



ROCpod episode 21 – Lessons from the Federal Court

The ROCpod was a monthly podcast focussed on the regulation of registered organisations. It shared information, tips and tools for improving compliance with legislative requirements.

The podcast was key part of the Registered Organisations Commission's (ROC) education strategy. The ROC was abolished on 6 March. The Fair Work Commission (the Commission) is now the regulator for registered organisations.

Although processes may change under the Commission, much of the podcast content is still useful.

Email any questions about anything in an episode to regorgs@fwc.gov.au.

Speaker Key

AN	Unidentified announcer
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FL	Francesca Lee

AN Welcome to ROCpod: Talking with the Registered Organisations Commission. The official podcast of the ROC about the regulation of unions and employer associations. And 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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CB Hello and welcome to another episode of ROCpod. My name is Catherine Bebbington and I am the Manager of the Education and Reporting Team here at the ROC. I am joined today by my colleague Francesca Lee. Francesca is a Senior Lawyer at the ROC and she is here to lend her expertise concerning enforcement and litigation to this month's topic; lessons from the Federal Court. We will focus on the outcomes of some of our cases and what registered organisations can learn from them. We'll also talk about alternatives to litigation. Thanks for your time today, Francesca.

**00:01:17**

FL You're welcome, Catherine and thank you for the introduction. So from our perspective, it's important to look at court decisions, and understand what they mean, not only for the organisation directly affected by the decision, but for all registered organisations.

Decisions are published online, but unless you have a particular legal interest in a case, you're probably not going to read the judgment. The ROC has tried to make our case law more accessible by publishing summaries of the cases in plain English online. And I'm also happy to talk with you today about the key findings from some of those decisions.

CB Okay so, before we talk about some cases, let's discuss the ROC's approach to compliance and litigation. I mean, only a fraction of non-compliance reaches the courts, and there are other tools available to the ROC to resolve matters. We know this, we use them in our work all the time.

So Francesca, can you tell us more about how the ROC monitors compliance and its approach to litigation?

**00:02:15**

FL You're right, Catherine. Court action is what gets the public's attention, but there is so much more that goes on behind the scenes. In fact, with co-operation from organisations the cases that have reached the courts may have resolved at a much earlier stage. Initiating court proceedings is not something we do lightly. In fact in the four years since we began in 2017 we've actually only commenced three court matters.

CB That's right Francesca. The ROC's approach to compliance starts with providing education and assistance to organisations, their officers and members. We know that most organisations will comply or try to comply with their obligations. We help them by producing and delivering education materials like fact sheets and templates, and sometimes, by providing tailored assistance to organisations and branches.

FL So in circumstances where we think there is non-compliance, we look at what's happened in each individual matter to determine how we respond. We may look at: What has caused the non-compliance. Is it a once-off? Is it likely to continue? Have there been efforts to fix it? How serious is the breach, and what are the consequences? All of these things influence how we respond.

If the non-compliance is minor or even accidental, we focus heavily on providing guidance and assistance to remediate to the extent possible or at the least, clarify what the non-compliance has been. By taking that type of approach, the ROC has worked with many organisations to strengthen their systems and processes and to



help them prevent future breaches. We find this to be an effective way to resolve minor issues. And it's also cost-effective, so it's a win for the organisation, their members and the ROC.

- CB** This is a big part of why we ask organisations to come to us if they've noticed any issues or have concerns about their compliance, isn't it Francesca?



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- FL** It really is. Our executive director has a great story he loves to tell, about a new secretary who came to us asking for help with their organisation's compliance. After we'd pointed them in the right direction and built some tools to address their needs, they said to Chris that they'd been told "to stay away from the regulator, it might cause trouble". But in fact coming to us had been the most helpful experience and now she was actually confident she could comply.

Honestly, Catherine, because we like to work with organisations on voluntary compliance if people do have concerns we strongly encourage them to come to us early. It is often far easier for us to work with organisations to prevent non-compliance or more serious non-compliance than it is to try to fix the issue after whatever you were worried about has happened.

- CB** But what about where the non-compliance is serious or deliberate? How does the ROC deal with those matters?
- FL** Through inquiries and investigations the ROC can gather more information about suspected non-compliance. In those rare cases where we can see that serious misconduct or serious contraventions have taken place, we will pursue an appropriate enforcement remedy. For example, we can seek a penalty order from a court as a deterrence. As I have said, we are not a high volume litigator, but we will take action where it is in the public interest to do so. A part of regulation is using cases and penalties to deter the organisation from doing it again or *other* organisations from performing the same behaviour. We've seen examples of this, and I can talk about some cases shortly.
- CB** A court decision can also clarify grey areas of the law. For instance, the ROC sought an appeal against the decision of the trial judge in the AWU case to quash its investigation. On appeal, the Full Court of the Federal Court overturned the trial judge's decision on the basis that he had misinterpreted the test for the ROC to commence an investigation and wrongly applied the legislation. It was important for the ROC to seek clarity about its jurisdiction.
- FL** That's exactly right Catherine. But as I said earlier, our enforcement doesn't start with litigation. We seek co-operation to try to resolve matters through negotiation, and we are mindful of resources, ours and organisations'. We cannot pursue all matters that come to our attention. It's also important to maintain public confidence in the ROC as



a regulator and act in the public interest. Each matter is different, and it's a bit of a balancing act between these factors.



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CB So for the very small number of cases that have reached the Federal Court, a lot of work has gone on behind the scenes to investigate the matter and then seek a resolution.

You mentioned earlier inquiries and investigations. Can you tell us a little more about them? What kind of conduct might the ROC examine in an inquiry or investigation?

FL I can tell you more about them. So inquiries and investigations help us to gather information about suspected breaches of the legislation and financial reporting obligations. We will only commence legal proceedings if the evidence has led us to serious non-compliance, we think we have sufficient evidence, and that it is appropriate that we litigate in the public interest, so inquiries and investigations are an important feature of our enforcement role.



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CB But it's important to know, inquiries and investigations are not the same. During an inquiry we rely on the voluntary co-operation of people and organisations. We cannot compel a person to give us information in an inquiry, however we have been able to resolve some matters quickly and effectively through this process.

Francesca can you share an example where the ROC has achieved an outcome through an inquiry?

FL Yeah I definitely can. So one inquiry that comes to mind is where the ROC suspected a reporting unit had breached its financial reporting obligations. There were concerns about whether the auditor's report had been prepared and lodged properly, and also whether the auditor was registered. So during the inquiry we requested the co-operation of the auditor as well as the organisation.

The inquiry confirmed that the auditor wasn't registered, however the auditor willingly co-operated to fix this, and got registered. As there was no material harm done, and because of the steps taken to remediate non-compliance, no further action was taken against the auditor. Non-compliance was identified through the inquiry and remediated to the extent that was possible.

CB But it's worth nothing this inquiry also uncovered concerns with the organisation's financial reports. And because we wanted more information about this, so we closed the inquiry and initiated an investigation into the matter which identified further and more serious non-compliance.

So how is an investigation different to an inquiry, Francesca?



FL Well, Catherine, unlike an inquiry the ROC can compel information during an investigation. So, if we believe a person or organisation has evidence that is relevant to our investigation, we can require them to provide documents or information and answer questions.

We use our investigation powers during investigations to compel an organisation or entity to provide documents that are relevant to our investigation. Although it has only been used on the single occasion and in particular circumstances, we also have the power to apply for a search warrant which would authorise a police officer to enter a premise to obtain documents relevant to our investigation. The AWU matter is an example of this. But there are checks and balances on these powers, so for instance in this matter there was evidence and arguments put before a magistrate to justify the issue of the warrant.

CB Investigations don't always follow an inquiry, like this one did. And at the end of an inquiry and investigation, a report is prepared for the Commissioner recommending whether or not the ROC should take any further action on the issue, including enforcement action.



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CB Now the ROC encourages transparency. You can find a list of current and concluded inquiries, investigations and litigation on our website. We will include a link to that list on the podcast episode webpage on our website.

So what you're saying, Francessca, is that the ROC has a number of enforcement tools at its disposal. It starts with the approach of education, assistance, and guidance. At the other end of the spectrum we have litigation. But in between there are all sorts of alternatives to court action like negotiation or mediation which are generally faster and cheaper options.

FL Yes, that's right. And the alternatives are not just faster and cheaper, but they can also cause less reputational harm than court action. We have many conversations with registered organisations about non-compliance, very routinely, but you wouldn't know it unless you're the person on the other end of the phone. Most matters are resolved before they become big problems and without the publicity of an investigation or court action.



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CB Well that's pretty interesting Francessca, but let's now move onto litigation. A small number of serious matters involving non-compliance proceed to the Federal Court.

We know court action can take time to resolve and it can be extremely costly. However, courts can clarify the law, their decisions remind us all about the expected standards of behaviour, and penalties can deter others from engaging in similar unlawful conduct. So there are lessons to be learnt from court decisions, and I want



to explore what some of those are for registered organisations.

Our recent litigation has brought home the importance of good governance, things like good record keeping, avoiding conflicts of interest, and accountability and transparency through elections.

So Francessa, we'll start with a recent case. The ROC v CEPU. The Federal Court handed down a decision in February 2020, and it penalised the union for multiple failures to maintain accurate records and notify changes to the ROC. The original penalty was significant, and it was later reduced to \$200,000 on appeal. A large sum of money nonetheless.

Can you tell us more about this case? What were the issues the court had to resolve here?

FL So registered organisations and branches will be aware of their obligation to keep accurate records, update them when certain details change and notify the ROC of the changes. This is a long-standing obligation, and it can be traced back to legislation from the early 1900s.

This matter involved multiple breaches of these requirements. The Court found on four occasions the organisation failed to keep accurate lists of its offices and office holders, and on 82 occasions it failed to notify the regulator of changes within 35 days.

The breaches were found to be widespread across three divisions of the organisation, six states and one territory, and it extended over many years. The regulators (the ROC, and previously the regulatory compliance branch of the Fair Work Commission) raised concerns on multiple occasions with the organisation, but it continued to breach the requirements for some time.



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CB One misconception about this obligation is that breaches amount to nothing more than a failure to lodge paperwork. However, we know the Federal Court does not share that view. In fact, in this case it quite strongly said the opposite.

Francessa, What did the Court say about the legislative requirements, and the organisation's non-compliance?

FL This matter serves as a reminder of why the legal requirements are in place. The presiding judge recognised that the record-keeping requirements allow members, the public and the regulator to identify the offices of an organisation and the officials who are making decisions and performing duties. It holds people to account and is essential to the democratic functioning of organisations. The court went to great lengths to explain this.



Even in the appeal judgment where the Court reduced the penalty to \$200,000, the three judges presiding over the case again emphasised that the record keeping obligation is important and serious.

CB So earlier in this episode we discussed the benefits of co-operation and early rectification. How did the conduct of the organisation influence the penalty amount handed down by the Court here?

FL The trial judge took into consideration that the organisation did not admit to the breaches as early as it could have. The organisation also waited for some time to put into place a system of compliance. However, the judge recognised the efforts of the national secretary for the significant changes he has led, which have improved the organisation's compliance record.

So this case tells us that courts are likely to look favourably on an organisation that takes responsibility for non-compliance.

The court also made it clear that claiming to have a large organisation with a complex structure is not an excuse for failing to comply with the legal requirements. Large organisations are expected to take greater steps to ensure there are appropriate systems in place to maintain compliance.



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CB What I'm hearing then is if your organisation is finding the record keeping and notification requirement challenging, or any of its other requirements, you shouldn't just ignore it. The number of breaches by the organisation in this case made the penalty significant, even after it was reduced on appeal.

Now The ROC provides courtesy reminder letters, we produce education materials, and when non-compliance is detected we will engage with your organisation. Working with us on these issues early can only be a positive thing. In this case, the regulator had written to the organisation on multiple occasions to warn of non-compliance but the same behaviour continued.

FL Yes, that's right. Had the organisation taken the advice in the letters seriously and acted earlier, the penalty amount may have been far less. Even better still, the matter may not have even reached the courts, which would have been a significantly cheaper outcome for the organisation. And without the adverse publicity that often comes with litigation.



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CB Thanks for that Francessa, but it's worth noting that other cases, for instance ROC v ANMF, have found that officers can be equally responsible for the breaches of the organisation. For instance in this matter the branch secretary was found to be in breach because the Branch hadn't lodged the financial reports with the regulator within the required timeframes. Some of those lodgements occurred several years



late and the consistent non-compliance extended over a period of 6 consecutive years. So non-compliance can have real implications for officers.

- FL** That's right, Catherine. The officers responsible for making the decisions of the organisation have duties and non-compliance by the organisation can be seen to be non-compliance by the officers.



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- CB** Okay, let's now talk about another case - the ROC v AHA. This involved an employer association that failed to arrange for its elections over a long period of time.

Elections for offices are another fundamental feature of democracy in registered organisations. They give members the opportunity to participate in the management and decision-making of their organisation.

We see election issues frequently in whistleblower disclosures. It's important to ensure that elections are conducted in accordance with the organisation's rules and the legal requirements.

Francesca, can you tell us what happened in the ROC v AHA case?

- FL** Yes, I definitely can. In this case a Branch of the organisation failed to arrange for elections for several of its offices over a long period of time – for about a decade. For some offices of the branch, the same people either held office for an extended period, without being re-elected, or were improperly appointed to office. The branch also failed to update its records when the holders of office changed between 2005 and 2017. And like the case we discussed earlier, the branch didn't lodge notifications of change with the regulator when they should have.



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- CB** What can we all learn from this case?

- FL** Like you said earlier, elections are fundamental to the democratic function of an organisation. It's not an excuse to fail to hold an election because you think compliance is too hard. The judge said that it was a 'serious contravention' every time the organisation failed to initiate elections when they should have.

And just like the previous matter, this one also highlights the importance of keeping up to date records and notifying the regulator of changes.

- CB** Did the organisation's conduct influence the penalty? In the other matter we saw the organisation delay taking action to fix their non-compliance, and this was a relevant factor in the penalty amount. Was this relevant here too?

- FL** Yes, the judge weighed up a few factors when he handed down the penalty. On the one hand he looked at general deterrence. He wanted to send a clear message to all registered organisations that these are important requirements that should be taken



seriously. The judge also looked at the significant length of time that the non-compliance had occurred. Some of the breaches occurred for over a decade. There were clearly weaknesses in the governance systems of this organisation that were overlooked for a significant period of time.



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CB Well that's not good Francesca, but were there factors that weighed positively in favour of this organisation?

FL Yes absolutely, on the other hand the organisation admitted to the contraventions at an early stage of proceedings and it co-operated with the ROC. Importantly, the organisation put in some internal systems to prevent future non-compliance.

To its credit, the governance procedures appear to have been effective and we haven't seen a repeat of the same conduct by this organisation.

So after weighing up all of these factors, the judge handed down the penalty of \$157,250.

However, I do need to point out that the amount of the penalty could have been much more if the same thing happened today. Most of the contravening conduct by the AHA occurred prior to increases introduced in 2012, which tripled the available maximum penalties. The first case we discussed today considered conduct after those increases, which explains why the penalty handed down by the trial judge was higher than this one, including for some contraventions that were quite similar.

CB Thanks for explaining that difference, Francesca. Both cases demonstrate just how serious breaches of the legislation are treated by the courts. We aren't talking small penalties here ... \$200,000 of members' money, not to mention the additional burden on resources. It's quite significant, but as we have discussed, it can be avoided if organisations engage proactively with the ROC as early as possible.

But, there are other cases that have reached the courts. Where can we go to find out about those?



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FL Court judgments are available online, but as I said earlier, we know it's unlikely that your officers and members, will read them.

That is why we started a recent education initiative of summarising our cases in plain language, which you can access on our website. We have released them on the back of feedback from people in registered organisations. We've taken on this feedback and there are now currently 12 case summaries on our website, and they are a quick and easy read. We have extracted the key findings of the decisions and we do hope



that you take every advantage of them. Each time one of our judgments is handed down, we will launch a plain language summary on our website.

CB So, to sum up today's episode I'm hearing that:

The ROC works with organisations to provide education and assistance to nurture a culture of voluntary compliance. Where a non-compliance issue exists, we take an evidence-based approach to gather information, identify its cause and decide on an appropriate response.

There are many advantages of working with us to resolve non-compliance. However, where a matter cannot be resolved, and where there is a public interest, the ROC may commence legal proceedings. Few instances of non-compliance are decided by the courts; however, we can learn more about compliance by listening to what the courts have said and acknowledging their decisions.

Thank you for your time today, Francesca. In particular, the information about what goes on behind the scenes outside of court proceedings.

FL You're very welcome, Catherine, I hope it's been useful.

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