



# RO POD episode 46 – current issues in the elections space

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## Speaker Key

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**AN** Welcome to RO pod: Talking about governance of registered organisations with the Registered Organisations Governance and Advice Branch at the Fair Work Commission. The official podcast about the regulation of unions and employer associations. In this monthly podcast we'll share essential information, uncover handy hints and tips and reveal our best tools for proactive compliance with the complex legislative requirements.

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**00:00:45**

**CC** Hello, and welcome to RO Pod. My name is Claire Cotterill I'm a lawyer with the Registered Organisations Governance and Advice Branch here at the Commission. I'm joined today by Bill Steenson who is the Branch's Principal Lawyer for Compliance and Protected Disclosures. Today we'll be discussing some of the issues we've been seeing in the elections space. Welcome, Bill!

**BS** Thanks Claire. Good great to be here.



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**CC** The *Fair Work (Registered Organisations) Act* – or as we call it, the RO Act – aims to ensure that registered organisations are properly regulated, function in a democratic way, and are representative of, and accountable to their members. An important element of ensuring democratic control that underpins the objectives of the Act is that every officer in an organisation and branch is elected.

For those who are new to elections, they must be conducted by the Australian Electoral Commission (which we'll refer to as the AEC) unless an organisation or branch holds an exemption. Elections are arranged by organisations lodging prescribed information with the Fair Work Commission at least two months before an election is due. A decision is then issued by the General Manager of the Commission or their delegate.

Prescribed information must list specific details. We really recommend you use our template so you don't leave anything out. You can find it on our website. The details include:

- the name of each office or non-office position
- the number to be elected
- the reason for the election
- the electorate that chooses the particular offices
- when nominations open and close
- the day the roll of voters closes and;
- the relevant voting system.

The prescribed information must also include a statement signed by an authorised officer of the organisation or branch.

Your rule book, as it was on the day nominations open, controls how your election is run.

Industrial elections will often involve ballots and are sometimes contentious. We often see issues about elections raised in the whistleblower disclosures we receive. Bill, what sorts of issues are we seeing with elections right now?



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**BS** Thanks Claire. Well, to start with, I think it's really important to remind organisations that the key question is what do your rules say about when your elections are due. There is an ongoing requirement to lodge prescribed information in accordance with those rules.

So if your rules say that there's an election due, you must lodge the prescribed information with the Commission. Your rules might say an election occurs in each odd numbered year, or that office holders only hold office for 1 year, 2 years, whatever it is and this will be coming to an end.

Now if for some reason an earlier election was delayed, you must still lodge the information if your rules say an election is due. The Commission can then decide your organisation doesn't need to have two elections, for example. But I need to emphasise that this something that is for the Commission to decide. Organisations can't just assume and make these decisions without reference to the Commission.



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**CC** And why have elections been delayed?

**BS** Well the short answer is COVID and the flow on effects from that. In many respects, the AEC has been playing 'catch up' because of postponements and delays during the height of the COVID-19 pandemic. So if you think back, people were sent home from workplaces and there was social distancing and other measures were being implemented. When the pandemic hit, the AEC put on hold all industrial elections that had not yet commenced.

And for a while there were no new industrial elections carried out. When they resumed there was, understandably, quite a backlog.

Now even though elections have been running again and there has been some catch up, there are some ongoing issues that we're seeing as a result of the earlier delays: things such as election cycles now being out of alignment, and that's what we're now working with the AEC and with each organisation to sort out.



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**CC** What can organisations do if they find themselves in this situation?

**BS** Well in the first instance, it's important that organisations and branches contact the Commission and let us know if previous elections were either not run at all or not run on time, and when any delayed elections finished. They should really do this at the same time or before they lodge their election request or prescribed information. This can really help when we are assessing the request.

**CC** And what will the Commission do if it turns out an organisation is overdue for a previous election or it didn't run at all?

**BS** So it will really depend on the specific circumstances and needs of the organisation, but we'll work with them to find a practical solution to get things back on a more regular cycle.

Now we had a recent example where an organisation lodged prescribed information for an election to be arranged for Federal and State offices. Under their rules, everyone had one-year terms, with the exception of a couple of Federal executive officers who had two-year terms.

We issued a decision to arrange for the 2023 election to go ahead, but then the AEC told us the 2022 elections had not been conducted yet.

The AEC naturally asked us, well which election is required or are both required.

And we concluded that only the 2023 one was. The 2022 elections had in effect been superseded. And we issued a new decision to that effect.



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**CC** So, if the organisation had told us the previous one wasn't run yet when they lodged their new prescribed information for 2023, we might have been able to find a solution before we issued a new decision?

**BS** That's right. And potentially the response could have been, okay, if the 2022 elections are run, that may cover it. But because we hadn't heard that and because it had the potential to be more complex because they had the Federal officers who had two-year terms. They were elected in alternating years.



So to explain that, half of the Federal Executive officers were elected in odd numbered years, and half in even numbered years.

And the AEC had told us that the last two elections, involving those officers were run quite late due to COVID delays.



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**CC** So, the officers who should have been elected in odd numbered years began their terms in even numbered years, and vice versa. With them all holding office for two years they were potentially out of sync?

**BS** Yes that's right. And we worked together to find a practical solution to resynchronise the elections without having duplication, without changing terms of office. And that's a big part of why we decided that we didn't need the 2022 election, because they already had two sets of officers who had been elected in separate years and were going to do their two years term of office.

**CC** When election cycles for organisations and branches are interrupted there are a number of issues that can arise. Things like delayed elections and declarations of results are the most obvious, as well as possible changes to the commencement of the terms of elected officers and their duration and end date. Are organisations able to adjust the terms of office to realign election cycles or ensure that the scheduled election cycle is maintained?

**BS** Well if an organisation thinks it needs to make changes to the terms of its elected officers, it might actually need to make changes to its rules.



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**CC** That can be an opportunity to make a better election rule can't it?

**BS** Yes it can. They may consider other things that the organisation or branch may want to make, which could have a real practical effect on how their elections are run going forward and how quickly they can be finalised. So some examples there are,



- changing the cut-off date for determining election-related calculations so it's known before the information is lodged with the Commission;
- removing out-of-date references;
- allowing for contingencies such as different forms of voting, so for example if there was a system whereby in-person voting was supposed to happen at a particular conference and that conference couldn't proceed, then allowing for postal voting as a back-up measure and likewise,
- practical changes like empowering the AEC so it can mark off the roll of voters as postal votes are received, rather than having to wait, as is the case with some sets of rules, until after the ballot closes, before even marking off that someone's returned a ballot paper.

Now changes like these can have a practical effect on timeframes, such as how soon the ballots can be counted and the result known.

And organisations will often take the opportunity of a rule change to clean up and modernise other rules. And if you send us a request for guidance on your draft rule changes, then here at the Commission we work with you and with the AEC to give you some simple, practical and effective guidance about rules that reflect how you want your elections to run.



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**CC** Bill, what happens if there is a rule change at the same time as an election? What do organisations need to do?

**BS** Well firstly, we strongly recommend that organisations and branches advise the Commission when lodging their prescribed information if there are any rule alterations that have been lodged or will soon be lodged. The template that we ask organisations to use, asks them to advise us of this. As you said earlier, the rules that control the election are the ones that exist on the day nominations open. If your rules change after that, then it may be too late for that particular election. That's why it's important to explore practical options with us as early as possible. It's also why it's prudent to lodge rule changes as early as possible.

Now engaging with us can include talking about rule changes to anything that will affect how elections are run, like any new offices that are created, restructures (such as creating or abolishing branches),



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any changes to the election timetable, and or to electorates or eligibility (so for example changes to who can vote and who's eligible to nominate).

Now if rule changes do come into effect before nominations open, then an organisation should lodge amended prescribed information setting out those changes and how they'll affect the election.



**00:10:48**

**CC** What do you mean by amended prescribed information?

**BS** It's just where information that's in the original prescribed information that was lodged has now changed and needs to be officially updated. For example, if your rule change created a new office. That new office wasn't in existence previously and so it wasn't in your original prescribed information. So as soon as the rules are changed, you can send us your amended prescribed information reflecting the new details. And if we know those rule changes are pending, we can even work with you to potentially draft the amended document in anticipation of those changes. That allows for speedy assessment and for issuing of amendments that the AEC needs to run the election. The same would apply if an elected office was abolished or varied, so we might need to remove the reference to the old one so there isn't an election run for it.

**CC** And so how do organisations lodge amended prescribed information?



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**BS** Well if you're working for your organisation on the election, you'll be contacting Commission staff and in particular the Commission staff member who worked on the original lodgement, who we commonly refer to as your action officer. So once those new rules have been certified and they legally exist, then you should contact your action officer and let them know they've been approved and that you're emailing in new prescribed information.

**CC** When we have assessed the prescribed information we will issue a decision. But there's other determinations that an organisation may receive from us about their elections. These are amending decisions and corrections. Bill can you step us through what the differences are between decisions and amending decisions or corrections are?



**BS** Sure. So most people will know what an election decision is: that's where the General Manager or their delegate approves or refuses the election. But sometimes there's an issue with the decision. That could be that the numbers of an offices that were to be elected was incorrect (for example, the decision says 3 to be elected, and it's actually 4) or, like in the example above, where an election isn't needed anymore. When that happens, the Commission will issue an amending or correcting decision to clarify the situation and what the legal obligations are.



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**CC** Once an election has been conducted, there will be a post-election report issued from the AEC that declares the results of the election. This is also a way for the AEC to communicate issues that occurred during the conduct of the election. Bill, what do organisations need to do with this report?

**BS** Well organisations need to take on board any feedback from the AEC report that highlights issues that occurred during the election, so they can take appropriate steps to remedy them before their next election is due. This might include whether the organisation had rules that were difficult for the AEC to apply or interpret (for example, because what was in the rule was unable to be achieved, or they contradicted other rules or contradicted the legislation). In this situation, the organisation must respond to the AEC within 30 days, providing a response to the issues raised with it. And the post-election report and any response from the organisation must also be made available to members, such as on the organisation's website.



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**CC** The Registered Organisations Governance and Advice Branch is available to help organisations with any questions or issues that they have around their elections. We have a range of tools and resources on our website, including two templates for prescribed information. We also send out courtesy letters to organisations to remind them when it appears that an election is due.

**BS** That's right Claire – we want to be a proactive and helpful regulator, and we want to ensure that organisations can comply with the election process at all stages. Candidates or members can dispute the election results or ask the court to conduct inquiries into any irregularities in an election – so getting it right is extremely important for organisations and their members, and important for the AEC.





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We get some good feedback about our courtesy letters reminding organisations that elections are due, but I just want to highlight that they are just that – they’re a courtesy reminder. The obligation still falls on the organisation or branch to ensure that they lodge their prescribed information for all of the roles that are due for election under their rules. An organisation or branch can phone or email us at any time to discuss what they need to do.



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**CC** At the end of the day, good communication is central to the election process. Organisations who let us know about any issues up front can work with us to find practical solutions that achieve what they need to. Letting us know about any issues as early as possible can really assist and often speed up the decision-making process for the elections that you’re needing to have run. Thank you for joining me today, Bill.

**BS** Thank you Claire.

**CC** Don’t forget to join us next month for the next instalment of RO Pod: we’ll be discussing the requirement for officers with financial duties to complete financial training within six months of taking office.

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