



Compliance Policy

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Relevant Legislation or materials:

Fair Work (Registered Organisations) Act 2009

Fair Work (Registered Organisations) Regulations 2009

Fair Work Act 2009

Financial Reporting Guidelines

ROC Protection for Whistleblowers Fact Sheet (FS 003)

1. Overview

- 1.1. This policy sets out the principles adopted by the Registered Organisations Commission (**ROC**) to achieve compliance with the law, and outlines the ROC's enforcement powers, functions, priorities and strategies.
- 1.2. In particular, this policy provides general information on how the ROC approaches its compliance and enforcement role in regulating employee and employer organisations that are registered under the RO Act (referred to collectively as, "**organisations**").
- 1.3. This policy addresses the following topics:
 - About the ROC (Part 2)
 - Aims of regulating organisations (Part 3)
 - Encouraging and monitoring compliance (Part 4)
 - Duties of officers and organisations (Part 5)
 - Initial assessment and voluntary compliance (Part 6)
 - Inquiries (Part 7)
 - Investigations (Part 8)
 - Information gathering powers (Part 9)
 - Principles and approaches underlying this Policy (Part 10)
 - Transparency and publication of compliance activities (Part 11)
 - Disclosure of information (Part 12)
 - Accountability and review mechanisms (Part 13)

2. About the ROC

- 2.1. The office of Registered Organisations Commissioner (**the Commissioner**) was created by Part 3A of the *Fair Work (Registered Organisations) Act 2009* (**the RO Act**). The Commissioner and the ROC commenced operating on 1 May 2017.
- 2.2. The Commissioner is responsible for carrying out a wide range of functions under the RO Act. These functions include conducting inquiries and investigations regarding contraventions of the RO Act and the *Fair Work (Registered Organisations) Regulations 2009* (**RO Regulations**). The Commissioner also has power to commence proceedings in the Federal Court regarding such contraventions.
- 2.3. Many of the Commissioner's powers can be delegated to persons with relevant experience, including the powers relating to inquiries and investigations.¹
- 2.4. Prior to 1 May 2017, many of the ROC's functions under the RO Act were carried out by the administrative arm of the Fair Work Commission (FWC), in particular by the General Manager and Regulatory Compliance Branch of the FWC.

3. Aims of regulating organisations

- 3.1. The regulation of employee organisations (i.e. unions) and employer organisations is necessary given their key role in the national workplace relations system. The primary aim of the ROC's regulatory activities is to promote a high level of compliance by organisations, their officers, employees and auditors.
- 3.2. The ROC also seeks to further the objectives of the RO Act.² These include:
 - a. providing for the democratic functioning and control of organisations;
 - b. ensuring that employer and employee organisations are representative of and accountable to their members, and are able to operate effectively; and
 - c. encouraging the efficient management of organisations and high standards of accountability of organisations to their members.

4. Encouraging and monitoring compliance

- 4.1. The ROC encourages compliance by:
 - a. providing information and support material on the ROC website including:
 - i. fact sheets on a range of topics;
 - ii. checklists to assist organisations with their compliance obligations;
 - iii. sample documents, including templates, such as model financial statements for financial reporting;

¹ S. 343B, RO Act

² S. 5, RO Act

- iv. a Quarterly Newsletter and media releases;
- b. giving presentations to organisations, peak employer and employee groups, and other stakeholders (such as auditors);
- c. conducting webinars regarding topics of interest;
- d. giving advice to officers, employees, members and auditors, in writing or by telephone;
- e. sending reminders to organisations and reporting units regarding their obligations to lodge statutory returns and election notifications; and
- f. sending information to subscribers of the ROC's email subscription service.

4.2. The ROC also monitors compliance by:

- a. examining whether lodged documents comply with the RO Act;
- b. examining complaints regarding organisations, including protected disclosure (whistleblower) matters – discussed in more detail below;
- c. assessing matters referred by Royal Commissions, government and government agencies;
- d. conducting surveys of organisations;
- e. proactively engaging with organisations, including conducting periodic reviews of compliance; and
- f. reviewing media coverage of organisations.

4.3. Complaints regarding the financial management of organisations or of possible or suspected breaches of the RO Act can be lodged with the ROC by:

- email - regorgs@roc.gov.au
- telephone - 1300 341 665
- mail - Registered Organisations Commissioner, GPO Box 2983, Melbourne, VIC, 3001

5. Duties of officers and organisations

5.1. Organisations registered under the RO Act have corporate status by virtue of section 27 of the RO Act.

5.2. For the purpose of regulating their accounts and audit, the RO Act provides for 'reporting units'. In particular section 242 provides that, in normal circumstances, the national office and each branch of an organisation is a reporting unit.³

³ Ss. 245 to 251, RO Act provide for reporting units to be determined on an alternative basis.

Financial reporting

- 5.3. One of the main tasks of a reporting unit is to take the following action within prescribed timeframes after the end of each financial year:⁴
- a. prepare a General Purpose Financial Report (**GPFR**) that complies with the RO Act, Australian Accounting Standards, and the Reporting Guidelines issued by the ROC;⁵
 - b. have the GPFR audited by an auditor registered by the ROC;⁶
 - c. ensure the full financial reports (the GPFR, Audit Report and Operating Report) are provided to members, presented to a meeting for approval and then lodged with the ROC.⁷

Officers' duties

- 5.4. The RO Act also imposes duties on officers and employees of organisations regarding financial management. The following duties apply to officers:
- a. acting with care and diligence;⁸
 - b. acting in good faith and for a proper purpose.⁹
- 5.5. The following duties apply to both officers and employees:
- a. not improperly using their position to gain an advantage for themselves or another person, or cause a detriment to the organisation or another person;¹⁰
 - b. not improperly using information (obtained as a result of being an officer or employee) to gain an advantage for themselves or another person, or cause a detriment to the organisation or another person.¹¹
- 5.6. A person may be involved in conduct in contravention of an officer's or employee's duties if they aided and abetted, induced, conspired, or was knowingly concerned in, the conduct.¹²

Civil penalty provisions

- 5.7. The above duties applying to officers and employees are comprised within civil penalty provisions. Contravention of such a provision by an individual may lead to Federal Court proceedings and a penalty of up to 100 penalty units for each contravention¹³ and up to 1,200 penalty units for a serious contravention.¹⁴

⁴ Ss. 252 to 255, RO Act

⁵ The Reporting Guidelines are published under s 255, RO Act.

⁶ Ss. 255A to 256A, 256 and 257, RO Act

⁷ Ss. 265, 266 and 268, RO Act. Financial matters regarding reporting units are also covered by the RO Regulations and the rules of the relevant organisation.

⁸ S. 285, RO Act

⁹ S. 286, RO Act

¹⁰ S. 287, RO Act

¹¹ S. 288, RO Act

¹² S. 284, RO Act

¹³ With effect from 1 July 2017, the value of each penalty unit is \$210 and is scheduled to be indexed every three years – refer s 4AA *Crimes Act (1914)* (Cth)

- 5.8. Several other provisions of the RO Act are civil penalty provisions¹⁵ – these include breaches of the following requirements:
- a. lodging membership numbers and officeholder details with the ROC each year;¹⁶
 - b. keeping and maintaining a register of members and a list of officers and advising the ROC of changes of officers;¹⁷
 - c. keeping historical copies of the register of members for seven years;¹⁸
 - d. removing from the membership register those members who have been unfinancial for 24 months (such removal to occur within the next 12 months);¹⁹
 - e. lodging prescribed information with the ROC to enable the conduct of an organisation's elections by the Australian Electoral Commission (AEC);²⁰
 - f. preserving records related to elections;²¹
 - g. lodging with the ROC details of loans, grants and donations made by an organisation or branch each year of more than \$1,000;²²
 - h. disclosing certain remuneration paid to officers in each branch and organisation and other relevant payment information;²³
 - i. disclosing material personal interests of officers, and restricting officers from participating in decisions which may involve a conflict of interest;²⁴ and
 - j. ensuring that officers who have financial duties (such as the members of the Committee of Management of each reporting unit) undertake approved financial management training.²⁵
- 5.9. The maximum civil penalty that can be imposed on an organisation is, in most cases, five times the civil penalty that can be imposed on an individual.²⁶
- 5.10. A number of the civil penalty provisions under the RO Act are strict liability offences, which means that it is not necessary to establish an intention by the person to break the law. Proof of simply doing the act may be sufficient to establish the contravention.

¹⁴ Defined in s 6, RO Act

¹⁵ As defined in s 305, RO Act. Civil penalty provisions are also contained in the RO Regulations, listed in Reg 168(2).

¹⁶ S. 233, RO Act

¹⁷ S. 230, RO Act

¹⁸ S. 231, RO Act

¹⁹ S. 172, RO Act

²⁰ S. 189, RO Act (An organisation or branch may be granted the right to conduct its own elections in some cases – refer ss 183 to 186)

²¹ S. 199, RO Act

²² S. 237, RO Act

²³ S. 293B, RO Act

²⁴ Ss. 293C and 293F

²⁵ Ss. 293K to 293M

²⁶ S. 306, RO Act

- 5.11. Civil penalty provisions need to be proved in the Federal Court to the usual civil standard of proof, that is, proof on the balance of probabilities.²⁷ The rules of evidence in the Federal Court apply to proceedings in relation to civil penalties.

Offences

- 5.12. The RO Act and RO Regulations also include a number of offence provisions. An ‘offence’ denotes criminal liability and is distinct from civil penalty liability. Offence provisions have a higher burden of proof (‘beyond a reasonable doubt’ rather than ‘the balance of probabilities’) and generally involve higher penalties including, in some cases, imprisonment.
- 5.13. The offence provisions in the RO Act include penalties for:
- a. failing to comply with a compulsory notice in an investigation; and
 - b. failing to comply with the officers duties in section 290A (which are similar to those in sections 285 to 288 but where the penalty is substantially higher).
- 5.14. The extent to which the ROC can investigate criminal offences is limited. However, at the end of an investigation the Commissioner can, among other things, refer possible offences to the Commonwealth Director of Public Prosecutions (CDPP), the Australian Federal Police (AFP) or a police force of a State or Territory.²⁸
- 5.15. The Commissioner also has a general power to disclose information if it is necessary or appropriate to do so in exercising his functions or powers, or if the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.²⁹ This power can be exercised at any time.

6. Initial assessment and voluntary compliance

Whistleblowers

- 6.1. New expanded provisions regarding protected disclosures (‘**whistleblowers**’) commenced on 2 May 2017 under Part 4A of Chapter 11 of the RO Act.
- 6.2. The new provisions describe the types of persons who may be whistleblowers - such as current or former officers or members of an organisation. The provisions also describe the types of disclosures that are ‘protected disclosures’ and the protections afforded to whistleblowers against reprisals – i.e. detrimental actions taken (or threatened) against them – for which criminal and civil penalties and applications for compensation may apply. These provisions are summarised in the ROC’s Fact Sheet [Protection for Whistleblowers](#) (FS 003).
- 6.3. In some cases the whistleblower provisions require an investigation to be conducted under sections 337C to 337CE. That type of investigation is distinct from an investigation under sections 331 to 334 and is not considered in detail in this

²⁷ *Briginshaw v Briginshaw* (1938) 60 CLR 336

²⁸ S. 336(2), RO Act

²⁹ S. 329G, RO Act

Compliance Policy. Refer to the guidance material on whistleblowers that is available on the ROC website at <http://www.roc.gov.au/whistleblowers/whistleblowers-organisations>.

- 6.4. If a disclosure is made to the ROC that appears to fall within the whistleblower provisions, those provisions will normally prevail in the first instance. After the whistleblower provisions have been followed (to the extent possible in each case) it may in some cases be appropriate to conduct an inquiry or investigation under sections 330 to 334, for example for the purpose of gathering evidence to assess whether proceedings should be commenced in the Federal Court.
- 6.5. If the relevant complaint does not, in the first instance, fall within the whistleblower provisions then the action that will be taken regarding the complaint is set out below.

Evaluation and follow-up

- 6.6. Upon the ROC becoming aware of a possible contravention, the matter will be evaluated to assess whether the Commissioner has jurisdiction to deal with it, as well as the most appropriate means of pursuing it.
- 6.7. Where a report has been made to the ROC it is expected that contact would be made with the person who made the report within 14 days to confirm receipt and provide the details of a contact action officer within the ROC. Upon finalisation, the person who made the report will usually be notified in writing by the ROC of the outcome of the matter.

Voluntary compliance

- 6.8. Voluntary compliance occurs where an individual, organisation, branch or reporting unit rectifies a contravention without the need for enforcement action to be taken.
- 6.9. It is open to an organisation or an individual (where possible) to take voluntary compliance steps. Any such action will be taken into account by the Commissioner in the exercise of his functions and powers. Further, the Commissioner may at any stage of a matter exercise his discretion to invite voluntary compliance in relation to an issue.
- 6.10. Voluntary compliance may be sought or achieved as an alternative to, or an action prior to, during, or at the conclusion of, inquiries or an investigation.
- 6.11. Issues which may be resolved by voluntary compliance include:
 - a. minor or technical contraventions of legislation and/or reporting requirements which can be rectified by the lodgement of documents—such as where original documents were not properly executed or where some of the documents in a current financial report have not been lodged with the ROC; or
 - b. more serious contraventions of legislation and/or reporting requirements which require financial documents to be prepared and provided to members again - such as where members have not been provided with all relevant documents or where there has been no, or only partial, disclosure of information required under the *Australian Accounting Standards*.

- 6.12. Where the possible contravention involves an inadvertent failure to lodge a matter with the ROC within the timeframes specified in the RO Act, RO Regulations or the rules of the organisation:
- a. the ROC may seek to contact the individual, organisation, branch or reporting unit, by telephone and/or in writing, within 14 days to advise that lodgement is overdue; and
 - b. that, in the absence of such voluntary compliance without reasonable cause, the ROC may commence inquiries under section 330 or an investigation under section 331 if the failure might contravene a civil penalty provision or constitute a breach of financial obligations.
- 6.13. Depending upon the nature of the contravention, the Commissioner may nevertheless refer the matter to another agency (such as the AFP or a State or Territory police force), even where there has been voluntary compliance. For example, if the funds of an organisation may have been fraudulently expended, it may be appropriate to refer the matter for possible criminal investigation even if those funds have been voluntarily reimbursed.
- 6.14. The Commissioner may determine that it is appropriate to commence proceedings in the Federal Court even where there has been voluntary compliance, such as where there have been serious or repeated contraventions, where proceedings would have a significant deterrence effect or where they involve significant sums.
- 6.15. Voluntary compliance is strongly encouraged and is a matter that will be considered as part of any inquiry and investigation, including as to any actions that may be taken by the Commissioner. The level of voluntary compliance may also demonstrate mitigation and contrition which may be relevant to any submissions on penalty.

7. Inquiries

- 7.1. The Commissioner has a general power under section 330 to make inquiries regarding whether any of the following have been contravened:
- a. a civil penalty provision in the RO Act;
 - b. a provision of Part 3 of Chapter 8 of the RO Act (regarding accounts and audits as set out in sections 238 to 279);
 - c. the Reporting Guidelines made under Part 3 of Chapter 8;
 - d. the RO Regulations made under Part 3 of Chapter 8; or
 - e. the rules of a reporting unit relating to its finances or financial administration.
- 7.2. The inquiries power is a valuable tool that is available to the ROC that can be utilised in a range of circumstances.
- 7.3. For example, it enables the ROC to seek information and explanations from organisations and their officers regarding:

- a. contraventions of the RO Act which have not been or are unable to be resolved via voluntary compliance;
 - b. allegations that are made by a member or other source such as those that appear in the media regarding organisations; and
 - c. systemic problems that are identified in the conduct of particular organisations or reporting units (such as deficiencies in the preparation of its financial reports).
- 7.4. The inquiries power is also relevant when there is material that suggests, on its face, that an investigation may be warranted but there is insufficient material at that point to be satisfied there is jurisdiction for an investigation under section 331 to be commenced.
- 7.5. While the Commissioner may take such action as is considered necessary for the purposes of making such inquiries, a person cannot be compelled to assist with inquiries under section 330.

8. Investigations

- 8.1. Four types of investigations can be conducted by the Commissioner under sections 331 to 334 of the RO Act.

General investigation power

- 8.2. If the Commissioner is satisfied that there are 'reasonable grounds' for doing so, the Commissioner may investigate, under section 331, whether any of the following provisions have been contravened:
- a. a civil penalty provision in the RO Act;
 - b. a provision of Part 3 of Chapter 8 of the RO Act (regarding accounts and audits as set out in sections 238 to 279);
 - c. the Reporting Guidelines made under Part 3 of Chapter 8;
 - d. the RO Regulations made under Part 3 of Chapter 8; or
 - e. the rules of a reporting unit relating to its finances or financial administration.

Specific investigation powers

- 8.3. The RO Act also includes three specific investigation powers as follows:
- a. the Commissioner *must* investigate any deficiency or shortcoming identified in an Audit Report of a reporting unit unless the Commissioner is satisfied, among other things, that the matters are trivial or will be remedied in the following year (see section 332);
 - b. the Commissioner *must* investigate the finances and financial administration of a reporting unit if a request is lodged by 5% of the members of the reporting

unit or 250 persons if the reporting unit has more than 5,000 members – whichever is the lesser amount (see section 333); and

- c. the Commissioner *must* investigate a matter referred to the Commissioner by the FWC under section 278 in relation to financial records (see section 334).

‘Reasonable grounds’ to investigate

- 8.4. The most common type of investigation is under section 331. Given that this type of investigation is discretionary the Commissioner must be satisfied that:
 - a. there are reasonable grounds for an investigation; and
 - b. the Commissioner’s discretion should be exercised to conduct the investigation.
- 8.5. In many cases when a matter comes to the attention of the ROC that potentially could be investigated under section 331 (whether due to the compliance monitoring activities of the ROC or an external report or otherwise) it may not be immediately clear whether there are reasonable grounds for an investigation.
- 8.6. Accordingly, it may sometimes be appropriate for the ROC to assess the available material on a preliminary basis and/or to make inquiries under section 330 prior to commencing an investigation. Section 331(5) provides that an investigation under the section ‘may, but does not have to, follow inquiries under section 330’.
- 8.7. In determining whether there are reasonable grounds to investigate the Commissioner will consider matters such as:
 - a. the number, nature and extent of potential contraventions that fall within the scope of section 331;
 - b. whether the alleged misconduct pertains, or is sufficiently connected, to an organisation registered under the RO Act (as opposed to an industrial organisation registered under State law);
 - c. the evidence before the ROC and whether any other documentary or witness evidence may be available and, if so, from where;
 - d. whether material has been provided to the ROC that is so voluminous, poorly organised and/or identified so as to require an unreasonable use of the ROC’s resources in determining whether there may have been a contravention which is capable of being investigated.

Exercising the discretion to investigate

- 8.8. If the Commissioner is satisfied there are reasonable grounds to investigate under section 331, the Commissioner retains a discretion whether to do so. Exercise of this discretion will be guided by public interest considerations having regard to all relevant matters including:
 - a. the nature and number of possible contraventions;

- b. the evidence available or likely to be available;
- c. whether the possible contraventions include a 'serious contravention' which is defined in section 6 as follows:

serious contravention, in relation to a contravention of a civil penalty provision by an organisation, a branch of an organisation or a person who is, or was, an officer or employee of an organisation or a branch of an organisation, means a contravention that:

- (a) materially prejudices the interests of the organisation or branch, or the members of the organisation or branch; or
 - (b) materially prejudices the ability of the organisation or branch to pay its creditors; or
 - (c) is serious.
- d. whether the matters also involve criminal offences that:
 - i. are (or are likely to be) investigated by the AFP or a State or Territory police force; and/or
 - ii. are (or are likely to be) prosecuted by the CDPP or an office of public prosecution in a State or Territory.

8.9. Whether criminal offences are being investigated or prosecuted may be relevant because:

- a. section 311 provides that the Federal Court *must not* make a civil penalty order against a person or organisation if the person or organisation has been convicted of an offence constituted by conduct that is substantially the same; and
- b. section 312 provides that proceedings for a civil penalty order against a person or organisation are *stayed* (i.e. suspended) if criminal proceedings are started (or have already been started) against the person or organisation for an offence that is constituted by conduct that is substantially the same.

8.10. The ROC cannot pursue all of the complaints and reports it receives, or issues that come to its attention relating to possible contraventions of the RO Act. While all matters are carefully considered, the ROC's focus is on those circumstances that will, or have the highest potential to, encourage the efficient management and high standards of accountability of organisations to their members. The Commissioner therefore exercises his discretion to direct resources to matters that provide the greatest overall benefit in the public interest and the interest of the members of organisations.

Timeframe for investigations

8.11. The RO Act requires an investigation to be completed as soon as practicable.³⁰

³⁰ S. 335B, RO Act

- 8.12. Matters that will influence the time taken for an investigation include:
- a. the volume of documents and evidence—while a large volume of material can increase the time taken to conduct an investigation, conversely an absence of documents which requires the Commissioner to seek to establish facts and evidence from other sources can also have an impact upon timeframes;
 - b. the number of possible contraventions—while a report to the ROC or a media report may make specific allegations, upon examination the number of potential contraventions that may require investigation can be greater in both number and scope than were originally identified or alleged;
 - c. the timeframes over which contraventions may have occurred—generally speaking, the older the possible contravening conduct and longer the period during which the possible contraventions may have occurred, the longer the inquiries or the investigation is likely to take;
 - d. the number of parties who are potentially involved;
 - e. the resources available for an investigation; and
 - f. the gravity of the possible contraventions.
- 8.13. While the ROC will aim to complete each investigation in a timely manner, the integrity of the investigation will not be compromised in order to conclude it more quickly.

Conducting an investigation

- 8.14. Once an investigation has been commenced, the ROC will write to the subject(s) of the investigation advising that it has commenced, as well as adding the investigation to the ROC website's Inquiries and Investigations page (<http://www.roc.gov.au/inquiries-and-investigations>).
- 8.15. Conduct of an investigation requires the Commissioner or his Delegate to make a judgment about the scope of the investigation.
- 8.16. In determining whether there has been a contravention the Commissioner will, after considering the available evidence, consider whether there is sufficient evidence to prove, on the balance of probabilities,³¹ relevant contraventions of the RO Act, the RO Regulations, the Reporting Guidelines made under Part 3 of Chapter 8 of the RO Act, or a rule of an organisation relating to its finances or financial administration.
- 8.17. All findings of a possible contravention must be based on the best available evidence.
- 8.18. Determining whether there may have been a contravention may also require interpretation of applicable legislation and case law, the *Australian Accounting Standards* and/or the *Australian Auditing Standards*.

³¹ *Briginshaw v Briginshaw* (1938) 60 CLR 336, at 362. Note that this standard does not apply to criminal offences (which is subject to the higher 'beyond reasonable doubt' standard of proof).

- 8.19. In accordance with the concept of procedural fairness, the Commissioner will generally, near the end of an investigation:
- a. inform an individual, organisation, branch or reporting unit of the nature of potentially adverse findings that are proposed to be made against them; and
 - b. give the relevant party an opportunity to respond on relevant points.
- 8.20. The Commissioner will take into account any such responses when making findings as to whether he considers there may have been contraventions of the RO Act or other provisions.
- 8.21. A finding of contravention is not a judicial finding or a final determination of rights. It is a determination which may ultimately be tested in court if the Commissioner makes a decision to commence legal proceedings.

Informing parties of contraventions

- 8.22. At the end of an investigation, the Commissioner must notify a reporting unit of contraventions in accordance with section 336(1) of the RO Act if he is satisfied that the reporting unit has contravened a civil penalty provision in the RO Act or a provision of Part 3 of Chapter 8 (or the RO Regulations or Reporting Guidelines made for Part 3 of Chapter 8) or a rule of an organisation relating to its finances or financial administration.³²
- 8.23. If that occurs, the Commissioner must also make follow up inquiries within 12 months to assess whether the reporting unit is complying with the relevant provision.³³
- 8.24. While there is no express obligation in the RO Act³⁴ for the Commissioner to similarly notify an organisation, branch or individual of any adverse findings made against them – the Commissioner would usually do so.

Sanctions

- 8.25. At the end of an investigation the Commissioner may:
- a. issue a rectification notice to a reporting unit requiring that it take specified action, within a specified time, to rectify a matter that has been the subject of the investigation. A reporting unit that has been issued with a rectification notice must comply with the request. The Commissioner may apply to the Federal Court for orders ensuring compliance with a rectification notice. If an organisation fails to comply with such an order, the Commissioner may apply to the Federal Court for cancellation of the organisation's registration.³⁵
 - b. if there have been contraventions of a civil penalty provision, apply to the Federal Court for orders:

³² S. 336(1), RO Act

³³ S. 336(1A), RO Act

³⁴ Comparable to s 336(1) in relation to reporting units.

³⁵ Ss. 336(2)(a), 336(4), 336(5) and 28(1A), RO Act.

- i. imposing a pecuniary penalty or penalties on an individual or organisation;
 - ii. that an individual pay compensation to an organisation for the damages caused to the organisation by that individual; and/or
 - iii. disqualifying an individual from holding office in an organisation.
 - c. refer a matter to the CDPP, the AFP or a police force of a State or Territory for action in relation to possible criminal offences.
 - d. refer a matter to another agency if the Commissioner is satisfied that to do so will assist in the carrying out of the Commissioners powers and functions and/or will assist in the administration or enforcement of a law of the Commonwealth, a State or Territory.
- 8.26. In some cases, at the end of an investigation, no further action will be required – for example where no contravention has been found under sections 331 to 334, or only relatively minor or technical contraventions have been found.

Litigation

- 8.27. The Commissioner may determine to commence proceedings in the Federal Court if there is a proper evidentiary basis to do so. Typically this will be at the conclusion of an investigation, although legal proceedings can be commenced without an investigation where it is appropriate to do so.
- 8.28. When considering whether to commence litigation the Commissioner will consider the public interest having regard to all relevant matters including:
- a. the nature and circumstances of the alleged contraventions, including their seriousness, the number of alleged contraventions and the prevalence of such contraventions amongst organisations;
 - b. the actual or potential consequences of the alleged contraventions, including harm to the organisation and its members;
 - c. mitigating circumstances (including voluntary compliance);
 - d. aggravating circumstances; and
 - e. any other relevant circumstances.

Matters that the ROC cannot investigate

- 8.29. The ROC does not have jurisdiction to investigate:
- a. provisions of the RO Act that are *not* civil penalty provisions or are not a provision in Part 3 of Chapter 8 of the RO Act (i.e. matters not related to financial management);
 - b. contraventions of the rules of organisations that do not pertain to finances or financial administration (however, the Federal Court has general power to

issue orders for the observation or performance of rules, if requested by a member or an applicant for membership);³⁶

- c. disputed elections in organisations (however, the Federal Court has power to conduct an inquiry into an election in certain circumstances);³⁷ or
- d. contraventions of State or Territory laws (however, the Commissioner may refer possible contraventions to the relevant State or Territory police force or government agency).³⁸

9. Information gathering powers

9.1. The Commissioner has a broad range of compulsory information gathering powers that can be utilised during an investigation.

Notices to produce and other notices

9.2. The Commissioner can issue a notice under section 335 to require a person to:

- a. give information within their knowledge or possession;
- b. produce or make available any documents in their custody or control, or to which they have access;
- c. attend to answer questions relating to the investigation and to produce all records and other documents in their custody or control; or
- d. give other reasonable assistance.

9.3. It is mandatory for a person or organisation to comply with a notice issued under section 335 and non-compliance may result in penalties being imposed. Penalties can be imposed on a person or organisation if they:

- a. fail to comply with a notice (whether intentionally or recklessly);³⁹
- b. give information or a document knowing, or reckless as to whether, it is false or misleading;⁴⁰
- c. hinder or obstruct a person exercising power in relation to an investigation;⁴¹ or
- d. take action that results in the concealment, destruction, mutilation or alteration of a document relating to the matter being investigated.⁴²

9.4. In relation to documents, the recipient of a notice may also be required to:

- a. provide an explanation relating to a document that has been produced;⁴³

³⁶ S. 163 to 164B, RO Act

³⁷ Ss. 200 to 209, RO Act

³⁸ S. 329G, RO Act

³⁹ S. 337(1)(a), RO Act

⁴⁰ S. 337(1)(b) RO Act

⁴¹ S. 337AB, RO Act

⁴² S. 337AC, RO Act. A contravention of this section is an offence punishable by a fine of up to \$42,000 or imprisonment for a period not exceeding 5 years, or both.

- b. explain where documents may be found or who had last possession, custody or control of them and where that person may be found.⁴⁴
- 9.5. The issuing of a notice is a discretionary tool which may or may not be used as deemed appropriate, considering the circumstances of the matter in question.
- 9.6. Such notices can only be issued by the Commissioner. Substantial penalties of up to 100 penalty units or imprisonment for up to 2 years or both can be imposed on an individual who fails to comply with a notice issued under section 335.⁴⁵

Legal professional privilege

- 9.7. If a lawyer is required to give information or a document that would involve divulging a privileged communication, the lawyer is entitled to refuse to comply with the requirement - unless the client entitled to the privilege consents to it being disclosed. If the lawyer exercises the right to not produce a document the lawyer must provide (to the person who issued the notice) details of the client to whom the privilege relates and sufficient detail to enable the document to be identified.⁴⁶

Self-incrimination

- 9.8. It is not a reasonable excuse for a person to fail to give information or a document in response to a notice simply because the information or document might tend to incriminate the person.
- 9.9. However, the information itself (or the fact that the person has produced the document) is not admissible in evidence against the person who provided the document in any proceeding against them for the imposition of a penalty (other than for perjury in relation to that matter), provided that before giving the information or document, the person claims that giving the information or document might tend to incriminate them or make them liable to a penalty, and it does in fact tend to have that effect.⁴⁷

Attending to answer questions

- 9.10. If you are required to attend to answer questions in accordance with section 335, you can be required to take an oath or affirmation, attesting to the truthfulness of the answers given. You may be accompanied by another person who may be a lawyer.
- 9.11. It is an offence if a person makes a statement that the person knows is false or misleading or if a person fails intentionally or recklessly to answer a question.
- 9.12. The Commissioner or the authorised person asking the questions may cause a record (such as a transcript) to be created of the statements made during the questioning and may require the persons answering the questions to sign that record. That person may also request you to keep the matters discussed confidential during the period of the investigation. The same approach to self-

⁴³ S. 335N, RO Act

⁴⁴ S. 335P, RO Act

⁴⁵ S. 337, RO Act

⁴⁶ S. 337AE, RO Act

⁴⁷ S. 337AD, RO Act

incrimination, as stated in paragraph 9.9 above, also applies in relation to attending and answering questions.⁴⁸

Production of documents

- 9.13. Documents are to be provided to the address stated in the notice, on or before the time and date stated in the notice.
- 9.14. Electronic documents should be produced to the ROC on a portable USB. Electronic documents should also be produced in their native format. For example, Microsoft Outlook emails are to be produced as .msg files and Microsoft Word documents as .docx files. All parts of electronic documents are to be produced. For example, if the file is an email chain, all parts of the chain are to be produced, and where the electronic file is the minutes of a meeting and it refers to an attachment, both the minutes and its attachment must be produced.

Redaction of documents

- 9.15. The Commission will issue a notice to produce under section 335 if he is satisfied there are reasonable grounds to believe that the specified documents are relevant to an investigation. Accordingly, once the Commissioner has determined that documents are relevant, production of the documents in full is required. The redaction (i.e. removal, blacking out or covering of parts) of such documents does not amount to compliance with such a notice.⁴⁹

Warrants

- 9.16. While likely to be an infrequent occurrence, the Commissioner can apply to a Magistrate for a warrant to enable the AFP to enter premises to obtain documents relating to an investigation in order to ensure that all relevant documents are capable of being gathered during an investigation.⁵⁰

10. Principles and approaches underlying this Policy

- 10.1. The Commissioner and the ROC will make inquiries and conduct investigations with no preconception, pre-judgment or preference for one outcome or another. The outcome of any inquiries or investigations will be solely determined by the facts and circumstances of, and the evidence available in, the matter in question.
- 10.2. The Commissioner and ROC staff act impartially, without bias and avoid conflicts of interest in dealing with inquiries or investigations. The Commissioner and staff have an obligation to declare and address any conflicts of interest. This is an ongoing obligation.
- 10.3. The ROC will conduct matters having regard to whether the facts disclose reasonable prospects of success, and in accordance with legal principle and practice, taking into account the legal rights of the parties, and any relevant risks.

⁴⁸ S. 335C to 335H, RO Act

⁴⁹ *Perilya Limited v Nash* [2015] NSWSC 706

⁵⁰ S. 335L, RO Act

- 10.4. ROC staff will comply with the following documented and publicly available procedures:
- a. the ROC's *Compliance Policy*;
 - b. the Australian Public Service (APS) Values; and
 - c. the APS Code of Conduct.
- 10.5. The ROC will maintain up-to-date versions of all relevant guidelines and directives.

11. Transparency and publication of compliance activities

- 11.1. Specific information about the ROC's regulatory activities must be published in the Annual Report of the Fair Work Ombudsman (FWO), as the agency responsible for reporting on the ROC's activities.⁵¹
- 11.2. The ROC may also publish information on its own website (www.roc.gov.au) regarding the nature and outcome of compliance and enforcement activities, and other activities that it undertakes as a regulator, as a method of educating organisations and encouraging compliance.
- 11.3. The ROC is required to protect the confidentiality and privacy of information obtained during inquiries and investigations. However, members of the public can apply to access information in accordance with the *Freedom of Information Act 1982* (Cth).
- 11.4. The ROC has an approach of proactively publishing relevant information including:
- Decisions made by the Commissioner and his Delegate;
 - Annual Returns lodged by organisations, including updates to these records;
 - Financial Reports lodged by reporting units;
 - Lists of registered auditors; and
 - The commencement by it of litigation.
- 11.5. In certain circumstances the Commissioner may disclose information to other agencies under section 329G if particular criteria are met. These are discussed in further detail below.
- 11.6. Where matters are the subject of a current inquiry, investigation or ongoing litigation, the ROC will seek to make minimal comment, and then only in general terms, in order to avoid prejudicing the matter.
- 11.7. For additional information regarding the ROC's handling of information see:
- a. the ROC's [Privacy Policy](#) (PP 006);
 - b. the ROC's [Access to Information Policy](#) (PP 005).

⁵¹ S. 329FC, RO Act

12. Disclosure of information

- 12.1. The Commissioner may disclose, or authorise disclosure of, information acquired in the performance of functions or the exercise of powers under the RO Act, if he reasonably believes that:
- a. it is necessary or appropriate to do so in the course of performing or exercising his functions or powers; or
 - b. the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth or a State or Territory.⁵²

13. Accountability and review mechanisms

- 13.1. Where an individual or organisation or reporting unit is not satisfied with the process of an inquiry or investigation, or with the outcome of the inquiry or investigation, a request for a review may be made, in writing, to:

The Registered Organisations Commissioner
Registered Organisations Commission
GPO Box 2983
MELBOURNE VIC 3001

Email: regorgs@roc.gov.au

- 13.2. The Commonwealth Ombudsman can review the actions taken by many Commonwealth government agencies, including the ROC. The Commonwealth Ombudsman may be contacted on 1300 362 072 or at www.ombudsman.gov.au.
- 13.3. In addition, section 604 of the *Fair Work Act 2009* provides that a person who is aggrieved by certain types of decision, issued by the Commissioner or a Delegate of the Commissioner, may lodge an appeal with the FWC.

Note: *This policy is intended to provide general information about the ROC's approach to compliance. The ROC's policies do not have the force of statute. While the ROC will seek to meet the requirements of its policies in carrying out its functions, failure by the ROC to comply with a policy cannot affect the validity of its conduct. This policy is not a direction issued by the Commission for the purposes of subsection 343B(5) of the RO Act and should not be taken as a substitute for legal advice.*

⁵² S. 329G, RO Act