

Conflict of Interest Management

Review for the New Zealand Film Commission Board

FINAL REPORT | Executive Summary and Recommendations

19 August 2022



Executive summary

This report sets out the findings and recommendations arising from a review of conflict of interest management at the New Zealand Film Commission (NZFC).

The review was commissioned by the NZFC Board (the Board) on 28 April 2022 to determine whether conflicts of interest arising from Chief Executive David Strong's personal interests had been appropriately disclosed by David Strong and appropriately managed by David Strong and the Board. The review was also asked to consider the existing processes for the disclosure and management of NZFC Board members' conflicts of interest.

NZFC is a Crown entity established to support the New Zealand screen industry. It invests in New Zealand feature and short films and supports the professional development of filmmakers directly and through funding provided to screen industry organisations. NZFC is responsible for administering Te Puna Kairangi Premium Fund (the Premium Fund), a one-off \$50 million fund established in December 2020 by the Government to support the recovery of the screen sector through the COVID-19 pandemic.

This review was commissioned after NZFC staff and screen sector representatives raised concerns about the management of conflicts of interests arising from David Strong's personal interest in a proposed television series, *The Pilgrim*, the producers of which were considering making an application to the Premium Fund. David Strong wrote the original script for *The Pilgrim* in 2008. He and his wife co-own Craftinc.Films Ltd (CIF), which is developing the series in association with Great Southern TV (GSTV). The producer of *The Pilgrim* initiated an application for the Premium Fund on 17 February 2022 but ultimately did not submit the application by the time applications for the Premium Fund closed on 22 February 2022.

To carry out the review, interviews were conducted with the chair and three other members of the NZFC Board, David Strong and other senior NZFC staff members, the chairs and chief executives of NZ On Air and Te Māngai Pāho (TMP), the Chair of the Premium Fund Panel¹, the chief executive and other staff at Manatū Taonga Ministry of Culture and Heritage (MCH), staff from Te Kawa Mataaho Public Service Commission (PSC), and representatives of four screen sector organisations that had expressed concern about the management of David Strong's conflicts of interest.

Key documents were also reviewed. However, many of the key events involved oral interactions. It became an important focus of the review to understand what happened in those interactions, and how the participants understood and (in some cases) acted on them. In some cases one or more parties made contemporaneous notes which were not shared at the time with other participants. Those notes, when available, were helpful for the reviewer in establishing the sequence of events and understanding what may have been said or agreed at particular points. Because a number of key actions resulted directly from those interactions, it was also important to obtain the recollections of those who were present, including their understanding at the time of what may have been said or agreed and how that may have influenced them to act thereafter. The report therefore includes those recollections where relevant. It is important to emphasise that the report makes no findings of credibility where recollections differ, or where recollections may appear to diverge from what was recorded in writing at the time.

¹ The NZFC Board established a Premium Fund Panel as a sub-committee of the Board in March 2021, and delegated to it the authority to approve Premium Fund applications. The Panel comprised board members from NZFC, NZ On Air and TMP with an independent chair

In making recommendations, the review considered the requirements of the Crown Entities Act 2004 (CE Act), the PSC's conflict of interest model standards² (PSC model standards) and the Office of the Auditor-General's (OAG's) good practice guidance on conflict of interest management.

The key events

The review established that:

- The Board used a recruitment agency to carry out the search and recruitment of the NZFC Chief Executive. The agency's candidate profile, based on a conflict of interest discussion at its initial interview, noted David Strong's current involvement in a TV drama series.
- The Board interviewed David Strong for the role of NZFC Chief Executive on 26 May and 2 June 2021. There are different recollections as to whether David Strong made reference to his interest in *The Pilgrim* in these interviews. David Strong recalls he did so. The Chair recalls asking a question based on the candidate profile with her interview notes recording a discussion about David Strong's interests. Other board members spoken to do not recall David Strong's interest in *The Pilgrim* being raised.
- David Strong formally disclosed his interests in CIF and *The Pilgrim* on his appointment as Chief Executive on 11, 12 and 30 June 2021. In the 30 June 2021 disclosure he advised that he did not perceive any circumstances where NZFC funding would be requested for *The Pilgrim*. The two potential funding scenarios for *The Pilgrim* would be either a request for NZ On Air production funding or production financing from an overseas organisation with a future application for the NZ Screen Production Grant (NZSPG), a government scheme that NZFC administers³. He proposed various measures to manage any "potential perceived conflict of interest".
- The Board sought legal advice from MinterEllisonRuddWatts (MERW) partner, John McCay (who is also a Board member), on the management of conflicts of interest arising from David Strong's disclosure of interests. The Board considered the advice on 26 July 2021 and concluded that David Strong could retain his interests in *The Pilgrim* as the conflicts of interest were manageable, and agreed the steps to be taken to manage David Strong's interest in *The Pilgrim*.
- On 11 August 2021, the Chair and John McCay met with David Strong to discuss the steps the Board had approved to manage his conflicts of interest, emphasising the need for caution. A day later, David Strong confirmed that he was happy with the Board proposals to manage his conflicts of interest.
- On 23 August 2021 John McCay emailed two senior NZFC staff members, copying the Chair, to advise them of the Board's decisions on the legal advice, and the subsequent discussion he and the Chair had had with David Strong. He asked them to consider the next steps needed to establish the necessary protocols within the NZFC. In the email, John McCay also noted that David Strong had advised the Chair and him that GSTV was likely to apply for NZ On Air production funding in October 2021, and had commented that the scale and nature of *The*

² The PSC conflict of interest model standards outline the Public Service Commissioner's minimum expectations for staff and organisations in the State Services to support effective reporting and management of conflicts of interest.

³ The NZSPG is part of the Government's screen incentives scheme. Eligible productions can access a cash rebate for Qualifying New Zealand Production Expenditure. The NZSPG is administered by NZFC on behalf of MCH and the Ministry of Business, Innovation and Employment.

Pilgrim meant that it might be eligible to apply to the 2022 final round of the Premium Fund. John McCay stressed the need for all parties to be alert to changes in circumstances which would require the agreed conflict of interest management plan to be reconsidered. David Strong's recollection is that although he indicated *The Pilgrim* was the type of show suited to the intentions of (rather than being eligible for) the Premium Fund GSTV was not considering applying to the Premium Fund for *The Pilgrim* at this time.

- Soon after, a NZFC senior staff member prepared a draft Conflict of Interest Management Plan for a potential future NZSPG application by *The Pilgrim* for the Board's approval and subsequent circulation to NZFC Senior Leadership Team (SLT) and other relevant individuals. The plan was never finalised because of an administrative oversight by another senior staff member.
- Between 14 and 20 September 2021, in line with the Board-agreed steps, David Strong formally notified NZ On Air, TVNZ, MCH and PSC of a perceived conflict of interest arising from a potential application to NZ On Air for production funding for *The Pilgrim*. David Strong also arranged, at the request of the Chair, for his bio on the NZFC website to be updated to make reference to his interest in *The Pilgrim*.
- On 6 December 2021, the final round of the Premium Fund opened for applications. On 9 December 2021, the Government announced a review of government investment in the screen sector. The NZSPG was to be a focal point for the review.
- On 16 December 2021, David Strong and the chief executives of NZ On Air and TMP met to jointly decide on applications for Premium Fund development funding.⁴ Two of the applications approved for funding were from GSTV for projects in which David Strong was not involved. David Strong declared his association with GSTV at the meeting. The chief executives of NZ on Air and TMP agreed that David Strong did not need to recuse himself from consideration of the GSTV applications as he did not have a material conflict. David Strong did not inform the NZFC Chair about this matter.
- On 17 January 2022, the Chair recalls that David Strong raised the possibility of an application to the Premium Fund for *The Pilgrim*, and that she made it clear that, should that occur, David Strong would have to recuse himself from the management of the Premium Fund. David Strong recalls that he said that *The Pilgrim* would be suitable for applying, but not that an application might be made.
- On 1 February 2022, David Strong advised the Chair that GSTV had formally advised him that it was considering making an application to the Premium Fund for production funding for *The Pilgrim*. The Chair recalls she reminded David Strong of the protocols to manage the situation and that she made it clear that 48 hours' notice was required so that a Board member could be present when staff were advised. David Strong does not recall the Chair discussing her expectations about how the matter should be managed, at this time.
- The next day, at the request of the Chair, David Strong emailed John McCay, who was Acting Chair at the time, and the Chair of the Premium Fund Panel, advising that he would remove himself from the Premium Fund processes and hand over his responsibilities for the Fund to the Chief Operating Officer should GSTV make an application for Premium Fund funding. The Acting Chair responded to his email, advising the approach he proposed to take was consistent with the Board's conflict of interest management process.

⁴ The Premium Fund Panel had delegated to the three chief executives the authority to award Premium Fund development funding.

- On 18 February 2022, after being advised by GSTV the previous day, David Strong informed three senior NZFC staff that GSTV was intending to submit a funding application for *The Pilgrim*⁵ and that he would recuse himself from that round of the Premium Fund in line with the Board-approved arrangements. He instructed them to start a process to manage his conflict of interest. This was the first occasion on which two of the three staff became aware of David Strong's interest in *The Pilgrim*. He then informed the Chair, John McCay, and the Chair of the Premium Fund Panel about the intended GSTV application and the actions he had taken, and was proposing to take to manage the situation.
- On 20 February 2022, senior NZFC staff members met with the Chair of the Premium Fund Panel to seek confirmation of the approved conflict of management process.
- On 21 February 2022, David Strong advised the NZFC Chair, the Chair of the Premium Fund Panel, and others that GSTV would not be submitting an application for *The Pilgrim*. In the end, GSTV did not submit an application for Premium Fund production funding for *The Pilgrim*.
- In the light of the events that had occurred, the Board sought and considered updated legal advice on 2 March 2022 to ensure that the approach it had approved for the management of David Strong's conflicts of interest was fit for purpose. The Board decided to inform key screen sector representatives about David Strong's conflicts of interest as the Board was concerned that rumours had started to circulate about the management of David Strong's interest in *The Pilgrim*. The Chair and a Board member met with a number of senior NZFC staff on 8 and 18 March 2022 to discuss staff concerns about the management of David Strong's conflicts of interest.
- On 23 March 2022, the Chair wrote to screen industry representatives to notify them of David Strong's interest in *The Pilgrim*, and to inform them that the conflict of interest was being managed by the Board.

Recognising, disclosing and managing conflicts of interest in the public sector

Both the PSC and OAG have published good practice advice/guidance on conflict of interest management for the public sector. This advice and guidance is outlined in Part 2 of this report.

As the OAG good practice guidance notes, conflicts of interest can arise in all walks of life. However, there are higher expectations about conflicts of interest in the public sector because it is public money that is being spent, and public powers that are being exercised.⁶

Processes to identify, disclose and manage conflicts of interest should be sound and operate effectively. Financial conflicts of interest must be treated more strictly than non-financial conflicts of interest. Under common law, a direct financial conflict of interest (except one that is minor, trivial or remote) automatically disqualifies a public official from participating in a decision, whereas non-financial conflicts of interest (commonly referred to as "perceived" conflicts of interest) require a risk-based approach to determining whether the interest amounts to a conflict in a particular situation.

⁵ On 17 February 2022, GSTV opened an untitled intended application for the Premium Fund in the NZFC portal used for the managing the submission of applications for funding.

⁶ The OAG's *Managing conflicts of interest: A guide for the public sector*, June 2020, describes a conflict of interest as one "where the responsibilities you have as an employee or office holder in a public organisation are affected by some other interest you have in your private life. That other interest could be a relationship, a role in another organisation, or a business interest".

The management of a conflict can take a number of forms. For example, in the case of a financial conflict that requires recusal from decision making, managing the interest may involve ensuring that happens should circumstances require it. In the case of a non-financial interest where the existence or otherwise of a conflict involves assessment of risk, the situation may be able to be managed in a way that reduces the severity of the risk and allows the individual to continue being involved in a matter.

Key findings

Key findings – disclosure and management of David Strong’s conflicts of interests

The key findings arising from the disclosure and management of David Strong’s conflicts of interests are:

- David Strong’s initial disclosure of his interest in *The Pilgrim* met the requirements established by the Board to disclose his interests on his appointment. However, the recruitment process did not fully meet the PSC’s model standards that organisations should ensure that people applying for a role disclose conflicts of interests prior to appointment. The Board received some information about conflicts of interest through the initial interview with the recruitment agency. That enabled a discussion of these interests in the Board interviews. Written disclosures of interest were then required on appointment.
- The Board did not formally record its decision to appoint David Strong.
- The Board acted appropriately and responsibly in seeking legal advice about how to manage David Strong’s conflicts of interest following his 30 June 2021 declaration. The legal advice appropriately recognised that the conflicts were financial in nature, and would therefore require recusal from any matter to which it related. The Board acted in line with good practice by notifying external stakeholders about the conflicts of interest and NZFC’s management of them. The update to David Strong’s bio on the NZFC website provided a level of public transparency about his interest in *The Pilgrim*.
- However, there were shortcomings in the Board’s management of David Strong’s conflicts of interest arising from his initial disclosures.
 - The Board did not document the decisions it made in relation to the legal advice it received on the management of David Strong’s conflicts of interest. David Strong’s conflict of interest management plan was not documented (except for in the legal advice). This is not in line with the NZFC Staff Conflict of Interest Policy, PSC expectations or good governance practice. Participants’ recollections of some key events and discussions differ, which highlights the importance of documenting significant decisions and discussions on conflict of interest management.
 - Key steps approved by the Board to manage David Strong’s conflict of interest were not implemented. In particular, NZFC SLT, other relevant NZFC staff and the NZSPG Panel members⁷ were not formally advised of his interests, the steps the Board had agreed to manage the interests, or how they could raise concerns if they had any. The Chair, the

⁷ The NZSPG Panel is a committee of the NZFC Board. The role of the NZSPG Panel is to administer the NZSPG for and on behalf of the NZFC. The Panel comprises a member of the NZFC Board, the NZFC Chief Executive or a direct report approved by the NZFC Board, nominees of the chief executives of MCH and the Ministry of Business, Innovation and Employment and a pool of independent people approved by the Board.

Chief Operating Officer and David Strong did not meet, as intended, to monitor any changes to his interests and consider any further action required.

- No explicit consideration was given to how the requirements of the NZFC Staff Conflict of Interest Policy, which restricts staff from applying for NZFC funding, applied to David Strong's situation. Insufficient consideration was given to other situations in which conflicts of interest might arise (such as applications for direct NZFC funding and/or to bespoke funds administered by the NZFC, such as the Premium Fund).
 - The Board-agreed steps to manage David Strong's conflicts of interest involved both the Chair and him having responsibility for implementing steps. This is consistent with good practice, as there can be some matters that the individual with the conflict is required to implement, for example, not discussing matters with certain parties. However, the primary responsibility for managing the conflicts needed to sit with the Board. The events show that there was insufficient clarity about the respective roles and responsibilities of the Board and David Strong in the management of his conflicts of interest. This issue was recognised in the updated legal advice the Board received on 2 March 2022.
 - David Strong was permitted under the steps agreed to with the Board to manage his conflicts of interest to discuss his "personal involvement" with *The Pilgrim* with NZFC staff, but the parameters of the conversations were not made sufficiently clear.
- The Board did not appropriately manage the informal disclosures by David Strong (on 11 August 2021, 17 January 2022 and 1 February 2022) about a potential change to his interests in the form of a possible application to the 2022 final round of Premium Fund by GSTV for *The Pilgrim*. The interest was clearly financial in nature, and the legal advice received by the Board made it clear (as both law and good practice dictate) that any resulting conflict of interest would require recusal from decision-making on matters to which the conflict related. Moreover, as Chief Executive, David Strong had a significant role in NZFC's management of the Premium Fund, which extended to being centrally involved in decisions on applications. Given those factors, the Board should have required David Strong to formally update his interest disclosures and assessed the potential conflict of interest accordingly.
 - David Strong should not have led the management of his own conflict of interest on 18 February 2022. He understood he had permission to proceed as he did. The Chair has a different recollection of what was agreed to. This serves to highlight the importance of documenting key discussions and decisions on conflict of interest management to avoid misunderstandings.
 - The inadequate communication to relevant NZFC staff about David Strong's interests, and the Board's plan to manage these interests, meant that key NZFC staff were inadvertently put in the position of having to assist with the management of David Strong's conflicts of interest in the intended Premium Fund application for *The Pilgrim* without knowledge of the Board-approved arrangements.
 - The Premium Fund Panel had delegated its authority to the chief executives of NZFC, NZ On Air and TMP to make decisions on Premium Fund development funding applications. However, there were no terms of reference for the Premium Fund chief executive meetings setting out who was responsible for making decisions on any conflicts of interest.
 - Notwithstanding the delegated authority and the fact that David Strong declared his interest in the two GSTV applications approved for Premium Fund development funding at the 16

December 2021 chief executives meeting, given the nature of David Strong's interests in *The Pilgrim*, and the conflict of interest management process that the Board had established for these interests, it would have been prudent for him to have also raised the matter for the Chair's consideration.

- David Strong did not raise for the Chair's consideration whether his involvement in the Government's screen sector review raised any potential conflicts of interest. He should have done so, in line with the Board-agreed steps to manage his conflicts of interest and the NZFC Staff Conflict of Interest policy.
- Following the events over February and March 2022, the Board took appropriate steps to seek updated legal advice, and to meet with staff to understand their concerns about the management of David Strong's interests.

In summary, the Board and David Strong both had opportunities to better handle the disclosure and management of his conflicts of interest. Inadequately documented decisions and discussions, gaps in the implementation of these decisions, breakdowns in communication and information flows, and blurred accountabilities were significant contributing factors to the events that unfolded.

Key findings – NZFC processes for board members' and staff conflicts of interests

The key findings in relation to the Board members' conflict of interest management processes are:

- The Board is well aware of the need for careful attention to the management of conflicts of interest.
- The Board has well-documented processes in its NZFC Governance Manual and the NZFC Rules for the disclosure and management of Board members' conflicts of interest, that are consistent with the requirements of the CE Act.
- These processes are put into effect through the maintenance of an interests register, and a standing conflict of interest agenda item for Board meetings. Board members are expected to declare interests in applications for NZFC funding and remove themselves from discussions of these applications (and any applications competing for the same or similar contestable funding). A review of the last 12 months' Board minutes shows the minutes have improved in terms of how they record these situations but they need to be more specific and consistent.
- As with any governance documents, regular review and updating is important to maintain currency and consistency with good practice. Two areas where the Governance Manual could usefully be updated are:
 - further clarification of the various types of conflict of interest, in particular the distinction between "actual" conflicts (with reference specifically to financial interests) and "perceived" conflicts (with reference to non-financial interests) as set out in section 62(2) of the CE Act.
 - To reflect the Code of Conduct for Crown Entity Board members.
- Equivalent updates could be made to rule 2 of the NZFC Rules, both as they apply to Board members and to NZFC staff.

In relation to managing staff conflicts of interest, the NZFC Staff Conflict of Interest Policy needs to better define the NZFC's policy position on staff applications for NZFC-administered funding, and clearly explain what is meant by "NZFC funding". Further guidance is also needed about different

types of conflicts of interest (as noted above in relation to the governance documents) and how conflicts of interests are to be managed in NZFC's assessment, recommendatory and decision-making processes for funding applications.

Other matters

The following comments are made regarding two other matters raised with the review:

- The representatives of some screen sector organisations interviewed for the review expressed concern and surprise that David Strong was not required to divest his interest in current projects on his appointment as Chief Executive. For some, it is untenable for an NZFC chief executive to retain interests in current projects given the role of the NZFC as the main public funding body for the screen sector in a highly contested funding environment. A number of people also pointed to “precedents” set by former NZFC chief executives and senior staff who had been required to divest these interests on appointment. Concluding on this matter is outside the scope of this review. However, suffice to say, the issue is not straightforward and requires consideration of a number of factors that lie outside the scope of this review. They include the functions of the NZFC, the role of its Chief Executive and the skills and expertise required for the role, the facts and circumstances of any interests and conflicts of interest and how they might change, the risks, and the possible mitigation options. Ultimately it is a matter of maintaining public trust and confidence in the NZFC. These are properly matters for the Board to consider and decide on.
- During the review, two parties questioned the appropriateness of John McCay serving as a Board member and the Board's legal advisor. It is not within with the scope of this review to examine particular Board member conflicts of interest. The fact that questions have been asked suggests that the arrangements are not clear to all parties. Given this, it would be appropriate for these arrangements to be reviewed by MCH, the agency responsible for managing NZFC Board appointment processes and advising the Minister on conflict of interest matters.

The review has also highlighted opportunities for further sector guidance and advice:

- MCH currently inducts newly appointed board members of Crown entities as the monitoring department. The induction covers the expectations about conflict of interest disclosure and management. MCH may also wish to consider providing ongoing regular refresher sessions for Board members in the sector. Training on conflict of interest management would also be useful for Crown entity chief executives and managers. Such training would assist in keeping conflict of interest management front of mind, and ensure good practice is regularly communicated and reinforced.

Recommendations

The recommendations arising from the review are set out below.

- 1 For future chief executive recruitment processes, the Board should establish its expectations about conflicts of interest, as part of the development of the candidate profile. Information should be sought from potential candidates to enable judgements to be made on interests, and any actual, perceived or potential conflicts of interest. The information should be assessed as part of the selection process in considering an individual's suitability for a role. The Board should assure itself that its approach to conflict of interest disclosure and management in the recruitment and appointment process is in line with public sector good practice expectations.
- 2 NZFC should review the NZFC Staff Conflict of Interest Policy to ensure that it aligns with public sector good practice, and provides sufficient guidance to staff. Specific matters to be considered in the review are:
 - a. Define what is meant by "NZFC Funding".
 - b. Further clarify how the policy applies to the Chief Executive.
 - c. Provide further guidance on the different types of conflicts of interests referred to ("actual", "perceived" and "potential"), their relationships to the different categories in the OAG guidance, and their implications for conflict of interest management.
 - d. Provide further guidance on the disclosure, identification and management of conflicts of interest in relation to applications for funding proposals, including where the staff member does not have a direct interest in an application.
 - e. Update the Staff Interest Declaration Form to have two sections, in accordance with good practice. The first section should record the disclosure of the interest or conflict of interest and be signed by the person disclosing the interest. The second section should record the conflict of interest management plan and be signed by the person responsible for approving the conflict of interest management plan.
- 3 NZFC should review and update the NZFC Rules and Governance Manual to:
 - a. Provide further guidance on the different types of conflicts of interests referred to ("actual", "perceived", and "potential"); their relationships to the categories of financial and non-financial interests as set out in the CE Act (for board members) and the OAG guidance; and their implications for conflict of interest management.
 - b. Define what is meant by "NZFC Funding", and provide greater specificity about what is meant by "directly" and "indirectly applying" for funding.
 - c. Ensure that the requirements and protocols are consistent between the two documents.
 - d. Update the Governance Manual to reflect the Code of Conduct for Crown Entity Board Members, and the good practice.
- 4 The Board should ensure key board decisions on matters considered in board-only time are appropriately documented. Where there are confidentiality considerations, confidential minutes could, for example, be prepared by a board member for the Board's agreement.

- 5 NZFC should make changes to the way the board minutes document the Board's consideration of board members' updated interest disclosures, and the action taken to manage identified conflicts of interests, to improve the specificity and consistency of the record-keeping.
- 6 NZFC should consider publishing the NZFC's Board and Staff Conflict of Interest policies on its website, to provide greater transparency of the approach that it takes to conflict of interest management.