

NOTICE OF FILING

Details of Filing

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File Title: REGISTERED ORGANISATIONS COMMISSIONER v THE AUSTRALIAN WORKERS' UNION
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



Statement of claim

No. _____ of 20____

Federal Court of Australia
District Registry: New South Wales
Division: Fair Work

REGISTERED ORGANISATIONS COMMISSIONER

Applicant

THE AUSTRALIAN WORKERS' UNION

Respondent

PART A PARTIES AND BACKGROUND

Applicant

1. The Applicant (**the Commissioner**):

- 1.1. is and has been at all material times since 1 May 2017 the holder of the office established by s 329AA of the *Fair Work (Registered Organisations) Act 2009* (**the RO Act**);
- 1.2. upon his appointment, assumed powers and functions in respect of the regulation of registered organisations under the RO Act which prior to 1 May 2017 were vested in the office of the General Manager of the Fair Work Commission; and
- 1.3. has standing under s 310 of the RO Act to apply to the Court for orders under Part 2 of Chapter 10 of the RO Act against an organisation whose conduct has contravened a civil penalty provision.

Respondent

2. The Respondent (**the AWU**) is, and was at all material times, an organisation registered under the RO Act.
3. At all material times, the AWU operated pursuant to rules made in accordance with Part 2 of Chapter 5 of the RO Act (**the Rules**).

Filed on behalf of (name & role of party) Registered Organisations Commissioner (Applicant)
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PARTICULARS

- A. The Rules are in writing and a copy of the Rules, as amended from time to time, and certified under section 161 of the RO Act to be a true and correct copy, is published on the website of the Fair Work Commission.
4. Under the Rules, at all material times, the AWU was comprised of a National Office and the following relevant branches (**AWU Branches**):
- 4.1. Port Kembla, South Coast & Southern Highlands (until 1 September 2016);
 - 4.2. Newcastle, Central Coast & Northern Region (until 1 September 2016);
 - 4.3. Greater New South Wales (until 1 September 2016);
 - 4.4. the New South Wales Branch (**NSW Branch**) (from 1 September 2016);
 - 4.5. South Australian Branch;
 - 4.6. Western Australian Branch;
 - 4.7. Queensland Branch;
 - 4.8. Tasmanian Branch; and
 - 4.9. The Tobacco Workers Branch, until it ceased to exist under the Rules on 1 July 2013.
5. By reason of s 242(2) and (5) of the RO Act:
- 5.1. Each of the AWU Branches; and
 - 5.2. So much of the AWU which is not a part of any branch (specifically, the National Office), are each taken to be a reporting unit for the purposes of Chapter 3 Part 8 of the RO Act.

PART B OBLIGATIONS OF REGISTERED ORGANISATIONS

6. At all material times:
- 6.1. s 230(1)(a) of the RO Act required a registered organisation to keep a register of its members, showing (among other matters) the name and postal address of each member;
 - 6.2. s 230(2)(b) of the RO Act required a registered organisation to remove from its register of members the name and postal address of each person who ceased to be a member under the rules of the organisation or s 171A of the RO Act, within 28 days after the person ceased to be a member;
 - 6.3. s 172 of the RO Act required a registered organisation to remove from its register members who were, under the organisation's rules, required to, but had not, paid their

membership dues for more than 24 months within 12 months after the end of the 24 month period;

- 6.4. s 231(1) of the RO Act required a registered organisation to keep a copy of its register of members as it stood on 31 December in each year, for 7 years after the 31 December concerned; and
 - 6.5. s 230(1)(d) of the RO Act in combination with reg 147(f) of the *Fair Work) Registered Organisations) Regulations 2009 (the Regulations)* required a registered organisation to keep a record of the number of members on 31 December in the previous year.
7. At all material times, a registered organisation was required to provide the following information about the number of its members recorded in the register of members to the relevant regulator (**the Regulator**) each year:
- 7.1. Under s 233(1) of the RO Act in combination with reg 149 of the Regulations, by 31 March each year, a registered organisation was required to provide (among other things), a copy of the record of the number of members on 31 December in the previous year required by s 230(1)(d) of the RO Act, certified by declaration by the secretary or other prescribed officer of the organisation to be a correct statement of the information contained in that record (**Annual Report**); and
 - 7.2. Under s 254(2)(f) of the RO Act in combination with reg 159(a) of the Regulations, as soon as practicable after the end of the financial year, each reporting unit in a registered organisation was required to prepare an operating report stating (among other matters) the number of persons that were, at the end of the financial year to which the report related, recorded in the register of members for s 230 of the RO Act (**Operating Report**).

PARTICULARS

- A. Prior to 1 May 2017, the relevant regulator was the General Manager of the Fair Work Commission. From 1 May 2017, the relevant regulator was the Commissioner.
8. At all material times, ss 172, 230, 231, and 254 of the RO Act were civil penalty provisions.

PART C CONTRAVENTIONS OF THE RO ACT

Contravention of s 254 – Failure to accurately report number of members

9. By reason of the matters in paragraphs 2, 4, 5 and 11 above, at all material times the National Office of the AWU was obliged under s 254 of the RO Act to provide an Operating

Report to the Regulator each year stating (among other matters), the number of persons that were, as at 30 June, recorded in the register of members for the AWU.

10. During the period from 31 December 2009 to 31 December 2014, the National Office adopted a practice of reporting in its Operating Report that the AWU's membership at 30 June each year was the same as that reported at 31 December the previous year, by replicating the membership figures from the preceding year's Annual Report.
11. In fact, the AWU's membership was not static from 31 December to 30 June in each year during the relevant period.

PARTICULARS

- A. The AWU Annual Reports for the years 2009 to 2013 and the AWU Financial Reports for the years 2010 to 2014 are in writing and are published on the website of the Commissioner.
 - B. By letter dated 15 November 2016, Mr Chris Enright, Director of the Fair Work Commission wrote to Mr Scott McDine, National Secretary of the AWU about the validity of the AWU's membership reporting in its Annual Reports.
 - C. By letter dated 25 November 2016 from Mr Daniel Walton, Acting National Secretary of the AWU to Mr Enright, Mr Walton admitted that the membership number reported in the Financial Reports reflected the membership number reported in the Annual Reports and that the AWU's membership was not static from 31 December to 30 June the following year during this period.
12. By reason of the matters in paragraphs 9 to 11 above:
- 12.1. The membership numbers reported by the National Office in its Operating Report for each of the financial years 2010, 2011, 2012, 2013 and 2014 did not accurately reflect the numbers recorded in the AWU's register of members as at 30 June in each year; and
 - 12.2. The National Office of the AWU contravened s 254(f) of the RO Act on five occasions between 2009 and 2014.

Contravention of s 231(1) – Failure to keep a copy of the register of members

13. By reason of the matters in paragraphs 2 and 6 above, at all material times the AWU was obliged under s 231(1) of the RO Act to keep a copy of its register of members as it stood at 31 December in each year for the period of 7 years after the December concerned.
14. During the period from 31 December 2009 to 31 December 2017:

- 14.1. Each AWU Branch used a software application database called MembershipToday to record and maintain its membership data;
 - 14.2. At the end of 2017, the NSW Branch transitioned from using MembershipToday to using a different software application database called Oracle Netsuite;
 - 14.3. The National Office did not maintain an independent record of the membership of the AWU but relied on the membership data maintained by individual branches to comply with its obligations under the RO Act;
 - 14.4. For the purposes of the preparation of the AWU's Annual Return, the Secretary of each AWU Branch would provide the AWU's National Office with membership numbers extracted from MembershipToday or Oracle Netsuite as at 31 December in the previous year;
 - 14.5. Some AWU Branches also provided the National Office with an extract containing the membership data stored on their system as at that date;
 - 14.6. The AWU's National Office took no steps to collate this data or to ensure that a copy of the register of members across all AWU Branches was kept for 7 years (either by the relevant AWU Branch or by the National Office).
15. Despite demand by the Commissioner, the AWU has been unable to produce or identify an accurate or comprehensive record of the state of its register of members as at 31 December for each year from 2009 to 2017.

PARTICULARS

- A. On 19 February 2021 the Commissioner issued a notice to produce (**First Notice**) under s 335(2)(b) of the RO Act, requiring the AWU to produce to the Commissioner the register of members kept for the purposes of s 231(1) of the RO Act as it stood on 31 December of each year from 2009 to 2017 for the National Office and each of the States other than Victoria.
- B. On 10 May 2021, the AWU produced to the Commissioner a USB containing approximately 1500 documents in purported compliance with the First Notice.
- C. On 18 May 2021, the Commissioner issued a notice (**Second Notice**) under ss 335(2)(a), 335N(9) and 335P of the RO Act requiring for the AWU to identify and explain how the documents produced responded to the previous notice.
- D. On 2 June 2021, the AWU provided a letter and a table which purported to identify how each document related to each category of the First Notice. It was not possible for the Commissioner to determine that any of the documents produced

in respect of the First Notice were genuinely copies of documents that had been kept by the AWU in compliance with section 231(1) of the RO Act.

- E. By letters dated 29 July 2021 and 3 August 2021 from the AWU's lawyers to the Commissioner, the AWU admitted that it failed to keep the Register as it stood at 31 December of each year, as required by s 231(1), between 2009 and 2017.

16. By reason of the matters in paragraphs 14 and 15 above:

16.1. The AWU failed to keep a copy of its register of members as it stood on 31 December for each of the years 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016 and 2017; and

16.2. The AWU contravened s 231(1) on nine occasions during the period from 2009 to 2017.

Contravention of s 230(1)(a) – Failure to record the name and address of each member

17. By reason of the matters in paragraphs 2 and 6 above, at all material times the AWU was obliged under s 230(1)(a) of the RO Act to keep a register of its members showing the name and postal address of each member.

18. During the period from 31 December 2012 and 31 December 2016:

18.1. The aggregated membership data maintained by each AWU Branch was treated by the AWU as the register of members required to be kept by the AWU under s 230(1) of the RO Act;

18.2. the AWU had no uniform set of systems or procedures in relation to member management or the validation of member entries; and

18.3. the AWU Branches had no uniform practice in relation to the verification of entries or the removal of duplicate entries from their membership databases.

19. Between 2012 and 2016 the membership database maintained by the Queensland Branch included:

19.1. 54 unique entries that were duplicates;

19.2. 425 unique entries containing an incomplete name;

19.3. 4,669 unique entries containing no postal address; and

19.4. 301 entries that contained both an incomplete name and no postal address.

PARTICULARS

- A. Extracts from the membership database maintained by the Queensland Branch as at 31 December in each year between 2012 and 2016 have been produced by the

AWU in the form of spreadsheets provided to the National Office for the purposes of the preparation of the AWU's Annual Return (**Queensland Member Extracts**).

B. The Queensland Extracts are in electronic form and are entitled:

- a. financial members as at 31 December 2012 – 'Annual ROI - National Office Financial 2012.xlsx',
- b. unfinancial members as at 31 December 2012 – 'Annual ROI - National Office Unfinancial 2012.xlsx',
- c. financial members as at 31 December 2013 'Annual ROI - National Office Financial as at 31.12.2013.xlsx',
- d. unfinancial members as at 31 December 2013 – 'Annual ROI - National Office Unfinancial 31.12.2013.xlsx',
- e. financial members as at 31 December 2014 – 'ROI National Office as at 31.12.2014 members who have paid.xlsx',
- f. unfinancial members as at 31 December 2014 – 'ROI National Office as at 31.12.2014 members who have not paid.xlsx',
- g. financial members as at 31 December 2015 – 'Annual ROI - National Office as at 31.12.2015 members who have paid.xlsx',
- h. unfinancial members as at 31 December 2015 – 'Annual ROI - National Office as at 31.12.2015 members who have not paid.xlsx',
- i. financial members as at 31 December 2016 - 'Annual ROI - National Office as at 31.12.2016 members who have paid within date range.xlsx',
- j. unfinancial members as at 31 December 2016 – 'Annual ROI - National Office as at 31.12.2016 member who have not paid within date range.xlsx'

20. As at 31 December 2013, the membership database maintained by the Greater NSW Branch included:

- 20.1. 4 unique entries that were duplicates;
- 20.2. 209 unique entries containing an incomplete name;
- 20.3. 1,215 unique entries containing no postal address
- 20.4. 60 entries that contained both an incomplete name and no postal address.

PARTICULARS

A. An extract from the membership register maintained by the Greater NSW Branch as at 31 December 2013 has been produced by the AWU in the form of a

spreadsheet provided to the National Office for the purposes of the preparation of the AWU's Annual Return.

- B. The NSW member Extract is in electronic form and is entitled 'Member Register of the Greater New South Wales Branch of the AWU as at 31 December 2013' coded AWU.006.002.4089.

21. As at 30 June 2016, the membership database maintained by the South Australian Branch included:

- 21.1. 285 unique entries containing an incomplete name;
 21.2. 466 unique entries containing no postal address; and
 21.3. 152 entries that contained both an incomplete name and no postal address..

PARTICULARS

A. An extract from the membership database maintained by the South Australian Branch as at 30 June 2016 has been produced by the AWU in the form of a spreadsheet produced for the purposes of the 2016 Operational Report for the South Australian Branch (**South Australian Member Extract**).

B. The South Australian Member Extract is in electronic form and is entitled 'SA - Member_list_30_June 2016 and 30 June 2017.xlsx' coded AWU.003.001.2513.

22. By reason of the matters in paragraphs 18 to 21 above:

- 22.1. between 2012 and 2016, the AWU failed to keep a register of its members showing the name and postal address of each member;
 22.2. the AWU contravened s 230(1)(a) of the RO Act on at least 4,847 occasions between 2012 and 2016 with respect to the Queensland Branch;
 22.3. the AWU contravened s 230(1)(a) on at least 1,368 occasions in 2013 with respect to the Greater New South Wales Branch; and
 22.4. the AWU contravened s 230(1)(a) on at least 599 occasions in 2016 with respect to the South Australian Branch.

23. Further, by reason of the matters in paragraphs 13 to 16 above, the Commissioner has been unable to ascertain whether the membership data maintained by other AWU Branches or in other periods complied with the AWU's obligations under s 230(1)(a) of the RO Act.

Contravention of s 230(2)(b) – Failure to remove ceasing members within 28 days

24. By reason of the matters in paragraphs 2 and 6 above, at all material times the AWU was obliged under s 230(2)(b) of the RO Act to remove from its register of members the name

and postal address of each person who ceased to be a member under the Rules or s 171A of the RO Act within 28 days after the person ceased to be a member.

25. During the period from 31 December 2012 to 31 December 2016:

25.1. Rule 14 of the Rules provided that a member may resign membership of the AWU by notice in writing. Depending on the circumstances, rule 14 provided that a notice of resignation would take effect on the day on which the notice was received, on the day specified in the notice, or two weeks after the notice was received;

25.2. When a member notified the Queensland Branch in writing that they wished to resign their membership, the practice of the Queensland Branch was to classify the member with an account status type of "Pending Resignation" in MembershipToday but not to remove the member from the register immediately. Rather, such members would be treated as "unfinancial" members and removed in accordance with the Queensland Branch's practice for the removal of such members; and

25.3. At no time did anyone from the Queensland branch or National Office question whether this practice was in accordance with the obligations of the AWU under s 230(2)(b) of the Act.

26. Between 2012 and 2016 the membership database maintained by the Queensland Branch included 6,362 entries for members classified as "Pending Resignation" in one year that remained on the register the following year.

PARTICULARS

A. The entries are recorded in the Queensland Member Extracts.

27. By reason of the matters in paragraphs 24 to 26 above:

27.1. the AWU failed to remove from its register of members the name and postal address of each of the persons referred to in paragraph 26 above within 28 days after those persons ceased to be a member; and

27.2. the AWU contravened s 230(2)(b) of the RO Act on at least 6,362 occasions between 2012 and 2016 with respect to the Queensland Branch.

28. Further, by reason of the matters in paragraphs 13 to 16 above, the Commissioner has been unable to ascertain whether the membership data maintained by other AWU Branches or in other periods complied with the AWU's obligations under s 230(2)(b) of the RO Act.

Contravention of s 172 – Failure to remove unfinancial members

29. By reason of the matters in paragraphs 2 and 6 above, at all material times the AWU was obliged under s 172 of the RO Act to remove from its register of members the name and

postal address of each member who was, under the Rules, required to, but had not, paid their membership dues for more than 24 months (**unfinancial members**) within 12 months after the end of the 24 month period.

30. During the period from 31 December 2012 to 31 December 2016:

30.1. The AWU had no uniform practice or process in relation to the removal of unfinancial members to ensure that such members were removed within 12 months of becoming unfinancial for more than 24 months.

30.2. As a result, each AWU Branch adopted its own practice in relation to the removal of unfinancial members, which operated without any oversight from the National Office;

30.3. The practice of the Queensland Branch in relation to the removal of unfinancial members was to 'purge' such members in bulk about once per year. This was a manual process involving the member record being moved to 'archived' status in the member database; and

30.4. In the case of the Queensland Branch, the archiving or 'purging' process would generally occur after members had been unfinancial for more than 3 years rather than occurring within the 3 year period prescribed by s 172 of the RO Act.

31. Between 2012 and 2016, the membership database maintained by the Queensland Branch included 13,950 entries for members who were required to, but had not, paid dues for more than 3 years.

PARTICULARS

A. The entries are recorded in the Queensland Member Extracts.

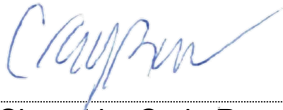
32. By reason of the matters in paragraph 29 to 31 above:

32.1. the AWU failed to remove from its register of members the name and postal address of each of the members referred to in paragraph 31 above within 12 months after the end of the 24 month period prescribed by s 172; and

32.2. the AWU contravened s 172 of the RO Act on at least 13,950 occasions between 2012 and 2016 with respect to the Queensland Branch.

33. Further, by reason of the matters in paragraphs 13 to 16 above, the Commissioner has been unable to ascertain whether the membership data maintained by other AWU Branches or in other periods complied with the AWU's obligations under s 172 of the RO Act.

Date: 17 November 2022




Signed by Craig Rawson
AGS Lawyer
for and on behalf of the Australian
Government Solicitor
Lawyer for the Applicant

This pleading was prepared by Allison Mills, solicitor and settled by Stephen Rebikoff and Edwina Smith of counsel.

Certificate of lawyer

I Craig Rawson certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 17 November 2022



Signed by Craig Rawson
AGS Lawyer
for and on behalf of the Australian
Government Solicitor
Lawyer for the Applicant