

SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE: RESPONSE TO QUESTION ON NOTICE

Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019

Public hearing, Friday, 13 September 2019, Brisbane

Senator PATRICK: Okay. To manage time, on notice—and I invite any of the unions here to provide this information—could you provide the committee with information where the ROC has initiated an application to a court in respect of what we call a paperwork issue?

Background

The Registered Organisations Commissioner (**ROC**) can commence proceedings in the Federal Court of Australia concerning compliance by a registered organisation, its officers, employees and auditors with the *Fair Work (Registered Organisations) Act 2009* (Cth) (**RO Act**).

Proceedings commenced prior to 1 May 2017 were conducted by the General Manager of the Fair Work Commission (**FWC**). The Commissioner was substituted as the applicant in proceedings that continued after 1 May 2017.

We have included below all prosecutions initiated or continued by the ROC for contraventions of the RO Act since it commenced on 1 May 2017.¹ As can be seen, all of the prosecutions initiated or continued by the ROC (since 2016) have been in relation to “paperwork issues”.²

This trend could reflect either or both of the fact that the union movement has worked hard to improve governance and compliance since the HSU corruption issues that emerged in 2008 and 2011, and a change in the regulator’s enforcement focus and approach since the ROC took over in May 2017.

Several of the prosecutions relate to a failure to maintain an up-to-date list of officer holders. For context, the maximum penalty is 60 penalty units per breach (\$12,600). By contrast, companies who file late notices of change of office holder are able to pay a late fee of \$80 for a change of details lodged up to one month after a change occurred and \$333 for a change of details lodged more than one month after a change occurred. Companies can make these changes via an online portal (which is not currently available to registered organisations).

Further, the CEPU, being one of the unions that the ROC has prosecuted in respect of this issue, has 551 office holders. Such a high number of office holders is very common for unions, but rare for companies. For example, BHP has a board of 11,³ and the Woolworths Group has a board of nine.⁴

The compliance burden on registered industrial organisations is significant. The NT Master Builders Association in its 2018 application to deregister said that “de-registration was the only viable option” available to it in an effort to “modernize” its governance in the face of a “heavy compliance burden” due to the “complexity and amount of legislation” that registered organisations must comply with. The organisation decided to instead become a not-for-profit company limited by guarantee.

¹ The information provided in this response has been sourced from the Registered Organisations Commission website (<https://roc.gov.au/inquiries-and-investigations>) and input from ACTU affiliates.

² With the exception of one case in which a union secretary overpaid himself in what the Court found to be “genuine belief” he was entitled to the payment.

³ <https://www.bhp.com/our-approach/our-company/leadership-team>

⁴ <https://www.woolworthsgroup.com.au/page/about-us/our-leadership-team/board-of-directors>

Completed Federal Court proceedings

<p><u>Registered Organisations Commissioner v Australian Hotels Association</u> [VIC1442/2018] – commenced 13 November 2018; judgment delivered 17 September 2019.</p>	<p>The ROC prosecuted the AHA over alleged record-keeping breaches at one of its branches. These allegations again predominantly related to failures to update its list of the names, postal addresses and occupations of the officer holders.</p> <p>The AHA admitted to:</p> <ul style="list-style-type: none"> • contravening s 189(2) by failing to lodge prescribed information in relation to elections for officers on 16 occasions between 2003 and 2016; • contravening s 230(1)(c) by failing to update its list of the names, postal addresses and occupations of the persons holding offices in the organisation, upon changes to the identity of such persons on 17 occasions between 2005 and 2016; and • contravening s 233(2) by failing to lodge notices of changes to the record required under s 230(1)(c) on 17 occasions between 2006 and 2017.
<p><u>Registered Organisations Commissioner v Australian Nursing and Midwifery Federation & Anor</u> [WAD470/2015] – commenced 21 August 2015; judgment delivered on liability on 13 November 2018 and penalty on 14 December 2018.</p>	<p>The FWC prosecuted the ANMF and the Secretary of the WA Branch, Mark Olson, for the Branch's late filing of its financial reports over three years.</p> <p>The ANMF admitted the contraventions and was commended by Justice Barker for urging the Branch to comply with its financial reporting obligations.</p> <p>Mr Olson, who is himself a registered nurse, unsuccessfully defended the application, citing the difficulties faced by a Branch Secretary in managing compliance obligations on top of the work of advancing and protecting members' industrial interests.</p>
<p><u>Registered Organisations Commissioner v Transport Workers Union</u> [NSD2041/2016] – commenced 25 November 2016; judgment delivered 2 February 2018. Appeal: <u>Transport Workers Union of Australia v Registered Organisations Commissioner</u> [NSD232/2018] – judgment delivered on 21 November 2018.</p>	<p>The ROC prosecuted the TWU for contraventions of ss172(1) and 231(1) relating to a failure to properly maintain the membership register of its NSW Branch and for two branches failing to keep a copy of the register as it stood on 31 December in several years. The TWU admitted the contraventions, which were due to problems with their record-keeping system that have since been corrected. Justice Perram commended the TWU's replacement system.</p>
<p><u>Registered Organisations Commissioner v Michael Mijatov</u> [NSD2181/2016] – commenced 19 December 2016 and concluded on 22 June 2018.</p>	<p>The Court fined a former Flight Attendants' Association international division secretary \$2000 for failing to submit six years of the union's budgets (a requirement under the union's rules, not a statutory requirement) and overpaying himself \$16,000 in 2011, taking into account his cooperation and "genuine belief" he was entitled to the sum.</p>

Current Federal Court proceedings

<p><u>Registered Organisations Commissioner v The Australian Workers' Union & Anor</u> [VID583/2018] – commenced 16 May 2018</p>	<p>The ROC prosecuted the AWU's Victorian branch and its former secretary, Victorian State Labor MP Cesar Melhem, for allegedly failing to remove 2,000 unfinancial members from its membership record over a five-year period through to 2013.</p> <p>The AWU has admitted contraventions that relate to the addition of some 851 non-members to its register in the period from 2008 to 2013 and the failure to remove more than 1000 un-financial members.</p> <p>In connection with these contraventions, Mr Melhem has admitted to eight civil breaches of statutory officer duties, (three in relation to good faith and eight in relation to care and diligence).</p> <p>The Court has not yet determined penalty.</p>
<p><u>Registered Organisations Commissioner v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia</u> [NSD802/2018] – commenced 10 May 2018</p>	<p>The ROC has prosecuted the CEPU for 82 breaches of s 233 and four breaches of s 230. The s 233 breaches principally relate to late filings of notices of change in office holders (a change is required to be notified to the ROC within 35 days), while the s 230 breaches relate to a failure to record certain officers on their list of office holders (organisations are required to maintain an up-to-date list).</p> <p>With one exception (on technical grounds) the CEPU admitted to all contraventions. The CEPU takes these contraventions very seriously. The breaches were not deliberate, were caused by administrative failings, and have caused the CEPU to institute a robust system to improve governance and ensure compliance. The new compliance system was instituted well in advance of any litigation, as the CEPU recognised that it had a problem. The CEPU believes that its compliance system is now the best in the country.</p> <p>The ROC was initially seeking a penalty of \$4.5m. In final submissions, they have reduced that to around \$400k. The CEPU has proposed penalties of under \$90k.</p> <p>The matter was heard by Justice Flick, with his decision being reserved. It's likely to come down in November or early next year.</p>