

ROC and Governance Changes

14 February 2023, *BN1*

Introduction

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth)* (**SJBP Act**) abolishes the Registered Organisations Commission (**ROC**) – which was introduced by the former Coalition Government in 2016 as the watchdog for unions. All of the current powers of the ROC are to be transferred to the Fair Work Commission (**FWC**). Additionally, the FWC will be given powers relating to:

- The issuing of Infringement Notices
- Entering into Enforceable Undertakings

These changes take effect from 6 June 2023.

Changes in Detail

Abolition of ROC and transferring powers

The Abolition of the ROC is a significant step towards shifting the focus of the regulatory environment away from being politicised and unduly punitive toward being more positive. Aside from the significance from a policy perspective, the legal mechanisms by which this is achieved are reasonably straightforward. From 6 June 2023, the ROC and the RO Commissioner will no longer operate, and all powers and functions held or exercised by them will be performed as required by the FWC or the FWC General Manager respectively.

Changes made relate Infringement Notices and Enforceable Undertakings (both of which are discussed further below). Other material changes to how unions operate relating to the ABCC, are outlined in the ABCC and Construction Industry Taskforce briefing note.

After 6 June 2023, unions should continue to submit any materials to the FWC that they currently submit to the ROC.

Infringement Notices

An infringement notice is, in essence, a fine (parking fines are a common example). Infringement notices are different to penalties imposed by courts in relation to a contravention in that they are issued administratively without court proceedings.

The significance of an infringement notice is that if one is given in relation to a particular alleged contravention, and the amount specified in the notice is paid by the person to whom it is given,

no proceedings can be brought in relation to the contravention.¹ In other words, paying the fine means that no court action can be taken. The infringement notice also isn't enforceable in its own right, so it's not illegal to not pay the specified amount. However, not paying the amount means that proceedings may be brought in relation to the original alleged contravention.

Infringement Notices can only be issued in relation to a single contravention (unless there are multiple contraventions arising out of a failure to perform an action by a particular date).² This also means that the immunity provisions which arise from paying an amount specified in an Infringement Notice only apply to the alleged contravention specified in that notice, and do not provide a shield in relation to other contraventions.

Commonwealth Infringement Notices are regulated by *the Regulatory Powers (Standard Provisions) Act 2014 (Cth)*. The SJBPA Act extends their availability to the FWC by making the General Manager an "infringement officer" for the purpose of *the Regulatory Powers Act* and allowing the GM to also appoint other FWC staff as infringement officers. Infringement Notices can only be issued in relation to specified provisions of *the Fair Work (Registered Organisations) Act 2009 (Cth)*.

Enforceable Undertakings

An enforceable undertaking is as it sounds – a commitment by a person (which may be a real person or an entity) to do (or not do) something which is binding and can be enforced.

Commonwealth Enforceable Undertakings, the power to enter into them and, their enforceability are provided for by *the Regulatory Powers (Standard Provisions) Act 2014 (Cth)*. They are a commonly used regulatory tool, including by ASIC, APRA and the FWO. Enforceable undertakings ordinarily specify an alleged contravention and a set of actions to be taken (or refrained from) by the person giving the undertaking (for example training, improved compliance processes, refunds or other payments).³ If a person enters into an enforceable undertaking with a regulator and then doesn't comply with it, the regulator can seek to have the undertaking enforced by a court.⁴ In these circumstances, it is the breach of the undertaking which is actionable, however the court will have powers to make a wide range of orders.⁵

The SJBPA Act extends their availability to the FWC by making the General Manager an "authorised person" for the purpose of *the Regulatory Powers Act* and allowing the GM to also appoint other senior (SES) FWC staff as authorised persons. Under the new provisions, Enforceable Undertakings will be able to be entered into in respect of any of the provisions of the FWRO Act.

The FWC GM is not obliged to enter into an enforceable undertaking, however their decision not to do so and press ahead with litigation instead may be capable of being challenged.⁶ⁱ

ⁱ *The information in this document does not constitute legal advice and should not be taken to include all requirements or obligations relevant to the entitlement(s).*

¹ *Regulatory Powers (Standard Provisions) Act 2014 (Cth)* s 107; note: s 107 also provides that paying an amount is not taken as an admission or acceptance of liability in relation to the alleged contravention.

² *Regulatory Powers (Standard Provisions) Act 2014 (Cth)* s 103

³ *Regulatory Powers (Standard Provisions) Act 2014 (Cth)* s 114

⁴ *Regulatory Powers (Standard Provisions) Act 2014 (Cth)* s 115

⁵ *Regulatory Powers (Standard Provisions) Act 2014 (Cth)* s 115

⁶ See *Australian Securities and Investments Commission v Donald* (2003) 203 ALR 566