



Australian Government

Registered Organisations Commission

PP 002

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## Litigation Policy

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### Relevant Legislation or materials:

*Fair Work (Registered Organisations) Act 2009**Fair Work (Registered Organisations) Amendment Act 2016**Fair Work (Registered Organisations) Amendment Regulations 2017**Legal Services Directions 2005**Prosecution Policy for the Commonwealth (Nov 2008)*

## 1. ROC policies

- 1.1. The purpose of this policy is to publish advice on the Registered Organisations Commission's (the ROC's) policies and procedures regarding the conduct of litigation under the *Fair Work (Registered Organisations) Act 2016* (the RO Act) and the *Fair Work (Registered Organisations) Regulations 2009* (the RO Regulations). In particular, this policy sets out guidelines to be followed by the ROC in making decisions relating to the commencement of civil proceedings in the Federal Court of Australia under subsection 336(2) of the RO Act in relation to contraventions of the RO Act.
- 1.2. The *ROC Litigation Policy* is based on the *Prosecution Policy of the Commonwealth* (November 2008) which sets out guidelines for the making of decisions in all Commonwealth prosecutions, whether or not conducted by the Commonwealth Director of Public Prosecutions (CDPP). The *Prosecution Policy of the Commonwealth* is, however, concerned with the decision to institute (or continue) criminal proceedings. While the ROC does have a limited power to investigate offences at the conclusion of any such investigation the ROC Commissioner will, where appropriate, refer a brief of evidence to the CDPP concerning possible prosecution of those offences by the CDPP. As such, the ROC does not prosecute criminal contraventions of the RO Act.
- 1.3. This *ROC Litigation Policy* has been developed concerning the commencement of civil proceedings by the ROC in the Federal Court of Australia.

- 1.4. Information concerning the ROC's conduct of inquiries and investigations concerning possible civil penalty contraventions and offences is set out in the *ROC Regulatory Compliance Policy* and the *ROC Offences Policy* respectively.
- 1.5. This policy addresses the following topics:
  - a. **ROC policies** (paragraph 1);
  - b. **About the ROC** (paragraph 2);
  - c. **Regulation of registered organisations and their officers, employees** (paragraph 3);
  - d. **Litigation as a compliance tool** (paragraph 4);
  - e. **Nature of contraventions** (paragraph 5);
  - f. **The decision to commence civil proceedings** (paragraph 6);
  - g. **Sufficient evidence** (paragraph 7);
  - h. **Public interest** (paragraph 8);
  - i. **Choice of contraventions to be litigated** (paragraph 9);
  - j. **Breach bargaining** (paragraph 10);
  - k. **Discontinuance of proceedings** (paragraph 11); and
  - l. **Submissions on penalty** (paragraph 12).
- 1.6. ROC policies do not have the force of statute. While the ROC will seek to meet the requirements of its policies in carrying out functions, failure by the ROC to comply with the *ROC Litigation Policy* cannot affect the validity of decisions that are made concerning litigation or the conduct of litigation.

## **2. About the Registered Organisations Commission (the ROC)**

- 2.1. The ROC is established by s.329DA of the *Fair Work (Registered Organisations) Act 2009* (the RO Act).
- 2.2. The ROC consists of a ROC Commissioner (the Commissioner) and any staff assisting the Commissioner.
- 2.3. The Commissioner is established by s.329AA of the RO Act. The Commissioner is responsible for, amongst other things, carrying out various functions under the RO Act, including conducting inquiries and investigations and conducting litigation in the Federal Court of Australia in relation to contraventions of the RO Act.
- 2.4. Prior to 1 May 2017, the ROC's functions were carried out by the administrative arm of the Fair Work Commission, formerly Fair Work Australia. Fair Work Australia commenced on 1 July 2009. Prior to 1 July 2009, Fair Work Australia's functions were

carried out by the Australian Industrial Registry and the functions of the Commissioner were carried out by the Industrial Registrar under the Workplace Relations Act 1996.

### **3. Regulation of registered organisations and their officers, employees and auditors**

3.1. The ROC's litigation activities are part of a broader regulatory framework which includes a combination of education and voluntary compliance and the conduct of inquiries and investigations which are aimed at bringing about compliance with obligations that are placed by the RO Act upon registered organisations, their officers, employees and auditors. The *ROC Regulatory Compliance Policy* sets out detailed information about the regulatory framework.

### **4. Litigation as a compliance tool**

- 4.1. The key aim of the ROC in commencing litigation against registered organisations, their officers, employees and auditors is to ensure compliance with legislative obligations set out in the RO Act and RO Regulations. In particular, the ROC is concerned with ensuring that there are high levels of accountability of registered organisations to their members.
- 4.2. At the conclusion of an investigation under Part 4 of Chapter 11 of the RO Act, actions that are available to the Commissioner under section 336 of the RO Act are to:
- a. issue a notice to the reporting unit requesting that the reporting unit take specified action, within a specified period, to rectify the matter (rectification notice).<sup>1</sup> The Commissioner may commence proceedings in the Federal Court of Australia:<sup>2</sup>
    - i. to enforce a rectification notice;<sup>3</sup> and
    - ii. seeking cancellation of the registration of a registered organisation for failure to comply with an order of the Federal Court that was made with respect to a rectification notice;<sup>4</sup> and
    - iii. apply for an order under Part 2 of Chapter 10 of the RO Act regarding civil penalty provisions.<sup>5</sup> Orders may be sought for:
    - iv. imposition of a pecuniary penalty;<sup>6</sup>
    - v. compensation<sup>7</sup> or other orders;<sup>8</sup> or
    - vi. declaratory relief.

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<sup>1</sup> Section 336(2)(a).

<sup>2</sup> The Commissioner can authorise another person in writing under section 310(1) to commence proceedings.

<sup>3</sup> Section 336(5).

<sup>4</sup> Section 28(1A).

<sup>5</sup> Section 336(2)(b).

<sup>6</sup> Section 306.

<sup>7</sup> Section 307.

<sup>8</sup> Section 308.

- 4.3. Civil penalty provisions of the RO Act are identified in section 305 of the RO Act as including subsections or sections that have set out at their foot a pecuniary penalty or penalties indicated by the words 'civil penalty'.
- 4.4. Civil penalty provisions are also contained in the RO Regulations. These provisions primarily concern the conduct of elections and ballots by the Australian Electoral Commission (AEC). Where such a matter has been referred to the Commissioner by the AEC under the RO Regulations, he or she may initiate Federal Court proceedings.<sup>9</sup>
- 4.5. While the decision to commence proceedings in the Federal Court of Australia is typically made at the end of an investigation, proceedings can be commenced without an investigation as long as the Commissioner otherwise has a proper evidentiary basis to commence such proceedings. Such a situation may arise, for example, where the AEC has referred evidence regarding possible contraventions of civil penalty provisions of the RO Regulations to the Commissioner.

#### 5. Nature of contraventions

- 5.1. The RO Act and RO Regulations distinguish between civil penalty provisions and offences. An 'offence' denotes criminal liability and is to be distinguished from civil penalty liability. The ROC Litigation Policy only relates to proceedings instituted by the ROC with respect to contraventions of civil penalty provisions.
- 5.2. As set out in paragraph 1.2 above, at the conclusion of any such investigation, the Commissioner will, where appropriate, refer a brief of evidence to the CDPP concerning possible prosecution of those offences by the CDPP.<sup>10</sup> The Commissioner does not prosecute criminal contraventions of the RO Act.
- 5.3. The Commissioner is not empowered to investigate possible criminal offences under other Commonwealth, State or Territory laws. Investigations of possible criminal offences under Commonwealth, State and Territory laws are carried out by the AFP, State or Territory police forces according to their jurisdiction. Upon receipt of a brief of evidence, criminal prosecutions can be initiated by the Commonwealth Director of Public Prosecutions (CDPP), their State/Territory counterparts or police prosecutors, depending upon the nature of the offence. Prosecutors have sole discretion to commence, or not commence, a criminal prosecution and for the conduct of any case taken to court in respect of an offence.
- 5.4. In a criminal matter the prosecution must prove the facts to the strictly applied legal standard of 'beyond reasonable doubt'. However, the facts of a civil case need only be proved to the lesser standard of 'on the balance of probabilities' (see *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362).

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<sup>9</sup> Regulation 171 provides amongst other things that the Commissioner may apply to the Court to make an order for contravention of the civil penalty provisions in the RO Regulations.

<sup>10</sup> Section 336(2)(c).

## 6. The decision to commence civil proceedings

- 6.1. The decision to commence civil proceedings under section 336(2)(b) of the RO Act rests with the Commissioner.<sup>11</sup>
- 6.2. Application may be made for an order in the Federal Court of Australia by the Commissioner or by some other person authorised in writing by the Commissioner under section 310(1) of the RO Act.
- 6.3. To the extent that it is applicable, the ROC will have regard to the *Prosecution Policy for the Commonwealth* in making its own decisions regarding commencement of civil proceedings under the RO Act. In determining whether (or not) to commence civil proceedings, the Commissioner is mindful of the need to maintain public confidence in the ROC's regulatory role under the RO Act and RO Regulations and of the need to meet standards of fairness, openness, consistency and accountability and efficiency in commencing proceedings concerning contraventions of the RO Act.
- 6.4. Not all contraventions will automatically result in proceedings in the courts. The resources available for court proceedings are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that available resources should be employed to pursue with appropriate vigour those cases that are worthy of prosecution. Further, the Commissioner is required by section 15 of Public Performance and Accountability Act 2013 to manage the affairs of the administrative arm of the ROC in a way that promotes 'proper use' of Commonwealth resources. The term 'proper use' is defined in that section as meaning 'efficient, effective, economical and ethical use that is not inconsistent with the policies of the Commonwealth'.
- 6.5. The decision whether to commence proceedings is the most important in the litigation process. In every case, great care must be taken in the interests of the party against whom proceedings will be brought and the community at large to ensure that the right decision is made. A wrong decision to commence proceedings or, conversely, a wrong decision not to commence proceedings both tend to undermine the confidence of the community in the regulatory system.
- 6.6. The objectives of fairness and consistency are of particular importance but it must be recognised that general principles must be tailored in their application to individual cases.
- 6.7. In determining whether to commence proceedings, the Commissioner will consider:
  - a. firstly, whether there is sufficient evidence to justify the commencement of proceedings and which indicates that there is a reasonable prospect of success; and
  - b. secondly, whether it is in the public interest taking into account the facts of the case and the surrounding circumstances.
- 6.8. Similarly, in determining whether to institute an appeal against a decision at first instance, the Commissioner will consider the merits of such an appeal and the public

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<sup>11</sup> Section 343A(2)(j).

interest, including the expenditure of public monies and the creation of legal precedents.

## 7. Sufficient evidence

- 7.1. It is not sufficient that there simply be a *prima facie* case. It is also necessary to consider the prospects of success. A matter should not be commenced if there is no reasonable prospect of success.
- 7.2. In determining whether there is sufficient evidence to indicate that there is a reasonable prospect of success, the Commissioner:
  - a. will consider whether there is admissible, substantial and reliable evidence that a contravention of the RO Act has occurred;
  - b. will evaluate the strength of the case that is likely to be presented to the court. This must take into account such matters as:
    - i. the availability, competence and credibility of witnesses;
    - ii. any admissions that have been, or are likely to be, made by parties against whom proceedings are to be brought;
    - iii. any defences that are available to, or have been identified by, parties against whom proceedings are to be brought; and
    - iv. any other factors that the Commissioner is of the view may affect the likelihood or otherwise of the litigation succeeding.
- 7.3. Before commencing proceedings, clause 4.7 of the *Legal Services Directions 2005* requires the ROC (except in urgent circumstances) to obtain written legal advice from lawyers whom the ROC is permitted to use in the proceeding indicating that there are reasonable grounds for starting the proceedings.

## 8. Public interest

- 8.1. Once it is established that there is sufficient evidence justifying the commencement of proceedings and that there is a reasonable prospect of success, the Commissioner will consider whether it is in the public interest to commence litigation in light of the provable facts and the whole of the surrounding circumstances.
- 8.2. Not all contraventions of the RO Act will warrant the commencement of proceedings. The factors that can properly be taken into account in deciding whether the public interest requires that proceedings be commenced will vary from case to case.
- 8.3. Public interest factors which operate in favour of commencing proceedings include the seriousness of the contravention and the need for deterrence. Generally speaking, the more serious the contravention, the more likely it will be that the public interest will require that the matter be litigated. Deterrence can be of a specific or general nature.

8.4. The factors that will arise for consideration by the Commissioner in determining whether the public interest requires that proceedings be commenced include the following matters:

a. The nature and circumstance of the alleged contravention:

i. The seriousness or, conversely, the relative triviality of the alleged contravention, including whether it is of a 'technical nature' only.

For example, a 'technical' contravention may arise where a GPFR has not been prepared in full accordance with Australian Accounting Standards but members of a registered organisation were nevertheless initially provided with most of the information that is required and full disclosure was subsequently achieved through redistribution of the GPFR in question; and

ii. The actual or potential consequence of the alleged contravention, including in particular the consequence for members of the registered organisation. Consistent with the objects of the RO Act, the ROC is concerned with ensuring that there are high levels of accountability of registered organisations to their members.

b. Factors relevant to the parties against whom proceedings may be commenced:

i. The degree of culpability of the party against whom proceedings may be commenced.

For example, the degree or extent to which a party voluntarily complied with any advice that had been given by the ROC in relation to complying with regulatory requirements and whether there was a genuine misunderstanding of legislative regulatory requirements;

ii. The compliance history of the organisation and its officers, employees and auditors (including, where relevant, responses to previous enforcement and prevention activities undertaken by the ROC);

iii. The attitude of parties (including any measures taken towards voluntary compliance); and

iv. The degree of involvement of officers and members of the committee of management and of members of the registered organisation in the alleged contravention.

c. Whether the nature of the alleged contravention is of considerable public concern. The ROC assumes that, in all cases, the public is concerned about compliance with the RO Act.

d. The likely impact of proceedings on:

i. General deterrence (i.e. reducing the likelihood that other registered organisations, their officers, employees and auditors will commit similar contraventions or otherwise contravene the RO Act); and

- ii. Specific deterrence (i.e. reducing the likelihood that the registered organisation in question will further contravene the RO Act).
- e. The effect of litigation:
  - i. The likely orders that may be made by the court in the event of a finding of contravention;
  - ii. The availability and efficacy of any alternatives to litigation, such as the issuance of a rectification notice and voluntary compliance; and
  - iii. Whether the consequences of any finding of contravention by the court would be unduly harsh and oppressive.
- f. Administrative considerations:
  - i. The necessity to maintain public confidence in the administration of the RO Act by the ROC;
  - ii. The likely length and expense of litigation;
  - iii. The obsolescence or obscurity of the law;
  - iv. Whether the commencement of proceedings would be perceived as counter-productive, for example by bringing the law into disrepute;
  - v. Whether there is a need for judicial clarification of the requirements of the RO Act; and
  - vi. The period of time that has elapsed since the alleged contraventions occurred.

- 8.5. The Commissioner's decision whether or not to commence proceedings will not be influenced by:
- a. race, religion, sex, national origin or political association, activities or beliefs of any person involved in the alleged contraventions;
  - b. personal feelings concerning the registered organisation, its officers, employees or auditor;
  - c. possible political advantage, disadvantage or embarrassment to the government or any political group or party; or
  - d. the possible effect of the decision on the personal or professional circumstances of the Commissioner.

## **9. Choice of contraventions to be litigated**

- 9.1. In many cases the evidence will disclose a number of possible contraventions of the RO Act and RO Regulations.
- 9.2. The Commissioner will take care to choose to commence proceedings only with respect to those possible contraventions which adequately reflect the nature and



extent of offending conduct disclosed by the evidence and which will provide the court with an appropriate basis for determining a penalty.

- 9.3. In the ordinary course, the Commissioner will proceed with possible contraventions that are substantiated by the admissible evidence. There may be cases where there is public interest in commencing proceedings concerning a number of contraventions. Under no circumstances will the Commissioner commence proceedings with respect to a particular proposed contravention for the purpose of providing scope for subsequent 'breach bargaining'.

#### **10. Breach bargaining**

- 10.1. Breach bargaining involves seeking a resolution of a proceeding by consent between the respondent and the Commissioner. If breach bargaining is successful, the parties will seek orders from the court by consent to resolve the proceeding.
- 10.2. A breach bargaining decision may only be made by the Commissioner.
- 10.3. Once the Commissioner has decided to pursue contraventions in a proceeding based on a careful assessment of the public interest, the Commissioner will usually only agree to resolve the proceeding on the basis of admissions to all pleaded contraventions. Nevertheless, circumstances may change or new facts may come to light which will make it appropriate, in the interests of justice or in the public interest, to proceed with fewer contraventions or to accept admissions to only some of contraventions.
- 10.4. Discussions between the Commissioner and the respondent are to be encouraged and may occur at any stage of the progress of a matter through the courts and may be initiated by the ROC.
- 10.5. Before agreement on a resolution is reached, the Commissioner must be satisfied that the contraventions regarding which admissions have been made:
- a. bear a reasonable relationship to the nature of the offending conduct;
  - b. provide an adequate basis for an appropriate penalty in all the circumstances of the case; and
  - c. are supported by evidence, such as an agreed statement of facts.
- 10.6. In many cases, the interests of justice will be served if a respondent admits agreed contraventions in circumstances described in paragraph 10.5 above and the community is not put to the burden of funding a long and expensive hearing.
- 10.7. A proposal by a respondent that it will agree to particular contraventions or accept a lesser number of contraventions may include a request that the ROC not oppose a submission by the respondent to the court that the penalty falls within a nominated range. The Commissioner may accept the proposal provided the range of penalty nominated is within appropriate limits having regard to all relevant matters including balancing the need for general and specific deterrence against any mitigating

circumstances—refer also to paragraph 12 below. Ultimately, the penalty that is imposed remains a matter for the court's discretion.

- 10.8. Under no circumstances will the ROC entertain a breach bargaining proposal if the respondent maintains their innocence with respect to the contraventions it has offered to concede. The respondent must genuinely accept wrong-doing on their behalf and be prepared to admit that publicly and to the court.

#### **11. Discontinuance of proceedings**

- 11.1. Consistent with the objective of ensuring that only appropriate cases are brought before the courts, the ROC will discontinue proceedings if appropriate.
- 11.2. The decision whether or not to discontinue proceedings rests with the Commissioner.
- 11.3. Having regard to the considered assessment undertaken by the Commissioner as to the public interest before the commencement of proceedings and the opportunity generally afforded for voluntary compliance, discontinuance is not usually agreed to.

#### **12. Submissions on penalty**

- 12.1. Where litigation results in a finding that the registered organisation laws have been contravened, the court will move to consider what penalty, if any, should be imposed.
- 12.2. The maximum penalty that can be imposed on a registered organisation (body corporate) has, in the case of body corporates, increased to 5 times the pecuniary penalty specified for the civil penalty provision and for other, is the pecuniary penalty specified for the civil penalty provision.<sup>12</sup> Penalties as high as 1,200 penalty units (times five for body corporates may be imposed. The current amount of a penalty unit under the Crimes Act 1914 is \$180.
- 12.3. Where appropriate, the ROC will seek penalties that balance the aims of general and specific deterrence with those circumstances that, in individual cases, constitute relevant penalty considerations. Where wrongdoers have co-operated with the ROC and also made admissions early in the course of an investigation, or soon after the commencement of proceedings, it is appropriate to allow a discount on penalty if the wrongdoer demonstrates contrition and a willingness to facilitate the course of justice (see the decision in *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70, at 71–76 per Stone and Buchanan JJ).
- 12.4. As noted at paragraph 12.2 above, the maximum penalties have recently increased. The size of, and recent increases to, the prescribed penalties is a relevant consideration in determining an appropriate penalty in all of the circumstances. The increase in the penalty reflects the importance of compliance with the RO Act and the subsequent significance that should attach to contraventions of these provisions.<sup>13</sup>

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<sup>12</sup> See section 306.

<sup>13</sup> See item 10 of the Explanatory memorandum to the *Fair Work (Registered Organisations) Amendment Bill* 2012.