



ROCpod episode 8 – How the ROC regulates

Speaker Key

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EA Welcome to episode eight of Rocpod, talking with the Registered Organisations Commission. This episode is about how the ROC regulates and it's a chance to hear from the two most senior people in the ROC, Mark Bielecki, the inaugural RO Commissioner and Chris Enright, the Executive Director and Delegate of the Commissioner.

I'm Eve Anderson and I head up the Education and Reporting team in the ROC, and we're here today to talk about the ROC's approach to the regulation of unions and employer organisations including how our regulatory approach has evolved over recent times. But firstly, let's hear from the Commissioner and Chris about what they do.



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EA So Commissioner, what do you do? And what does your role as RO Commissioner mean?

MB Thanks for that. There are five key functions that I have. The first one is to promote the efficient management of organisations and that really picks up a governance element if you like. And also to promote high standards of accountability of organisations and their officeholders so both the organisation and their officeholders to their members.



Also, one of my functions is to promote compliance with the financial reporting and accountability requirements of the Act and that's a big focus of the Registered Organisations Act. And that is to be done including providing education to those stakeholders, assistance and advice to organisations and their members.

And finally, my function is to monitor acts and practices of registered organisations and offices to ensure they comply with the provisions of the Act that provide for the democratic functioning and control of organisations. So there are a couple of other incidental functions and powers that I have but they're the core things that I'm focused on.

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EA So thanks. In summary, we're really talking about promoting the efficient management of organisations, high standards and we do that through a mixture of educative activities as well as monitoring compliance and other actions as necessary.

MB Yes, that's right. We'll use every tool that's available to us to help promote those outcomes.

EA Thanks. So Chris, you're the Executive Director and the Delegate of the Commissioner. So what does that mean? What does your role involve?

CE Thanks Eve. So my role is to put into effect the Commissioner's functions that you've just heard him talk about. In other words to engage in the operational aspect of the work the Commissioner's charged with doing under the Act.

So that means essentially assisting him to act as his delegate by issuing election decisions, ensuring organisations receive the advice and assistance that he talked about, the education that they need to comply with their obligations. And in terms of financial reporting as well, to deliver on that aspect of reporting.

And also to ensure that we, we the ROC, are accountable and transparent in the work we do. And that means in the way we report to government, the way we let the community and our stakeholders and our organisations know what it is we're doing. So I'm responsible in effect to drive the operational arm of the Commissioner's functions and his responsibilities.

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EA So thanks Chris. So that's a really important point as well that we, the ROC, must be transparent and accountable in our functions as well. And that's a large part of my team's role. We have a reporting role and we put information out there about how we've performed as well.

So back to the topic is how the ROC regulates. So we know that unions and employer associations that are registered in the Commonwealth, they've been regulated for about 115 years now. And just an interesting fact I thought I'd point out,



in its first five years of operation, the Commonwealth Court of Arbitration had registered about 61 organisations.

But the original regulatory regime was quite light-touch regulation and there was very few externally imposed regulatory requirements. It wasn't until the 1970s that the amendments were made to the Act which introduced much higher levels of external regulation of organisations.

And there have been a number of changes to the regulatory regime since then. So Chris, could you tell us how that role as a regulator has changed?

- CE** So post those regulatory changes that you talked about in the 70s, none of us were around at that stage, but I came into this role at the Fair Work Commission essentially doing the job we're doing now with some really distinct differences. And I immediately recognised and have learnt since that time, there have been three distinct phases of this regulatory role.



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- CE** So that is between the 70s and, say, the early 2000s, which I call the pre-Thompson HSU period. The regulator was a small group of public servants working under the auspices of the Fair Work Commission. And largely acting as a registry. That is where the Commission would receive things like elections and prescribe information and financial reports of others and simply process those as a registry.

Then there's the next period which was the Thompson HSU period which was transformational because that required the regulator to completely reinvent itself because it was not doing the things that normal regulators or other regulators were doing at the time and that we now know much more since that time.

So it was not proactively engaging in regulatory activities other than what was being reported to it. And that was transformational between, say, 2013 and '15, '16. And then we've moved into a new period of the ROC since 2017. During that transformation period was the trade union Royal Commission.

So what happened is necessarily the regulator had to change its focus in actually regulating. So the responsibilities on registered organisations actually existed to comply with things like the Australian accounting standards, prior to that and the Act. But the regulatory light touch was that if an organisation was non-compliant as many, many were, we as a regulator would write to them and say that you're non-compliant, you need to fix that up.



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- CE** And then sometimes that would go on for two years or three years or five and ten years without any intervention by the regulator. And that all changed around the



Thompson HSU period, necessarily, because the regulator wasn't doing the things it was supposed to be doing. So that caused a lot of, I would say shockwaves through the system, but necessarily shockwaves because that was the role of the regulator was to engage in compliance activities.

And there was no fault to be laid, it was simply a culture and capability of the Fair Work Commission at the time which was largely self-identified as a registry. So that caused immense change. There was a lot of pushback, a lot of complaints about, well why are you regulating us now? You've never done this before.

Well, our response to that, well we've never done it before but the Act requires compliance and so now we're acting as a regulator. So that was a period of quite tumultuous activity, led to a number of investigations and inquiries. In fact prior to Thompson HSU only one investigation had been conducted in the ten or 20, maybe even 30 years prior to that.

But subsequent to the Thompson and HSU matter, a large number of inquiries and whistleblower matters were conducted by the Commission and now the ROC. As well as in 2012 the other really significant change was some legislative change in 2012 to the Registered Organisations Act increasing compliance activity, increasing requirements, increasing penalties. Really signalling to registered organisations that compliance was a serious thing.



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EA So in response to the Health Services Union and Thompson matters, the Fair Work Commission had to realise that it had to change from a registry to a regulator and the ROC is continuing in that role. So we're just not a keeper of records, we're a regulator of organisations. Commissioner, could you talk to us about the significance of these changes for organisations?

MB Yes, certainly Eve. The focus actually in a sense isn't new because the provisions that we enforce and that we ask our stakeholders to comply with have been in the Registered Organisations Act for a while. So they're legislative requirements and our job as I mentioned when I went through my functions is to monitor compliance with those obligations.

Most of the regulatory requirements that we're concerned with here at the ROC have been around for a long time as you mentioned before. And there are a number of good reasons for that. The first one is that registered organisations are an important part of our industrial relations landscape. They have a key role to play and they're important contributors to our economic prosperity as well as to social justice issues.

These are membership organisations and they must act in the best interests of their members and they need to be accountable to their members. And that underpins a lot of the legislative requirements in the Registered Organisations Act and it also underpins our approach to the regulation in this area.



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MB The fourth good reason is that organisations are accorded a number of benefits and that includes being tax exempt so that if they comply with the relevant taxation provisions, they don't pay income tax, they are accorded corporate identity which gives them perpetual succession.

They have the ability to solely represent their members and relevant people in the industries they're concerned with in the Industrial Relations Tribunal, the Fair Work Commission and more generally. Also, they have the benefit of being able to sue and be sued. So there are quite a number of benefits that are accorded to an organisation when it's registered.

And part of the legislative requirement is to recognise that with those privileges, there comes some obligations. And in fact there was an observation made really to that effect by the Full Court in the decision in the TWU matter. So it's not just our view of things. It's a view that's been endorsed by the Federal Court.

As I've said on a number of occasions now, it's really important to note that most organisations are run by very competent officers who are very interested in doing the right thing, who are acting in good faith and are acting in the best interests of their members. For these organisations abiding by the regulatory regime, demonstrates this attitude.



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MB There are a small minority of officers who don't act in accordance with the Act and in those circumstances, we're not shy. In fact, we're really obliged to take action. And so we've had a number of enforcement actions. In fact, although we run six court cases, three of those we've inherited from the FWC at the time we came into existence. And three others were the court cases that we initiated off our own bat, if I can put it that way.

So it is an area where while the regulation's been around for a long time, as Chris has mentioned, the approach to requiring compliance with the legislation and the requirement has changed over time.

EA But a longstanding objective of statutory regime has been to encourage democratic control of organisations and full participation via their members in affairs of the organisation. So that standing has been around for a long time. So how does our current regulatory regime and our current regulatory regime approach enable democratic control and participation by members in their affairs?

MB Well, Eve, it's really fair to say that the current regulatory regime is very focused on this. And the courts in those cases I've mentioned have really reinforced the importance of it. A few of the recent cases have commentary to support this.



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MB If I go to our most recent case which involved the CEPU, the judge said that although sections 230 and 233 may properly be described as record-keeping provisions, and he wasn't using that term in any sort of derogatory sense, those provisions impose, he said, important and significant obligations upon a registered organisation.

And in this particular case, he pointed out the very fact that the union had what could be described as a complex structure, should have alerted it the necessity to take greater steps than it obviously did in the past to ensure compliance. And that all came up because that union had put in submissions to the court that because it had a big, complex structure it should receive some lesser or some easier treatment in terms of the contraventions that were the subject of the case.

EA So what you're saying, in fact, the more complex your structure the more effort you got to put in to make sure you're complying with your legislative obligations?

MB Well, in fact, that's what the Federal Court is saying. And in that case the judge also found that if that union hadn't improved its processes which it did a very short time before the case commenced, it would have been inclined to impose an even higher penalty. And the penalty in that matter was \$445,000.

I'll just mention a couple of other cases. Not so much my observations on them but what the judges have said. Another one that was decided late last year was our case against Mr Melhem and the Australian Worker's Union. That case involved entry into the register of the AWU of people who weren't entitled to be members and that was contrary to the rules of the AWU.



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MB And it was contrary to the provisions of the Registered Organisations Act which require organisations to keep accurate register of members. The case emphasised that officers are responsible for ensuring both the organisation's rules and that the requirements of the Act are complied with. The judge had a lot to say in this case.

Justice Mortimer found that Mr Melhem's conduct was a clear and serious example of the most senior officeholder within the AWU in Victoria but also a senior officeholder within the national AWU structure, failing to discharge his powers and duties in the best interests of the AWU. And this was one of the driving factors in our taking the action because it was important, and we see it always as important to look after the interests of members.

And Her Honour went on to say that Mr Melhem should have been setting an exemplary standard of behaviour as the most senior officeholder in the Victorian branch but rather he didn't even attempt to ensure the rules of the union he was charged with administering in Victoria were complied with. She described it on a



matter as fundamental to the running of the union as the way that workers become members.

And another matter against an employer association, the Australian Hotels Association, the judge said it was a serious contravention that the Queensland branch of the AHA failed to lodge information for elections for a period that extended over ten years. He saw that as a serious category of contravention in relation to members of the state board where there also had not been elections.



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MB He said that from what he could see that that board continued to function as a body composed by way of an informal collective process of self-election. The person so acting conducted the affairs of the branch without the formal or substantial authority and legitimacy required by the Act and the rules of that Association. So that's a classic example. I'm sure those people meant well but it's a classic example of trying to ensure that the democratic functioning of organisations is maintained.

And in relation to the obligation that came up in that matter for the AHA to notify us of changes to the list of office holders, the judge said that those provisions require that there be an authoritative and reasonably current record held by the regulator identifying each of the officers who hold responsibilities and powers under the rules of the organisations so that it may be inspected by any person.

The full judgements in all of these cases are really instructive reads. So I think it's actually useful to hear what the Federal Court says about the laws that we're regulating and gives people perhaps a different perspective and also the authority of the Court for the approach we take to compliance.

EA Yes, and so they're all quite important cases in terms of those democratic functioning of organisations. I mean if you don't have a proper register of members, how can members participate? You've got to have a proper record there and that was clearly an important point in Melhem's case. And if you're not having elections how are you having democratic processes?



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MB Both things can't be in the one sentence. No elections but democratic process, they just don't reconcile. And indeed, if people aren't notifying who the changes in offices are, how do members know who's exercising the powers? Or fulfilling the obligations of the leadership of the organisation?

So I can understand that organisations find some of this compliance work exacting but it's there for a reason. And our experience has been that once organisations have developed good systems, they've been good compliers.



EA So, I mean I think they're all interesting cases but, Chris, I was wondering if you could tell us a little bit about how we as a regulator go about conducting our inquiries and investigations when we believe there's an issue to look at?

CE Sure, Eve. Well, let me just caveat that by giving you an example of how we operationalise the Commissioner's functions in the selections area. I mentioned the Thompson HSU era. At that stage if an organisation had not conducted an election for ten years in a row, the regulator wouldn't have been aware of it.

And so, since that time we've actually gone from using a Sony Walkman, rather than it being incremental, we've gone straight to Spotify because what we've done is we've created an alert system for an election. So now we send reminder notices to every organisation based on their individual rules and there are very many and very diverse, inviting them to submit prescribed information for upcoming elections.



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CE So gone are the days when an organisation could escape its obligations by having elections and the way we do that, again how we operationalise that, is through this early warning or alert system. So that's just an example.

But in terms of our conducting of inquiries and investigation, this is what gets a lot of media attention even though, as the Commissioner said, we've started three civil proceedings, we've conducted a range of investigations and inquiries but it's very, very minor in terms of our overall numbers of things that we do.

Our education strategy, our inquiries, our assistance, our strategies, our compliance activities. But what we do is we're a forensic-based regulator. We'll follow the evidence. So we've had about 180 whistleblower complaints since the creation of the ROC and we investigate every one of those. We're required under the Act to do that.

We analyse every financial report that's lodged with us. If they're not lodged we follow them up and we have quite a few people self-reporting a number of issues. But the point I want to make is because of the complexity, we understand that in our Act about the timelines and about reporting obligations, we understand that there'll be issues where some organisations either won't or can't comply with those things.



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CE And we've seen hundreds of examples of those and the word I continually use is collaboration. We collaborate with organisations to achieve compliance to the extent that it's possible. If an Act says you're required to lodge something by a particular date and you haven't been able to do that, you're never going to be able to achieve that after it's passed.



But we will work with you and organisations as we do, day in, day out, to achieve as close to compliance as is possible. And as the Commissioner said, we understand that vast majority of organisations and their members and their officers try and comply and we'll work with them. It's only those very few cases where things have not gone according to the Act and compliance has been so significant that we've had to bring proceedings.

Otherwise, we will work with organisations to achieve things through the eyes of a member. We look at things, all of our regulatory activities, through the eyes of a member of a particular organisation. So if a compliance issue emerges, we say, what would members of that particular organisation think about this? What would members of that organisation expect us as a regulator to do or the Commissioner to do? And then we'll follow that path.



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CE So we're very focused on members and their responsibilities, their entitlements, because after all, all organisations are spending their members' money. And we publish things, we're transparent. I go to great pains, often I'm criticised, to make our own activities transparent. And I open up our organisation to great levels of transparency but I also go to great lengths to keep it transparent on behalf of organisations.

So when we have an investigation or inquiry, we'll put it on our website so that people know what's going on. Members will know what's going on. Organisations can expect that they won't get any surprises from the Registered Organisations Commission.

EA Yes, thanks Chris. So I think that's a really important point that we try to engage with organisations as much as possible to achieve a high standard of compliance as we can get to. And I think a recent example of that is our engagement with organisations over governance training and through engaging with that, a number of organisations identified some officers that they needed to have trained and are putting the mediation plans to make sure that has occurred.

And that's a really positive outcome for organisations and for us. So that's another example of that.

CE Yes, significant non-compliance in that area but the activities and our collaboration with organisations is leading and has led to significant increases in compliance. That's the goal and that's the goal for, particularly if you're financial training because that's one of the most significant things that organisations can do is ensure their officers who are spending their members' money have sufficient financial training and are able to do that efficiently and effectively.



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CE So we're not taking a big stick to organisations and saying, the Act says you have to do it, therefore you have to do it. It's common sense it's beneficial to the organisation and we're working with organisations to become compliant in that area because the advantages are for all.

EA Thanks, Chris. So Commissioner, where to from here?

MB Well that's a big question, Eve. I suppose the first thing to note is that we're almost three years old. And over that period it's been a very busy time and a lot of change has accompanied those three years. We have had a number of new functions that were previously held by the FWC, for example the registration of auditors that audit the financial statements of registered organisations.

We've been responsible for an expanded whistleblower regime as Chris mentioned and, in fact, at the time we were given that jurisdiction it was one of the most advanced whistleblower regimes that was being managed here in Australia. During this period we've had new ORP, Officer and Related Party return obligations come in and we've done a lot of training around that.

And we've had a much increased focus on compliance and education. So in terms of where to from here, I think you'll continue to see a very strong focus on education and training. We've been inviting organisations at our various workshops around the country to focus on organisational governance and to focus on the culture of their organisations.



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MB There are a lot of lessons that can be learnt for organisations from the findings of Commissioner Hayne and the banking Royal Commission. I'm not saying it's on all fours but effectively things that he said about governance and culture probably apply to all organisations. But certainly there are lessons that can be picked up by registered organisations.

So that focus will continue going forward. The whistleblower provisions will continue to be, I think, an important source of information about compliance issues of organisations and officers. And we will continue to work with organisations to help them with their compliance efforts. It's part of my statutory mandate to do that, to help them with education, advice and assistance.

And we want to do that but at the same time as I think we've demonstrated, we're not shy of taking action if we have to in circumstances where that's really our last resort.

EA So really we want to continue to engage with organisations as much as possible to achieve compliance but we really have to think about government's processes that



are in place and the culture of organisations so that we can achieve high standards of accountability to members.



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- MB** I think so. I think the leadership of organisations owe that to their members and I think they, on the whole, want to achieve that for their members. It's just perhaps looking at the issue in perhaps more contemporary terms than it has been in the past.
- EA** Yes, I think it's important to note that organisations are generally run by competent officers who want to act in the best interests. The question is how can you really put that into action and we want to help you to do that.
- MB** Yes, and as I say, I think most officers actually want to do it.
- EA** Yes. So thank you Commissioner. Did you have any other points, Chris, before we conclude this?
- CE** Look, you will often hear both the Commissioner and I talking about the regulating employer and employee organisations. We don't discriminate or discern between the two. All the obligations are exactly the same. And you've only heard me talk about the Thompson and HSU matters going back to 2011 or '12. And we haven't talked about any other individual organisations.

But I should make the point, HSU and most organisations in fact are vastly different organisations than they were, nothing like the organisations in the compliance issues that were occurring in those days, back in the day. So whilst that was transformational that period, that organisation has transformed itself as well.



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- CE** So again, the Commissioner and I keep making the point, we know that most overwhelmingly the organisations that we're dealing with today are vastly different organisations than they were years ago and compliance is a key aspect of their business.
- MB** I think an important message to take away is that ROC is very focused on supporting organisations. I'm very pleased to say that during the lifespan of the ROC, we've had increases in compliance rates in a host of areas and that is obviously in part due to organisations learning more and fulfilling their compliance obligations.

It's in part due to the conscientious efforts of the staff here at the ROC but it's a good trend and I think that underscores some of the things that we've been talking about today. And then, finally, I suppose I would like to thank organisations and their



officers for all of their efforts and encourage them to continue working with us as we wish to continue working with them.

EA Thanks Commissioner and thank you Chris, as well. And thanks listeners who are joining us today. And please join us in our next podcast about elections in registered organisations. Thank you very much.

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