



Fair Work  
Commission

# Compliance and Enforcement Policy

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## Introduction

### About this policy

The General Manager of the Fair Work Commission (the Commission) is the independent statutory regulator of federally registered organisations under the *Fair Work (Registered Organisations) Act 2009* (RO Act).<sup>1</sup>

The purpose of this Compliance and Enforcement Policy (Policy) is to provide simple and clear information about how the General Manager, supported by specialist staff within the Registered Organisations Services Branch (ROSB), undertakes compliance and enforcement activities.

The Policy sets out:

- the General Manager's approach to compliance and enforcement
- the tools and outcomes used by the General Manager and specialist staff within the ROSB
- what the General Manager expects of registered organisations
- what registered organisations can expect from the General Manager and the ROSB.

This Policy is intended to provide general information about the General Manager's approach to compliance. It does not have the force of statute.

### The General Manager's functions

The functions of the General Manager<sup>2</sup> include:

- promoting efficient management of organisations and high standards of accountability of organisations and their office holders to their members
- promoting compliance with the financial reporting and accountability requirements of the RO Act
- providing education, assistance and advice to registered organisations and their members
- monitoring acts and practices to ensure they comply with the provisions of the RO Act and providing for the democratic functioning and control of organisations

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<sup>1</sup> Where not otherwise specified, all references in this document to sections are to provisions of the *Fair Work (Registered Organisations) Act 2009* and references to regulations are to provisions of the *Fair Work (Registered Organisations) Regulations 2009*.

<sup>2</sup> section 329A of the RO Act



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- doing anything incidental to or conducive to the performance of any of the above functions.

The General Manager is also required to embed within organisations a culture of good governance and voluntary compliance with the law.<sup>3</sup>

## **Our common interests**

There are common interests shared by the registered organisations and the General Manager to:

- enhance the democratic functioning of registered organisations
- empower registered organisations to achieve voluntary compliance effectively and efficiently
- enable high levels of ongoing compliance, transparency and accountability of registered organisations to their members
- minimise unnecessary red tape and barriers to achieving compliance
- actively encouraging and supporting members to confidently participate in the running of their organisations.

These common interests are at the centre of the General Manager's approach to compliance and enforcement.

## **Assistance: Our primary tool**

### **Supporting registered organisations to maintain positive and compliant operations**

#### **Our approach**

The General Manager provides education, assistance and advice to registered organisations to help them maintain positive regulatory cultures that embed practices of good governance and voluntary compliance.

A focus on information sharing and engagement assists the General Manager and staff in the ROSB to work with registered organisations to identify barriers to compliance, streamline processes, appropriately identify and manage risks, and educate and empower registered organisations to drive their own good governance practices, for the benefit of their members.

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<sup>3</sup> Section 329A(2) of the RO Act



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The officers of registered organisations are the primary gatekeepers responsible for managing risks associated with potential non-compliance while promoting member engagement and organisational transparency. The General Manager understands that supported, engaged, educated and well-informed officers who are encouraged to “speak-up” and ask questions helps to ensure organisations can self-audit and achieve voluntary compliance.

### **What you can expect from us**

The General Manager will dedicate significant resources to develop and maintain tools that support organisations to build competent governance practice and strong self-regulatory cultures.

We will listen carefully to feedback, routinely engage with stakeholders, and gather knowledge from our daily interactions with registered organisations, to help ensure that our education, advice and assistance services are meeting the evolving and often individual needs of registered organisations.

We will consult with stakeholders each year to identify upcoming and future priorities.<sup>4</sup>

### **What we expect from you**

We expect registered organisations, particularly those encountering challenges in meeting their compliance obligations and obligations to their members, to engage with our feedback and consultation processes in order that we can improve our services in the most beneficial way.

## **Cooperation and working closely together**

### **Our approach**

We will seek to foster a regulatory environment which encourages organisations to cooperate and genuinely engage in self-reporting to secure voluntary compliance, in order to experience improved outcomes that are faster and more cost effective for the organisation and their members.

Early engagement in relation to specific concerns of non-compliance will assist in tailoring effective solutions, including through education, voluntary remediation or use of compliance tools that achieve a proportionate outcome and will likely avoid escalation of the matter. This works best when there is a pro-active approach and cooperation from the affected registered organisation.

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<sup>4</sup> This forms part of the ROSB’s broader Education, Advice and Assistance Strategy that will be renewed every three years, through cooperation and consultation with the Registered Organisations Advisory Committee and the Compliance Practitioners Reference Group.



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### **What you can expect from us**

When organisations and individuals work cooperatively with the General Manager and the staff in the ROSB, you can expect us to:

- recognise your cooperation
- negotiate tailored resolutions to the matter with you, including the use of alternative enforcement tools to civil penalty litigation, such as enforceable undertakings, infringement notices, education and ongoing support
- consider 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
- in civil penalty matters, take cooperation into account, which may influence submissions or an agreed position resulting in a reduction in the type of order or amount of any pecuniary penalty order sought

### **What we expect from you**

We expect registered organisations to work with us cooperatively and negotiate solutions in good faith and with the needs of members front of mind.

Cooperation can take many forms and degrees and may include:

- voluntarily self-reporting any non-compliance or potential misconduct
- honestly and completely disclosing all information relevant to the non-compliance or potential misconduct
- providing voluntary assistance during any assessment, inquiry or investigation
- providing evidence in a form that can be used in a court
- making admissions in relation to non-compliance or potential misconduct committed
- any other form of cooperation which reduces the complexity or length of inquiries, investigations or litigation.



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## **Assessment: When non-compliance occurs**

### **Our approach**

The General Manager understands that non-compliance will occur from time to time. Some may be incidental and some may be egregious.

The General Manager also understands that the overwhelming majority of people within registered organisations will make genuine attempts to voluntarily comply with their obligations.

Accidental or trivial non-compliance by organisations and individuals who attempted to comply may be most appropriately resolved through guidance and assistance. This may include working with organisations to remediate non-compliance and address concerns about the adequacy of their systems to help ensure future compliance.

More serious allegations relating to repeated, opportunistic or deliberate contraventions or misappropriation of funds will involve a greater level of response and allocation of resources than less serious non-compliance. Deliberate or fraudulent conduct is likely to give rise to a swift, focused and well-resourced investigation and enforcement action.

### **What you can expect from us**

The ROSB takes a strategic approach to compliance and enforcement interventions. This involves a tiered, escalating approach that assists in creating a positive regulatory culture and encourages voluntary compliance, including alignment with the interests of members of the registered organisation.

Where a suspected non-compliance issue exists, the ROSB will take an evidence-based approach to gathering and analysing relevant facts to:

- identify the cause
- understand the conduct and its scope
- decide the likelihood that a contravention has occurred (and whether it may be repeated)
- evaluate the consequences including the impact on members' interests.

The ROSB will then take a risk-based approach to determine the appropriate and proportionate regulatory response to non-compliance.



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In assessing which education, compliance and enforcement interventions will be exercised, the factors we will consider include, but are not limited to:

- the requirements of the legislation and jurisdictional issues, including whether the General Manager is required to take certain steps
- the seriousness of the conduct, including the risk of serious harm
- the effect on the members' interests of both the non-compliant conduct and the proposed education or compliance response
- whether the conduct was self-reported and the level of cooperation
- steps taken (or proposed to be taken) by the registered organisation to remediate or mitigate the issues, including improvements that will increase the organisation's good governance and resilience against future non-compliance
- the age and duration of the non-compliant conduct and whether it has been repeated
- whether the conduct was inadvertent, caused by a lack of systems and knowledge, was reckless or whether it demonstrates systemic, opportunistic, or deliberate non-compliance
- the appropriate and proportionate level of response that is an efficient, effective and ethical use of public resources
- the importance of specific and general deterrence to improve the behaviour of the affected organisation and encourage positive behavioural change to the entire regulated community
- strategic risks
- the registered organisation's history of compliance and cooperation
- how to best direct finite resources appropriately to matters that provide the greatest overall public benefit.

Following this assessment, we will determine a response, which may include:

- general education to the entire regulated community when intelligence suggests wide-ranging, but low level non-compliance
- specific and tailored education and advice to the registered organisation affected by the non-compliance





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- advice and assistance on policy, structural and rule changes to encourage ongoing, generational improvements to underlying good governance
- protected disclosure investigations into allegations raised under the whistleblower scheme
- supervision of, advice to and assistance with internally run investigations and self-driven compliance processes
- inquiries and investigations into allegations of non-compliant conduct
- rectification and infringement notices
- enforceable undertakings
- litigation and civil penalties
- referrals to other regulatory or law enforcement agencies.

These tools may be used individually or in combination.

Cooperation by the registered organisation may inform the factors we consider and the appropriate response.

### **What we expect from you**

We expect you to work with the General Manager and ROSB staff to:

- identify underlying root causes for non-compliance
- take steps to minimise further issues and build resilient processes to ensure future compliance.



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## Operational activities

### Our approach

The General Manager or their delegate will apply the principles of natural justice. This includes providing opportunities to organisations and persons of interest to respond to issues of potential non-compliance or adverse report findings, whenever it is possible or appropriate to do so.

The way the ROSB conducts its operational activities is informed by the General Manager's approach to compliance, whether that is processing applications and lodgements submitted by regulated entities or undertaking inquiries and investigations.

The General Manager and the ROSB will approach their compliance activities in a way that is appropriate, targeted and proportional. The ROSB will aim to avoid unnecessary escalation by tailoring approaches that are focussed on achieving proportionate outcomes that are in the best interests of the members of registered organisations.

### Information sources

Any person may lodge a complaint regarding registered organisations or of potential or suspected breaches.

The ROSB obtains information about possible non-compliance in a range of ways, including from:

- organisations and individuals who self-report
- whistleblowers who make a protected disclosure
- the review of financial statements and other documents lodged with the Commission
- referrals from other agencies
- intelligence that is gathered through research and analysis to identify the risk of breaches that would cause significant harm to members, including from:
  - media reporting and other public sources
  - proactively engaging with organisations, including periodic reviews of compliance
  - undertaking cross-organisational reviews, including audits and surveys of organisations, and
  - evaluating information from the public and peak bodies.



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The ROSB receives information from anonymous and confidential sources and, subject to the law, protects the privacy of anonymous and confidential sources wherever possible.

Where information is received from an anonymous or confidential source, the ROSB may be restricted in its ability to investigate the matters raised or to raise any allegations of wrongdoing with an organisation or person of interest.

### **The General Manager's compliance powers**

During an investigation under section 331 the General Manager has access to statutory powers that can be used to compel the production of evidence relevant to the investigation.

The General Manager may in certain circumstances give a notice to a person requiring them to:

- give any information or produce any documents relevant to an investigation to the General Manager or their delegate
- attend before the General Manager or their delegate to give evidence under oath or affirmation and to produce records or other documents, and
- give other reasonable assistance in relation to an investigation.

A person commits an offence if they fail, intentionally or recklessly, to comply with a requirement made by the General Manager in respect of a statutory notice.

The General Manager has other powers in relation to documents and may, in certain circumstances, apply to a magistrate where appropriate during an investigation for the issue of a warrant to seize documents.

### **Applications and lodgements**

Documents lodged with the Commission are assessed against the legislative requirements as to whether those documents should be filed.

Different types of lodgements are assessed against specific relevant criteria and may be assessed differently based on risk. For example, Financial Reports may be subject to a primary or advanced review. In most cases the assessment criteria against which lodgements are assessed is published on the Commission's website.

If documents that are lodged with the Commission do not meet legislative requirements, the ROSB may request that they be amended or resubmitted.



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## Protected disclosures – whistleblowers

The RO Act provides a whistleblower scheme and protection to a person who is eligible to be a whistleblower.<sup>5</sup>

The disclosable conduct can relate to:

- a federally registered organisation
- an officer of a registered organisation
- an employee of a registered organisation.

If the ROSB receives information regarding disclosable conduct, then the disclosure will in most cases be investigated by an authorised officer in accordance with the whistleblower provisions in the RO Act. A whistleblower investigation is different to a section 331 investigation.

An authorised officer does not have the power to compel information in a whistleblower investigation and must rely on the cooperation of organisations and their officers. While the ROSB endeavours to protect a request for anonymity by a discloser, this may impact the ability to progress a whistleblower investigation.

For more information regarding protected disclosures please refer to the ROSB's [Whistleblower Disclosures website](#).

## Inquiries (section 330)

Following an assessment of the above factors, the General Manager or their delegate may determine it is appropriate to commence an inquiry. The inquiry can concern whether:

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

The General Manager or their delegate must also conduct a follow up inquiry within 12 months if the General Manager has notified a reporting unit of contraventions following the completion of a section 331 investigation.

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<sup>5</sup> [Fact Sheet: Protections for Whistleblowers](#).



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Voluntary cooperation from organisations and individuals is encouraged and recognised during the conduct of inquiries. A person cannot be compelled to assist an inquiry.

### **Investigations (section 331)**

The RO Act establishes the framework for the conduct of investigations by the General Manager or their delegate during which certain information can be compelled from third parties.

If the General Manager or their delegate is satisfied there are reasonable grounds for doing so, they may commence an investigation as to whether:

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

In certain circumstances the General Manager must conduct an investigation.<sup>6</sup> 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.

An investigation may, but does not have to, follow the making of inquiries or the completion of a protected disclosure matter.

Investigations will be completed as soon as practicable without compromising the integrity of the investigation.<sup>7</sup>

### **Responding to inquiries and investigations**

During or at the end of a protected disclosure, inquiry or investigation the registered organisation or any person of interest will generally be afforded an opportunity to respond to any allegations of non-compliance. However, it may not be possible or appropriate to contact the registered organisation or any person of interest in every case.

Where an organisation or person is invited to provide a response to potential findings, that response will be voluntary. Providing a response and voluntary assistance may demonstrate cooperation. The General Manager will be able to consider any response when deciding what enforcement action is appropriate.

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<sup>6</sup> Sections 332–334, RO Act.

<sup>7</sup> Section 335B, RO Act.

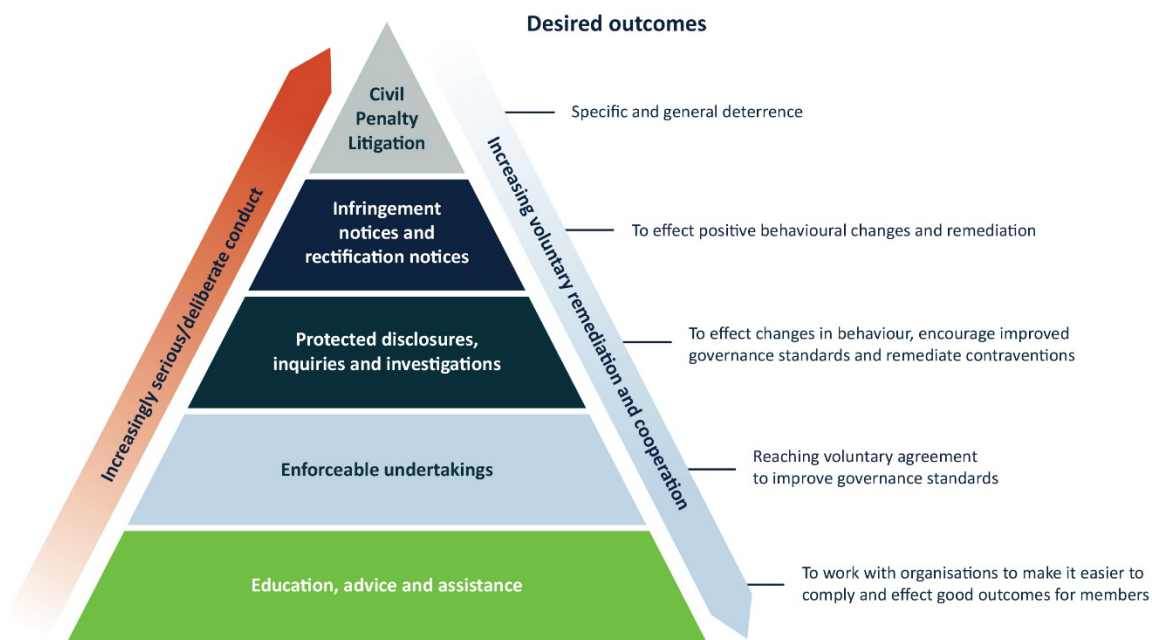


## Enforcement outcomes

### Our approach

The General Manager or their delegate will decide on what, if any, enforcement outcome is considered appropriate, having regard to the objects of the RO Act and the factors outlined above in this policy.

The General Manager will draw from a wide range of enforcement outcomes.



When considering regulatory responses to non-compliance, the General Manager will consider genuine steps taken by an organisation to remedy non-compliance and mitigate against any harms.

The General Manager supports voluntary disclosure and rectification. Examples of remediation and mitigation include:

- self-reporting, including any concessions made
- cooperation
- re-lodging a document correcting any earlier misleading or incorrect statement, even if that later lodgement may be out of time
- modifying or improving internal controls or procedures or implementing training to prevent recurrence where non-compliance arises from a systemic cause



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- active and voluntary review of any control measures
- announcements or sharing of additional information with the members.

### **What you can expect from us**

You can expect that our approach will be appropriate and proportionate to the harm or non-compliance to achieve necessary deterrence, remediation and compliance in the future.

### **What we expect from you**

We expect registered organisations to take genuine steps to remedy non-compliance and mitigate against any further harm or non-compliance.

### **Education, advice and assistance as an outcome**

Most compliance concerns can be resolved using an educative response. However, it will not be appropriate to provide an educative response to serious, systemic, opportunistic, or deliberate non-compliance or where this does not provide a proportionate response having regard to any harms suffered.

### **Enforceable undertakings**

The General Manager will use enforceable undertakings when appropriate.

Enforceable undertakings are a valuable tool that are likely to be faster and more cost-effective compared with court processes. Enforceable undertakings may provide an opportunity for registered organisations and individuals to be involved in the resolution of a matter to achieve a certain outcome.

They provide a tailored and flexible resolution to issues of non-compliance in a manner that advances the interests of members of registered organisations. An enforceable undertaking can be made to fit the specific issues of an organisation. It can include requirements that a person or organisation:

- complete additional training
- publish a statement
- undertake remediation
- make improvements to systems and processes
- enter into a compliance regime



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- take, or not take, any other relevant steps.

Enforceable undertakings are made by agreement between the General Manager or their delegate and an organisation or individual. The General Manager may accept an enforceable undertaking in circumstances where:

- potential, likely or suspected non-compliance with provisions of the RO Act has been identified
- the registered organisation or individual entering into the enforceable undertaking is prepared to voluntarily address the compliance concerns
- the enforceable undertaking will provide an effective and appropriate regulatory outcome that is in the public interest.

The General Manager may accept an enforceable undertaking at any time, including in conjunction with other regulatory action. An enforceable undertaking may be initiated by request made by a registered organisation or individual, or at the initiative of the General Manager.

The General Manager will usually publish an enforceable undertaking on the Commission's website and an organisation or individual will be made aware of this as a condition of entering into an enforceable undertaking.

### **Rectification notices**

A rectification notice is a remedy notice that the General Manager can issue to a reporting unit (section 336(2)(a)) at the conclusion of an investigation if the General Manager is satisfied that a reporting unit has contravened certain provisions or their rules relating to their finances or financial administration.

A rectification notice can require a reporting unit to take specified actions within certain time periods to rectify a contravention notified to the reporting unit. A reporting unit must comply with a rectification notice.

Rectification notices do not require the consent of the organisation, though the organisation's response to the investigation may be relevant to formulating the requirements contained in the rectification notice.





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## Infringement notices

The General Manager may appoint infringement officers. Infringement officers may issue infringement notices if they reasonably believe that a person has contravened certain provisions of the RO Act or Regulations.

An infringement notice will:

- set out the particulars of an alleged contravention of an offence or civil penalty provision that the infringement officer believes has been contravened
- specify an amount to be paid
- be given within 12 months after the day on which the contravention is alleged to have taken place.

A person who receives an infringement notice can choose to:

- pay the amount specified in the notice. Agreeing to pay an infringement notice does not constitute an admission of guilt by the person who receives it but will prevent subsequent court proceedings in relation to the contraventions specified in the notice.
- NOT pay the amount. Court proceedings may then be brought against them in relation to the alleged contravention(s).

Infringement notices allow the Commission to provide timely and cost-efficient enforcement outcomes which may be appropriate in some circumstances as an alternative to civil penalty litigation, particularly for less serious matters, or where unintentional but repeated or systemic contraventions are identified.

## Civil penalty litigation

The General Manager can commence legal proceedings as another enforcement option in respect of a contravention of a civil penalty provision. It is generally reserved for more serious non-compliance and is an essential regulatory mechanism for enforcing the law because:

- enforcing the law and obtaining Court orders sends a powerful public message to others not to engage in similar conduct (general deterrence)
- stopping and deterring those contravening legislation from engaging in unlawful conduct now and in the future makes the need to comply with Commonwealth laws real (specific deterrence)



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- clarifying the law helps the community understand the various obligations and rights arising from Commonwealth workplace laws.

The General Manager will only commence legal proceedings (including appeals against a court decision) if the General Manager considers that there is sufficient evidence and appropriate grounds to do so, and it would be in the public interest having regard to the factors above.

The General Manager may also commence legal proceedings to enforce compliance with an enforceable undertaking or rectification notice.

In legal proceedings the General Manager can seek orders that a person:

- pay a pecuniary penalty for contravention of a civil penalty provision
- compensate an organisation for damage it has suffered
- be disqualified from holding office
- any other orders that are appropriate.

The General Manager does not have a general power to enforce the rules of a registered organisation.

Members of a registered organisation can seek to enforce the rules under the RO Act. Registered organisations can also take their own actions to apply for a compensation order for a contravention of a provision of the RO Act.

In conducting the proceedings, the General Manager acts as a model litigant. The Federal Court is 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 the General Manager considers to be appropriate orders.

The General Manager will seek penalties that are appropriate to the nature of the conduct and that will achieve general and specific deterrence. The General Manager will consider a range of factors including relevant sentencing principles, cooperation and remediation in relation to the submissions on penalty ranges.

In civil penalty matters, courts in assessing the appropriate penalty will usually give weight to cooperation provided and contrition expressed by a respondent, along with other mitigating and aggravating factors.



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In general, the earlier and more substantive the cooperation provided, the greater weight that will be given to that cooperation by a court. Cooperation by a respondent in civil penalty proceedings can take the form of:

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

### **Resolving litigation by agreement**

If appropriate, a matter may be resolved by agreement with a party. This may involve contraventions being admitted or an agreed penalty being submitted to the Court. The Court ultimately decides on what penalty to impose but may accept the agreed penalty if it is satisfied that the amount is appropriate.

In settling civil penalty proceedings, the General Manager will expect a full and frank statement of agreed facts that:

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

An agreement to settle a legal proceeding may be reached at an early stage of the proceeding or a mediation, or at any later stage of the proceeding. The General Manager will discontinue legal proceedings only if it is appropriate to do so.

### **Publicising compliance and enforcement**

The General Manager may publish information regarding compliance, enforcement and other regulatory activities, as a method of educating organisations and encouraging compliance.



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## Disclosure of information to relevant bodies

The General Manager or an authorised official:

- can refer information that is acquired in the exercise of powers and functions under the RO Act to other relevant bodies
- may disclose information acquired 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. In some circumstances, the RO Act requires disclosure.<sup>8</sup>

The General Manager may:

- disclose information to a third party where it is necessary or reasonable to do so in the course of performing their functions or exercising their powers.

## Review of decisions

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](mailto:regorgs@fwc.gov.au)

The Commonwealth Ombudsman can review the actions taken by many Commonwealth government agencies, including the ROSB. The Commonwealth Ombudsman may be contacted on 1300 362 072 or at [www.ombudsman.gov.au](http://www.ombudsman.gov.au).

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 their delegate may lodge an appeal with the Commission.

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<sup>8</sup> See sections 329G and 337CD of the RO Act.



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## Limitations

While the ROSB and the General Manager intend to comply with this policy in carrying out functions under the RO Act, a failure to do so does not affect the validity of any conduct taken. 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.

## Contacting the ROSB

Any person is welcome to contact the ROSB to:

- raise concerns about the conduct of registered organisations
- raise concerns about officers of registered organisations
- ask questions about general regulatory requirements.

Our contact details are:

- Email – [regorgs@fwc.gov.au](mailto:regorgs@fwc.gov.au)
- Phone – 1300 341 665
- Mail – GPO Box 1994, Melbourne, VIC 3001

We welcome feedback. It helps us to improve how we assist and support registered organisations.

Feedback can be sent to [regorgs@fwc.gov.au](mailto:regorgs@fwc.gov.au).