



ROCpod episode 35 – Making your rules work for you

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

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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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00:00:41

SG Hello and welcome to *ROCpod*. My name is Sam Gallichio and I'm an Adviser in the Education and Reporting Team at the ROC. Today's episode is about the rules of registered organisations.

All registered organisations as well as their branches are governed by rules which are contained in what is known as a rulebook. Rules deal with how organisations and



branches are run, include the powers and duties of officers, how money is managed and who is eligible for membership.

Here at the ROC, we analyse your rulebooks when we assess compliance.

For today's episode I'm joined by Francessca Lee, who is a Senior Lawyer in our Compliance and Investigations Team. We'll talk about rulebooks, and what we've observed, and how you can make your rules assist with your compliance. Welcome aboard, Francessca.

FL Thank you for having me on Sam. The rules of organisation are important, and I'm happy to help.

Many of our colleagues are *very* knowledgeable about rulebooks, because they sometimes need to consider them in great detail. Particularly for activities such as arranging elections and in investigations, where we're considering whether actions were authorised.



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SG But we should remind everyone at the outset that while we work with rulebooks every day – the ROC isn't responsible for certifying changes to them.

FL Yes that's right. Registering and certifying rule changes is a function that belongs to the Fair Work Commission (which we refer to as the FWC for short).

SG Also, dealing with internal breaches of rules and policy is not something that the ROC usually gets involved in unless it's specific to financial matters or officer duties. It's generally up to the organisation to deal with these issues, or for members to enforce the rules in court.

FL Yes, and if you have any of these concerns, you should first raise it directly with your organisation.

But as you said Sam, the ROC's compliance work involves reading and interpreting rulebooks. We know that rules can directly influence compliance outcomes, sometimes positively, but also negatively. Rules can also sometimes also create unnecessary compliance requirements for organisations – but there are ways to fix this going forward.

When we notice that the rules are making compliance more difficult, we'll usually engage with organisations to let them know. But, it is ultimately the responsibility of organisations to maintain their rulebooks and update them to ensure they reflect how they want the organisation to run.



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SG Later on in the podcast we'll share our observations about the difficulties caused by some rules, and how to prevent them. And we'll give some practical examples, but before we do that, let's start with the basics.

Francesca, what does the *Fair Work (Registered Organisations) Act* (which we call the RO Act for short) require of rulebooks?

FL Well, the RO Act includes a list of the issues that must be part of the organisation's rules. You have already mentioned some of them. Further examples include how officers are elected and removed, who is authorised to spend the organisation's funds, how documents are executed, and the process for changing the rules. You can refer to section 141 for the full list of requirements.

The rules of organisations must also provide conditions for loans, grants and donations. And sections 143-147 include specific requirements for election rules.



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SG Can you give a quick summary about the requirements for election rules?

FL So they cover much of the information that is lodged with the ROC in prescribed information, when organisations are seeking to have an election arranged.

The rules must identify what officers an organisation has, the terms of office, the voting system used for electing officers and how casual vacancies are filled in the organisation. But again, you should definitely refer to the RO Act for the full requirements.

SG Now the RO Act also provides some general requirements about rules. Can you explain what they are?

FL Yes, so section 142 includes a list of things that the rules must not do.

For instance, the rules must not conflict with a requirement of the RO Act, the Fair Work Act or an enterprise agreement, or prevent members from observing the law. They also cannot impose unreasonable, unjust or oppressive conditions on or discriminate between members for a prohibited reason.

So to give you an example – the FWC is unlikely to certify rules that prevent members from belonging to a particular political party.

The general requirements in section 142 are important and the FWC will consider these matters when they register a rulebook or certify any changes.



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SG Thank you Francesca, that's a good summary of those rulebook requirements under the RO Act.



You mentioned earlier that our colleagues sometimes deal with rules that are difficult to apply when they're assessing compliance. Before we talk about some examples, why do you think there are difficulties?

FL Well to be honest, rulebooks can be old and complex documents, particularly in relation to large organisations with several divisions and branches. Some branches have their own rules that are designed to be read alongside the rules of the national office. Rules are usually drafted by lawyers, and they might be interpreted differently depending on who is interpreting them.

SG Some rulebooks have also grown organically over time, haven't they?

FL Yes, many organisations have been registered for decades, and as they change, new rules are added, existing rules are amended or even removed altogether (and sometimes the superseded rules might not be deleted). If the rulebook isn't reviewed as one whole document, you do run the risk of creating inconsistencies when changes are made.

So there's a practical tip – if you're considering a rule change, make sure you look at the rulebook over all as one document.



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SG That is really great advice, and can definitely save you hitting hurdles further down the track. Given we're talking about rulebooks that may be hundreds of pages long it's not entirely surprising that inconsistencies emerge over time.

Francesca, what is the impact of rules that are challenging to apply?

FL The purpose of rules is to provide order, or instruction about how things are done. If there is a dispute in an organisation, you may turn to your rulebook to see if it can resolve it. But when rules are inconsistent, it can be confusing – to the organisation *and* also others they deal with. This includes the ROC and the Australian Electoral Commission (or the AEC) and of course, your members.

Ambiguous rules can also decrease efficiency. The ROC has seen this in the past with the arrangement of elections, financial reports and financial exemptions. Outdated rules can also force organisations to undertake compliance activities that are no longer required.



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SG Okay let's now talk about some practical examples.

FL Yes, sounds good Sam. I'll continue the topic of election rules ...



Many of our listeners will know about the process for arranging an election. Organisations lodge prescribed information with the ROC, which helps the ROC determine whether an election is due under the organisations' rules.

If your rules are unclear, it can take extra time for a decision to be issued. On average, we probably take about 14 working days to arrange an election. But if we need to look more closely at your rules, especially where they seem inconsistent, or if we need to contact an organisation to talk about an interpretation issue, the process is likely to take longer.

SG What kind of inconsistencies have you seen in rulebooks?

FL A common one is where the rulebook says that a person shall hold office for two years, but elsewhere in the rulebook it may refer to annual elections. Another one is the name of an office being referred to by two different names in the same rulebook. For example, if 'Deputy President' and 'Vice President' are used interchangeably.

You can see how this might lead to the assumption that the Deputy President and the Vice President are two different offices. And in some organisations they *are* different offices – but in others they're not and it's just inaccurate.



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SG Yes, and inconsistencies with the names of offices aren't just an issue for elections, are they?

FL Definitely not, Sam. The offices listed in your rulebook are relevant for other compliance activities too – including your annual return and officer and related party disclosure statements. If your rules are inconsistent, what are the office names listed in these documents? Perhaps you're using both names for different documents. We've also seen examples where offices are informally referred to by completely different names in their day-to-day activities.

SG Another issue that many organisations faced during the COVID-19 pandemic was the impact of rigid rules. Having some flexibility in your rules, particularly around meetings, is a great way for organisations to navigate any unexpected issues.

FL Yes, that's a really good point. In the last few years, most of us would have experienced a lockdown or had our travel restricted, as part of health orders to limit the spread of COVID-19. But, to their great credit, most organisations continued to run very effectively. Meetings were held online or via phone, and many officers continued in their roles until a delayed election was held.

But, for some organisations and branches, their rulebooks created extra challenges. For example, an organisation whose rules were very specific about only holding the Annual General Meeting at a particular physical location. Some rulebooks even prohibited meetings from occurring over video conferencing technology.



A big issue we found was organisations that were forced, by their rules, to only present their financial report to their annual general meeting, which meant they couldn't complete their financial reporting on time, putting them outside the RO Act timeframes.



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SG And the global pandemic impacted the way all workplaces as well as registered organisations operate in a way that we couldn't have previously predicted.

FL Yes, that's true, but we've seen a lot of other reasons in the past for failed AGMs, for instance where an organisation didn't have enough people attending to get a quorum. Without a 5% rule in your rulebook you have to keep trying to hold the AGM if that's what your rulebook requires.

So, it's definitely a good idea to include some flexibility in your rules, because you never know what's around the corner. Make sure your rules are updated so suitable options are available if you need them.



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SG You've just mentioned the 5% rule. Can you explain what that is?

FL Yes, so that's a rule that allows you to present your financial report to a second committee of management meeting instead of a general meeting of members. If you're interested in a rule like that you should probably speak to our financial reporting team.

SG Are there any other rules that organisations can adopt and use to increase flexibility?

FL There are. Having rules that allow for 'out of session' decision making between meetings, proxies (if that's something your organisation agrees to), rules that enable officers to fill in or act in other offices if there are absences – or at least to make decisions in their absence. These can all give an organisation more flexibility in how they are run.



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SG But it's not just about updating the processes described in your rulebook. Modernising the language is also important, isn't it? Because your rules need to reflect the reality of today's requirements ...

FL Absolutely! It's inevitable that things will change over time. In fact, some of the compliance requirements have changed even just in the last few years.



To give you an example: do your rules deal with the updated financial training requirements for officers with financial duties? Or does it still deal with the old regime that existed before the legislation amendments in 2016?

Before the changes, the rules of an organisation included the requirement that officers undertake financial training. This requirement is now in the RO Act and there is an avenue to get an exemption from training. If the rule still exists in an organisations' rulebook, an officer who has been granted an exemption under the RO Act would still have the obligation under their rules to do the training.

So for a tip, you should review your rules to make sure they're consistent with legislative changes.



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SG Can this be an issue for organisations and officers?

FL Yes, you must comply with the legislative requirements *and* the requirements in your rules, even if what is in your rules is no longer required by legislation.

We've also seen some organisations update their rules so they better reflect their values. A simple example of this is changing gendered language such as 'chairman' to 'chairperson'.



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SG Your example about officer financial training leads me to another point, and that is to review which bodies within your organisation exercise financial duties. Can you explain how this has been an issue for some organisations?

FL I can, so in some rulebooks, we've noticed that some large decision-making bodies exercise financial management duties. They might meet very infrequently, say once every two years. And in this example, *all* the officers on the large body must either complete financial training or get an exemption – even if they're only exercising their financial duties on the odd occasion. A large body could potentially include hundreds of officers.

You may want to think about whether this arrangement is suitable, or if the financial duties would be more appropriately assigned to a smaller group in the organisation such as the committee of management.



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SG That's excellent guidance, Francesca.



Another issue we've noticed, particularly in investigations, is that some rulebooks say one thing, but in practice the organisation does things quite differently. In other words the rules don't match reality.

FL That's definitely right.

So, one area we see this is when a branch has an arrangement for their financial affairs to be managed or contained within their equivalent state-registered entity. But the rules of the federally-registered branch say that the branch must collect membership fees, pay capitation fees to their national office and keep a bank account. It may sound like a really small thing, but it can cause issues if the branch wants to be exempted from the financial reporting obligations under the RO Act. So definitely check your rules and make sure they reflect how you want your organisation to run.

It goes back to what we were saying before about the rulebook being a reference guide to how things are done in an organisation. The rulebook is not a 'set-and-forget' document. People should know where to find the rules and how to follow any processes that are set out in them.



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SG So what happens if the rules don't say anything about a particular issue and are silent on a matter?

FL That can be a real problem Sam. Sometimes we've seen that decisions are taken when the rules don't say anything. But you can't just treat it like a blank sheet of paper and make it up as you go along. There must be a legal basis for the decisions that are made – especially when they concern finances, governance and elections. The authority for those things is meant to be in your rules. It can't just be 'I'm the President, so I do things by default'.



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SG Okay, so, where can you find a copy of your organisations' rulebook?

FL They're published on the FWC website. This includes the rulebook of the central office of the organisation and branch rules (if there are any). There are also old rulebooks online, so you can see the changes that have occurred over time. We would strongly encourage organisations to make their current rulebook accessible on their website.

SG Why is it important for the organisation to promote things being done in accordance with the rules?

FL It's essential for the good governance of organisations. Rules reflect its values and provide transparency about how things are done.



The procedures around financial management, elections and other activities promotes compliance with the legal requirements.



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- SG** Yes and I suppose it's as you alluded to, that it's about looking after the members' money. Can you give us an example? What could happen if an organisation doesn't have a compliance culture?
- FL** If officers ignore the rules around how money is spent, they risk breaching their statutory duties. Organisations should have rules about how funds are managed, and they may refer to internal policy documents that provide the finer procedural details. Letting people make it up as they go is likely to lead to inconsistent practices, and possibly misconduct, or at the very least a lack of care and diligence (which is a duty that all offices have). Organisations and officers can also face civil penalties if there are breaches.
- SG** One area where organisations may be guided towards a rule change is elections. After an election has been conducted, the AEC will issue a post-election report. The report then identifies if the AEC ran into issues during the election, including if any of the rules were difficult to interpret or apply.
- Would you be able to shed some light on why organisations should consider this information?
- FL** Yes I can, adverse election reports are important for the ongoing improvement of election rules. They may include practical advice about how organisations can improve the conduct of their next election, or if a rule is found that contradicts what is required in the RO Act or regulations. One we've seen recently is where the rules said that the roll of voters closes on the 1st of May and nominations open on the 5th of May – but the Act actually requires a minimum of 7 days.



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- SG** And organisations are required to respond to the AEC about whether they intend to make any changes, and they must also make adverse reports and responses to them available to members.
- FL** And it's also not every day that you are given information about how to improve something, so it's a good idea to consider them. And because we do a lot of work on elections, the ROC is happy to work with organisations to address these sorts of issues as well.
- SG** Are there any other election-related issues that regularly crop up because of how organisations' rules are set out?



FL Yes, so the other one we often see is where the wording of rules make election decisions more cumbersome and create extra steps before the AEC can conduct the election.

I'll give you an example. Let's say your rules require nominations to open on the 10th of April, but they also say that the number of officers to be elected is calculated based on the number of members on the 31st of March.

In practical terms, this creates several issues.

Firstly – when the organisation lodges prescribed information (which is at least two months before nominations open), it can't accurately say how many offices are to be filled (because that date is in the future). Also, when the ROC issues the decision it would have to say that the "number of offices is to be determined in accordance with the rules" rather than a specific number. And finally, the AEC must do the extra work of calculating how many offices it needs to fill – in a short space of time before it can issue the call for nominations. It's better that we all know this information beforehand.



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SG Is there a solution for this kind of problem? How can the rules be changed to streamline the election process in this example?

FL The organisation can make the calculation date in the rulebook a few months earlier, so that it's clear how many offices are to be elected. It can also then include those numbers in the prescribed information, the ROC can issue an election decision with the exact numbers required and provide it to the AEC.

It sounds like a minor change, but it really will simplify and streamline the process.

SG That sounds like quite a simple fix. And when the ROC identifies anomalies like this, we'll also let the organisation know about them so that they can be addressed as soon as possible – and certainly before the next election.

So, we've discussed how important it is for organisations to act in accordance with its rules. But what if an organisation is doing things differently in practice because it genuinely considers that it is a better process than what is written in the rulebook?

FL Well then the organisation should change its rules so that they reflect the reality of how things are done, with the caveat that it is still in accordance with the RO Act. It's an important message – the rules should reflect the reality.

Some of the organisations that experienced difficulties during the pandemic because of how their rules were written have since taken steps to change them.



I'll give you another real-life example. The ROC received a complaint from an officer that a branch wasn't paying invoices in accordance with its rules. The rules required expenses to be paid by cheque, but the branch had changed to a more efficient and preferred EFT system. In this case, we'd recommend the branch update its rules so that they reflect how things are done.

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SG Okay, so if I want to change the rules in my organisation, where do I start with that process?

FL You'll need to follow the steps in the rulebook – every rulebook has its own rule alteration process.

Depending on which rules you want to change, the approval process by the FWC may be somewhat different. If it doesn't affect the name or eligibility rules, the application to alter the rules goes to the FWC to consider.

But if the change affects the name of the organisation or who is eligible to be a member, then it must be considered by a tribunal member and there'll probably be a notification period.

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SG How do I identify the process under the rules that I need to follow? Are there steps that *most* organisations will need to consider?

FL Yes, there are a few things to think about.

Firstly, what branch, body or person is authorised to change your rules?

For example, under your rules does the committee have the power to vote to make the rule change, or does it need to go to a vote of members?

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SG Another issue to consider is whether the rules require notice to be given...

FL Yes, there are a few things to consider with notice.

Firstly, whether notice of rule changes must be given to anyone and if so, who must be notified? There may be a requirement to give an opportunity for objections to be lodged. For example, your rules might require your organisation to advise members by email or publish a notice on the website.



It's really important to follow your rules as you will need to provide evidence to the FWC that you've followed both the rule alteration process and any notice requirements.

SG That's very helpful. What other steps should be looked at?

FL So you should determine if there are any vote or resolution procedures. Your rules may include meeting requirements, and these two processes may not necessarily be the same, and therefore both must be met. If you're seeking to change the name of the organisation or the eligibility requirements, a hearing will be conducted which will address some of the RO Act requirements we spoke about earlier in the episode. For example, that the proposed change doesn't discriminate between members.



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SG If you want more information about the process you can refer to the materials on the FWC website. We'll provide a link on the podcast episode webpage on our website. It's also a topic that the ROC addressed in a masterclass in 2021, and we can provide a link to the slides from that presentation too.

As we said earlier, the Fair Work Commission is the agency who are responsible for overseeing rule changes in registered organisations – they're a great resource if you have any questions about changing your rules.

Thank you for joining me today, Francessca, I really appreciate the time you've taken to talk about the rules of organisations, and why it's relevant to the ROC's jurisdiction.

FL You're welcome, Sam.

Before we finish today's episode, I do want to let our listeners know that if they're considering a rule change in their organisation ... especially if the rules are relevant to compliance ... please get in contact with us. As you've heard in our discussion today, while the ROC doesn't sign off on rule changes, we can certainly give you some insight into how they may influence compliance outcomes.

SG Thanks Francessca. Please tune into *ROCpod* next month, where we'll be talking about ROC inquiries and investigations.



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