



ROCpod episode 24 – Corporate governance experiences and what registered organisations can learn from them

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
AS	Andrew Schultz
MB	Commissioner Mark Bielecki



00:00:00

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.

Don't forget to subscribe and see how ROCpod can help you and your organisation.

AS Hello, and welcome to ROCpod, Talking with the Registered Organisations Commission. My name is Andrew Schultz, and I'm a Senior Adviser in the Compliance and Investigations team at the ROC. We are now one year into our Good Governance in Practice podcast series. And we've focused on issues like conflicts of interest, record-keeping, decision-making, and the benefits of a speak-up



culture.

Governance is important for registered organisations and their members. It's also a hot topic in corporate Australia. In today's episode, I'm joined by the Registered Organisations Commissioner Mr Mark Bielecki. He'll share his insights into why governance matters for registered organisations, some of the latest governance issues faced by corporate Australia. And also, some practical lessons for registered organisations. Thank you for joining me today, Commissioner.



00:01:26

MB Thanks, Andrew, it's really good to be with you. Our approach here at the ROC to governance in registered organisations is something we see as part of our work around the protection and preservation of members' interests. So, it's something I'm very happy to chat about.

AS So, let's start with your take on good governance. Governance is a bit of a buzzword at the moment. It's been discussed in the context of climate change, not-for-profits, superannuation, and other sections of corporate Australia. But I guess we know it's more than just jargon. So, would you be able to tell me what is governance, and why do registered organisations need to reflect on their governance practices?

MB You're right to identify that as an issue. We do need to know that we're all on the same page as to what we're talking about. Governance is a hot topic, it's something that featured in the Banking Royal Commission from a little while ago. And from the inquiry by Commissioner Bergin into the Crown Casino in New South Wales. Both of those were high profile and shined a light on how things can go wrong when governance and systems are neglected.

In fact, I was interested to read that there were even observations after the recent G7 meetings, about matters relating to global governance in the context of climate change. I never thought of that issue as one of global governance. But the interesting part of that is that the discussion was around the global governance of climate change.

Look, when I'm talking about governance, I'm talking about the systems that monitor and control how an organisation is run. And good governance processes in our context, a registered organisation, will help to manage risk and to hold people accountable and to make a valuable contribution to looking after the interests of members.

**00:03:10**

AS In our series of podcasts about good governance in practice, Commissioner, we've explored the policies and procedures that registered organisations can implement to promote good governance.

For example, how the officers on a committee of management can be transparent decision-makers, including procedures for disclosing conflicts of interest. While the recent examples you've mentioned are from other jurisdictions, good governance is also essential for registered organisations, isn't it?

MB Yes, absolutely. I'd agree with that. Recent media attention has focused on corporate governance, but the lessons are absolutely transferable and they're relevant to registered organisations.

The fact is that organisations have to be governed and they have to be led. They have to be managed and given the advantages of approaching that in accordance with the principles of good governance that might as well be done with the benefit of the best and latest thinking in this area. And, of course, as is often the case, we can borrow lessons from other jurisdictions and other areas in the regulated population.

**00:04:20**

AS Okay, so let's start with some examples the listeners might be familiar with.

You've mentioned the Crown Inquiry, which examined the governance systems of the casino operated in New South Wales. And the report by Commissioner Bergin that was tabled in the New South Wales Parliament uncovered issues like alleged money laundering, partnerships with junket operators, and a poor corporate culture.

MB Yes, it did. Commissioner Bergin, in that inquiry into Crown and New South Wales, found that the problematic behaviours that were actually uncovered at Crown occurred because its corporate governance structures were lacking.

For example, in some areas Crown's directors were not informed of significant matters and risks weren't appropriately appreciated by management at Crown. As we speak, actually, there are inquiries underway into Crown Casino in both Victoria and Western Australia. So new lessons may emerge. I think those inquiries were actually triggered by the findings of Commissioner Bergin as to what was going on in New South Wales.

**00:05:26**



AS I think that would be correct, that they would have been influenced by what happened in New South Wales. So, what can we learn from the Crown Inquiry Report that has already been completed in New South Wales?

Well, one good thing is that many of those lessons are ones that we've already explored in our Good Governance in Practice series podcast. I don't mean the actual events at Crown, but the subject matters of the compliance inquiries. So, for example, officers need to be aware of conflicts of interest. And conflicts need to be carefully managed, which best practice would require be done through established policies and procedures of disclosure and decision-making.

We've actually issued some specific guidance about how those conflicts can be managed in podcast episode 17. And we provided a guidance note to assist as well. And that explains when officers are required to make disclosures. The reality is that conflicts of interests are inevitably going to arise. It's just a fact of life.

The challenge is in how they are managed and dealt with, and that's where the lessons of good governance can help us. The New South Wales Crown Inquiry also examined the quality of the education and training undertaken by the Board in the casino context on issues such as money laundering. In our context of registered organisations, we focused heavily on providing education resources to assist organisations, and more particularly their officers to meet their compliance obligations.

We for example have emphasised the importance of officers completing their required financial governance training. So, it's important, we think, that financial decision-makers are inquisitive, that they actively seek clarification if they have concerns. And that they're always cautious if they are faced with the temptation to simply follow the herd in dealing with particular issues.



00:07:26

AS Okay, so you've given us some interesting lessons, there, from that inquiry. Do you think you have any practical tips that might arise from that inquiry, so organisations can put them into practice?

MB One tip that I've come across is that during committee meetings, the chairperson should ask what questions do you have, rather than do you have any questions. The difference is subtle, but, of course, it draws out, or is designed to draw out, a question because it presupposes a committee member will have a question.

Also, committees of management should consider whether they provide the materials for their meetings sufficiently early enough for members to formulate their questions.

Transparency is a key enabler of good governance. We've heard some concerns from officers of registered organisations in this space. For example, where hardcopy



materials have only been provided to committee members when they actually attend the meeting, and then they're prevented from taking the materials away with them. We've seen this lead to poor decision-making and financial loss on some occasions. In other circumstances, certain documents like financial reports also shouldn't be hidden behind unnecessary access restrictions, like the need for passwords. We think the better approach is to avoid barriers to accessing a central document as much as that is possible.

Another tip would be around the financial training that's required under our Act for officers with financial management duties. That training can actually help to build the confidence and knowledge of committee members to do the very asking of the questions that will keep processes properly under consideration. Organisations should also have processes which ensure committees are informed of important decisions. And really importantly, that committee members are sufficiently educated to assess the risk.

One of the things I challenge our listeners to today is to assess whether their organisations are doing that. A lesson from the Crown Inquiry is that they should be doing that.

**00:09:40**

AS Thank you very much for that, Commissioner. Are there any other lessons relevant to registered organisations that would come out of that Crown Inquiry, in your view? For example, we've recently discussed organisational culture in this podcast series. For example, we've looked at developing a speak-up culture in organisations.

So, in your view, was culture a feature in the New South Wales Crown Inquiry Report?

MB Yes, 100%, it was. The importance of culture within an organisation is critical, generally, but, certainly it was part of the Crown Inquiry Report. Organisational culture drives behaviours. They could be bad or good behaviours, it depends on the culture of the organisation. But in our context, we could ask the question what attitude does an organisation take to the accuracy of membership numbers?

I would say that that's not a paperwork issue, but it is actually an issue that's fundamental to the democratic functioning of the organisation. Now, we have had a podcast on the importance of developing a speak-up culture in registered organisations, and organisations need to do more than say they have a commitment to a culture of compliance. It's essential for senior officials to demonstrate that and to lead the organisation by good example and to openly encourage feedback.

**00:11:01**



AS Thank you very much for that, Commissioner. So we know from examples like the Crown Inquiry that governance is an issue that many companies are grappling with. And we also saw this, of course, in the very well-known Banking Royal Commission, where a number of large financial institutions were found to be lacking in good governance.

MB Yes, that's right. A key theme of that Royal Commission was culture and governance. And actually many of the case studies that it examined and which shocked Australians along the way, illustrated what could happen when sound organisational culture is lacking.

For example, consumer lending practices were found to be well short of community expectations. Known practices involving misconduct and fraud were simply allowed to happen without reprimand, perpetuating a culture of wrongdoing. And we will remember those instances of fees being charged by financial institutions for no work being delivered.

The wash-up of the Commission is that even today those issues are being resolved by some of our biggest financial institutions, some or dealing with enforcement challenges from ASIC. Others are simply trying to clean up their act. And it's actually interesting to see how much work is involved to put the organisations back on the right track, given the cultural deficiencies which allowed them to go off track.



00:12:28

AS I guess it's taken a long time for them to remedy those issues because they were so endemic. That's what that might suggest, perhaps. But we're now a few years on from the Banking Royal Commission, so I wonder what we've learnt from that Royal Commission. There are lessons in Commissioner Hayne's report for organisations and regulators, as well. What's your view about that?

MB I agree with you, Andrew. There are lessons, in particular, for regulators and it's part of what I took away from the report out of that Royal Commission. The ROC is a conduct regulator, which is similar to the work ASIC does in the corporate environment.

And I was interested in Commissioner Hayne's remarks about enforcement. Those remarks have actually influenced enforcement by regulators ever since Commissioner Hayne made them. if I could just read what he said.

"When contravening conduct comes to its attention, the regulator must always ask whether it can make a case that there has been a breach. And if it can, then ask why it would be in the public interest to bring proceeding against the breach."

Now, this has been shortened in the press and by others to the 'why not litigate' catch cry. And underpinning Commissioner Hayne's remarks was his finding that there's an expectation that laws are to be obeyed and that you can't excuse



organisations from wrongdoing merely because they self-report the problem. All of which is true. Of course, self-reporting a problem will have consequences in other respects, in terms of, perhaps, mitigating the consequences of the misconduct. But I know, for example, at the moment, the Fair Work Ombudsman is dealing with, I think up to 80 investigations involving self-reported breaches of various pieces of payment legislation and enterprise bargaining agreements.

And there are media reports that ASIC will be moving away, a little, from the strict adherence to Commissioner Hayne's approach. And that's in the context of the new charter that it's reportedly going to be given by the Treasurer to facilitate business and to help getting the economy moving, post the COVID crisis.

But make no mistake, organisations are encouraged to cooperate with the ROC. There are definitely benefits in doing so. For example, we might be able to guide an organisation to a non-enforcement solution to the problem that they're worried about. Or, in any event, if we do feel that in the public interest, we need to commence proceedings, we will give credit for cooperation. But look, when all is said and done, where issues are identified early, it maximises the opportunities for organisations to take steps to prevent falling into misconduct. And that's one of the most important lessons that can be learnt.



00:15:27

AS I can see that the examples you've mentioned there concerned conduct mainly under the Corporations Act, and so, therefore, relate to conduct that is normally regulated by ASIC. Which, of course, is the Australian Securities and Investments Commission.

While this legislation doesn't apply directly to registered organisations because, of course, they're covered by a different Act, we call it the RO Act, its official name is the Fair Work Registered (Organisations Act) 2009. We know that our Act was drafted on similar principles to the Corporations Act, so how does the RO Act demand that registered organisations have good governance practices?

MB Well, our Act was quite plainly drafted to help registered organisations maintain strong governance practices. And in fact, right at the outset of the Act, in Section 5, Parliament has considered it important to record its intention in enacting these laws, which is not that usual, I have to say. But in that section, Parliament says that the standards in the RO Act are to ensure that registered organisations are representative of and accountable to members and are able to operate effectively.

It also says the aim is to promote high standards of accountability and the efficient management of organisations. Now, while the section doesn't use the word governance, these are all principles of good governance, and they're enshrined in the legislation right at the front.



Previously, one of my roles was as Regional Commissioner at ASIC, and there are, clearly, similarities that I can see between the Registered Organisations Act and the Corporations Act. And what we found, actually, is that courts often rely on decisions made under the Corporations Act to assist with their interpretation of provisions under the Registered Organisations Act. And this is particularly the case in the context of officers' duties. The provisions in the RO Act are pretty much modelled on the provisions in the Corporations Act.



00:17:31

AS Yes, it's certainly true that a lot of the judgements that have come out of the courts pertaining to duties under the Corporations Act have been pertinent and relevant to organisations and their officers. So that's actually a very useful thing for our listeners to be aware of, I think.

But I'm just thinking now that one possible criticism of the RO Act that could arise is that it imposes a lot of tick-the-box requirements. I know that you don't share that view, and as you said earlier, you're very passionate about governance practices under the RO Act. But how do you challenge the perception, or the possible perception, that the RO Act, it just imposes all these tick-the-box requirements, and it doesn't do much more than that?

MB Well, I would absolutely challenge that thinking. Quite apart from what I've just spoken about, which was the intention of the legislature to actually ensure that organisations are representative and accountable to members. And have high standards of accountability. The fact of the matter is that the Act actively provides a comprehensive framework to support good governance in organisations.

And the recent examples of failures in that space exposed the importance of having that comprehensive framework in place. The RO Act provides a structure for the expected standards of behaviour in registered organisations. And so, in my view, going much further than a tick-the-box exercise. Some of the basic principles that you'll hear about when people talk about governance include transparency. It includes accountability. Definitely sound financial management. And many of the compliance obligations imposed by the RO Act can be directly linked back to these principles. You don't achieve these things simply by ticking the box. And I'd also go on to say that the implication from that kind of description, that is that there's a tick-the-box paperwork issues, rather suggest that the RO Act exists to descend on organisations and, I guess, cause them problems.

But the reality is they actually help to lift the quality of the governance of organisations, which can only be for the benefit of the members. And is, in part, the quid pro quo that organisations are required to grant for the many benefits they receive by virtue of being registered.



AS Okay, so you've mentioned principles of transparency and accountability. So how does the RO Act encourage those behaviours?



00:19:59

MB Well, a number of the compliance requirements in the Act do support transparency and accountability. For example, the lodgement of the annual return. Another is the lodgement of notifications of change. These are public documents that provide important information for members. Like, for example, who are the officers of the organisation that are responsible for the decision-making and the strategy of the organisation.

Also, who are the officers who have stewardship of members monies. It's really important, I think, to remember that it's members' money that funds the activities of organisations. Another example is the requirement for organisations to lodge the Officer and Related Party disclosure statement, which, in the ROC, we refer to as the ORP statement. Organisations are also required to provide those statements to members. And that requirement ensures that organisations are transparent and accountable to members about the remuneration paid to officers. As well as any benefits they might receive by virtue of their position. I think members are entitled to know these things and they should know them, and organisations, of course, should be happy to provide that information.

AS Thank you, Commissioner. But I'm just wondering here, organisations can, should, and need to do more than just lodge an annual return and an annual financial report. And the ORP statements that you refer to and, also, any notification of changes to their records, for example, when an officer ceases to hold a position.

So, they're required to do more than these things in order to be transparent and act with accountability. So, I know that good governance is not as simple as ticking off boxes, as you've indicated. So I'm just interested in your comments about something that Commissioner Hayne said in his report about the Banking Royal Commission. Where he said that culture cannot be prescribed or legislated. What would you say about Commissioner Hayne's comment, there?

MB Look, I completely agree with that observation, Andrew. I've heard one commentator put it this way: That culture is what people do when no one is watching. And there are other variations on that theme. But governance does require more attention than making sure you simply follow what the law says, which is why we've explored and shared practical strategies within this Good Governance podcast series. For example, Episode 11 of our podcast series is about record-keeping and decision-making within registered organisations. And there, we spoke about the information that should be recorded when a decision is made and how the level of detail may be different, depending on the circumstances. So, there are definitely record-keeping requirements under our Act, but best practice governance requires organisations to



have policies and procedures that support legal obligations. And the fact is that good governance does protect members interests.

But it can also directly protect the organisation's interests or the interests of its officers by, in this case, having good records. So, you can't legislate to have a good culture. What you need to do is to work hard at it, and a lot falls on the leaders of the organisation to lead by example.



00:23:15

AS Thank you for that, Commissioner. So, you've also mentioned there the importance of sound financial management to the governance of organisations. So, how does the RO Act specifically promote financial governance within organisations?

MB Well, to be specific, Andrew, I need to just mention a couple of sections and chapters within the Act. For example, Part 3 of Chapter 8 of the RO Act provides a comprehensive financial reporting regime for organisations. Now, that's designed to provide transparency to members about the financial performance of the organisation. That requirement also includes checks and balances like the auditor requirements. And all of this is to ensure that financial reports fairly represent the reporting unit's financial position.

And this is, actually, in many respects, not too different from the obligations that apply to corporations. Also, a second area, my Commissioner's Reporting Guidelines, a practical tip here is to make sure your accountant and your auditor have a copy of these every time they do your financial report.

Some registered auditors also like to have a copy of the ROC's Advanced Checklist for looking at financial reports, to run over the financial reports against that checklist. It would be good to include that, too, in your package of materials for the auditor. And in fact, I should digress to say that one of the reasons we make the Advanced Checklist and all of our checklists available is part of our efforts to seek to be transparent in the work we do.

There's also the requirement under section 293 K, which I mentioned earlier, for officers with financial duties to complete financial management training. That's a very important part of the matrix. Beyond the Act, it's also common for organisations to have additional policies and procedures, and those are designed to support financial governance. For example, credit card and expenditure policies. There's quite a detailed framework available to help with promoting sound financial governance.



00:25:27

AS Thank you very much for those comments, Commissioner, and specifying some of those things. So, let's finish this episode with the release of the ROC's Education



Strategy. I know you're also passionate about the ROC's education function and you're proud of the tools and resources that we deliver to assist with compliance. So, how does the Education Strategy support the ROC's focus on good governance in organisations?

MB I'm glad you've asked me about this, Andrew. The national Education Strategy that we pursued is now its fourth year. And it actually sets out for the year ahead, the 2021-2022 financial year of our planned education activities. And we do that to allow organisations to plan ahead as to what interests them and to schedule for who might go to what or who might attend which online session. And it also assists peak bodies to plan their education in this area around our strategy and to fit in, perhaps, with themes that we're pursuing at particular times.

I definitely encourage organisations to engage with our education resources, including this Good Governance in Practice series, which will be continuing over the next year. In fact, we'll be releasing episodes focused on officers' duties, transparency, and accountability, financial decision-making, and the role of the committee of management. So, there's a lot behind each of those topics. And what we've tried to do is to break it down into bite-sized chunks so that by listening to these podcasts, you can develop a library of practical suggestions on how to deal with these issues.

A new strategy that we're pursuing in the Education Strategy for next year, which I'm pretty excited about, is the ROC to You outreach programme. And what that means is that we'll be inviting organisations and branches to request tailored information and assistance from the ROC. For example, an organisation might want someone from our financial reporting team to talk to their committee of management about financial reporting obligations, in a context where that discussion is simply with those members of that particular committee. Or an organisation might have a governance issue that it wants to engage with us about. This initiative is designed to be driven by the needs of organisations, and we're really excited to see which of our services will be of greatest assistance. It's a bit like a house call from a doctor but it's free so we're hoping I'll get a good take-up.



00:28:00

AS Well, that sounds like a very useful new development, Commissioner. If individual organisations can contact the ROC and get tailored information, I think some of our listeners would be eager to take up that option.

And also, thank you very much for joining us today, Commissioner. For sharing your insights. You pointed to some very interesting points about matters that are risen outside our jurisdiction and their relevance to organisations.



-
- MB** You're very welcome, Andrew. Governance and accountability are concepts that I think are here to stay. And the more they're embraced, the better organisations will fare because of it. Thanks for your time.
- AS** Please join us next month for the continuation of our Good Governance in Practice podcast series. The one next month will have a special focus on officers' duties. So, I do hope you'll join us then.
- AN** ROCpod is the official podcast of the Registered Organisations Commission. It is copyright to the Commonwealth of Australia. The opinions expressed in ROCpod are the opinions of the particular speaker and not necessarily the opinions of the Registered Organisations Commission.

This information is general and is not intended to be comprehensive. It is designed to assist in gaining an understanding of the relevant provisions of the legislation, the ROC and its work.

- AN** The ROC is not able to provide legal or accounting advice.

For further information please see the materials on our website www.roc.gov.au or contact us at regorgs@roc.gov.au.