

Registered Organisations Review Report

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Introduction

The Fair Work (Secure Jobs, Better Pay) amendments to the Fair Work Act 2009 contained the transfer of the functions of the Registered Organisations Commission (ROC) to the Fair Work Commission (Commission).

The General Manager of the Commission (GM) established the Registered Organisations Governance & Compliance External Review (Review) to identify opportunities to better support Registered Organisations to meet their obligations. Jonathan Hamberger and Anna Booth of CoSolve (Reviewers) were engaged to conduct the Review.

The Terms of Reference of the Review are Attachment A to this report.

This report reflects the views of the Reviewers on the topics covered by the Terms of Reference following their analysis of the written submissions as well as discussions with key stakeholders, including Registered Organisation Services Branch (ROSB) staff. A list of the submissions received, and the organisations with whom we met are listed in Attachment B to this report. In many cases, the recommendations could be implemented administratively. This should occur wherever possible, though some recommendations would require changes to the *Fair Work (Registered Organisations) Act* (the Act) and/or associated regulations. These will need to be brought to the attention of the Minister and the Department if the GM wishes to pursue them.

It is important that in performing their functions under the Act, the GM and the staff in the ROSB have regard to the underlying purpose of the regulatory scheme. This is not to achieve 'compliance for compliance's sake' but to protect the interests of members of registered organisations (ROs) by:

- ensuring that organisations registered are representative of and accountable to their members;
- ensuring that organisations are run democratically;
- ensuring that organisations are able to operate effectively;
- encouraging members are able to participate in the affairs of their organisation;
- ensuring that financial reporting is in a form that assists members; and
- organisations are managed efficiently.

The focus on protecting the members' interests needs to be reflected in the Branch's planning.

Stakeholder engagement

- There should be a permanent advisory committee with the GM and representatives from the ACTU, ACCI, and AiG. (Registered Organisations Advisory Committee – ROAC)
- There should also be a regular compliance practitioners’ reference group (CPRG) to consult on technical matters.
- All educational activities and policy development (including the implementation of the recommendations contained in this report) should occur with appropriate consultation with these two bodies.

Compliance and enforcement policy

- The GM should publish a Compliance and Enforcement policy on the ROSB website using FWO’s policy as a template. The policy should indicate the criteria that are used to decide when matters are escalated to the next step. The policy should ensure a positive regulatory culture that encourages voluntary compliance and supports the democratic functioning of organisations and is aligned with the interests of the members.

A strategic approach to enforcement should be adopted. Triage and prioritisation based on intelligence gathering are fundamental to strategic enforcement.¹

- Adopting this approach to regulating ROs, the ROSB should use intelligence to identify the risk of breaches that would cause significant harm to members and focus compliance activities accordingly. The goal is to change behaviour rather than punish past behaviour as an end in itself.
 - Compliance actions (including investigations) should generally be triggered by reasonable suspicion of serious breaches of the Act.
 - The main factor in determining the seriousness of a potential breach is the extent to which the potential breach damages the interests of the organisation’s members, for example, by involving the misappropriation of funds or undermining the democratic functioning of the organisation. Other factors that may be relevant include whether the potential breach involves recklessness or a deliberate refusal to comply with the requirements of the Act.
 - Self-reporting and cooperation, including concessions which may fall short of full admissions, should be treated as mitigation that influences enforcement intervention.

¹ Creating a strategic enforcement approach to addressing wage theft: one academics journey in organizational change. David Weil Journal of Industrial Relations 2018 Vol. 60(3) 437 – 460

- Unless there are exceptional circumstances, breaches that are more than six years old should not be investigated.
- Infringement notices should be used when the alleged misconduct is relatively minor and does not indicate a broader pattern of misconduct by the RO.
- ROs should be provided with an opportunity to respond to any findings by ROSB
- The use of enforceable undertakings should be seriously considered where serious breaches have occurred, but there is a clear willingness on the part of the organisation to rectify those breaches and to ensure that such breaches do not recur. The terms of enforceable undertakings should be reasonable and proportionate to the alleged contraventions that they address.
- The GM should recommend to the Minister and the Department that a full review be undertaken of the penalties that apply under the RO Act – including the application of criminal penalties and the impact this may have on the participation of members in the running of their organisation. The review should have regard to the penalty regimes that apply to other not for profit institutions.

Reports

- A portal should be implemented to allow for the submission of all reports and applications, similar to that operated by the Australian Charities and Not-For-Profits Commission (ACNC). This should enable ROs to see online all the previous reports they have submitted. The portal should be designed in consultation with the CPRG.
- The annual return, financial statement, loans, donations and grants report and officer and related party disclosure statement should all be consolidated into one audited return (to be submitted via the portal).
- There should be a longer-term review of the financial reporting requirements in the RO Act that are in excess of those required of listed companies to assess whether these additional requirements add value.
- The financial statement should no longer be automatically assessed. Assessment should only occur in accordance with strategic compliance principles. Financial reports submitted to ASIC and the ACNC are not subject to automatic assessment, and there is no reason why the financial statements of ROs should be treated differently.
- The ROSB should continue sending out prompts prior to reporting deadlines (via the portal).

- The ROSB should develop, in consultation with the CPRG, an ‘easy to read’ model summary financial statement for members. The auditor should confirm that this summary document is consistent with the full financial report.
- ROs should be audited to the Tier 2 standard that applies to charities and other not-for-profit entities. This would impact disclosures rather than financial results reporting and be a time saver for ROs. Publicly listed companies are subject to Tier 1 audits because of the unique requirement to provide details to shareholders. ROs do not warrant this level of auditing.
- The only changes in office holders that should continue to be reported as they occur throughout the year should be for positions that exercise significant direct control over the operations and finances of the registered organisations on a day-to-day basis. Otherwise, changes in office bearers should be reported once a year as part of the consolidated report. Changes in office holders should be reported through the portal.

Education, assistance, and advice

- Staff from the ROSB should continue to be accessible to organisations and provide problem-solving advice on a confidential and informal basis.
- An induction pack for organisation compliance staff should be developed in conjunction with the CPRG.
- ROSB should run in-person education activities on a regular basis, as far as resources permit.
- The ROSB website should primarily be maintained by the staff from that area and should be clearly distinct from the rest of the FWC site. This reflects the different nature of the relationship between the ROSB and its clients compared to other parts of the FWC.
- Financial training should not be required for those who have changed office if they have completed the training in the previous five years.
- ROSB should continue to provide a check list for financial reporting.
- Model rules, including election rules, should be developed in consultation with ROAC to encourage democratic and efficient management.

Rule change applications

- The Branch should improve the time it takes to deal with applications for rule changes (which should be made via the portal). It is acknowledged that this might require some additional resources.
- The Branch should adopt performance standards in processing rule change applications (using the certification of rule changes - not time taken to 'assess');
- Feedback should be provided on where applications are up to in the assessment process (through the portal), and explanations should be provided for any delays.
- A bench book should be published on the website outlining relevant case law.

Right of Entry Permits

- The process for obtaining a right of entry permit should be significantly streamlined, and the need for one-on-one meetings to verify identity should be eliminated.
- Applications should be lodged through the portal.
- The process for obtaining a permit should be no more onerous than that required to obtain a passport unless there are good grounds for questioning whether the proposed permit holder may not be a fit and proper person. This assessment should generally be based on the declaration made by the Secretary of the RO applying for the permit. It would be appropriate to consult the President of FWC on the process for deciding which applications should be referred to a Commission Member.
- Renewal application should be even more streamlined – in particular, there should be no need for further identity checks.

Elections

- The legislation should be amended to allow scope for voting electronically.
- There should be greater involvement of ROSB staff with expertise in RO rules in assisting AEC in conducting elections. There should be an MOU between the FWC and the AEC to promote the fair and efficient conduct of RO elections.

Unregistered associations

- Our attention has been drawn to the growth of unregistered associations that purport to be membership-based and participate in the industrial relations system alongside ROs. Some ROs have expressed concern that such organisations operate without the obligations upon ROs that are designed to protect members' interests. This is an issue that stakeholders and policy makers may wish to explore further.