



Fair Work
Commission

Compliance and Enforcement Interim Policy

Compliance and Enforcement Interim Policy: 24 March 2023

Fair Work Commission



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Purpose

1. The General Manager of the Fair Work Commission (**the Commission**) is the regulator of federally registered organisations established under the *Fair Work (Registered Organisations) Act 2009 (RO Act)*.
2. The General Manager has the following functions:
 - (a) to promote:
 - (i) efficient management of organisations and high standards of accountability of organisations and their office holders to their members; and
 - (ii) compliance with financial reporting and accountability requirements of this Act; including by providing education, assistance and advice to organisations and their members;
 - (b) to monitor acts and practices to ensure they comply with the provisions of this Act providing for the democratic functioning and control of organisations;
 - (c) to do anything incidental to or conducive to the performance of any of the above functions.
3. In performing functions and exercising powers under this Act, the General Manager must seek to embed within organisations a culture of good governance and voluntary compliance with the law.
4. The General Manager is assisted in the performance of their functions and exercise of their powers by staff of the Commission.
5. The purpose of this Compliance Policy is to provide an overview of how we perform our statutory compliance and enforcement functions under the RO Act.

Approach

6. We primarily seek to embed a culture of good governance and voluntary compliance within organisations by providing education, assistance and advice to organisations, their officers and



- members, and the public. This promotes self-regulation and internal management systems by organisations.
7. Our approach to compliance assumes that most people will comply, or try to comply, with their obligations. The ability or willingness of persons to comply informs our compliance strategy and decisions.
 8. Where a suspected non-compliance issue exists, we take a forensic, evidence-based approach to gathering and analysing relevant facts to identify the cause, decide the likelihood that a contravention has, or contraventions have, occurred (or may occur or reoccur), the degree of seriousness, and likely consequences. We then take a risk-based approach to determine the appropriate regulatory response to non-compliance.
 9. In the event of accidental or trivial non-compliance by organisations and individuals who try to comply, our primary approach will be to provide guidance and assistance, including to work with organisations about the adequacy of their systems to help ensure future compliance.
 10. In the more limited but serious cases involving systemic, repeated, opportunistic or deliberate non-compliance, other regulatory tools are available to us. Enforcement action is one of those tools. Where it is in the public interest, we use enforcement action to deter misconduct.

Promoting and Monitoring Compliance

Promoting Compliance

11. In line with our approach to optimise voluntary compliance, we work productively with organisations, their officers, other stakeholders and the community to raise awareness of statutory and reporting obligations and assist organisations to comply with them.
12. We invest heavily in providing education, assistance and advice to organisations and office holders in ways which are designed to streamline compliance and reduce the regulatory burden and cost; including:



- a) by providing information, tools, templates, model financial statements, model policies, guidance notes, fact sheets, checklists and support materials on our website (<https://regorgs.fwc.gov.au/tools-and-resources>)
 - b) by delivering presentations and workshops to organisations, peak employer and employee groups, and other stakeholders (such as auditors)
 - c) through webinars and podcasts regarding topics of interest
 - d) by tailored advice provided in writing or by telephone
 - e) through courtesy reminders to organisations and reporting units regarding upcoming obligations
 - f) by regularly sending information to subscribers of our email subscription service
 - g) by publishing decisions which contain guidance as well as publishing a quarterly newsletter on current, emerging and hot topics.
13. We promote the organisational objective of a culture of compliance which operates in the best interests of organisations' members and in the public interest.
14. A culture of compliance involves an individual, organisation, branch or reporting unit demonstrating a commitment to doing the right thing. This can be through good governance, informed self-assessment and compliance-oriented management.

Monitoring compliance

15. We may become aware of instances of non-compliance through a diverse range of sources including by receiving a complaint, proactive monitoring or self-reporting by organisations.
16. We monitor compliance by:
- a) assessing whether documents lodged with the Commission comply with the legislative requirements
 - b) internal reviews
 - c) assessing information we receive from external sources
 - d) proactively engaging with organisations, including periodic reviews of compliance
 - e) undertaking cross-organisational reviews, including audits and surveys of organisations.
17. We receive information from external sources about potential breaches of the RO Act in a number of ways, including through:



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- a) registered organisations and officers, including self-reporting
- b) statutory reports from auditors
- c) protected disclosures (whistleblowers)
- d) peak bodies
- e) referrals from other agencies or authorities
- f) media reporting
- g) the general public.

18. Any person may lodge a complaint with us regarding the financial management of organisations or of potential or suspected breaches of the RO Act by:

- email – regorgs@fwc.gov.au
- telephone – 1300 341 665
- mail – GPO Box 1994, Melbourne, VIC 3001

Assessment

Applications and lodgements

19. We use a risk-based approach in processing applications and lodgements submitted by regulated entities.
20. In assessing applications for authorisation or approval to perform a particular activity (such as to be registered as an auditor, to be exempted from a legislative obligation, or requesting the General Manager to arrange for the conduct of an election) we consider the profile of the regulated entity, the type and status of application for approval and case-specific factors.
21. The higher the risk, the more likely that conditions will be imposed or that the application for authorisation or approval may require more information before being issued.
22. We also assess documents that are required to be lodged with the Commission having regard to legislative requirements as to whether those documents should be accepted. If documents do not meet legislative requirements we may request that they be amended or resubmitted.



Assessment of non-compliance

23. If we become aware of a possible instance of non-compliance, we will identify any possible contraventions of the law and assess whether we have relevant jurisdiction and if we do, assess the most appropriate means of handling it.
24. We carefully consider how to respond to all potential breaches of the law, but we do not undertake a formal investigation of every matter that comes to our attention. In some instances, such as whistleblower disclosures, the RO Act sets out particular steps that the must be taken.
25. We use a risk-based approach to determine the nature, severity and speed of responses to complaints or concerns about regulated entities and/or compliance and enforcement action to be taken in relation to instances of non-compliance.
26. That approach considers inherent risks relevant to the nature of the obligation that may have been contravened along with case-specific factors such as the compliance profile and past conduct of the regulated entity or individual and the impact or harm associated with the conduct.
27. The higher the risk, the more likely that a swift and more focused response will be implemented, including conducting inquiries or investigations under the RO Act in appropriate circumstances.

Mitigation

28. Consistent with our risk-based approach, we encourage organisations and individuals who may have engaged in non-compliance to take active steps to remediate or mitigate the effects of non-compliance, to the greatest extent that is possible.
29. In considering our regulatory response to non-compliance, we will take into account steps taken by an organisation to remedy any harm caused by the non-compliance. For example, that may include taking steps to re-lodge a document correcting any earlier misleading or incorrect statement, even if that later lodgement may be out of time.
30. Similarly, where non-compliance arises from a systemic cause, remediation may include the steps taken to modify or improve internal controls or procedures or to implement training to prevent recurrence of the non-compliance, and the active review of the success of those measures.



Discretionary factors

31. We cannot pursue all matters that come to our attention. We consider a range of factors when deciding whether to investigate and possibly take further enforcement action, to ensure that we direct our finite resources appropriately.
32. In accordance with our risk-based assessment, a higher level of scrutiny will be given to some applications and documents lodged with us which carry a higher risk.
33. Similarly, in assessing non-compliance that comes to our attention, we exercise discretion to direct resources to matters that provide the greatest overall public benefit.
34. The specific factors we consider will vary according to the circumstances of the case.

Inquiries and Investigations

Inquiries¹

35. The General Manager has the power to make inquiries to determine whether:
 - a) a reporting unit of an organisation has complied with its financial reporting obligations or its rules relating to its finances or financial affairs
 - b) a civil penalty provision of the RO Act has been contravened.
36. We seek voluntary cooperation from organisations and entities during the conduct of our inquiries. We cannot during an inquiry compel a person to assist us.

Investigations²

37. If the General Manager is satisfied that there are reasonable grounds for doing so, the General Manager also has the power to commence an investigation as to whether:

¹ Section 330, RO Act.

² Section 331, RO Act.



- a) a reporting unit of an organisation has complied with its financial reporting obligations or its rules relating to its finances or financial affairs
- b) a civil penalty provision of the RO Act has been contravened.

38. The General Manager may also conduct an investigation in the circumstances set out in the Fair Work (Registered Organisations) Regulations 2009 (Regulations).

39. A number of the General Manager's compulsory information-gathering powers can only be used when we are conducting an investigation.

40. In certain circumstances the General Manager must conduct an investigation.³ This includes where an auditor's report identifies certain non-compliance by a reporting unit or where a request is made by a required number of members of a reporting unit.

41. An investigation may, but does not have to, follow our making of inquiries.

42. We will complete an investigation as soon as practicable without compromising the integrity of the investigation.⁴

Protected disclosures – Whistleblowers

43. The RO Act provides protection to a person who is eligible to be a whistleblower and who provides information regarding disclosable conduct.⁵ The disclosable conduct can relate to a federal registered organisation, or an officer, or an employee of a registered organisation.

44. If we receive information regarding disclosable conduct, then the disclosure will generally be investigated according to the whistleblower provisions. For the purposes of the investigation, obtaining more information and making further inquiries may be considered to be appropriate.

45. For more information regarding protected disclosures please see our [Whistleblower Disclosures Fact Sheet](#).

³ Sections 332-334 RO Act.

⁴ Section 335B RO Act.

⁵ [Fact Sheet: Protections for Whistleblowers](#).



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Enforcement tools

46. At the end of an inquiry or investigation, the General Manager will make a decision on what, if any, enforcement action is considered appropriate.
47. We can pursue a variety of enforcement remedies, depending upon the seriousness and consequences of the misconduct. We will pursue the enforcement remedies best suited to the circumstances of the case and what is sought, or able, to be achieved.
48. We can take enforcement action that is designed to obtain declarations and pecuniary penalties to achieve either general or specific deterrence, or both, to correct disclosures, to seek disqualification orders or to compensate people. We can also issue rectification notices and try to resolve matters through negotiation.
49. From 6 March 2023 the General Manager may also issue infringement notices and accept enforceable undertakings. The Commission will publish guidelines about the circumstances in which we may use these new enforcement tools in due course.

Litigation

When do we litigate?

50. The General Manager will only commence legal proceedings (including appeals against a court decision) if he considers that there is sufficient evidence or appropriate grounds to do so and it would be in the public interest.
51. In determining whether commencing a proceeding is in the public interest, the General Manager will consider the relevant matters including the following:
 - a) the nature and circumstances of the alleged contraventions, including their seriousness, the number of alleged contraventions and the prevalence of such contraventions amongst organisations
 - b) the actual or potential consequences of the alleged contraventions, including harm to the organisation and its members



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- c) the compliance history of the organisation and its officers, employees and auditors (including, where relevant, responses to previous regulatory activities undertaken by us)
- d) the likely impact of litigation, including as to general and specific deterrence against future contraventions
- e) the appropriateness and availability of other enforcement options which may provide a proportionate regulatory response
- f) mitigating circumstances (including cooperation and remediation)
- g) aggravating circumstances.

52. In determining whether or not to commence legal proceedings concerning contraventions of the RO Act, and in pursuing appropriate remedies that may be available, the General Manager is mindful of the need to maintain public confidence in our regulatory role and to achieve proportionate outcomes to meet standards of fairness, openness, consistency, accountability and efficiency.

How we litigate

53. The General Manager will conduct litigation in accordance with the Commonwealth's Obligation to Act as a Model Litigant (Appendix B to the *Legal Services Directions 2017*).
54. The General Manager will exercise discretion as a regulator as to the contraventions pursued and in doing so will be guided by public interest factors.
55. If appropriate, the General Manager may resolve a matter by agreement with a party (which may be on the basis of the party admitting to contraventions of the RO Act). This agreement may be reached at an early stage of the proceeding or a mediation, or at any later stage of the proceeding.
56. The General Manager will consider any new evidence provided by a party and will act accordingly. This may involve reducing the number of contraventions.
57. The General Manager will discontinue legal proceedings only if it is appropriate to do so. It will be rare for us to make this decision, given the detailed assessment we undertake before we commence proceedings.



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Orders and penalties

58. Under the RO Act, there are various obligations that apply to organisations and/or its branches, officers and employees.⁶
59. If there has been a failure to comply with the obligations, the General Manager may apply to the Federal Court for orders:
- a) imposing a pecuniary penalty or penalties on an individual or organisation
 - b) that an individual pay compensation to an organisation for the damages caused to the organisation by that individual
 - c) disqualifying an individual from holding office in an organisation
 - d) that a court may consider appropriate in all of the circumstances of a case.

Submissions on penalty

60. The Courts are responsible for determining what orders are made and appropriate in a case and the amount of any civil penalty. The General Manager may make submissions to the Court regarding the seriousness of the conduct and what he considers to be appropriate orders.
61. The General Manager will seek penalties that are appropriate to the nature of the conduct and that will achieve general and specific deterrence. A range of factors such as, for example, cooperation and remediation will be taken into account in relation to the submissions on penalty ranges.
62. The parties may reach an agreement resulting in contraventions being admitted and agreement about a specific or range of penalty that we ask the Court to order. The Court ultimately decides on what penalty to impose but may accept the agreed penalty if it is satisfied that the amount is appropriate.

Cooperation with the Commission

63. It is our policy to encourage and fully recognise genuine cooperation.

⁶ As defined in s 305, RO Act. Civil penalty provisions are also contained in the RO Regulations, listed in Reg 168(2).



64. A cooperative approach to dealings with the Commission may benefit an organisation or individual in many ways:

- a) early notification of misconduct and/or a cooperative approach during an investigation will often be relevant to our consideration of which type of action to pursue and what remedy or combination of remedies to seek
- b) in any proceedings commenced by the General Manager we will give due credit for any cooperation we have received from the person or entity against whom the proceedings are brought.

65. You can cooperate with us by:

- a) voluntarily self-reporting any misconduct to us
- b) honestly and completely disclosing all information relevant to the misconduct
- c) providing voluntary assistance during any assessment, inquiry or investigation
- d) providing evidence in a form that can be used in court
- e) making admissions in relation to misconduct you committed or were involved in committing.

66. Merely fulfilling your legal obligations (e.g. by complying with reporting obligations under the RO Act, or by producing documents in response to statutory notices issued by the General Manager) does not, by itself, constitute cooperation for the purposes of this policy.

67. In general, the earlier and more fulsome the cooperation provided, the greater the benefits may be. If you cooperate with us we can:

- a) fully recognise your cooperation
- b) negotiate alternative resolutions to the matter
- c) take into account the degree of cooperation provided during an assessment, inquiry or investigation when determining the appropriate regulatory response including the type of remedy or remedies sought, depending on the circumstances of the case
- d) in administrative and civil matters (other than civil penalty matters), make particular submissions to the court or tribunal as to what the outcome should be
- e) in civil penalty matters, take your cooperation into account including for example in respect of the settlement of the matter or aspects of the matter and/or by way of submissions or an agreed position reflecting a reduction in the type of order or amount of any pecuniary penalty order that may be sought.



68. We retain a discretion regarding whether and how to disclose the fact, manner and extent of an individual's or organisation's cooperation in documents filed or issued by the Commission in connection with an enforcement matter.

Cooperation in civil penalty matters

69. In civil penalty matters, courts in assessing the appropriate penalty, will usually give weight to cooperation provided by a respondent. In general, the earlier and more substantive the cooperation provided, the greater weight that will be given to that cooperation by a court.

70. Cooperation by a respondent in civil penalty proceedings can take the form of:

- a) making admissions in relation to liability
- b) agreeing facts that are not in contest, including entering into an agreed statement of facts to limit the matters in dispute
- c) making joint or agreed submissions in relation to orders and penalty

71. In settling civil penalty proceedings we expect a respondent to agree to a full and frank statement of agreed facts that:

- a) contains all background facts necessary for the court to understand the circumstances of the respondent's conduct in relation to the agreed contraventions
- b) sets out all of the facts necessary to establish the requisite elements of the agreed contraventions
- c) properly reflects the respondent's role in matters which are the subject of the agreed contraventions
- d) where relevant to the court's understanding of the matter, identifies other persons or entities involved in the misconduct
- e) does not contain any mitigating facts or circumstances that you are not able to substantiate to our satisfaction.



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Disclosure of information

72. Where we become aware of issues that are outside of our statutory functions, the General Manager is able to refer the matter, or provide the information obtained, to the relevant bodies.
73. We may disclose information that we acquire in relation to a possible contravention of the law to a member of an Australian police force or other enforcement agency if it will assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory, and in some circumstances we are obliged to do so.⁷

Transparency and publication of compliance activities

74. We will always assert the right to make an enforcement outcome public, unless the law requires otherwise. We will not agree to keep enforcement outcomes secret. This is important for regulatory transparency and effective deterrence.
75. We may, at our discretion, give advance notice of a public statement about an enforcement outcome to an interested party. However, we will not provide any draft public statement before an enforcement outcome is reached (e.g. the terms of a settlement being agreed).
76. We may also publish information on our website (<https://regorgs.fwc.gov.au/>) regarding the fact of, nature or outcome of compliance and enforcement activities, and other activities that we undertake as a regulator, as a method of educating organisations and encouraging compliance.

⁷ See sections 329G and 337CD of the RO Act.



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Review of decisions

77. If an individual or organisation or reporting unit is not satisfied with the process of an inquiry or investigation, or with the outcome of the inquiry or investigation, a request for a review may be made, in writing, to:

The General Manager

Fair Work Commission

GPO Box 1994

MELBOURNE VIC 3001

Email: regorgs@fwc.gov.au

78. The Commonwealth Ombudsman can review the actions taken by many Commonwealth government agencies, including us. The Commonwealth Ombudsman may be contacted on 1300 362 072 or at www.ombudsman.gov.au.

79. In addition, section 604 of the *Fair Work Act 2009* provides that a person who is aggrieved by certain types of decision issued by the General Manager or a Delegate of the General Manager may lodge an appeal with the Commission.

Note: *This policy is intended to provide general information about our approach to compliance. Our policies do not have the force of statute. While we will seek to meet the requirements of our policies in carrying out our functions, failure by us to comply with a policy cannot affect the validity of our conduct. This policy is not a direction issued by the General Manager for the purposes of subsection 343B(5) of the RO Act and should not be taken as a substitute for legal advice.*