



## **Guidance Note**

### **Disclosures required by Holders of Office under the *Fair Work (Registered Organisations) Act 2009***

Prepared and issued by the Registered Organisations Commission

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1.2	24 July 2018	Typographical corrections

## **Guidance Note: Disclosures required by Holders of Office under the *Fair Work (Registered Organisations) Act 2009***

### **Disclosure Schemes**

The *Fair Work (Registered Organisations) Act 2009* (the **RO Act**) requires officers, branches and organisations to make disclosures concerning remuneration, non-cash benefits, and payments to related parties and declared persons or bodies.

This Guidance Note explains the disclosures that holders of office in registered organisations are required to make as set out in the provisions of Chapter 9, Part 2A of the RO Act. The RO Act mandates when these disclosures must occur, how they are made and to whom.

The ROC believes compliance with this disclosure framework will ensure high levels of transparency in the transactions entered into by officers, and their remuneration, for the benefit of members of registered organisations and the broader community.

A number of the key concepts in these provisions are based on those found in relevant provisions of the *Corporations Act 2001* (the **Corporations Act**). This Guidance Note explains those concepts, where relevant, to understanding the equivalent RO provisions.

Further, this Guidance Note draws on the experience and understanding of the Registered Organisations Commission (**ROC**), in the absence of detailed judicial consideration of the regulatory regime, to promote compliance by office holders through step-by-step instructions and practical examples. This Guidance Note will be updated following case law developments or in light of the outcomes of ongoing engagement with relevant stakeholders.

These disclosure requirements are separate and in addition to any disclosure scheme contained in the rules of the organisation.

For information about disclosure requirements under the RO Act of organisations and branches, see GN 014: Disclosures required by Organisations and Branches under the *Fair Work (Registered Organisations) Act 2009*.

## Disclosures by Holders of Office

### Disclosures that must be made by ALL OFFICE HOLDERS (s. 293B)

Each officer of an organisation and each officer of a branch must disclose to the organisation or branch any remuneration paid to the officer:

- because the officer is a member of a Board and:
  - the officer is **only** a member of the Board because they are an officer, or
  - the officer was **nominated** to the Board by the organisation, branch or peak body
- by a related party of the organisation or branch in connection with the officer's duties as an officer. For information about who is a related party see also 'Disclosure of payments to related parties and declared persons or bodies' in GN 014: Disclosures required by Organisations and Branches under the *Fair Work (Registered Organisations) Act 2009*.

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**Remuneration** that officers are required to disclose is defined in the RO Act to include pay, wages, salary, fees, allowance, benefits or other allowances, but does not include a non-cash benefit.

The definition of 'remuneration' is discussed in GN 014: Disclosures required by Organisations and Branches under the *Fair Work (Registered Organisations) Act 2009*.

The disclosure must be made in writing to the Committee of Management of the organisation or branch:

- as soon as practicable after it is paid,<sup>1</sup> or
- as part of a standing disclosure made before or as soon as practicable after the first payment.<sup>2</sup> Standing disclosures can be made in relation to remuneration paid to an officer under a contract or arrangement regularly during a financial year. The officer must update the standing disclosure, where the amount they are paid exceeds that previously notified<sup>3</sup>; or if (at the end of a financial year) the amount differs from that notified.<sup>4</sup> See also 'Standing Disclosures' below.

<sup>1</sup> Section 293BA, RO Act. NOTE: all maximum penalties in this Guidance Note are current as at the date of publication

<sup>2</sup> Sections 293BB(1) & (5), RO Act.

<sup>3</sup> Section 293BB(3), RO Act.

<sup>4</sup> Section 293BB(4), RO Act.

**Example:** Jennifer is an officer of XYZ union, which has nominated her to the Board of MNO organisation. MNO will pay Jennifer a monthly Board fee of \$500. Jennifer can make a standing disclosure to XYZ's Committee of Management any time before, or as soon as practicable after, she receives the first monthly payment. She will need to update the standing disclosure if, for example, MNO increases the monthly Board fee to \$750.

Jennifer will also need to update the standing disclosure if MNO decreases the monthly Board fee to \$400 as this is a different to the amount contained in her standing disclosure.

**Penalties:** Officers are liable for civil penalties of a maximum of \$21 000, or a maximum \$252 000 for serious contraventions, for breaches of these disclosure obligations.<sup>5</sup>

### **Disclosures that must be made by 'disclosing officers' (s. 293C)**

A disclosing officer is an officer whose duties include duties that relate to the financial management of the organisation or branch<sup>6</sup> – for example, an organisation's Secretary, Treasurer and Committee of Management members. An officer will have duties relating to the financial management of the organisation or branch where they are, for example, responsible for authorising payments or approving the financial reports.

A disclosing officer must disclose to the Committee of Management of the organisation or branch details of any material personal interest that the officer has or acquires in a matter that relates to the affairs of the organisation or branch.

### **The meaning of 'material personal interest'**

'Material personal interest' is not defined in the RO Act, but the same concept is used in the Corporations Act, and therefore the following principles are likely to apply:<sup>7</sup>

- 'Material' means matters that may influence an officer's consideration of a matter relevant to the organisation, including influencing how an officer may vote on an issue determined by the Committee of Management
- A 'personal' interest does not have to be financial
- A 'person interest' does not need to be held by the officer directly – for example, where an officer's relative will benefit from a matter relevant to the organisation, this

<sup>5</sup> Sections 293B(1) & (2), RO Act.

<sup>6</sup> Section 293C(1), RO Act.

<sup>7</sup> These principles are found in *Ford, Austin and Ramsay's Principles of Corporations Law* (17<sup>th</sup> edition, 2018), at [9.130.3].

may amount to a material personal interest of the officer if it could influence the officer's consideration of the matter

- An interest which does not give rise to a 'real sensible possibility of conflict'<sup>8</sup> of interest on the part of an officer would not be a material personal interest
- An assessment must be made of the connection between any advantage an officer might personally obtain, and the matter relating to the organisation or branch. If the officer's interest is real or substantial, it must be disclosed.

A disclosing officer should consider the following questions regarding any possible material personal interest:

Step 1	Step 2	Step 3	Step 4
Does it affect me personally?	Does it affect someone I know?	Is the connection close enough or important enough to influence me?	Could the interest give rise to a real sensible possibility of conflict?
<b>No - go to Step 2</b> <b>Yes - go to Step 3</b>	<b>No - no material personal interest</b> <b>Yes - go to Step 3</b>	<b>No - go to Step 4</b> <b>Yes - likely material personal interest</b>	<b>No - no material personal interest</b> <b>Yes - likely material personal interest</b>

## Examples

In the examples below, the disclosing officers' duties include duties that relate to the financial management of the organisation.

Material personal interest	No material personal interest
Julie is President of DEF employer organisation, which is currently considering the purchase of property to relocate its head office. Julie's sister, Dominique, is a real estate agent specialising in commercial property. Julie would like to use Dominique's agency to purchase the property. This would amount to a material personal interest on the part of Julie, because Dominique is a relative who will benefit from the purchase, which she must	Louise is on the board of union HIJ which is seeking to purchase new premises. HIJ is currently determining which bank to take out a mortgage with. Louise is aware that she may indirectly own shares in some of the major banks through her superannuation fund.  This is unlikely to be considered a material personal interest on the part of Louise as, given the scale of the banks and distance between the purchase and Louise's indirect

<sup>8</sup> *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41.

<p>disclose to DEF's Committee of Management.</p> <p><b>Material Personal Interest: YES</b></p>	<p>interest in shares held by her superannuation fund, it is unlikely the decision will benefit her in any meaningful way.</p> <p><b>Material Personal Interest: NO</b></p>
<p>Stacey is the Secretary of WXY Union which is considering the appointment of a new organiser. A candidate for appointment to the role is Alan, who is Stacey's brother. Stacey thinks Alan would do an excellent job and thinks he is far superior to any of the other candidates for the role. Stacey believes that she has reached this conclusion on an objective assessment of Alan's abilities and experiences. Nevertheless as their relationship has the potential to affect Stacey's vote on the appointment of an organiser she is required to disclose her relationship to the Committee of Management as a material personal interest.</p> <p><b>Material Personal Interest: YES</b></p>	<p>Ioannes is the President of QRS Union, which is currently considering which major telecommunications company to use for its internet and phone services. Ioannes' wife owns a small quantity of shares in one of the major telecommunications companies. Given the scale of the major Australian telecommunications companies and the very limited effect that the decision of QRS Union is likely to have on their share price, this is unlikely to be considered to be a material personal interest on the part of Ioannes, although it may be best practice to disclose it anyway.</p> <p><b>Material Personal Interest: NO, but best practice to disclose</b></p> <p>The situation will be different in relation to shareholdings in smaller companies, where the decision of the organisation may have a real or substantial effect on the share price or ongoing profitability.</p> <p><b>Material Personal Interest: Probably YES</b></p>
<p>Andrew is the Treasurer of MNO union which is considering which superannuation fund to use as its default fund for the union's employees. Andrew's husband, Steve, is a funds manager at EFG Super. Steve's remuneration has a performance component, based on the number of new members who join EFG Super each year. This would amount to a material personal interest on Andrew's behalf which he must disclose to MNO's Committee of Management.</p> <p><b>Material Personal Interest: YES</b></p>	<p>Gustav is a member of the Committee of Management of employer organisation TUV, which is hoping to contract with LMN Pty Ltd. Gustav is a non-executive director of LMN Pty Ltd. Gustav is paid a fixed fee for his role at LMN Pty Ltd. It is therefore unlikely that the contracting of the companies would constitute a material personal interest.</p> <p><b>Material Personal Interest: Probably NO</b></p> <p>The situation would be different if Gustav received performance based remuneration from LMN Pty Ltd or held shares in LMN Pty Ltd, where the contract may have a real or substantial effect on the performance of LMN Pty Ltd., and therefore Gustav has received a financial advantage.</p>

	<p><b>Material Personal Interest: Probably YES</b></p> <p>However, there may be a conflict of interest between Gustav’s two roles in negotiating and executing the contract. Therefore it would be best practice for Gustav to disclose that he is a non-executive director of LMN Pty Ltd.</p> <p><b>Best Practice to disclose</b></p>
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<p><b>Best practice tip</b></p>	<p>If it is unclear whether an interest is material, the ROC encourages officers to disclose the interest. This ensures compliance and increases transparency.</p>
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It is important to note that officers must also consider their obligations under other provisions of the RO Act, especially the duties of an officer to act in good faith/for proper purposes and not to misuse their position improperly to gain advantage for themselves/others: sections 286-287. Common law rules relating to conflicts of interest may also apply, along with any conflict rules in the rules of the organisation (this is the effect of section 293E of the RO Act).

Disclosing the material personal interest

The disclosure of a material personal interest must:

- be made as soon as practicable after the officer acquires the interest<sup>9</sup>
- include sufficient details of the nature and extent of the officer’s interest and how it relates to the affairs of the organisation or branch<sup>10</sup> to enable the Committee of Management to understand the scope of the interest and any potential benefit to the officer<sup>11</sup>
- be made at a Committee of Management meeting (orally or in writing) or to the Committee of Management members individually in writing.<sup>12</sup>

<sup>9</sup> Section 293C(5)(a), RO Act.

<sup>10</sup> Section 293C(5)(b), RO Act.

<sup>11</sup> *Ford, Austin and Ramsay’s Principles of Corporations Law* (17<sup>th</sup> edition, 2018), at [9.130.9].

<sup>12</sup> Section 293C(5)(c), RO Act.

An officer may also provide standing notice of a material personal interest to the Committee of Management of an organisation or branch.<sup>13</sup>

**Best  
practice  
tip**

The ROC encourages officers to raise a material personal interest with the Committee of Management when the Committee is considering a matter that relates to that interest, even if the officer has already made a standing disclosure.

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Not every material personal interest of an officer is required to be disclosed.

Interests that do not need to be disclosed

Officers are not required to disclose material personal interests if the interest is:<sup>14</sup>

- due to the officer being a member or representative of a member and the interest is held in common with other members of the organisation or branch, for example, it is an interest held by all members of a union
- in relation to the officer's remuneration as an officer
- in relation to a contract of the organisation or branch that is subject to approval by the members
- in a contract for the benefit of a related party of the organisation or branch that is a body corporate and arises merely because the officer is on the Board of the related party
- already contained in an effective standing notice of disclosure (see below).

**Penalties:** Officers are liable for civil penalties of a maximum of \$21 000, or a maximum of \$252 000 for serious contraventions, for breaches of these disclosure obligations.<sup>15</sup>

<sup>13</sup> Sections 293C(4)(b) and 293D, RO Act.

<sup>14</sup> Section 293C(4), RO Act.

<sup>15</sup> Sections 293C(2) & (3), RO Act.



Disclosure of material personal interests: actions required by the organisation or branch (s. 293C)

Once an organisation or branch receives a disclosure of a material personal interest from an officer it must record it in the minutes of the meeting of the Committee of Management at which the disclosure was made (or the first meeting after a disclosure made between meetings).<sup>16</sup>

The organisation or branch must provide any member of the organisation or branch details of the disclosure within 28 days of receiving a written request from the member.<sup>17</sup>

**Penalties:** Organisations are liable for civil penalties of up to a maximum of \$105 000 for breaches of this obligation by an organisation or branch.<sup>18</sup>

Restriction on taking part in decisions (s. 293F)

An officer with a material personal interest (see above) must not be present during any deliberation or take part in any decision on the matter if the interest:<sup>19</sup>

- relates to the affairs of an organisation or branch, AND
- is required to be disclosed (including, as best practice, interests which have already been notified in a standing disclosure)<sup>20</sup>

The officer may be present and take part in decisions if the remaining members of the Committee of Management have passed a resolution stating the officer should not be disqualified from that decision.<sup>21</sup> The resolution must:

- identify the officer, the nature and extent of the officer's interest and how it relates to the affairs of the organisation/branch,<sup>22</sup> AND
- state that the Committee of Management members are satisfied that the interest should not disqualify the officer from taking part in a decision on the matter.<sup>23</sup>

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<sup>16</sup> Section 293C(6), RO Act.

<sup>17</sup> Section 293C(7), RO Act.

<sup>18</sup> Sections 293C(6) & (7), RO Act.

<sup>19</sup> Sections 293F(1), (2) & (3), RO Act.

<sup>20</sup> Section 293(4)(b), RO Act.

<sup>21</sup> Section 293F(4), RO Act.

<sup>22</sup> Section 293F(4)(a), RO Act.

<sup>23</sup> Section 293F(4)(b), RO Act.

**Best  
practice  
tip**

Under the equivalent provision in the Corporations Act, a company director must not be present while a proposed resolution permitting him/her to participate in a decision is being considered.<sup>24</sup> Having regard to the purpose of these provisions to avoid conflicts of interest, this practice should also be observed by a Committee of Management in considering whether to allow an officer of an organisation/branch to participate in a decision in which he/she has an interest.

**Penalties:** Officers are liable for civil penalties of a maximum \$21 000, or a maximum of \$252 000 for serious contraventions, for breaches of these requirements not to take part in decisions where an officer has a material personal interest.<sup>25</sup>

### **Standing Disclosures (ss. 293BB & 293D)**

Standing disclosures can be made by officers in respect of their obligation to disclose remuneration paid to them,<sup>26</sup> as well as in respect of their obligation to disclose a material personal interest.<sup>27</sup>

Whilst standing disclosures are permissible, it is important that they are kept up to date and that other Committee of Management members are informed of any changes to them.

Standing disclosures in respect of remuneration need to be updated whenever the remuneration received by the officer changes.<sup>28</sup> They also need to be updated where the source of the remuneration changes – for example, where the officer changes Boards that they have been appointed to by the organisation.

Standing disclosures in relation to material personal interests need to be updated whenever the nature of the interest materially increases.<sup>29</sup> This could be because the officer's interest changes – for example, they increase their shareholding or take on a more senior role in the other entity. It could also be because the interest has become more material – for example, the officer is now responsible for making procurement decisions for the organisation in an area related to their material personal interest.

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A standing notice of a material personal interest ceases to have effect when a new member is elected or appointed to the Committee of Management. For the standing notice to have effect again the new member must be given notice of the material personal interest.<sup>30</sup>

<sup>24</sup> *Ford, Austin and Ramsay's Principles of Corporations Law* (17<sup>th</sup> edition, 2018), at [9.150.5].

<sup>25</sup> Sections 293F(1) & (2), RO Act.

<sup>26</sup> Section 293B, RO Act.

<sup>27</sup> Section 293D, RO Act.

<sup>28</sup> Sections 293BB(3) & (4), RO Act.

<sup>29</sup> Section 293D(6), RO Act.

<sup>30</sup> Section 293D(5), RO Act.

## Training (ss. 293K & 293L)

Each officer of an organisation or branch who has duties which includes duties that relate to the financial management of the organisation, must undertake training approved by the Commissioner that covers each of their financial duties within 6 months of beginning to hold office.<sup>31</sup>

The obligation to ensure that the officer completes the training within that time period falls on the organisation/branch.<sup>32</sup>

**Penalties:** Organisations are liable for civil penalties of up to a maximum of \$105 000 for breaches of this obligation by an organisation or branch.<sup>33</sup>

### Exemptions from financial training (s. 293M)

An organisation or a branch of an organisation may apply, in writing, to have an officer exempted from the requirement to undertake training.<sup>34</sup> The Commissioner may grant the exemption if satisfied the officer has a proper understanding of the officer's financial duties within the organisation or branch because of their:<sup>35</sup>

- experience as a company director
- experience as an officer of a registered organisation
- other professional qualifications or experience.

## Further information

For further information please contact the Registered Organisations Commission at [regorgs@roc.gov.au](mailto:regorgs@roc.gov.au).

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This guidance note is not intended to be comprehensive. It is designed to assist in gaining an understanding of the Registered Organisations Commission and its work. The Registered Organisations Commission does not provide legal advice.

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<sup>31</sup> Section 293K(1), RO Act.

<sup>32</sup> Section 293K(2), RO Act.

<sup>33</sup> Section 293K(2), RO Act.

<sup>34</sup> Section 293M(1), RO Act.

<sup>35</sup> Section 293M(2), RO Act.