



ROCpod episode 19 – Election exemptions: what they are and how do they work?

Speaker Key

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AO Hello and welcome to another episode of ROCpod. My name is Andrea O’Halloran and I’m a senior advisor in the Compliance and Protected Disclosure team. In today’s episode we will be talking about a topic that has been the subject of many questions from our registered organisations – and that is Elections. We will share some of the questions we’ve being asked, and the options and potential solutions that are available to organisations. In fact, the focus of our discussion will be election exemptions, specifically what they are and the process of applying for an exemption from the requirement for the Australian Electoral Commission, that is the AEC, to conduct your election or the requirement to have your election by postal ballot.

There have been lots of election-related issues that organisations can face, because every registered organisation and branch, including yours, needs to have elections.

Some organisations need to have elections as soon as possible to ensure that they have enough elected officers to achieve a quorum for decision making. And others want greater control over the timing and conduct of their elections or want to change the method of their election.

These are some of the election issues that we have been helping organisations and branches to work through – mostly with the AEC but sometimes using other methods.



To explain how, I am joined today by Bill Steenson. Bill leads the ROC's Compliance and Protected Disclosures Team. He also issues election decisions as a Delegate of the Registered Organisation Commissioner. Thanks for your time today, Bill.



00:02:20

BS You're welcome, Andrea. So elections are a really hot topic at the moment. In fact, I'm probably doing more work on elections than on anything else at the moment. And as we all know, the pandemic was an unfolding issue in 2020 and the AEC suspended lots of elections for reasons of safety and the restrictions that were in place. Now in 2021, elections have recommenced, but organisations are still reaching out to us with questions about them. We know many elections were delayed from their usual schedule, and there's quite a bit of "catch up" going on. Now we've been working individually with organisations, and also with the AEC, to resolve those issues as best we can.

AO Okay, so let's start at the beginning, with the suspension of elections. In April 2020, the AEC suspended elections following the outbreak of COVID-19. And the ROC acknowledged that this decision was taken to protect the health and safety of AEC staff, and the members, staff and officers of registered organisations.

Bill, what was the immediate impact of the suspension of elections for registered organisations?



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BS So the impact of the suspension varied across our registered organisations. Some didn't have elections scheduled at all for 2020, so it really didn't affect them as much, unless they had casual vacancies arise. Other organisations were able to rely on the 'holding over' principle – that's where existing officers stay in office until an election can be run for their successors – in order for them to keep on functioning.

Now in a very small number of cases, it was critical for the running of an organisation for an election to take place, and in those circumstances after we consulted with the organisation and with the AEC, the AEC carefully and safely conducted those.

AO So the ROC released a guidance note to assist registered organisations to understand the effects of delayed elections, including the principle of 'holding over'. The guidance note was one of our most accessed resources after its release last year, which suggests that the issue was an important one to many of our stakeholders.

BS That's right and we also put out an e-learning module on elections, we stepped through the election process and ways to help it run more smoothly and we also held a number of live panels on things like governance training for officers. I certainly recommend having a look at those resources on our website.



AO Yes I agree, Bill, the panels have been getting strong positive feedback, particularly the way they give hands on examples. Okay, so going to the recommencement of elections. The AEC lifted the temporary suspension and has begun processing a staged return of elections. Since elections have resumed, what are some of the issues being raised by registered organisations?



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BS Well with the AEC are conducting elections again, you can expect unsurprisingly there was quite a bit of backlog in election matters from that several months of suspension. What the AEC has done is triaged election matters, they've appointed relationship managers to assist in communicating with organisations particularly about the expected timing of those elections.

Now for some organisations that's going to mean their election won't be run until some months after it would otherwise have.

AO And another thing we're seeing a bit of, Bill, is organisations that have annual elections who are due for their next or incoming 2021 election and last year's 2020 election hasn't yet been run. What does an organisation do if that happens?



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BS: Well this is something where the organisation should reach out to us about as soon as possible. We have seen a heap of these. If you have your next election due, because of what your rules say, you still **MUST** lodge prescribed information on time in order to meet your legal obligations – and those legal obligations are, if you have an election due under your rules you must lodge a prescribed information, whether or not you did it last year as well. We encourage organisations to please do this to meet their legal obligations. And still do it even though the last election may be on hold. Because there's a way for us to deal with that, which I'll go through in a minute.

Now the prescribed information template on our website will help to lodge prescribed information for this year's coming election, but you should also include a line in that template or in the email submitting it, telling us for example that last year's election is still on hold, or that it's just about to recommence – whatever the case may be.

We've been working closely with the AEC to find the most effective and legally valid way forward for each organisation. Sometimes this means that we should an Amending Decision clarifying that certain elections are still required and also identifying any that no longer needing to be run. Now this might be because the organisation changed its rules to extend the term of office, for an extra year or so, is one we've seen quite often, or it might be that we're trying to deal with a situation of preventing two identical elections for the same offices from being run at the same time or one straight after the other. When obviously only one is needed.



We're here to try and make that transition to normal timelines feel as smooth as possible. And we've had a lot of success doing that so far. It's all about early communication though, so speak to us as soon as you realise it could happen. And if we identify that, we'll do similar and contact you.



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AO Now Bill we're also being asked a bit about organisations running their own elections while the AEC is clearing that election backlog. Can an organisation or branch just do that?

BS Well the short answer is no. Not unless they've got explicit permission to do so. The RO Act makes it very clear that the default position for all organisations and branches is they **MUST** use the AEC as returning officer unless they have an exemption.

AO So, an organisation needs an exemption to run some or all of its elections without the AEC assistance?

BS Yes, that's right Andrea. And that's part of the focus of today's podcast, is what an organisation needs to do to get this exemption if that's the step they want to take.

Obviously there are many advantages to having your election run by the AEC, for instance, it means the process is paid for through AEC funding, using AEC resources to run the election and with the benefit of the AEC's vast experience running elections all over the country. This could be very important if there are allegations of things like election irregularities. But some organisations are considering running their own elections, seeking the exemption, particularly for some smaller elections.



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AO So Bill, what do you mean by smaller elections?

BS Well, some organisations have what are known as collegiate elections (some people might also know them as Stage 2 elections) – that's where the rules of that organisation specify that a particular group of officers, who've already been elected by members, are the ones who get together to elect certain officers within that group, such as the President or Vice-President – and some organisations are asking us how they can just get those elections exempted, because in practice you're sometimes taking about, say, 10 to 20 Committee members electing a few offices from among themselves. And when the starting point is that the AEC conducts all elections there is a need for a specific exemption granted in order for the organisation to run that themselves if that's what they want.

The other thing we're seeing is organisations contemplating electronic elections, and I'll also deal with that question a bit later towards the end of the podcast.



AO OK Bill, so moving back to organisations considering applying for an exemption from elections being conducted by the AEC. If an organisation or branch actually holds an exemption, it can organise its own election. And the ROC has been approached by organisations about how to apply for an exemption, and we've been able to help them navigate through that process. And in fact, earlier this month, in February 2021, the ROC conducted a hearing and granted a branch of an organisation an exemption.

Most elections as we know are run by the AEC so many people would not be familiar or unsure of the process of applying for an exemption. So Bill, can you explain how an organisation can apply for an exemption from having their elections run by the AEC?



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BS Sure, so the vast majority of organisations have their elections conducted by the AEC because section 182 of the Act says that the default position is the AEC runs the elections. But the Act also gives organisations and branches the ability to apply to the ROC to conduct their own elections.

Now before they make their application, the organisation or branch's committee of management must pass a resolution. And they must let their members know about the resolution. When they make that application to us, it must include a declaration that the organisation or branch has passed that resolution and how they've advised their members of it.

AO And by a resolution you mean, the committee of management's decision what they want to do. So in this case the committee of management must hold a vote amongst the committee members about making an application for an exemption and if that vote or motion passes, it must be recorded into a committee meeting minutes that the committee has resolved to make an application for an exemption from the AEC running their elections, including which elections the exemption request specifically applies to – because the organisation can apply for an exemption for some elections but not others. So do we have some recommended wording to help them in that application Bill?

BS Yes, just picking up on what you said a moment ago, the application that we dealt with very recently, was one where they did only ask for an exemption in relation to one set of elections, not all of them. Now, the wording that's used doesn't have to be complex. I would recommend that they include specifically what elections they're looking at getting exempted – is it all elections or just a specific one, and that they've agreed to seek the exemption. So for example it could say something like -

The committee of management has resolved to apply to be exempted from the AEC conducting the election for say, President, Treasurer and Secretary. The Committee will inform the members of this resolution and make an application to



the ROC for the appropriate exemption. All other elections will still be conducted by the AEC.

So in that case, they're specifying that's one not all of the elections. Then they've included in the minutes what the result of the vote was and how they've informed members of the resolution. We've had an earlier podcast on meetings, which explained some best practice about holding meetings and keeping minutes. And, listeners can go back to that podcast if they haven't heard that already in relation to some of those meeting processes.



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AO And then organisations apply to the ROC? So, is there a particular form that they must use to do that?

BS Well the answer to your first question yes, they then apply to the ROC, but in answer to the second one no there isn't a form. And one of the reasons for that is these types of applications are very rare. So what you could do if you were applying is to send an email to us at the standard ROC email address, which is regorgs@roc.gov.au and this would include what elections you're seeking the exemption for, information in support of the exemption request and why you say you should be granted the exemption. It should also include the minutes of the meeting showing that the committee has considered it and agreed to it, as well as any proof that you've sent it to the members – for example did you send them an email? Include a copy of that email. Did you put it on the website? Give us some information about that.

Now the ROC is also required to publish a public notice in at least one newspaper, to assist communicating with members that the application for an exemption has been lodged with us.

AO So Bill, if a member has concerns about an organisation's application to conduct it's own elections, how can they raise their concerns or indeed oppose the application?

BS Members have got the right to lodge objections to the exemption application, which is why it's important to be transparent and communicate the resolution to members. It's also essential to point out that the legislation says that members lodge their objection with the Fair Work Commission (as distinct from the ROC, even though the ROC is the body that hears the exemption application). Now we deal with this somewhat quirky situation by asking in the notice that we publish that notices of objections be provided to both the Fair Work Commission and to us. And this is an example again of why working closely with other regulators is so important to the work that we do.



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AO So Bill is there an expense for applying for an exemption?



BS No, there's no application fee as such and we pay for the publication of the notice as well, but if the organisation is granted the exemption then the organisation has to pay for their whole election process, rather than the AEC running it at no cost to the organisation, and obviously that is a factor for the organisation to consider.

AO So Bill what happens after an application is actually lodged with the ROC, and members have been given the opportunity to object? How does the ROC decide an application for an election exemption?

BS The ROC holds a hearing. We have to do that because the Act tells us that we have to. And we have to do it to give the organisation the opportunity to be heard, as well as anyone who has lodged an objection.

Our recent hearing was held via tele-conference. And as we said earlier, the overwhelming majority of elections are conducted by the AEC, so we don't hold these exemption hearings very often. But we must hold a hearing as I say, to consider the exemption application.

And in the hearing, the Commissioner or the person delegated by him, will consider the application and any objections that have been made to it.



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AO So can you explain what information the ROC would expect to see in an application. I mean, are there specific criteria which must be met for the granting of an exemption?

BS Yes, so definitely so specific criteria and section 186 of the Act sets those out. Organisations or branches that want to apply need to familiarise themselves with those criteria basically so that they can ensure the application address those requirements. This is part of the organisation explaining why it should be granted the exemption.

And those criteria are what the Commissioner has to be satisfied of before an exemption can even be granted. Firstly, the rules of the organisation or branch need to comply with the Act and the requirements about elections for office.

AO So, that's an important issue. So for instance, this includes all officers must be elected, the returning officer that the organisation selects to replace the AEC cannot be an officer or employee of the organisation, and there are rules about how to deal with defective nominations, how to become a candidate, election timelines and, of course, the requirement for secret ballots. They're all in the RO Act around section 143.

BS That's right, and we haven't gone into the full list of those, but the rules must comply with all those requirements.



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AO And Bill, what if the organisations rules are not compliant with those requirements?

BS Well, most organisations' rules do, and it doesn't necessarily arise but if they don't, then the organisation must ALSO deal with the Fair Work Commission, basically because they got to put in place a rule change to make the rules compliant. So for rule changes the organisation should speak to the Fair Work Commission, because the ROC can't just change your rules to make the exemption work. If the rules don't comply, the Commissioner can't just approve the exemption.

AO And are there any other issues considered by the Commissioner at the hearing?

BS Yes, there's a second part of the criteria that are under section 186. So as well as being satisfied that the branch has rules that allow it to comply with the Act, the Commissioner also has to be satisfied that if the organisational branch holds that exemption allowing it to conduct its own election, then that the election will still be conducted under the rules of the organisation and in accordance with the Act and in a way that gives members the opportunity to vote without intimidation.

Now that's really important. It's about safeguarding the democratic process and protecting the integrity of the election process and the election result.

So, for example still ensuring that the returning officer is impartial, still having a process that gives eligible voters the opportunity to vote and allows for secret voting, and a process that is practical and is achievable. So this is a very specific look at the process the organisation wants to implement in place of the process the AEC uses.



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AO So let's presume an application is lodged with the ROC and the Commissioner grants the exemption. For how long is that exemption valid?

BS So an exemption isn't time-limited, but it can be revoked. What that means in practice is that providing there are no concerns with their elections and the Act and their rules are complied with, an exemption holder can conduct their own elections for as long as they wish to do so. We have a small number of organisations who have successfully conducted their own elections for several years. However, organisations and branches need to take care to ensure high standards of democratic control and compliance with their rules.

The Act allows the Commissioner to revoke the exemption if there are concerns about how the elections are being conducted. And the committee of management can also apply to have that exemption revoked, if the organisation or branch no longer wants to conduct their own elections.

AO And this has occurred recently, is that not the case Bill?



BS Yes, it has. We've got some organisations who weren't using their exemption – in one case, the organisation was still asking the AEC to conduct its elections, even though the organisation held an exemption. In that case, we asked the organisation to consider if it still needed the exemption since it wasn't using it. And after considering it, the committee of management agreed to ask for that exemption to be revoked.

In another case, the organisation's committee of management voted to hand back its exemption and requested that we remove it from them after concerns about irregularities in the way that its elections had been run.

And in a different case, the ROC actually wrote to the organisation indicating that it seemed the organisation wasn't conducting its elections in accordance with its rules and asked the organisation to show cause why its exemption shouldn't be revoked. It didn't do that and the ROC then held a hearing and revoked the exemption for that organisation as a result.

Now the elections go to the absolute heart of transparency and accountability in organisations, and how members participate in them and the standards that the organisation or branch needs to uphold. So we take these things very seriously.



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AO So Bill, you've just explained the process involved in applying for an election exemption. Are you able to share with us how long that process would take? And I expect time may be an important factor for some of our organisations in the current time.

BS Yes so not all matters are going to take the same time to resolve, because some will have objections some won't, different variables will come into it, but if we use the recent exemption the ROC granted as a guide, it shows the sort of streamlined process that can be achieved.

In that case the branch committee of management passes their resolution at the very beginning in December and lodged their application with us two days later. Now the public notice has to be published with an application has to be done within a fortnight of the application being lodged and in this case we published it within a week. The notice period for objections is 28 days, so that period has to elapse – and that took us through to mid-January. Once we verified that there were no objections that had been lodged, then we asked the branch for some written submissions to support their application and we set a hearing date. The ROC heard the matter at the beginning of February and granted the exemption in a written decision issued a week later. So, depending on the timing or expected timing of your delayed election, seeking an exemption might be something you are interested in considering. But just be aware that the application I talked about had no objections lodged, and the objection process would have extended out that application by several weeks.



AO And if an organisation has an exemption, let's say because of the AEC election backlog, can an organisation utilise the AEC in the future?



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BS You certainly can, depending on how your rules are written, though it might involve you having to ask the ROC for your exemption to be revoked. It's not a forever thing.

AO And would the organisation still deal with the ROC if it had an exemption from the AEC conducting its elections?

BS Yes they definitely would – you just wouldn't happen to send us Prescribed information anymore to start off the election process, but we would absolutely still be seeing notifications of change telling us when new officers got elected or others left office, because that's still an obligation on every organisations, AEC or not, and many organisations with exemptions end up sending us the outcome of the election (like the declaration of results) as a form of good practice so we can continue to post that information on the website and give transparency to members.

AO: Now I just want to come back to something you said earlier about organisations that are contemplating electronic elections. Why would that need an exemption?|



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BS: Well, there are two reasons potentially. One is that the legislation requires any direct election – so any election in which all members of the organisation, or the branch or the particular electorate – vote directly for office bearer to be by secret postal ballot unless there is an exemption. So for those stages of election section 144 of the RO Act says that every organisation's rules must provide for a postal ballot as a default. But that section also allows for an exemption to be granted. So for example to run some other kind of non-postal ballot election. That type of exemption is dealt with by the Fair Work Commission because it's a rules related issue and the Fair Work Commission has to be satisfied that the criteria set out in section 144 are met. A big one there to consider those exemptions is whether the change is likely to result in greater participation in the ballot and that members still have the opportunity to vote without intimidation. So, for example, what steps are going to be put in place to ensure the secrecy of the members' vote under the changed system.

Now I said there were two issues with wanting to run an election electronically. The postal ballot exemption (section 144) is one of them of the direct elections. The other is one of practicality and availability – and that's because at the moment the AEC doesn't offer electronic ballots. Which means if you wanted to run an electronic ballot, you would need to use a different provider and in order to do that you would need an exemption from the AEC running an election – the process that we've just talked about earlier.



Now as you can appreciate, Andrea, there's sometimes quite a bit of complexity involved in an organisation navigating its way through to the system that it wants. Sometimes these can take time to achieve and so we really encourage organisations to work through things well before their next election is due, not just popping out some election related rule changes a couple of months before the election is due. Now we're here to help and to provide guidance to make sure that what organisations are doing complies with the law, and to work through practical examples with them of how what they are proposing might work in practice.

AO: Yes that's very interesting Bill, and I suspect that we're going to be hearing more about electronic elections as time goes on. But thank you very much for your time today.

BS: Thanks, Andrea. And of course, if there's any questions about elections or other registered organisations related issues you can certainly can contact the ROC and we can help walk organisations and branches through those process.

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