



ROCpod episode 25 – Good governance in Practice: the duties of officers

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

AN	Unidentified announcer
CLB	Cynthia Lo-Booth
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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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CLB Hello and welcome to ROCpod. We're back for an instalment of our good governance in practice series, and today we'll be talking about officers' duties. We're going to share practical tips for officers of registered organisations to help them carry out their duties in compliance with the legislation. We'll also going to share some strategies for organisations to help their officers. My name is Cynthia Lo-Booth and I'm a senior adviser and lawyer in the Compliance and Investigations team at the ROC.



To help me with the discussion, I'm joined by colleague Francesca Lee. Fran is a senior lawyer also in the compliance and investigations team at the ROC. Hi Fran and thank you for joining me today.

FL Hi Cynthia and thank you for having me on today's episode. I'm really glad we're talking about the duties of officers. These duties set a minimum standard of conduct and can protect the organisation, its members and property ... so, if you're an officer it's essential you know them.

You may have heard about director's duties in the Corporations Act. The duties of officers under the *Fair Work (Registered Organisations) Act* (what we call 'the RO Act') are very similar.

Breaching your duties as an officer can expose you to a civil penalty. A court can impose a civil penalty against the organisation and personally against you as an officer.



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CLB So this isn't just something that organisations will need to know about. Officers have individual responsibilities as well.

So, let's start today's episode with the RO Act. The RO Act imposes the duties on officers. Is the RO Act the only source of officers' duties?

FL So the RO Act sets out the general duties of officers, but officers will also need to consider the rules of the organisation. Organisations and branches have rules, which describe the powers and duties of office holders.

So two Secretaries from different registered organisations may have different powers and duties. And while they are both the 'Secretary' of their organisation, they belong to entities that are governed by their own rules.

So it's important that officers understand what *their* organisation's rules say about their functions and powers. And the policies and procedures of the organisation – that's also going to be relevant too.



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CLB The duties of offices we'll be talking about today don't just apply to senior officials of registered organisations, like the Secretary ... is that right Fran?

FL Yes, that's correct. The duties apply to all officers of registered organisations and branches. So, we're not just talking about the Secretary or the President. And they don't just apply to paid officers. *All* officers exercising a financial management duty, so even members of the Committee of Management or a larger national conference, are required to comply with them.



CLB Let's now look more closely at the RO Act. Now the Act outlines the general duties of officers that relate to the organisation's financial management.

We'll start with the duty under section 285, which is the requirement for officers to act with care and diligence. What does that duty, to act with 'care and diligence' mean? For example, how can an officer meet this standard of conduct?

FL This duty requires the officer to act with the degree of care and diligence that a reasonable person would if they were an officer holding an equivalent position.



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CLB Okay, but what does that mean? What do you mean by "care" and "diligence"?

FL Well, care and diligence basically means that you need to pay attention. Officers are given powers and responsibilities. They need to act to minimise risk or damage to the organisation and they must exercise their powers carefully.

CLB And what do you mean by a 'reasonable person'?

FL Well, the reasonable person is hypothetical. It's a concept that the law uses to reflect what the community expects and sets as a standard. It's not perfection, it's what a reasonable person would do.

CLB So Fran, can you give us an example?

FL Yes, I definitely can.

So let's say you are an officer on the committee of management and the committee needs to approve the financial report. You must act with care and diligence when giving your approval. If you don't understand the figures in the financial statements, a reasonable person with the same level of responsibility is expected to ask questions before approving them. Officers need to inform themselves, be inquisitive and make further enquiries if they need to.



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CLB So if committee members give blind approval of the statements without proper consideration, they may be in breach of their duty? For example, can an officer potentially be in breach of their duty by voting in support of something just because the other officers on the committee have voted that way?



- FL** Yes, a Court could find that the officers haven't acted with the appropriate degree of care and diligence. We'd need to know more about the circumstances of course, and the Court will judge cases individually. But it's important you seek clarification on issues you don't understand, especially where it involves important decision-making on behalf of the organisation.
- CLB** But it's still a *reasonable person*. A reasonable person would ask questions until they understand, but it might not be reasonable to expect them to examine all of the receipts for the entire financial year and add them up themselves. Or learn to be an accountant.
- FL** Yes, that's definitely right. So those things you've mentioned are not what society expects of a person in that position of responsibility...so there is common sense to it as well.

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- CLB** To what extent can an officer rely on information that's given to them by others? For example, the Finance Manager of the organisation advises the committee that they've prepared the accounts and have confirmed they're in order. Can the officer rely on that information?
- FL** Officers must inform themselves with enough understanding, so they have a rational foundation for their decision. It may be okay to rely to some extent on the advice of the Finance Manager, but a committee member must be certain about the manager's expertise. And if an officer relies on an employee it must be in good faith, and their reliance on that person must be reasonable.

Let's say the Finance Manager was known as a competent employee and had years of experience doing this kind of work. It may be reasonable to rely on the advice.

However, would it be reasonable if you know the Finance Manager has only been there a week and the documents were prepared by a previous employee who has moved on from the organisation? Probably much less so in the second case.

In any event, it's best practice to take notes when you're making a decision, especially if it's a significant one. Your notes should describe the steps you've taken to arrive at your decision, including any enquiries you've made along the way.

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- CLB** You mentioned the Courts earlier. Have we seen the duty of care and diligence enforced by the Courts against registered organisations and their officers personally?



FL Yes, we have actually. So in *Registered Organisations Commissioner v ANMF*, a Branch Secretary's duty of care and diligence was relevant to the preparation of financial reports. The Federal Court found the Branch Secretary had breached their duty of care and diligence when they failed to prepare financial reports in accordance with the RO Act requirements for three years.

CLB Can you explain what the Branch Secretary did in the ANMF matter? What actions contributed to the breach?

FL Yes, I can. So in this case, the regulator wrote to the Branch Secretary on multiple occasions to advise of the outstanding financial reports.

The Court found a reasonable Secretary would have allocated more resources to get them lodged on time. Instead, the Branch Secretary delayed taking appropriate action. So the Court found they breached their duty of care and diligence, and awarded a civil penalty against the Secretary and the organisation.

CLB Now let's talk about the practical things that officers can do to ensure compliance. You've mentioned that in the ANMF case, that the Court found a reasonable Branch Secretary would have allocated additional resources to have the financial reports lodged on time.

Do you have any practical tips for officers who find themselves in a similar situation Fran?

FL Yes I do have a few tips Cyn. Engaging with the ROC early about non-compliance is really important.

In this matter, the regulators wrote to the Branch of the organisation, on multiple occasions, to advise that the financial reports were overdue. Had the Branch, and the Secretary in particular, acted sooner, the outcome of the matter may have been a more positive one.



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CLB Yes, and the ROC has a records management system that identifies non-compliance in organisations and branches and we'll let them know if it identifies a non-compliance issue.

FL That's right. Organisations can help their officers by having internal compliance systems in place as well. I know some of our organisations have things like electronic diary reminders to ensure that lodgements like annual returns and prescribed information for elections are prepared on time. Most lodgements have due dates that are known in advance, so with a bit of care there shouldn't be any surprises.

If organisations need tailored assistance, for example, some guidance to understand how to fix an issue, the ROC can provide additional support. We do this all the time



with organisations which is great, because it provides a quick solution to address possible non-compliance and it also helps to prevent repetition.

CLB Fran, before we talk about another duty, can you give us one more good governance tip? I'm particularly interested in how organisations can help their officers comply with their duties.

FL So ... in the *ANMF* case, the Finance Manager of the Branch resigned around the same time that the Branch was falling into non-compliance. This put additional pressures on the organisation to rectify existing issues.

We can all learn something from this. Senior management should think about how the organisation can maintain corporate knowledge, notwithstanding changes to office-holders and employees. It's inevitable people will move on from organisations, and often you cannot predict when this will happen.



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CLB Yes, that's a good point. Compliance obligations still need to be met, regardless of internal changes to employees and officer-holders. So, what can organisations do to help new starters understand their responsibilities?

FL Having a 'hand over' process and written procedures can be useful. I've been that new employee who didn't know basic things like where to find important documents.

Induction procedures and process manuals can give direction to new starters about how to complete time-critical tasks while they're finding their feet in a new role.

And of course, organisations need to ensure officers know about their statutory duties. Investing the time and resources for appropriate education and training is essential.

CLB We've spoken about officer induction in a previous episode. So for our listeners, if you want further guidance about 'best practice regarding the induction of new officers' you can go back to our podcasts and listen to episode 15 entitled "Good governance in practice: officer induction".

Okay, let's move onto another duty of officers under the RO Act – the duty to act in good faith and for a proper purpose. What does it mean to act in good faith and for a proper purpose?

FL Well, the duty to act with good faith and a proper purpose requires officers to act in the best interests of the registered organisation, and not for personal advantage.



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CLB Do we have a case example where an officer was found to have breached this duty?

FL Yes, we do actually. So the case involving the *General Manager of the Fair Work Commission v Thomson ...*

In the case the Court found the National Secretary used the organisation's money, without authorisation, to pay for several personal expenses, including travel, donations and sponsorships. He actually tried to hide some of his spending by recording them as "meetings" and "telephone conferences".

The Secretary also used the organisation's funds to further his political aspirations, using a union credit card to pay for election advertising, and an office fit out. The Secretary also directed staff, who were being paid as employees of the registered organisation, to work on the political campaign.

CLB I understand this case involved serious breaches of the duty to act in good faith and for a proper purpose. The Court also found that the Secretary had breached the duty to act with care and diligence that we previously spoke about.

FL Yes, that's right.

The Court ordered the Secretary to pay over \$80,000 in civil penalties and \$231,000 plus interest in compensation to the organisation. The personal spending caused significant damage to the organisation.



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CLB Okay, so in the Thomson matter there was a serious breach of the duty to act in good faith and for a proper purpose. But I'm wondering Fran, do you have another example, that you can share with us? Can you think of potential breaches that may not be so easy to recognise, that are important for officers to know about? There are some tricky situations that may arise from time to time that present ethical dilemmas for officers...

FL Yes, there are definitely a few tricky dilemmas that arise from time to time and there are probably a few examples that we could talk about. But what comes to mind are smaller everyday decisions made by officers that may be in conflict of personal interests.

For example, hiring a relative to perform some work without declaring the interest, over a field of other candidates who may be more qualified or suitable. Or unfairly favouring a client because they sent you a nice gift. These types of issues have been the subject of whistleblower disclosures, so we know they happen.

Another potential breach could arise if an officer has access to a car that is owned by the organisation. For example let's say an organisation has a policy that officers can only use a fleet vehicle for a purpose relevant to the work of the organisation. The officer runs their own consulting business. And in breach of policy, they pay for petrol



using an organisation's fuel card and then uses that car to drive around to meet some clients. This is another example where the officer may be in breach of their duty to act with good faith and a proper purpose.



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CLB Thank you Fran for sharing those examples – I think they are helpful to our listeners in understanding the expected standard of conduct.

So, you've explained what the duty means, but how can registered organisations protect themselves, and their members' money, against this kind of behaviour? It seems like the officer in the *Thomson* case acted deliberately to deceive the organisation and to gain a personal advantage.

FL Good governance requires organisations to put controls in place that detect financial misconduct. Officers are placed in a position of trust by members, that they will act in their members' best interests. Unfortunately, we have seen in a small number of cases, examples like this, where officers have acted outside of the organisation's rules, and in breach of the RO Act. The impact on the organisation can be significant, as it was in the *Thomson* case.

CLB You've mentioned governance controls. What internal financial controls can help an organisation prevent or detect misuse of money?

FL There needs to be oversight. So officers should have clear limits to how they can use their corporate credit card, for example. A credit card or expenditure policy is a good starting point.

Having policies and processes are a great way to formalise your controls. For example, a policy can require more than one officer to carry out certain financial activities, like approving transactions. Transactions of a higher value or with a greater level of risk can have extra processes, like approval by a committee of management or from senior officers of the organisation. There is actually an example of this in the RO Act, specifically in section 149, which has a requirement that every organisation's rules must require that loans grants and donations over \$1000 can only be approved by the committee of management.

But while it's all well and good to have policies and requirements in place, it's essential that the organisation ensures that officers and employees act consistently with them.



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CLB Are reconciliation and auditing processes relevant? Fran you said earlier that in the *Thomson* matter, thousands of dollars were spent on personal items and services, and some were deceptively described as "meetings".



FL Yes, absolutely. Organisations should require that financial records are kept (like receipts and invoices), and ensure they're regularly checked against accounts.

Something we've spoken about in a previous ROCpod episode is a 'speak up culture'. If a person thinks they've detected financial misconduct or other wrongdoing in an organisation, would they know how to report it? Do you think people in your organisation would feel supported to raise issues with management? Investing in a speak up culture can be hugely beneficial for organisations.

CLB Some of the protected disclosures we've received have alleged breaches of officer duties. And we find that a 'speak up culture' can address issues as they arise, because people can raise them within their organisation, and prevent them from turning into big problems (like the case examples we've discussed).

You can go back and listen to Episode 20 – 'Creating a speak up culture'.

In that podcast, our Executive Director, Chris Enright, talks about a speak up culture within the organisation and how to develop one.

So Fran, earlier you mentioned education and training for new officers on the committee of management. Can you tell us why this is particularly important for new officers?

FL I can. So important for organisations to invest the time to educate officers.

Section 293K of the RO Act requires all officers with financial management duties to complete financial training within 6 months of taking office (or get an exemption if they can't). The training is not just something officers should do because they must. It covers officers' duties and other practical topics like how to understand financial statements. Having officers that appreciate these issues can help them make decisions that are in the best interests of members. And officers with financial duties means every member of the committee of management, as the committee's responsibilities under the rules will include financial decision making.

Some organisations offer refresher courses at regular intervals, so all officers have the latest information, and are reminded of their responsibilities. This is a great way of keeping the information front and centre and normalising a compliance culture.



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CLB Over the last few years we've approved more training packages and many can now be completed online. So training is more accessible than ever before.

Okay, so in this episode we've covered two general duties of officers: The duty to act with care and diligence; and the duty to act in good faith and for a proper purpose. Are there any other officer duties that are set out in the RO Act?



FL Yes, there are actually. Under section 287, officers and employees must not improperly use their position to gain an advantage for themselves or someone else, or to cause detriment to the organisation or another person.

Section s 288 is similar, but it relates to the use of information. So officers and employees of organisations must not misuse information they have as a result of their position, to gain an advantage for themselves or someone else, or to cause detriment to the organisation or another person.

An example of conduct which may be in breach of s 288 is passing on commercially sensitive information to a third party. For example, if an officer gave information to a friend to help them negotiate a better price when purchasing property from the organisation or putting in for work.

Officers who have access to confidential information, must act with care to protect it.



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CLB So the duty not to misuse your position, and not to misuse information apply to both officers AND employees?

FL Yes that's right. So the duties under section 287 and section 288 apply not only to officers of registered organisations, but to employees as well. We've focussed on officer duties today, but it's actually a good idea to ensure your employees also know about their duties when they join your organisation. Again, I would recommend this information is included as part of your induction for new employees and officers.

If your organisation doesn't have an induction program, you can start with the ROC's Officer Induction Kit. This kit includes information about officer duties and the compliance obligations of organisations.

CLB What role does the ROC play in the regulating the conduct of officers? In the cases that you've mentioned today, it was the Court's role to consider and impose penalties. Can you finish today's episode by explaining ROC's role in regulating the conduct of officers?

FL So the ROC does a number of things. We provide education, assistance, and advice to registered organisations and members.

We're a pretty small regulator and we have helpful advisers, who provide tailored guidance and advice to organisations about compliance, including officers' duties. We're only a phone call away or send us an email. We're more than happy to help where we can.



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CLB The ROC also monitors conduct and practices to ensure organisations and officers, and in some cases employees, comply with the RO Act, don't we Fran?

FL Yes, that's right. Part of the ROC's compliance and enforcement role involves the investigation of possible breaches of the general duties of the RO Act – the duties we've discussed today. As you mentioned earlier, we receive protected disclosures and some of the complaints have been about allegations of misconduct, including breaches of officer duties.

The ROC can 'make inquiries' – this involves seeking voluntary information from organisations and other parties involved. And we can also 'conduct investigations'. For example, the ROC can compel information and conduct interviews to examine possible breaches of the RO Act.

Investigations can conclude with the recommendation to start Court proceedings. It's the Courts role to determine whether a breach has occurred and to impose a penalty.

CLB Thank you Fran for joining me on today's ROCpod episode. The case examples help us understand the legislation, and your practical tips make us think about how governance can influence behaviours.

FL You're welcome, Cynthia and thank you for having me. We have published simple summaries of the cases we've discussed on the ROC website. The case summaries are an education tool, and we hope they help officers to understand their duties.

CLB We'll publish a link to the case summaries on the podcast page of our website. And we'll also include a link to the Officer Induction Kit that we mentioned earlier.

Please join us next month for another episode of ROCpod. In our next ROCpod episode, we will be answering that common question we are often asked by registered organisations – Who is a related party?

My name is Cynthia Lo-Booth and thank you for listening.

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