

After the Dyson Heydon reasons for ruling: A refresher on conflicts of interest

By Victoria Hawkins, Special Counsel, Colin Biggers & Paisley

- The reasonable person test is central to help identify conflicts of interest.
- Categories of conflict of interest include 'actual conflict of interest', 'potential conflict of interest' and 'perceived conflict of interest'.
- Best practice dictates that an organisation records in a conflict of interest register all declared or identified conflicts of interest and how they have been managed.

Given the recent controversy surrounding whether the private activities of Royal Commissioner John Dyson Heydon AC QC could reasonably give rise to an apprehension that he might not be impartial as a royal commissioner of the Royal Commission into Trade Union Governance and Corruption, it is timely to consider afresh the broad topic of conflict of interest, of which issues of bias form part.

There is almost universal agreement regarding the need to manage conflicts of interest but a more limited understanding as to what constitutes a conflict of interest and how it might be managed. At a macro level, it is generally accepted that, while conflict of interest is not the same thing as corruption, conflicts of interest can directly lead to corrupt activity.¹ Further, as the recent controversy surrounding the royal commission has shown, even an allegation of conflict of interest can have lasting reputational consequences. It is therefore generally accepted that a proper governance framework should be developed, implemented, reviewed and updated to provide confidence in organisational decision-making.

It is not uncommon, however, for decision-makers to find it difficult to identify conflicts of interest at a suitably early stage of the decision-making process. In such situations, it may be helpful, as a first step, to evoke the hypothetical 'reasonable person'. Understanding the 'reasonable person' test is critical for decision-makers because, if the conduct in question does not comfortably pass the reasonable person test, other steps should immediately be taken, consistent with the organisation's conflict of interest protocols. This article, therefore, aims to flesh out the character of this reasonable person and how the 'reasonable person' test forms part of the overall management of conflicts of interest.

Before addressing these issues, the first step is to consider what may constitute a conflict of interest.

There is a variety of expressions used to convey the broad concept of a 'conflict of interest'. These include concepts of 'lack of impartiality' and 'undue influence'. However, there is no strict definition that applies to all circumstances. This is because the existence of, or potential for, conflicts of interest is measured against the surrounding factual circumstances.

Nevertheless, the law does regulate certain behaviours that could otherwise result in conflicts of interest. Familiar examples include provisions of the *Corporations Act 2001* regarding improper use of one's position to gain an advantage and the obligation placed on directors to notify the

remainder of the board of material personal interests in a matter.² Another well known example is the legal duty imposed upon a fiduciary (such as a lawyer) to act solely in another party's (for example, a client's) interest such that the fiduciary is not permitted to profit from their relationship with that other party without the other party's express informed consent.

In the public sphere, as well, duties of public officers to avoid conflicts of interest are often enshrined in legislation. Hence, the common formulation that a holder of a public office must 'act impartially and in the public interest'.³

From a governance perspective, a broad definition should be adopted in order to best capture activities and behaviours that are antithetical to good governance. For example, the Law Society of NSW provides that a conflict of interest involves serving, or attempting to serve, two or more interests or duties which are not compatible.⁴

The broad concept of conflict of interest can then be sub-divided into three categories. Those categories are 'actual conflict of interest' (where a real or tangible conflict exists), 'potential conflict of interest' (where circumstances arise which could give rise to a conflict) and 'perceived conflict of interest' (where a third party reasonably forms the view that a conflict exists or could arise). All three categories should be addressed in any conflict of interest protocols.

It is also generally accepted that, to be actionable, a conflict must meet a threshold 'materiality' test, although the bar is generally set quite low. As long as the issue or interest is more than a remote or insubstantial one, then it is one that needs to be captured by conflict of interest protocols.

It is of course the case that it may not be possible to avoid all situations where conflicts of interest could arise. This is particularly the case in niche industries or when operating in a small geographical area. Processes for managing conflicts of interest should, therefore, be as much a focus of an organisation as the initial identification of the conflicts.

A common approach to both identifying and managing conflicts is to list certain types of conduct which are prohibited unless consented to at a senior level of the organisation. Ideally, any such list would form part of the organisation's conflict of interest protocols and be cross-referenced to other appropriate policies, such as a sanctions and penalties policy and a conflict of interest register. Examples may include:

- having a direct financial interest in a competitor
- accepting gifts, benefits and hospitality from suppliers above a nominal value, and
- contracting with an entity with which you have a secondary employment arrangement.

Of course, many conflicts of interest will not fit neatly within the parameters of any listed examples. Thus, one commonly recommended approach to assessing whether decision-making is tainted by any conflict of interest is to ask the theoretical question: how would a reasonable person view this conduct?

This question is analogous to the test used by Courts to examine allegations of bias and, as adopted by Royal Commissioner Heydon,⁵ is that '*a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide*'.⁶ The question for the fair minded lay observer (or reasonable person) is said to be largely a factual one, albeit one that must be considered in the legal, statutory and factual contexts in which the decision is made.⁷

I note here for completeness that the application of a judicial bias test to decision-makers other than judges must necessarily recognise and accommodate differences between court proceedings and other kinds of decision making and, consequently, the content of the test may differ.⁸ So, for example, the test may be re-formulated to ask whether a reasonable person may apprehend that a decision-maker lacks impartiality as a consequence of his or her material personal interests in the matter being decided.

So what, then, is the mindset of this reasonable person? This person has certain qualities. The reasonable person, among other things, does not make snap judgments⁹ and is informed by their training and experience.¹⁰ He or she also knows all the relevant circumstances of the matter and, importantly, reserves judgment until all circumstances are considered.¹¹

The reasonable person does not assume that a decision-maker is devoid of life experiences and personal view points. Instead, the reasonable person understands that a decision-maker is entitled to be predisposed to a view, as long as he or she does not prejudge the matter so as to be incapable of being swayed by evidence or judgment. Royal Commissioner Heydon acknowledged this point and stated '*if it was enough to disqualify a person from a role because the fair-minded observer might conclude that the person held political views, there would be non-one who would occupy the role*'.¹² This is consistent with the views expressed by Justices Gleeson and Gummow quoted earlier in Royal Commissioner Heydon's reasons that:

Decision-makers, including judicial decision-makers, sometimes approach their task with a tendency of mind, or predisposition, sometimes one that has been publicly expressed, without being accused or suspected of bias. The question is not whether a decision-maker's mind is blank; it is whether it is open to persuasion. ... Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion.¹³

Finally, Royal Commissioner Heydon adopted a three-step test from Justice Gageler in an earlier decision,¹⁴ as follows:

1. Identify the factor which might cause a question to be resolved otherwise than as a result of a neutral evaluation of the merits.
2. Articulate how the identified factor might cause that deviation from a neutral evaluation of the merits.
3. Consider the reasonableness of the apprehension of that deviation being caused by that factor in that way.