



RO POD episode 51 – New enforcement tools

Speaker Key

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SG: Hello and welcome to RO pod. I'm Sam Gallichio, a Senior Adviser in the Education and Advice Team of the Registered Organisations Services Branch here at the Fair Work Commission. Today we'll be talking about new enforcement tools that have been given to the General Manager of the Commission, their current and future application, and the effects of these for registered organisations.

With me today is Patrick Coyle, Legal Counsel for the Branch and head of our Legal and Rules Team. Welcome Patrick.



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PC: Hi Sam, thanks for having me.

SG: No problems at all. So, in March last year all the functions for regulating registered organisations under the *Fair Work (Registered Organisations) Act 2009*, or the 'RO Act' as we call it, were consolidated in the General Manager of the Fair Work Commission. At the same time the General Manager was granted some additional enforcement powers. Can you tell us a bit about those changes and the context in which they came about?



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PC: Yes, before these recent changes the regulator didn't have that many options that were available to respond to non-compliance by organisations or individuals. Now the circumstances in which non-compliance might arise can differ in many different cases. Non-compliance could involve anything from serious harm through to quite trivial matters; and it could involve thousands of contraventions or just one; and it can be deliberate misconduct or it can relate to a genuine mistake.

Until recently, the primary enforcement tool that had been available to the regulator was to commence civil penalty proceedings in the Federal Court. Now this is a course that the regulator did not take lightly. Despite seeing thousands and thousands of potential contraventions, over the last ten years the regulator has only commenced a dozen proceedings. In relation to the rest of the contraventions we see, the regulator has sought to work cooperatively with organisations to educate, improve compliance and remediate any errors.

The new powers have been granted to the General Manager, now enable the General Manager to enter into enforceable undertakings and issue infringement notices. These new enforcement options provide for a more flexible, proportionate and targeted approach to non-compliance which may save time, costs and result in a less adversarial outcome.

Many of these options have been available to other regulatory agencies for some time and been used to good effect.



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- SG:** So some of our listeners might already be familiar with enforceable undertakings, but for those who aren't, can you explain what an enforceable undertaking is under the RO Act?
- PC:** Yes, and enforceable undertaking is a voluntary, binding agreement that a person or organisation can make, committing to take, or not take, specific action to comply with a provision of the RO Act. An enforceable undertaking can be directed toward non-compliance that has already occurred or tailored to prevent future non-compliance.

The terms of the enforceable undertaking are negotiated to ensure that compliance with it is acceptable and achievable.



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- SG:** What provisions of the RO Act can enforceable undertakings apply to?
- PC:** Any of the provisions in the RO Act may be subject to an enforceable undertaking, this includes provisions that are not civil penalty provisions. That means that an enforceable undertaking can have a broad application including to matters relating to the organisation's compliance with its own rules, record keeping practices, management policies and procedures or, if an organisation has an election exemption to conduct their own elections, about how those election processes are undertaken.
- SG:** That's really interesting - and sounds like it could apply to a variety of matters.
- PC:** Absolutely, and the actions that a party might agree to could include anything from completing training, to compliance reporting, changing their processes, conducting an internal or external audit, implementing fraud controls, making rule alterations, issuing a public notice or making contrition payment.



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SG: In addition to the specified action that's at the heart of an enforceable undertaking, are there any other elements that might be included?

PC: Yes, there are some other matters that the General Manager is likely going to want to see in any enforceable undertaking. As it is a voluntary process, we would expect to see an acknowledgement by the party making the undertaking that shows that it understands it has not complied with the RO Act and is prepared to take genuine steps to voluntarily remediate the issue through future actions.

SG: So we've talked about what an enforceable undertaking is, but how do they work with our other tools? Are they used alongside or instead of actions we've used in the past, such as conducting an investigation or commencing proceedings in the Federal Court?



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PC: Well, we may accept an enforceable undertaking instead of, or in addition to, some of those other formal enforcement actions you've talked about. We can agree to an enforceable undertaking at any time including to resolve civil penalty proceedings that have been started. In determining whether to do so, we consider a number of factors including whether an enforceable undertaking will be a proportionate and appropriate response given the nature of any compliance concerns. We also look at their seriousness, any relevant compliance history of the person or organisation, and any other relevant circumstances.

Another factor is whether it would provide an adequate deterrence against future misconduct by the person and by other organisations. Finally, we assess whether the outcome advances the General Manager's functions by promoting the efficient management and democratic functioning and control of organisations and embedding within the organisation a culture of good governance and voluntary compliance with the law. We expect to release our updated Compliance and Enforcement Policy soon which will set out these factors in more detail.



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SG: Is there also a public interest component that's weighed up?

PC: Yes, as a government agency, all decisions made are looked at through a public interest lens, and this is no different. In addition, a major factor to contemplate is whether it would be in the best interests of the organisation's members.

SG: Can an organisation draft an enforceable undertaking?

PC: We will generally prepare the draft enforceable undertaking but certainly an organisation can have significant input into it as this is an agreement. The party to the enforceable undertaking can seek independent legal advice and request changes by agreement with the General Manager before signing it.



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SG: How long does an enforceable undertaking last?

PC: An enforceable undertaking will remain in place while its terms continue to have effect unless it is cancelled by the General Manager. A party to an enforceable undertaking can withdraw or vary the undertaking at any time, but only with the written consent of the General Manager. When we are satisfied that all the obligations under an enforceable undertaking are complete, a letter will be sent to inform the person or organisation giving the undertaking that it's complete. We expect parties who have been involved in this process to maintain high levels of compliance once the undertaking is completed. A party to an undertaking can expect us to take stronger regulatory action in the future if further non-compliance occurs.



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SG: What's the Commission going to do to ensure that an enforceable undertaking is being honoured by the person or organisation?



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PC: Monitoring compliance with undertakings is central to their credibility. Depending on the undertakings requirements, the person giving the undertaking should expect the Commission to check in on their progress. We also expect that party to monitor their own compliance with the enforceable undertaking and proactively and routinely report to the Commission on compliance with it and any progress being made.

SG: What would happen if an enforceable undertaking is breached?

PC: Failure to comply with the agreed terms of an enforceable undertaking is a serious matter. If we consider that a person has breached an enforceable undertaking, we may apply to a court for orders enforcing it.



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SG: In that case, what kind of outcomes could the court order if a breach is found?

PC: Well there are several options available to a court in those circumstances. For instance, they may direct the organisation to comply with the enforceable undertaking. They also can order that a payment be made to the Commonwealth of an amount to any financial benefit they received directly or indirectly, that is reasonably attributable to the breach.



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SG: I understand that even though these enforcement powers are quite new, the General Manager recently entered in to the first enforceable undertaking with a registered organisation. Can you tell us about that?

PC: That's right Sam. In December last year the General Manager entered into the Commission's first enforceable undertaking after the CPSU, this related to the State Public Services Federation admitting to non-compliance by its Western Australia Prison Officer's Union Branch.

SG: If I'm not mistaken, there was an inquiry into that Branch around conducting branch elections internally, rather than through the Australian Electoral Commission, and I think also failing to lodge notifications of change. Was the enforceable undertaking did that come about as a result of the inquiry?



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PC: Yes, it did. To the credit of organisation and the Branch, they were fully cooperative throughout the inquiry, and in the enforceable undertaking admitted to contraventions regarding conducting internal branch elections. They each acknowledged the seriousness of these failures, and committed to strengthening its governance and compliance framework to ensure they would not be repeated.



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SG: Are enforceable undertakings, such as the one entered into by the CPSU, are they private documents or are they available to our listeners who might be interested in seeing what an enforceable undertaking looks like?

PC: As a general rule, we intend to publish enforceable undertakings on our website. And the undertaking that's been given by the CPSU is currently available for review on there.



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SG: Now we've spoken a lot about enforceable undertakings so far, but I'd like to explore infringement notices which is another new enforcement power. Would be able to tell us a bit more about them?

PC: Yes. Infringement notices are also new for us, and are akin to providing a fine that relates to certain provisions in the RO Act. Our listeners might be more familiar with this type of notice in the context of the powers of the Fair Work Ombudsman where there has been a breach of workplace laws.

SG: When can an infringement notice be issued?

PC: An infringement notice can only be issued when an infringement officer believes on reasonable grounds that a person has contravened a provision that is subject to an infringement notice. Importantly, the infringement notice must be given within 12 months after the day on which the contravention is alleged to have taken place, so it will only be able to be used in some cases.



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SG: So, who is an infringement officer?



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- PC:** Under the RO Act, the General Manager is considered to be the relevant chief executive. He can appoint members of the staff of the Commission as infringement officers, providing that they have the knowledge or experience necessary to properly exercise the powers of an infringement officer.
- SG:** Earlier you touched on enforceable undertakings potentially applying to all provisions of the RO Act generally but with this one you said “a provision that is subject to an infringement notice”. What does that mean?



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- PC:** Well Sam, unlike enforceable undertakings, the RO Act specifically lists those provisions which can be subject to an infringement notice. It's quite a long list, but it does not cover all of the obligations on organisations under the Act. An infringement notice can only be issued to a person ‘in relation to a contravention’ that is listed in the RO Act and these can be found at section 316A or in the (RO) Regulations at 176AA.
- SG:** Looking at those provisions, some examples which could be the subject to an infringement notice include non-financial members not being removed from the register of members, not lodging prescribed information for an election in the prescribed period, not keeping, recording or lodging certain records with the Commission, and not following financial reporting requirements correctly.
- PC:** Yes and there are also plenty more, but we probably don't need to list them all here! The list includes some provisions that as a regulator we have not had historically any involvement in, such as provisions that relate to complying with election powers given to the Australian Electoral Commission when it conducts industrial elections.



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- SG:** Am I right in saying that it's not just the registered organisation that can be issued an infringement notice, but officers and individuals as well?
- PC:** Absolutely. But again you have to have a look at the whole list. For example an infringement notice can be issued to an officer if they have failed to meet their disclosure and conflict of interest



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obligations, but it doesn't apply to breaches of officers' duties relating to care and diligence, acting in good faith and or not misusing their position.

SG: If our listeners would like to know more about what could be subject to an infringement notice, they can see the provisions listed at section 316A of the RO Act and regulation 176A A of the (RO) Regulations. So how do infringement notices work?



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PC: Well infringement notices can be issued if an infringement officer believes on reasonable grounds that a person has contravened one of the infringement notice provisions. The infringement notice will set out the amount of a fine, which is calculated in accordance with the statute, and a date by which the infringement notice can be paid.

A person receives an infringement notice can decide to pay it, and if they do that's the end of the story, that payment is not taken as an admission of guilt and the General Manager could not take any further steps in relation to the contravening conduct, such as by commencing civil penalty proceedings.

However if a person who receives an infringement notice decides not to pay it, the General Manager could then consider whether it's appropriate to take further enforcement action, and this could certainly involve commencing civil penalty proceedings. In that case the party could ultimately incur additional costs and might receive an adverse judgment, findings of contravention, and a penalty that is higher than the amount that was set out in the infringement notice. In this way, paying the infringement notice could save an organisation the time, cost, inconvenience and possible adverse public attention involved in court proceedings.



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SG: I'm aware that ASIC, the ACCC and the Fair Work Ombudsman use enforceable undertakings and infringement notices as well. Are our enforcement tools and the way we enforce them the same, or are there differences?



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PC: Well each of those agencies you mention have their own unique statutory provisions. The new powers that have been given to the General Manager adopt a scheme provisions from the *Regulatory Powers (Standard Provisions) Act* which are a model set of rules that can be adopted in other statutes. But in determining how the General Manager might use these new powers we have certainly looked at what those other agencies are doing successfully and modelled our approach accordingly.



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SG: We've published two guidance notes about enforceable undertakings and infringement notices on our website that's available for registered organisations to view to find out more information on this topic.

Before we go today, I'd just like to remind our listeners that our email address where you can contact us and lodge documents is regorgs@fwc.gov.au. And if you have any questions about enforceable undertakings, infringement notices or anything else, our phone number is 1300 341 665.

Thanks for your time today Patrick, and for sharing your expertise on these new enforcement tools with us.

PC: Thanks Sam. It's been my pleasure talking with you.

SG: Please tune in to our next episode of RO pod, which will be released in April.



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