



Fact sheet

Duties of officers (including case studies)

The *Fair Work (Registered Organisations) Act 2009 (RO Act)* requires officers of organisations (both employer and employee organisations) to meet certain standards of good financial governance. This fact sheet provides an overview of the duties of officers and the training requirement. It also provides case studies to assist with understanding the duties.

This fact sheet does not cover all matters relating to the obligations of officers arising under the Fair Work legislation.

Summary

Part 2 of Chapter 9 of the RO Act contains requirements for officers of organisations and branches in relation to their financial duties. Part 2A of Chapter 9 contains the requirements for officers with financial duties to undertake training.

The officer duties covered in this fact sheet include:

- Care and Diligence (s. 285)
- Good Faith (s. 286)
- Misuse of Position (s. 287)
- Misuse of Information (s. 288)
- Financial training (s. 293K)

The duties are explained in detail beginning with who they apply to, practical examples, possible defences and legal consequences. Finally the fact sheet includes case studies with descriptions of the facts, decisions and lessons for the future.

Financial training (s. 293K)

Section 293K of the RO Act requires officers whose duties include duties that relate to the financial management of the organisation or branch must undertake training that covers each of the officer's duties.

The training must be approved by the Commissioner and undertaken within 6 months of beginning to hold office. There is no ability for the ROC to grant extensions.

The ROC does not believe officers who are returned to the same office are required to undertake new training. However if there have been changes to the officer's duties or changes to the legislation, the ROC recommends that the officer undertake training.

An officer can be exempted from training on application by the organisation or branch to the ROC if the Commissioner is satisfied that the officer has a proper understanding of the officer's financial duties because of their experience or qualifications.

General duties of officers and employees regarding financial management under the RO Act

Under the RO Act, officers have responsibilities called 'general duties' (duties), which apply in addition to duties in the organisation's rules. Some of the duties also apply to employees.¹

Why are these duties important?

The duties placed on officers under the RO Act are central to the good corporate governance, effective operation of organisations, and to high standards of accountability of organisations to their members.

They comprise a series of minimum standards of conduct for officers and employees.

The general duties are similar, but not identical, to the obligations of directors of companies under the *Corporations Act 2001*. However, there are a number of attributes of registered organisations that mean understanding the duties of a director might not be sufficient to have a full appreciation of the responsibilities of an officer or employee of an organisation.

An officer must meet the minimum standards of conduct as set by the RO Act,² certain other statutes,³ and the common law.⁴ An officer includes a person who holds an office in a division or a branch of an organisation.

What penalties apply?

A failure to comply with the general duties can make an officer liable to significant civil penalties in proceedings commenced in the Federal Court. Serious contraventions can give rise to a civil penalty of up to 1,200 penalty units.

Officers who are recklessly or intentionally dishonest may also be liable for a criminal offence, which can include very substantial fines or imprisonment for up to 5 years, or both.⁵

Employees

The duties do not just apply to persons who hold office. The duties in relation to the proper use of position and information⁶ also apply to employees of a registered organisation.

¹ The RO Act also imposes 'general duties' on officers and employees of organisations regarding compliance with orders and directions of the Federal Court and the Fair Work Commission (FWC) - refer ss294 to 303A.

² See sections 285 to 288, 290A RO Act

³ Including the *Fair Work Act 1999* and the *Corporations Act 2001*. For example, the general duties under the *Corporations Act 2001* may also apply to officers of registered organisations - refer ss9 and 57A(1)(b).

⁴ Sections 285 to 289 and 290A are in addition to any rule or law relating to the duty or liability of a person because of their office or employment in an organisation or branch. This might include other statutes, common law or equitable obligations.

⁵ Section 290A, RO Act

⁶ Sections 287, 288 and 290A(2) & (3), RO Act

Employees who are found to be in breach of these duties may be liable for significant civil penalties.

Can anyone else have penalties?

Any person who is *involved in* a contravention of the general duties under sections 286, 287 or 288 may also be liable to a civil penalty.⁷ This may be an officer or employee. However, this could include a person who is not an officer or employee, for example, a professional advisor.

What are the duties? (ss. 285, 286, 287 & 289)

The duties of an officer will differ in each organisation. Registered organisations are required to have rules which may provide for varying elected positions and substantial differences in officer's roles and responsibilities. For example, two organisations may define the role and obligations of a Secretary very differently. Therefore duties may depend upon the organisation's rules and practice, the general duties of officers under the RO Act as informed by the common law, and the relevant facts in each case.

The four general duties which apply to officers and employees of organisations under the RO Act are:

- **Care and Diligence** (s 285) - officers must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if he or she were an officer holding an equivalent position. This obligation is subject to a 'reasonable judgment' rule explained further below.
- **Good Faith** (s 286) - officers must exercise their powers and discharge their duties in good faith in what the officer believes to be the best interests of the organisation, and for a proper purpose. This involves the subjective question as to what the officer believes but also the objective question as to whether the conduct discloses a proper purpose.
- **Misuse of Position** (s 287) – officers and employees must not improperly use their position to gain an advantage for themselves or someone else or to cause detriment to the organisation or to another person.
- **Misuse of Information** (s 288) – a person who obtains information as a result of being an officer or employee must not improperly use that information to gain advantage for themselves or someone else or cause detriment to the organisation or to another person.

Section 290A provides that certain conduct in the nature of a breach of good faith, or misuse of position or information, undertaken recklessly or dishonestly, may give rise to a criminal offence. A table summarising the relevant general duties and the penalties can be found at Attachment A.

Limits on the scope of the general duties

Section 283 limits the scope of sections 285 to 288 and 290A to the exercise of powers and duties related '*to the financial management of the organisation or branch*'. That means that

⁷ Sections 286(2), 287(2) and 288(2), RO Act

the general duties should not apply to conduct by officers and employees exercising duties that are wholly unrelated to the financial management of the organisation. However, other statutory provisions or the common law may still apply to such conduct.⁸

Officers' duties are not limited to senior officers

The general duties of officers extend to all officers in an organisation as defined in section 6 of the RO Act. This includes the members of a Committee of Management of an organisation or a branch. Each member of a Committee of Management should ensure that they are aware of and comply with the duties set out in sections 285 to 288 and 290A.

Practical example – financial reports

The members of the committee must exercise care and diligence in dealing with financial matters and in the consideration and approval of financial reports. These duties may be comparable to those of directors in a corporation which have been described as follows:

... each director is expected to ... take a diligent and intelligent interest in the information available to him or her, to understand that information, and apply an enquiring mind to the responsibilities placed upon him or her [including] ... adopting and approving the financial statements. Because of their nature and importance, the directors must understand and focus upon the content of financial statements, and if necessary, make further enquiries if matters revealed in these financial statements call for such enquiries.⁹

Accordingly if the members of a Committee of Management approve a financial report at the end of a financial year without adequately considering it, and the financial report contains significant errors, they may potentially be liable for a penalty under section 285.¹⁰

Officers' duties include a failure to act (s285)

The general duty to exercise care and diligence under section 285(1) concerns not only actions, but also a failure to act.

Practical example – prior approval of expenses

The rules of many organisations require a committee to give its *prior approval* for all non-ordinary expenditure. In those circumstances, the committee plays an important role as gatekeeper to oversee the proper expenditure of monies by the organisation. A failure to act can arise where the members of a committee fail to ensure that senior officers comply with the rules of the organisation regarding the approval of expenditure. If the committee abandons its role and enables a senior officer to incur expenditure without oversight, each member of the committee might be exposed to liability for a failure to exercise care and diligence.

⁸ This may include common law and/or obligations under the *Corporations Act 2001* which are similar to the general duties, which are not limited to financial management: see generally *Health Services Union v Jackson (No 4)* [2015] FCA 865.

⁹ *ASIC v Healey & Ors* [2011] FCA 717 [Centro] at [20].

¹⁰ *ASIC v Healey & Ors* *ibid.*

Practical example – loans, grants and donations over \$1000

The rules of every organisation must ensure that every loan, grant or donation over \$1000 has the *prior approval* of the relevant committee of management.¹¹ Each officer on a committee of management of an organisation or branch must be vigilant in ensuring these provisions are complied with to avoid possible personal liability for a failure to exercise care and diligence.

What conduct might give rise to a breach of the general duties?

It is useful to consider various case studies where the Federal Court has found that certain conduct contravened the general duties under the RO Act. A range of case studies which may be of assistance can be found at Attachment B.

Some guidance can be also obtained by considering analogous cases regarding the breach of director's duties under the similar provisions of the *Corporations Act 2001*.¹² However there may be relevant distinctions between the two legislative schemes, which could lead to different results in relation to similar fact cases.

The ROC cannot provide legal advice. If in doubt obtain independent legal advice as to your obligations under the RO Act.

Are any defences available?

Reasonable judgment rule – s 285(2)

The obligation under section 285 to take care and diligence is subject to a 'reasonable judgment' rule. This rule applies to protect an officer who made a judgment to take or not take action if the officer:

- made the judgment in good faith for a proper purpose;
- did not have a material conflict of interest;
- informed himself or herself before making the judgment; and
- rationally believed that the judgment was in the best interests of the organisation.

A belief that the judgment was in the best interests of the organisation is taken to be rational unless the belief is one which no reasonable person in their position would hold.

Acts required to be taken under statute

It is not a contravention of sections 286, 287 or 288 for an officer or employee to do an act that another provision of the RO Act or the *Fair Work Act 2009* requires that officer or employee to do.¹³ It should be noted that an officer must still take 'care and diligence' under section 285 in doing an act required to be taken under the RO Act or the *Fair Work Act*.

Reliance on others

¹¹ Refer section 149 of the RO Act. In rare cases a loan, grant or donation of up to \$3,000 may be made without prior approval to relieve a member (or a member's dependant) in severe financial hardship - but the committee of management can overrule such a loan at its next meeting - refer section 149.

¹² The provisions under sections 285 to 288 of the RO Act are modelled on sections 180 to 183 of the *Corporations Act 2001* and the link between officers of organisations and Directors has long been recognised; see *Allen v Townsend (1977)* 31 FLR 431 at 483 - 489 per Evatt and Northrop JJ; *Health Services Union v Jackson (No 4)* [2015] FCA 865 at [56].

¹³ Section 290, RO Act

An officer may be entitled to rely upon information, or professional or expert advice, from certain persons on whom they might be expected to rely, if they did so in good faith and after making proper inquiries, and relying on that information or advice was reasonable.¹⁴ This is called a 'rebuttable presumption' which means that it is assumed by a court to be true unless proven otherwise.

Delegated authority

Section 293 of the RO Act provides that an officer is responsible for the exercise of a delegated power by a person to whom they have delegated power as if they had themselves exercised the power.

However, an officer may avoid responsibility for the other person's conduct if the officer believed, on reasonable grounds:

- that the person would exercise powers in conformity with the duties imposed on an officer; and
- in good faith, and after making proper inquiry, that the person was reliable and competent in relation to the power so delegated.

Relief from liability

The Court may¹⁵ excuse a person or organisation from liability if the Court finds that the person or organisation has, or may have contravened, a civil penalty provision but:

- the person or organisation has acted honestly; and
- having regard to all of the circumstances of the case, the person or organisation ought fairly to be excused for the contravention.

What role does the Commissioner and the ROC play?

The Commissioner and the ROC are responsible for the education, assistance and advice to organisations and their members, and to monitor acts and practices to ensure they comply with the RO Act.

Part of that role involves the investigation of possible breaches of the general duties under sections 285 to 288 of the RO Act. The Commissioner or delegate can 'make inquiries'¹⁶ and 'conduct an investigation'¹⁷ into, among other things, whether a civil penalty has been contravened, including in respect of the general duties.¹⁸

The Federal Court can, on application by the Commissioner, make a range of different orders, including ordering payment of pecuniary penalties, compensation orders, disqualification orders and other orders.¹⁹

¹⁴ Section 292, RO Act

¹⁵ Sections 315, RO Act. Section 316 has additional provisions that only pertain to officers of an organisation

¹⁶ Section 330, RO Act

¹⁷ Section 331, RO Act

¹⁸ Investigations may also be conducted in other circumstances - refer sections 332 to 334.

¹⁹ Sections 306 to 308, RO Act

The Commissioner has other compliance tools, including seeking voluntary compliance, issuing rectification notices, and referring possible criminal offences to State and Federal Police.²⁰ For more information on this topic, please see the ROC's [Compliance Policy](#).

If you require any further information or assistance about the requirements explained in this fact sheet and how to comply, you may email your question to regorg@roc.gov.au, call us on 1300 341 665.

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This fact sheet is not intended to be comprehensive. The Registered Organisation Commission does not provide legal advice. Users must rely upon the relevant legislation, which is set out in the *Fair Work (Registered Organisations) Act 2009*, the *Fair Work Act 2009* and the *Fair Work (Registered Organisations) Regulations 2009*.

²⁰ Sections 336(2)

Attachment A

Summary of general duties regarding financial management

Section	General duty	Applies to	Maximum penalty
CIVIL OBLIGATIONS:			
285	Care and diligence	<ul style="list-style-type: none"> • officers 	Civil penalty: 100 penalty units (\$21 000) or 1200 (\$252 000) for a serious contravention
286	Good faith & proper purpose	<ul style="list-style-type: none"> • officers • other persons involved 	As above
287	Not to misuse position to gain advantage for self or another or to disadvantage organisation or another	<ul style="list-style-type: none"> • officers • employees • other persons involved 	As above
288	Not to misuse information to gain advantage for self or another or to disadvantage organisation or another	<ul style="list-style-type: none"> • officers • employees • other persons involved 	As above
CRIMINAL OFFENCES:			
290A(1)	Good faith (not to act with intentional or reckless dishonesty)	<ul style="list-style-type: none"> • officers 	Criminal offence: 2000 penalty units (\$420 000) and/or 5 years imprisonment
290A(2)	Not to misuse position (with intentional or reckless dishonesty)	<ul style="list-style-type: none"> • officers • employees 	As above
290A(3)	Not to misuse information (with intentional or reckless dishonesty)	<ul style="list-style-type: none"> • officers • employees 	As above

Attachment B - Case Studies

Health Services Union v Jackson (No 4) [2015] FCA 865

Key issue

An organisation sought compensation against a former National Secretary regarding the alleged misappropriation of more than \$1 million.

Bankruptcy

Prior to the proceedings the former officer (who had been a National and Branch Secretary) declared bankruptcy. The court allowed the matter to proceed notwithstanding this.

Conduct

Neither the officer nor her bankruptcy trustee appeared at the trial. Therefore the evidence of the union was unchallenged. The court found the evidence substantially supported the claims of the union. The court's findings included the following:

- **Credit card expenditure** - the officer expended more than \$300 000 for personal purposes (such as travel, food and entertainment) on union credit cards;
- **Consultant** - the officer engaged a consultant to be paid \$150 000 per year (whether or not he rendered any services), as a result the union lost more than \$400 000;
- **Legal bill** - the officer engaged a law firm regarding allegations made against herself and charged the fee of \$34 725 to the union without authorisation;
- **NHDA transfers** - the officer transferred more than \$250 000 of union funds into an account (the National Health Development Account) controlled by herself, this was done without authority and the funds were primarily used for personal purposes;
- **Cashed cheques** - the officer signed and cashed out about 40 cheques for a total amount of more than \$200 000 in a manner that was unauthorised (except regarding \$100 sitting fees paid to officers to attend meetings);
- **Overpayment of wages** - the officer received \$67 912 of normal salary when she should have been drawing on her accrued entitlements (for example by receiving her normal salary while on holidays without drawing on her annual leave entitlement).

Contraventions and compensation

The Court ordered the officer to pay compensation of more than \$1.4 million for damage she caused the Union due to her multiple contraventions of s. 287 (improper use of position to gain an advantage). The court also noted that the conduct may have contravened other provisions of the RO Act and comparable provisions of the *Corporations Act 2001* (Cth).

Quote from the case

[90 and 91] ... [The officer] ... appears to assume that the expenditure of members' funds to advance factional causes would, in some way, be beneficial to them ... This mindset readily evolves into a pervasive sense of entitlement, on the part of the office holder, to utilise the Union's resources to advance his or her personal interests.

General Manager of the Fair Work Commission v Thomson (No 3) [2015] FCA 1001

General Manager of the Fair Work Commission v Thomson (No 4) [2015] FCA 1433

Key issues

This case concerned allegations against a former National Secretary of the Health Services Union and former Member of the Australian House of Representatives.

Allegations

It was alleged that the former officer used the union's funds to make personal purchases, attempted to conceal the nature of those purchases, directed the union's employees to work on his election campaign whilst employed working for the union and caused the union to enter into sponsorship agreements and to make donations without proper authority.

Decision

The Court held that by using the union's funds to make purchases for his own benefit, including hiring escorts and paying for personal travel and accommodation, the former officer contravened s. 287 (improper use of position to gain an advantage for himself and/or to cause detriment to the organisation).

The former officer was also found to have contravened s. 286 (good faith and proper purpose) by seeking to conceal the true nature of those transactions by directing his staff to record his personal purchases incorrectly as 'meeting expenses' and 'telephone conferences'. The former officer had an obligation correctly to record the true nature of those payments.

In breach of sections 286 (care and diligence) and 287 the former officer also directed two employees of the union to work on his political campaign for the 2007 Federal Election, while the employees were paid by the union, and causing the union to enter into a sponsorship agreements to benefit his election campaign, without proper authority.

The Court also found that the officer has breached his duties under section 285, 286 and 287 by causing the organisation to make donations without proper authorisation.

Contraventions, penalties and compensation

The former officer was ordered to pay compensation to the organisation of \$231 243.42 plus \$146 937.16 in interest within 74 days of the judgment. The former officer was also ordered to pay a penalty of \$80 050.

Practical implications

This case highlights the significant penalties officers may face for misappropriation of union funds and resources (such as employees) for personal gain. It also highlights the importance of accurate record keeping and the correct authorisation of loans, grants and donations.

Quote from the case

[97 of [2015] FCA 1001] ... When it is realised that the respondent himself had only recently moved into the [Dobell electorate] ... with the general project of increasing his own profile in the community to further his own political career, the potential for a conflict of interest to have arisen is all too obvious. ... I would infer that his decision to commit the funds and staff resources of the HSU to Coastal Voice, a group which he himself established, was substantially influenced ... by the advancement of that general project. In short [he] ... used his fiduciary position to benefit himself ... That was a conspicuous impropriety.

General Manager of Fair Work Australia v Health Services Union [2014] FCA 970

Key issues

Senior officers of a branch ignored financial controls and some gained a financial benefit.

Conduct

Three branch officers (President, Secretary and Assistant Secretary) signed blank cheques and gave their electronic PINS for the payment of branch expenditure to an unelected employee contrary to the rules of the organisation.

The Secretary and Assistant Secretary also had the branch pay personal travel expenses for themselves and their partners to attend a wedding.

The Branch Secretary also:

- paid \$15 000 to himself and \$5000 to another employee without authorisation;
- allowed an unelected employee to sign cheques for the branch contrary to the rules;
- failed to retain documents for a reimbursement of \$4128 credit card expenditure;
- failed to apply and/or obtain authorisation for annual leave he took or cashed out.

Contraventions, penalties & compensation

The court:

- found the former President contravened s. 285 twice and ordered a penalty of \$4505;
- found the former Assistant Secretary contravened s. 285 three times, s. 286 once and s. 287 once and ordered a penalty of \$6720;
- found the former Secretary contravened s. 285 six times, s. 286 once and s. 287 once and ordered a penalty of \$18 262 and that compensation be paid to the branch of \$26 779.40 (including interest).

Applications for relief from liability under s. 315

The former President and Assistant Secretary sought relief from liability under s. 315 (which gives the court that discretion if satisfied a person acted honestly and, in the circumstances, such relief should be granted). The court refused the applications on the basis that it had been unreasonable for those officers to ignore the branch's financial controls.

Contribution

The court noted the genuine contribution of the former Assistant Secretary and the penalty ordered against him included a discount to reflect that.

Quote from the case

[137] The proper functioning of the Branch depends on its [elected] leaders using their experience to ensure that the Branch is administered properly. They provide the example to junior officials and staff of the need to comply with ordinary standards of diligence and competence. By ignoring the financial controls in place, the [former President] ... sent a message to other officials and staff that it was acceptable to ignore the rules if they were inconvenient.

General Manager of the Fair Work Commission v McGiveron [2017] FCA 405

Key issues

Senior officers had a conflict of interest when considering a redundancy and the purchase of two vehicles.

Conduct

Two officers (a Branch Secretary and the next Branch Secretary) arranged for the branch to purchase two luxury vehicles worth more than \$300 000 in total, allegedly for their personal use, without the approval of the Branch Committee of Management (BCOM).

In addition:

- the first Secretary proposed and voted for a more generous redundancy policy at a Branch Committee Meeting (BCOM) in circumstances where:
 - the new policy was likely to, and did, benefit him when he left the branch; and
 - he did not declare a conflict of interest or absent himself from voting on the policy at the BCOM;
- the successive Secretary:
 - approved a termination payment to the former Secretary of over \$348 000 without proper authority;
 - had the branch pay for personal expenditure items (a restaurant meal, car hire and attendance at a football function);
 - did not inform the Branch Finance Committee and/or the branch auditor of the purchase of the luxury vehicles from October 2012 to February 2014.

Contraventions and penalties

The court:

- found the first Secretary contravened s. 285 once and s. 286 twice and was ordered to pay a penalty of \$16,000 (discounted to \$11 000 if the \$11 000 was paid in 74 days);
- found the next Secretary contravened s. 285 five times, s. 286 five times and s. 287 three times and was ordered to pay \$49 900 (discounted to \$27 300 if the \$27 300 was paid in 74 days).

Quote from the case

[121] ... Senior union officials ... who have the power to control or influence outcomes, including outcomes that might benefit them or others close to them personally in the running of union affairs and have the duty to act in good faith and for proper purposes, must understand that they will feel the full weight

General Manager of the Fair Work Commission v Musicians' Union of Australia [2016] FCA 302

Key issues

The organisation and many of its branches failed to prepare and lodge financial reports for many years and the Federal Secretary failed to discharge his duties to remedy this.

Conduct

For many years the organisation and a large number of its branches failed to prepare a General Purpose Financial Report (GPFR), provide a full financial report to members and present the full financial report to prescribed meetings. Such failings led to contraventions of ss. 253, 265, and 266 of the RO Act.

The former Federal Secretary of the organisation also admitted that he had contravened his duty to exercise care and diligence (s. 285) by failing to attend to the organisation's compliance with these requirements.

As the conduct was admitted by the organisation and the officer, the issue for the court was the penalties which should be imposed for the admitted contraventions.

Contraventions and penalties

The Court ordered the organisation to pay total penalties of \$76 500 and the former Federal Secretary to pay total penalties of \$17 000 within 134 days.

In considering the above penalties, the court considered the small size and resources of the organisation, its prior good record, its contrition, the steps taken by the organisation to minimise the prospect of such contravening conduct occurring in the future, and its cooperation with the Fair Work Commission.

The Court also considered that the former Federal Secretary only worked with the organisation on a part time basis and that over a period of five years he had sole responsibility for the records and accounts of the organisation and its branches.

These considerations were balanced against the fact that the organisation and the officer were regularly reminded of their obligations under the RO Act and prior legislation and were urged to attend to them. This led the Court to conclude that the conduct was wilful, as distinct from inadvertent. Having regard to the organisation and officer's inaction in the face of repeated reminders, and the seriousness of these requirements under the RO Act and prior legislation, the Court considered that the above penalties were justified.

Practical implications

This case demonstrates the importance the court places on proper financial administration and the obligation of the relevant officers to ensure that these requirements are met.

Quote from the case

[25] ... the scale of [the organisation's] contraventions make specific deterrence an important consideration for the court.

[26] So too is general deterrence an important consideration ... Were this proceeding to have no other consequence, if it alerts other small organisations to the importance of compliance with the RO Act it will have served a salutary public purpose