



ROCpod episode 33 – Managing conflicts of interest

Speaker Key

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NM Hello and welcome to *ROCpod*. My name is Nicola Martin and I am a lawyer here at the ROC. This month we're taking the opportunity to talk about a 'hot topic' ... a compliance issue we've been dealing quite a bit over the last 12 months – and that is, conflicts of interest.

We know that registered organisations and their officers can't always avoid conflicts of interest, and sometimes your focus must shift instead to managing them.

To share practical tips about managing conflicts of interest and encouraging disclosures, I'm joined by my colleague Bill Steenson who is the Principal Lawyer of the ROC's Compliance and Protected Disclosures team.

Thank you for your time today, Bill.

BS You're welcome, Nicola. Happy to help.

NM To begin, can you explain how conflicts of interest has emerged as a 'hot topic'? The ROC's latest compliance update (which was released in March 2022) was about sure what is conflicts of interest, and we know it continues to be an issue for many organisations.



So Bill, what has been happening in our jurisdiction?



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BS Over the last 12 months we've received lots of contact about alleged conflicts of interest. Many have been through whistleblower disclosures reported to the ROC, some of them we've identified from reviewing the documents lodged by organisations. It's also a common theme in some of our other investigations too.

We've heard about senior officials making important decisions that may have benefitted people they were in a close relationship with. We've also been dealing with matters where officers have failed to disclose some of their financial interests.

The number of reports on this same topic is really a concern to the ROC. We know that there are potential effects on decision-making, transparency and trust when conflicts go undisclosed or unaddressed, and they can be significant.

NM The ROC has covered the law around conflicts of interest in a previous podcast - Episode 17. It was an instalment of our good governance in practice series. You can go back to hear about the disclosure obligations of officers, and some practical strategies for avoiding conflicts of interest.

But today I want to focus on how registered organisations can carefully manage conflicts of interest. The reality is, officers have social, family and business relationships ... and these relationships may come into conflict with their role as an officer of a registered organisation.



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BS Yes, it's an area that people often think isn't relevant to them – but it is. It's not someone else's problem. Conflicts of interest occur in all organisations, sometimes it's in the most routine transactions and decisions. It's important to remember the rules around conflicts of interest apply from the minute you have an interest that has got anything to do with the organisation – it's not about waiting until you're experiencing an actual conflict, or someone is trying to influence you.

That's why all officers of registered organisations have disclosure obligations, and especially if you exercise financial management duties. For example, if you're a member of a body like the committee of management, that body will almost always have powers to deal with the organisation's funds, its property, and decisions on budgets and expenditure.

But you can't always prevent conflicts, and then the focus must then shift to properly managing them through good governance.

NM So how can conflicts of interests be managed in a registered organisation?

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BS Well, there are several ways for organisations to manage conflicts of interest, and I can explain briefly what they are with some recent examples.

In some circumstances it might be appropriate to take the organisation out of the conflict. Another approach is to restrict that officer's involvement in the situation, and then keep records about their participation. In some cases, we've seen organisations effectively manage conflicts by engaging an independent third party that oversees the activity or process.

NM Thank you, that's a good summary.

Let's start with removing the conflict. Can you share an example where this can be an effective way of managing a conflict of interest?

BS Sure, Nicola. We received a whistleblower disclosure that alleged that an organisation had recently appointed an auditor someone who was also the personal tax accountant for a few of the officers on the committee of management.

NM It may be appealing to engage a service provider you know ...you trust them and the quality of their work.

But why should the committee not have appointed the registered auditor in this instance?

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BS Because auditor independence is critically important.

They're expected to give an unbiased and honest professional opinion on the financial statements of the reporting unit that they're doing the audit on. Members of the organisation, and we as the regulator, should be able to trust their professional opinion and their ability to 'say the hard things' about the organisation's finances if they have to. So, the auditor must be independent from the organisation, so their opinion isn't influenced by any relationship between them.

In this example, the pre-existing relationship between the auditor and the members of the committee is a conflict of interest. Of course, that's not to say that the auditor's opinion *will* automatically be biased, but there is a risk that their competing loyalties *may* influence the outcome of their audit.

It's also about perception – the members who know about the conflict could believe there is bias, and this can affect the credibility of the audit.

NM Thanks Bill, but how can an organisation manage this type of conflict of interest?



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BS One approach is to appoint a different registered auditor, and one that doesn't have a pre-existing relationship with any of the officers of the organisation. Now if the auditor works for a firm, using another registered auditor from the same firm might be a simple and appropriate way to manage the issue. But of course, the auditor with the conflict should play no part in that audit.

NM So another strategy for managing conflicts of interest is to restrict the conflicted officer's involvement in the situation, and then document the officer's participation.

BS Yes and this is something that's set out in the *Fair Work (Registered Organisations) Act*. We sometimes see it reflected in conflict of interest policies around decisions and meeting processes. For example, the conflicted officer might be required to leave the room at the start of the agenda item that relates to their conflict, and not return until after that item is finished and they are onto the next agenda item. And it's certainly best practice for the minutes to document that the officer has left the room while the discussion is underway.

It's particularly important around decision making – if a decision is made that could be affected by the officer's interest, it needs to be really clear what steps were taken in relation to the interest, and that the officer did not vote on that decision.

But, as you mentioned, the conflicted officer might have a skill that will benefit the organisation. So you may not want to exclude them altogether and that needs to be really carefully managed.

NM Can you give us an example Bill?



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BS Sure.

In some cases you might actually want the conflicted officer to be involved, because they have particular knowledge or skills that will ultimately benefit the organisation.

Now let's say one of your officers is an IT expert, and your organisation has got an IT project and that project needs funding. So your organisation if it doesn't have the money available, but the officer can provide the funding from their own source. Well right there, there's a conflict of interest, an actual conflict and usually you'd need to address it straight away by excluding that officer from participating in discussions and decisions involving the project because of their personal financial interest.

But the officer has fully disclosed the nature and extent of their interest and involvement and the organisation has fully informed itself of the benefits and risks, and they ultimately decides that it is more valuable to have access to the officers' expertise. But there can be no secrets in a situation like this – nothing held back –



there must be full disclosure by the officer before the organisation decides on them having an involvement.

NM But the officer's level of involvement will depend on the circumstances, won't it? In some instances it might be appropriate to restrict the officer from speaking to other committee members about the issue. Or it might be inappropriate for the officer to vote on decisions.



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BS Yes, that's right Nicola.

The idea is to regulate the conflicted officer's influence as much as is required to maintain integrity. And then you'll need to keep detailed records about what's happened so that you can legitimately defend any decisions if they're later questioned. And don't forget this step! Keeping records about interests and conflicts being identified and how they're treated is really important! These are the kinds of records that the ROC may look at when looking into a whistleblower allegation or in pursuing an investigation.

In many cases, we've recommended to organisations that they improve their governance and record-keeping practices – in some cases because they didn't keep enough – in one case because the organisation didn't have any process at all for dealing with conflict of interest. Records can protect your organisation, so it's in your best interests to invest the time to keep thorough and accurate records.

NM Let's say we decide we want the officer involved. What is best practice for an organisation in this circumstance?



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BS The law requires that before the officer has any involvement, the committee has to determine what involvement, if any, the person should have. They must then vote on allowing the officer to remain involved in the matter, if that's what they decide. And it must be a fully informed vote. The minutes, and what the committee is told about the issue before they vote, must explain the nature and extent of the interest, how it relates to the decisions that are going to be made and why the committee decided that the default position (that the officer is excluded) shouldn't apply. Only then can the vote take place. And remember to clearly record in the minutes whether the committee supported the officer's involvement or refused it – and/or any conditions that they put on it.

NM What if there are other officers on the committee with a conflict?

BS Then you need to consider each one on its own merits – you can't take a blanket approach. That means getting full disclosure from each officer, considering it specifically, and then have a vote for each of them with all those details known AND



– here’s the important thing – they can’t participate in votes to include each other. Only officers without a conflict can vote in that situation.

NM Alright, so we’ve considered the interest, had a vote and the committee has resolved not to disqualify the officer from being involved. The officer can now be present and vote?



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BS Well, this is where the real detail comes in. The committee can decide in its resolution how much involvement it wants from the officer. For instance do they just want the officer to provide information and participate in discussions but not vote, do they want them to vote on some decisions, but not others like financial ones, to have access to all information or be excluded from certain papers relating to it? All of this should be documented in the minutes and then as the relationship continues the minutes should whether it was complied with and how.

NM And if I’m the officer with the conflict?

BS Then be aware of what they have allowed you to be involved with and don’t overstep or be tempted to cut corners. Also, if your interest changes – let the committee know straight away. They might need to vote again on your involvement – whether the change means you’re excluded or still involved, and how. It’s really best practice for you as the officer to keep your own records. Remember, good records can protect both the officer and organisation from allegations of misconduct. And records can often tell their own story.

NM Another issue that’s come to our attention are conflicts of interest involving intimate partners and relatives. Conflicts of interest aren’t always about receiving a direct financial benefit yourself, sometimes it’s about loyalty and things that could benefit others. Can you tell us more about this issue?



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BS Yes that’s right,

In one whistleblower matter, a senior official of an organisation was in an intimate relationship with a colleague. The official didn’t disclose the relationship to the organisation and was later involved in the decisions to promote their partner and increase their salary.

Now it’s not the existence of relationships that concern us here. We know about organisations that have had generations of families making contributions to the organisation and its members. And similarly, there’s nothing particularly unusual about meeting your partner at or through work, as long as its handled appropriately.



The real issue is the lack of transparency, and the unrestricted participation and influence over the decision-making process. If the organisation isn't aware of the relationship, they're not given the opportunity to come up with a strategy for managing it.

NM I imagine it might be embarrassing in some situations to reveal information about your personal relationships. How do you promote a culture of compliance in circumstances where disclosing your interest may be uncomfortable?



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BS Being an officer of a registered organisation means accepting the duties that come with it – including the disclosure requirements, and acting in good faith, with care and diligence, and not using your position to gain a benefit for others. As an officer, you can't avoid these responsibilities.

But there may be ways to appropriately disclose the relationship and to report when you are potentially conflicted – reporting it to those people with a 'need to know', such as the committee, which then decides on how to manage the conflict. And then you'll need to make sure that the decision-making process has checks and balances to remove the potential impacts, or the potential of the conflict.

It's a balancing act – but the possible embarrassment of having to disclose a personal relationship is far outweighed by the consequences of not disclosing it.

NM So in your example, if the officer had made appropriate disclosures about the personal relationship, the committee could have managed the conflict by restricting the officer's involvement?

BS Yes, that's one way the conflict of interest could have been appropriately managed. It's not necessary to tell the whole world – but it is necessary for the decision-making body to be kept fully informed.

Another way is to engage an independent third party to oversee the process. This can be an internal or external body. In many recruitment or promotion decisions for example, it's not uncommon for a third party like HR, a panel of people from across the organisation or a recruitment company, oversee the processes and be involved in making decisions. A third party won't have the same loyalties (and potential conflicts) as a relative or a friend making a decision, which can help to promote decisions that are in the best interests of the organisation.



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NM But what if the officer has expertise around the role?

BS Well then the independent advisors can be briefed, or if the officer needs to be involved, then you need a resolution acknowledging their interest and considering



whether it can be a panel involving them and others, such as HR or other members of the committee. That way you have their input, if it's required, but it is balanced by people who are aware of the interest.

- NM** Another way might be removing discretions and decisions about salaries where there are family relationships. Standardised pay in an enterprise agreement is a good example. If everyone is being paid using the same salary scale and the agreement contains transparent processes for advancement, this can also protect an officer from allegations of conflict.



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- BS** That's right. In a separate whistleblower matter, it was alleged that an official was involved in making administrative changes to the structure of their organisation, which has their partner reporting directly to them.

Even if you think you're making the best decision for the organisation, perceived conflicts of interest can have a substantial impact both internally and externally, so it's important to prevent them, or if that's not possible, they need to be carefully managed.

- NM** So where to from here, Bill? You've spoken about how the ROC has been dealing with several matters that have involved conflicts of interest. We know it's a significant issue.

If I'm a senior official, what should I do to manage this issue in my organisation?



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- BS** There are a few things.

Firstly – you need to make sure your officers are aware of their disclosure obligations. These are civil penalty provisions, and there are reputational risks for an organisation when there's non-compliance. You don't want to be the organisation with the reputation for making questionable decisions that benefit your officers or someone else.

As you said earlier, some people don't think they'll ever face a conflict of interest – or that their own situations don't involve any – but given the reach of our social, personal, and business contacts, this is relevant to all officers of registered organisations. Remember, while it's called a conflict of interest, it's not necessarily about you personally feeling *conflicted*. It's an objective test – not just what you think about it.

It's about having interests that intersect with those of the organisation. You need good governance and management about this early on to prevent, limit or reduce actual, potential or perceived conflicts.



The ROC's developed education resources on this topic. The disclosure module in our digital classroom, which is available on our website is a good starting point. From there you'll be directed to the key materials, including our guidance note that explains the legal requirements in plain English.

NM We'll include a link to the officers' disclosures guidance note on our podcast page on the ROC website. And you will also find on this webpage a link to our latest compliance update, which will take you through some practical examples and strategies to manage conflicts of interest.



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BS Nicola, you mentioned earlier that officers who exercise financial duties have particular disclosure requirements. It's essential for organisations to also ensure that all officers with financial duties (and that means all of the committee, not just the Treasurer) have completed the mandatory financial governance training, within 6 months of taking office, or that they've obtained an exemption within that time period. The training includes units about the disclosure requirements, conflicts of interest and other officer duties.

NM So education and training are important, but organisations will need to reinforce this with a culture of compliance. How can organisations encourage officers to disclose their interests, and put their hand up when there's a potential conflict?

BS It starts with leadership at the very top. Some of the matters we've been dealing with have involved senior officials of registered organisations and their branches. And that's particularly disappointing from people in leadership roles.

We know that, realistically, leaders can have a huge influence over the culture of their organisations, and the behaviours that flow from that. If senior officers and managers are publicly seen to be doing the right thing it can positively influence the rest of the organisation.

Embedding certain practices in 'public' can serve as an example that disclosures are required and expected from everyone. For example, having 'disclosures' as a standing agenda item at the beginning of every committee meeting, and having senior officers step out if they have conflicts – and recording these things in the minutes.



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NM We know that a 'speak up culture' promotes people raising issues and organisations effectively dealing with matters quickly. Some of the matters we've spoken about today could, and should, have been resolved internally by the organisation. It's much better if an organisation encourages disclosures, looks into the issues raised and prevents potential breaches.



Thank you for your time today, Bill. The examples of conflicts of interest are a timely reminder of the disclosure requirements, and how organisations can effectively manage conflicts of interest when they cannot be avoided.



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BS Thanks Nicola.

I'd also like to take the opportunity to remind our listeners that the ROC can provide guidance if you're faced with a governance issue, and you're not quite sure how to deal with it. It's better to get advice and address the issue sooner rather than later. So please give us a call or send us an email.

NM Please join us again next month for another episode of *ROCpod*. We'll be talking about the latest governance issues faced by committees of management of registered organisations and branches.

AN The opinions expressed in *ROCpod* are the opinions of the particular speaker and not necessarily the opinions of the Registered Organisations Commission.

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