is a situation where a person's official duties come into conflict with their private interests. For example, do they or someone else get a personal benefit from actions or decisions that are made in their official capacity ... if potentially the answer is yes, the question then arises – did they let that influence their decision.

So, let's consider an officer of a registered organisation. The officer has a financial interest in a business that is separate to the organisation. Let's say they own or have a share in a corporate training business. And in their capacity as an officer of the organisation, they vote on financial matters. A conflict of interest can arise if the officer votes for the organisation to contract their officer's training business to provide services to the organisation.

It's pretty reasonable to ask – did they choose that training provider because they were the best option? Or because they'd get a benefit? Either way, given their personal involvement in that training provider, should they even be part of the decision making.



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AO The real problem with conflicts of interest is that they can undermine the officer's duty to act in the best interests of the registered organisation and their members.

MaryAnne, there are different types of conflicts of interest, aren't there?

MG Yes, there are indeed.

AO Can you explain what they are?



MG A conflict of interest can arise when an officer is in a position to be influenced by their private interests. A clear instance of this is the training organisation owned by the officer example referred to earlier.

But they can be less obvious than this. There could be a potential conflict that could arise at some point in the future or it may be perceived by others as a conflict of interest.

A perception of a conflict of interest can be just as important as an actual conflict because it can undermine the reputation of people and the organisation that they belong to. And it's important to have good governance practices for exactly this reason. Because even if the officers are acting correctly, you need to have strong processes in place so that people see and trust that people are acting transparently and correctly in the best interests of the organisation.



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AO It's also important to know that the interest doesn't have to belong to the officer for there to be a conflict. The training business could be owned by an officer's family member, or by a close friend.

MG That's right, Andrea. In some cases, perceived conflicts of interest can be complicated to manage because there can be a large number of people involved. But an organisations culture and governance can certainly help to manage conflicts, which is why we're going to talk about practical steps that organisations and branches can take right now – to start creating that good governance structure.



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AO: I think it's important to highlight that conflicts of interest cannot always be avoided. As you've just said, sometimes it's all about how they are actually managed.

Officers of registered organisations can legitimately have multiple interests because of their private financial affairs, their personal and family relationships. They can also be employees of other companies or other entities and hold other positions as private citizens. These connections, their knowledge and life experiences can contribute to the achievements of the officer in their organisation.

But what duties do officers have to their organisation and how can they find out about them?

MG All officers have duties under the Fair Work (Registered Organisations) Act, which we call the RO Act, and these duties exist to ensure good financial governance in registered organisations. The duties set a minimum standard of conduct, and a Court



can impose civil penalties if they are breached. So knowing your duties and complying with them can help to manage and avoid conflicts of interest.

For example, officers must exercise their powers and discharge their duties in good faith and in the best interests of the organisation, and for a proper purpose. They should also act with care and diligence. It can be difficult to make a decision that is in the best interests of the organisation if the decision conflicts with a personal interest.

Officers also have a duty not to misuse their position or misuse information which they obtain in the course of their office role. They must not improperly use their position or information that they have access to in order to gain an advantage for themselves or for someone else. For example, an officer may have access to confidential information which belongs to the organisation. If they use that confidential information for their own benefit, or if they share it with a friend to help them gain an advantage, the conflict of interest could result in a breach of their duties as an officer and expose them to penalties.

If an officer needs more information about their duties, they can start with our Officer Induction Kit which will explain some of the main duties. The kit is available on our website under the fact sheet pages for officers. They can also look at the rules of their organisation.



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AO There are also disclosure requirements under the RO Act, aren't there MaryAnne?

MG Yes, there are. Officers with financial management duties are required to disclose material personal interests that are relevant to the affairs of the organisation or branch. For example, if a committee of management member has an interest that could influence or affect how they vote on a particular issue.

AO How does the officer know if they need to disclose an interest? What makes something a "material personal interest"?

MG Well that's a good question. "Material personal interest" is not defined in the RO Act. But we are guided by a similar concept under the Corporations Act. The officer should consider the connection between the advantage they may personally gain, and the matter that relates to the organisation or branch. If the officer's interest is real or substantial, they should disclose it.

But it's not always clear. And if an officer isn't sure whether their interest is a material personal interest, they should exercise caution and disclose the interest in any event. It's all about transparency.



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AO So, officers should identify conflicts of interests and be aware of their duties as an officer. There are also additional disclosure requirements for officers who exercise financial management duties. So that's a good starting point.

Let's now talk about strategies for managing conflicts of interest. We know that not all conflicts of interest can be avoided. What steps though can an organisation or branch put in place to manage them?

MG It's very important for organisations to promote a culture of disclosure. One way for an organisation to do this is to have a conflicts of interest policy. And to ensure that all officers have knowledge of its content and how it applies to their role. Such a policy is a great way to set expectations about how conflicts of interest are to be dealt with. The policy can have procedures which explain when officers need to disclose their interests, and how they are to be recorded. It can also describe consequences for failing to disclose interests.

The organisation could draw attention to all their policies in an induction process and provide regular training to their officers.



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AO You mentioned that a policy could deal with how interests are recorded. How might an organisation actually record disclosed interests?

MG Well the RO Act sets out how officers with financial management duties should disclose their material personal interests. These disclosures should be made to the Committee of Management, and an easy way to do this is at a Committee meeting – which has the added advantage that it can be recorded in the minutes. They need to make the disclosure really soon after the interest arises, for example as soon as they're elected in the case of an existing interest, or as soon as the new interest is acquired in the case of an existing officer. Enough information should be given about the interest so that the nature of it can be understood.

Organisations can maintain a register to keep track of the interests that people hold and record the disclosures that have been made. A register will also help to identify potential conflicts of interest. How the organisation maintains the register of interests, and who can access it, are all governance issues for each organisation to decide. It certainly could be addressed in a policy. Also it would be good practice to check the register and update it when big decisions are being made. A good governance step might include having a person responsible for that process to ensure that it is done.



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AO A conflict of interest policy and register is a great start. But there are also day to day practical things to attend to as well, aren't there?



MG Yes that's right Andrea. It could be as simple as having a form for officers to complete so you know you get all the details. A form makes it quicker and easier to make the disclosure. Or it could be an annual reminder email at a particular time each year to ask officers if they have made all their required disclosures. For example, before preparing the officer and related party disclosure statement. All of these practices can contribute to good governance and build a culture of disclosure within the organisation.



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AO How meetings of the organisation are conducted and recorded can also encourage transparency. For example, organisations can make conflicts of interest a regular agenda item at the start of their meetings. Meetings should always have an agenda sent to everyone before the meeting which describes the matters to be discussed and the decisions to be made. This is helpful for officers in considering whether a conflict of interest may arise, and if the officer needs to declare it. An agenda also allows officers to excuse themselves from a particular part of the meeting where an actual or perceived conflict may arise. Also you can have a standing agenda item at the beginning of each meeting to enable officers to declare conflicts of interests or new material personal interests. As we mentioned before, conflicts of interest can be actual, perceived or potential, and it's important to address them.

This is the sort of process that underpins good governance. And it's a good way to keep it in the forefront of people's minds on an ongoing basis.

MG That's a good point Andrea. You have just mentioned an example of how to deal with a conflict of interest ... the officer excusing themselves from a meeting when a conflict arises. What about if the officer wanted to be there during the discussion but to abstain from voting on the matter? Doesn't this mean that the issue will still be dealt with by impartial decision-makers?.



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AO Well, there can be times when not voting or refraining from voting is not sufficient. This point is really important and it's recognised in the RO Act in the form of an expressed prohibition upon officers with material personal interests from being present during discussions that are actually or potentially impacted by their interest. If officers don't abide by this requirement, there can be significant penalties.

If an officer has stepped out of a meeting room when a particular item is being considered, make sure it is recorded in the minutes. The minutes are another good governance control that will help give confidence to the decision that has been made.



MG Yes that's true, and conflicts of interest should not be ignored. Poor governance controls may result in a failure by officers to disclose their interests, or inadequate management of them by the organisation. This can come with severe consequences, including the misuse of members' money and reputational damage. It's something that we regularly see in whistleblower complaints.



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AO Conflicts don't have to be interests outside of the organisation either. It's not uncommon for an officer to have powers to control employee benefits or bonuses. If their decision might impact their own entitlements, or perhaps those of a family member. That's also a potential conflict which needs to be addressed.

MG That's right. When those powers reside with a collective body, good governance practices like an agenda, disclosures, minutes and stepping out can help address the issue.



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AO But what happens if the power sits with a single officer in an organisation?

MG Well that really depends on the rules of the organisation and every officer should be aware of the rules of their particular organisation. It could be that the power can also be handled by a collective body, but is just normally dealt with by a single officer. If the officer sees a conflict (for instance they're about to sign off on a pay rise that might benefit their spouse, or might be paying a bonus that they will also receive), a good approach is to ask the collective body to deal with that particular decision. If the power cannot be given to someone else under the rules, make full disclosure of the reasons for the decision and take really good notes ... explain why it was the best decision. These steps demonstrate that while the officer was aware of the apparent conflict, it can be shown that the conflict did not impact on the decision itself. Decision records can be really good, not just for addressing conflicts of interest, but also to help with continuity if and when someone else takes up the office.



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AO An example of what can happen when there are governance failures is the 2017 Federal Court decision of General Manager of the Fair Work Commission v McGiveron and Burton. We have a summary of this case on our website, because there are important lessons to be learned from it. MaryAnne, what happened in the McGiveron and Burton case?



MG Well this case certainly did involve conflicts of interests. There was the purchase of two luxury utes, the recommendation of a generous redundancy policy and the use of money for personal benefit.

The court case looked at the conduct of two branch secretaries, Mr McGiveron and Mr Burton. Mr McGiveron was planning to resign as the branch secretary and continue as an employee of the organisation. And after Mr McGiveron resigned, Mr Burton took over the role of branch secretary.



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AO So let's start with the purchase of the utes. What happened in that case?

MG Well in 2012, Mr McGiveron agreed with Mr Burton that the branch should buy two luxury utes. They didn't tell anybody else about this agreement. And the utes themselves were worth over \$100,000 each. Mr McGiveron was to drive one of these utes while he was employed at the organisation, and he knew that he might end up personally owning it when his employment at the organisation ended. This was a conflict of interest because Mr McGiveron knew he that he would personally benefit from the purchase.

AO So what were the findings of the court?

MG Well the Federal Court found that when Mr McGiveron entered into the contract to buy the utes and paid the deposit, he had no authority to do so. And after taking over as the branch secretary, Mr Burton acted without authority when he completed the purchases of the ute.

The Court also found that Mr Burton kept details of the purchases secret and he did not disclose them to the branch committee of management, the finance committee or to the organisations auditors. The officers also registered the utes to themselves personally, rather than to the organisation, and they used them for their personal benefit.



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AO What should the officers have done?

MG Well, in this instance, it is important that all the relevant committees know, and that expenditure is properly authorised. If you have a finance committee or an audit committee, they should know about big purchases. If an officer knows they might get a benefit from the purchase, they should disclose that fact to the committee of management. It is then likely that the decision needs to be made without them in the room. Or it could be they discuss it at a committee meeting – which would then be recorded in the minutes– with full disclosure of the relevant issues and the potential



personal benefit or conflicts and then can leave it to others to make a recommendation on whether to go ahead with the purchase.



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AO It's also really important to know the limit of ones authority or of an officer's authority. Conflicts of interest aside, you can only do what the rules enable you to do. So, an officer needs to know what they can approve under the rules.

Another issue in this case involved the recommendation of a redundancy policy. What did the officers do, and what were the court's findings?

MG Well Mr McGiveron also admitted in the hearing to recommending to the branch committee of management that they adopt a more generous redundancy policy. The committee of management agreed to the recommendation and then Mr McGiveron resigned as the Secretary (although he then remained as an employee at the organisation) and Mr Burton became the secretary.

But consequently Mr Burton later made Mr McGiveron's position as an employee redundant and he received a significant amount of money under the new redundancy policy.

AO So why was this a conflict?

MG Well when he made the recommendation, Mr McGiveron knew that he would personally stand to benefit from the new policy.

Mr Burton also admitted to misusing his position as the branch secretary for personal advantage by using the organisation's money for his own personal expenses.

In the end the Court found that both Mr McGiveron and Mr Burton breached their officer duties, and they were both ordered to pay penalties.



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AO What could an officer do differently if they are faced with these sorts of issues?

MG Well it's really important that you share with the decision makers the details of your conflict and how it might impact decision making. This should be recorded in the minutes. If the Committee of Management decides to accept the recommendation even though you've told them about the conflict, the minutes will show this.

And in relation to spending money for your own benefit, this comes back to the proper purpose duty. You should only be acting to benefit your organisation and it's



members. There are real legal consequences for spending money inappropriately to benefit yourself.

AO But it's not just up to an officer. This comes back to good governance processes as well. An organisation should have arrangements in place that prevent an officer from approving expenses for their own benefit. Having a second officer check those expenses are for a proper purpose, is a good way to ensure that they are for organisation business.

What other lessons can we learn from this case MaryAnne?



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MG It's important that officers fully understand their authority and make proper disclosures about financial transactions.

We discussed earlier how organisations can protect against conflicts of interest by having robust policies and procedures. A culture of compliance and disclosure could have prevented the misconduct that we heard about in McGiveron and Mc Burton case.

All these policies and processes aside, the best way to create a culture of speaking up, compliance and disclosure is to have your senior officers model it and expect it. If everyone is seen to be doing these things regularly, if you have normal practices that check for conflict and provide processes for officers to speak up, this will encourage them to live it.



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AO Thanks MaryAnne. The case serves as a really good practical example of how conflicts of interest can arise, their consequences, and how organisations can work to encourage a culture of good governance and disclosure.

MG Before we finish Andrea, I want to mention the concept of developing a speak up culture within organisations. What I mean by this is a supportive environment where people feel safe to raise issues and share their ideas or any concerns they may have.

The ROC receives and investigates whistleblower disclosures from people in registered organisations. And quite a few of the complaints have been about apparent conflicts of interest.

It is in the organisation's best interests to deal with these issues and those concerns appropriately from the outset. And while disclosable conduct can be reported to



agencies like the ROC, in many cases if it is dealt with effectively, openly, transparently, the organisation will be capable of dealing with the matter internally.



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AO Thanks, MaryAnne. The ROC has developed a guide for designated officials and managers about handling matters like these within registered organisations. It covers how to develop a speak up culture in greater detail.

In this episode we've spoken about the conflicts of interest that may arise in registered organisations. We've considered how organisations and their officers can manage those conflicts, including the governance procedures that can help identify when action needs to be taken. Strategies for managing conflicts of interest can be supported by a policy, and a register of interests that can help organisations to identify conflicts of interest before they arise.

Thank you for joining us for the final episode of ROCpod for 2020. And thank you, MaryAnne, for sharing your knowledge about this topic.

MG You're very welcome, Andrea. Thank you for having me.

AO Please all join us again in 2021. We will be kicking off the new year with another episode of ROCpod in January.

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