



FAIR WORK
COMMISSION

22 January 2013

Ms Lee Thomas
Federal Secretary
Australian Nursing Federation
Unit 3, 28 Eyre Street
KINGSTON ACT 2604

By email: fedsec@anf.org.au

Dear Ms Thomas,

**Section 233 of the Fair Work (Registered Organisations) Act 2009 (RO Act)
Obligation to lodge information with the Fair Work Commission
Annual Return of Information for year 2011 – AR2011/2540**

We acknowledge receipt on 17 January 2013 of the Annual Return providing information required under subsection 233(1) of the *Fair Work (Registered Organisations) Act 2009* (RO Act) for the Western Australian Branch of the Australian Nursing Federation (ANF) for the year 2011. Subsection 233(1) of the RO Act and Regulation 149 of the *Fair Work (Registered Organisations) Regulations 2009* (the Regulations) require that Annual Returns be lodged by 31 March each year.

Further, in accordance with subsection 233(2) and Regulation 151 of the Regulations an organisation must lodge with the Fair Work Commission (FWC) notification of any changes made to the records within 35 days. In future please ensure these requirements are complied with.

Please note that section 233 of the RO Act is a civil penalty provision and the General Manager of FWC is able to commence proceedings in the Federal Court of Australia seeking the imposition of civil penalties in relation to contraventions of this provision.

Yours faithfully

Sam Lynch
Senior Adviser
Regulatory Compliance Branch
Fair Work Commission

MERCOVICH, Elizabeth

From: LYNCH, Sam
Sent: Tuesday, 22 January 2013 10:49 AM
To: 'fedsec@anf.org.au'
Cc: 'Mark Olson'
Subject: Annual Return of Information for year 2011 – AR2011/2540
Attachments: L - Lee Thomas - ANF - 22 January 2013 - AR2011_2540.pdf

Dear Ms Thomas,

Re: Annual Return of Information for year 2011 – AR2011/2540

Please find the attached documentation in relation to the above matter.

Should you have any questions in relation to this correspondence please feel free to contact me.

Regards,

Sam Lynch
Regulatory Compliance Branch

Fair Work Commission
Tel: (03) 8661 7943
Fax: (03) 9655 0412
Samuel.lynch@fwc.gov.au

11 Exhibition Street, Melbourne Victoria 3000
GPO Box 1994, Melbourne Victoria 3001
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Australian Nursing Federation

WA Branch & Industrial Union of Workers Perth



ifolio.anfiuwp.org.au

Tribunal Services and Organisations
Fair Work Australia
Level 4, 11 Exhibition Street
GPO Box 1994
Melbourne VICTORIA 3001

17th January 2013

Fax: 03 9655 0401

Attention "Carruther's Team"

Dear Sir,

I declare:-

1. That I am the duly elected Secretary of the Australian Nursing Federation, WA Branch.
2. That the register of members has, during the 2010 year, been kept and maintained as required by s230(1)(a) and s230(2).
3. That annexed hereto and signed by me is a list of names, postal addresses, and occupations of the persons holding office in the Australian Nursing Federation (WA Branch) as at 1st January 2011 and that this is a correct statement of the information contained in the records.
4. That the name of the branch is the Australian Nursing Federation (WA Branch).
5. That the address of the Australian Nursing Federation (WA Branch) is 260 Pier Street, Perth WA 6000.
6. That between the first day of September and the 30th day of October 2011, an election will be held for the offices of President, 2 Executive Councillors, and 9 Councillors.
7. That as at 31st December 2010, the number of members in the branch was 20560.
8. That no agreement was entered into under s 151(1) of the Registration and Accountability of Organisations Schedule.

Yours Sincerely

A handwritten signature in black ink, appearing to read 'Mark Olson'. The signature is fluid and cursive, with a large loop at the end.

Mark Olson
Secretary, ANF (WA Branch)

Australian Nursing Federation

WA Branch & Industrial Union of Workers Perth



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OFFICERS OF THE AUSTRALIAN NURSING FEDERATION, WA BRANCH

- SECRETARY:** Mark Olson, Australian Nursing Federation, 260 Pier Street, Perth WA 6000, Registered Nurse
- PRESIDENT:** Patricia Fowler, Princess Margaret Hospital, Roberts Rd Subiaco WA 6008, Registered Nurse
- VICE PRESIDENT:** Dianne Pember, St John of God Hospital, PO Box 507, Bunbury WA 6230, Registered Nurse
- EXECUTIVE:** Jo-Anne Briggs, 260 Pier Street, Perth WA 6000, Registered Nurse
Lisa Gatzonis, Joondalup Health Campus, PO Box 242 Joondalup WA 6919 Registered Nurse
Sally Wearne, Fremantle Hospital, Alma Street, Fremantle WA 6160, Registered Nurse
Kerry Leipold, King Edward Memorial Hospital, 374 Bagot Road, Subiaco, 6008, Registered Nurse

COUNCILLORS:

- Dean Casey, Rockingham Kwinana Hospital, Rockingham WA, Registered Nurse
Michael Clancy, 260 Pier Street, Perth WA 6000 Registered Nurse
Sam Cook-Barron, Exmouth Hospital, Exmouth WA 6707 Registered Nurse
Elaine Daniels, 260 Pier Street, Perth WA 6000, Registered Nurse
Treena Evans, Armadale Kelmscott Hospital, Mt Nasura WA 6112 Registered Nurse
Ann-Marie Linder, Swan Districts Hospital, Eveline Rd, Middle Swan WA 6056 Enrolled Nurse
Dorothy Marie, Glengarry Hospital, Arnisdale Rd, Duncraig WA 6023 Registered Nurse
Loreta Murphy, Sir Charles Gairdner Hospital, Hospital Ave, Nedlands WA 6009 Registered Nurse
Lisa Natoli, Kalgoorlie Regional Hospital, Piccadilly St, Kalgoorlie WA 6430 Registered Nurse
Karen Roan, Kalgoorlie Regional Hospital, Piccadilly St, Kalgoorlie WA 6430 Registered Nurse
Janet Reah, Royal Perth Hospital, Wellington Street, Perth WA 6000 Registered Nurse
Natalie Sheehy, Royal Perth Hospital, Wellington Street, Perth WA 6000. (Registered Nurse)
Lynette Tutt, Albany Regional Hospital, Warden Ave, Albany WA 6330 Registered Nurse
Stephen Voke, Royal Perth Hospital, Wellington Street, Perth WA 6000 Registered Nurse
Elizabeth Waters, Bega Ganbirringu, 16-18 McDonald St, Kalgoorlie WA 6430 Registered Nurse
Janette Westbrook Concord Nursing Home Anstey Street South Perth WA 6151. (Enrolled Nurse)
Tanya Wooller, Sir Charles Gairdner Hospital, Hospital Avenue, Nedlands WA 6009

MERCOVICH, Elizabeth

From: Mark Olson [Mark.Olson@anfiuwp.org.au]
Sent: Thursday, 17 January 2013 6:35 PM
To: LYNCH, Sam
Cc: Lee Thomas (lee@anf.org.au)
Subject: 2010 annual return for WA Branch of ANF
Attachments: 2010 Membership & officers returns FWA.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Hi Sam

I received a letter today from you (via our Federal Office) about the annual return for the year ending December 2010.

The requested return is attached.

Please accept my apologies for the lateness of this return.

The return was done in March 2011 but we cannot find any confirmation that it was actually sent at that time.

Regards
Mark Olson



FAIR WORK
COMMISSION

15 January 2013

Ms Lee Thomas
Federal Secretary
Australian Nursing Federation
Unit 3, 28 Eyre Street
KINGSTON ACT 2604

By email: fedsec@anf.org.au

Dear Ms Thomas,

Failure to lodge Annual Return of information for the Western Australian Branch of the Australian Nursing Federation for the year 2011 under section 233 of the Fair Work (Registered Organisations) Act 2009 (RO Act) - AR2011/2540

As you would be aware, subsection 233(1) of the RO Act requires each organisation to lodge with the Fair Work Commission (FWC) certain information relating to records required to be kept and maintained by the organisation under section 230 and regulation 147 of the Fair Work (Registered Organisations) Regulations 2009 (the regulations). Such information must be lodged once in each year at any time during the period of three months commencing 1 January, that is the 2011 Annual Return was due no later than 31 March 2011.

FWC records indicate that the Australian Nursing Federation (ANF) made only a partial lodgement of the Annual Return of information for the Western Australian Branch for the year 2011. Receipt of the federal Office's 2011 Annual Return (AR2011/2545) was acknowledged by FWA on 7 April 2011.

FWC records indicate that the WA Branch was reminded of the obligation to lodge the required information by letter dated 27 January 2011 followed by further correspondence regarding the non-compliance dated 21 April 2011.

Paragraph 7.4 of FWC's Regulatory Compliance Policy (a copy of which is attached) states as follows:

- 7.4 Where the possible contravention involves failure by an organisation, branch or reporting unit to lodge a matter with FWC in accordance with the timeframes specified in the RO Act, RO Regulations or the rules of the organisation, branch or reporting unit:*
- a. The Registered Organisations Team will contact the organisation, branch or reporting unit, by telephone and/or in writing, within two weeks to advise that lodgement is overdue;*
 - b. If lodgement has not occurred within one month of the timeframe specified in the RO Act, RO Regulations or rules, the Organisations Team will advise the organisation, branch or reporting unit that it is seeking voluntary compliance within a specified timeframe and that, in the absence of such voluntary compliance without*

cause, FWC will commence an inquiry or investigation or initiate court proceedings; and

- c. If lodgement has not occurred within the timeframe specified in the correspondence referred to in paragraph b and the organisation, branch or reporting unit has not been able to show cause regarding why it should not do so, FWC will commence an inquiry or investigation or initiate court proceedings in accordance with this policy as soon as reasonably practicable.*

Under s.331 of the RO Act the General Manager of FWC is empowered to investigate compliance by an organisation with:

- Part 3 of Chapter 8 of the RO Act;
- the reporting guidelines made under that Part;
- the regulations made for the purposes of that Part;
- the Australian Nursing Federation's rules regarding finances and financial administration; and
- civil penalty provisions of the RO Act (see s. 305).

In accordance with the processes set out in paragraph 7.4(b) of the Regulatory Compliance Policy set out above, the Australian Nursing Federation is required to lodge its outstanding Annual Return of information for the Western Australian Branch with FWC within one month of the date of this letter. Should the organisation fail to do so the Delegate of the General Manager may consider commencing an investigation into the non-compliance.

If you have any queries regarding the above, please contact me by email at Samuel.lynch@fwc.gov.au, or by phone on (03) 8661 7943.

Yours faithfully



Sam Lynch
Senior Adviser
Regulatory Compliance Branch
Fair Work Commission



FAIR WORK
COMMISSION

FWC Regulatory Compliance Policy

Publication History:		Relevant Legislation or materials:	<i>Fair Work Act 2009</i>
First edition:	August 2012		<i>Fair Work (Registered Organisations) Act 2009</i>
Second edition:	January 2013		<i>Fair Work (Registered Organisations) Regulations 2009</i> <i>Industrial Registrar's Reporting Guidelines (Oct 2004)</i> <i>FWC Offences Policy</i>

1. FWC policies

1.1. The purpose of this policy is to publish advice on the Fair Work Commission's (FWC) policies and procedures regarding its enforcement powers under the *Fair Work (Registered Organisations) Act 2009* (the RO Act) and the *Fair Work (Registered Organisations) Regulations 2009* (the RO Regulations). In particular, this policy sets out guidelines to be followed by FWC in regulating employee and employer organisations that are registered under the RO Act (registered organisations).

1.2. This policy addresses the following topics:

- a. **FWC policies** (paragraph 1);
- b. **About the Fair Work Commission** (paragraph 2);
- c. **Regulation of registered organisations, their officers, employees** (paragraph 3);
- d. **Compliance Tools** (paragraph 4);
- e. **Sanctions** (paragraph 5);
- f. **Timeframes for conduct of inquiries and investigations** (paragraph 6);
- g. **Identification of Possible Contraventions and Case Selection** (paragraph 7);
- h. **Voluntary compliance** (paragraph 8);
- i. **Conduct of Inquiries and Investigations** (paragraph 9);

- j. **Sharing of information regarding inquiries and investigations** (paragraph 10);
- k. **Performance and Quality Control Measures** (paragraph 11);
- l. **Publication of Compliance and Enforcement Activities** (paragraph 12); and
- m. **Review of Findings** (paragraph 13).

1.3. FWC policies do not have the force of statute. While FWC will seek to meet the requirements of its policies in carrying out functions, failure by FWC to comply with a policy cannot affect the validity of the conduct or, in considering this Regulatory Compliance Policy in particular, the outcome of inquiries and investigations undertaken by FWC. This Regulatory Compliance Policy is not a direction for the purposes of subsection 343A(4) of the RO Act.

2. About the Fair Work Commission

- 2.1. FWC is established by section 575 of the *Fair Work Act 2009* (FW Act).
- 2.2. FWC is divided into two arms, the FWC Tribunal and the administrative arm.
- 2.3. The General Manager of FWC is established by section 656 of the FW Act. The General Manager is head of the administrative arm and is responsible for, amongst other things, carrying out various functions under the RO Act, including conducting inquiries and investigations and conducting litigation in the Federal Court of Australia in relation to contraventions of the RO Act.
- 2.4. Prior to 1 January 2013, FWC was known as "Fair Work Australia". Fair Work Australia commenced on 1 July 2009. Prior to 1 July 2009, Fair Work Australia's functions were carried out by the Australian Industrial Registry and the functions of the General Manager were carried out by the Industrial Registrar under the *Workplace Relations Act 1996*.

3. Regulation of registered organisations, their officers, employees and auditors

- 3.1. The key aim of FWC's regulatory activities is to ensure compliance by registered organisations with their legislative obligations as set out in the RO Act. Other objectives include ensuring:
 - a. efficient financial management and effective operation of registered organisations; and
 - b. high standards of accountability of registered organisations to their members.
- 3.2. Parliament's intentions in enacting the RO Act are set out in section 5:
 - a. ensuring that employer and employee organisations are representative of and accountable to their members, and are able to operate effectively;
 - b. encouraging members to participate in the affairs of organisations to which they belong;

- c. encouraging the efficient management of organisations and high standards of accountability of organisations to their members;
 - d. providing for the democratic functioning and control of organisations;
 - e. facilitating the registration of a diverse range of employer and employee organisations;
 - f. assisting employers and employees to promote and protect their economic and social interests through the formation of employer and employee organisations, by providing for the registration of those associations and according rights and privileges to them once registered; and
 - g. recognising and respecting the role of employer and employee organisations in facilitating the operation of the workplace relations system.
- 3.3. Registered organisations have corporate status under section 27 of the RO Act. For the purposes of regulating the accounts and audit of registered organisations, each registered organisation is divided into “reporting units” under section 242 of the RO Act.
- 3.4. Part 3 of Chapter 8 of the RO Act regulates the finances and financial administration of reporting units of registered organisations. The finances and financial administration of registered organisations are also regulated by the Rules of the registered organisation, the Industrial Registrar’s Reporting Guidelines¹ (the Reporting Guidelines) and the RO Regulations.
- 3.5. The RO Act also places general duties upon officers and employees of registered organisations in relation to the financial management of organisations. These general duties concern acting with care and diligence² and in good faith³ and the improper use of position⁴ and information.⁵ These general duties are civil penalty provisions.
- 3.6. A number of other provisions of the RO Act are civil penalty provisions, some (although not all) of which concern the finances and financial administration of registered organisations. Civil penalty provisions are listed in section 305 and include, in particular, obligations with respect to:
- a. lodgement of prescribed information in relation to the conduct of elections by the Australian Electoral Commission under section 189;
 - b. the keeping of membership records under section 230;
 - c. retention of membership records under section 231;

¹ The first Industrial Registrar’s Reporting Guidelines were made by the Industrial Registrar on 20 June 2003 under section 255 of the RAO Schedule and commenced on 1 July 2003. Subsequent Guidelines were made on 12 October 2004 and apply to each financial year of an organisation that started on or after 1 November 2004.

² See section 285.

³ See section 286.

⁴ See section 287.

⁵ See section 288.

- d. lodgement of membership records under section 233;
 - e. access to membership records under section 235;
 - f. lodgement with FWC of particulars of loans, grants and donations under section 237;
 - g. keeping and preparation of a general purpose financial report (GPFR) under sections 253 and 254;
 - h. the appointment by a registered organisation of an auditor under section 256;
 - i. qualification of auditors under section 256;
 - j. preparation of auditor's reports under section 257;
 - k. forwarding by a reporting unit to its auditor of notices regarding presentation of the auditor's report to a meeting under section 259;
 - l. removal of auditors under section 263 and distribution of an auditor's reasons for resignation under section 264;
 - m. provision of financial reports to members under section 265;
 - n. presentation of financial reports to meetings under section 266;
 - o. the making of false or misleading comments in reports to members under section 267;
 - p. lodgement of financial records with FWC under section 268;
 - q. provision of information under section 272; and
 - r. provision to members of copies of rules and information regarding offices under section 347.
- 3.7. Civil penalty provisions are also contained in the RO Regulations and are listed in sub-regulation 168(2). These provisions primarily concern the conduct of elections and ballots by the Australian Electoral Commission (AEC). Where such a matter has been referred to the General Manager under the RO Regulations, he or she may initiate Federal Court proceedings.⁶
- 3.8. The RO Act and RO Regulations distinguish between civil penalty provisions and offences. An "offence" denotes criminal liability and is to be distinguished from civil penalty liability. Part 3 of Chapter 8 of the RO Act contains two offences concerning conduct with respect to auditors of registered organisations:
- a. Hindering or obstructing access by the auditor to information or records of the reporting unit under subsection 258(1); and

⁶ Regulation 171 provides amongst other things that the General Manager may apply to the Court to make an order for contravention of the civil penalty provisions in the RO Regulations.

- b. Failing to afford an auditor the opportunity to be heard at a meeting at which the auditor's report or the GPFR to which it relates is presented under subsection 260(4).
- 3.9. The General Manager of FWC has power under the RO Act to conduct inquiries⁷ and investigations⁸ concerning compliance by registered organisations, officers and employees with:
- a. Part 3 of Chapter 8 of the RO Act regarding Accounts and Audits;
 - b. The Reporting Guidelines made under that Part;
 - c. The RO Regulations made for the purposes of that Part;
 - d. The Rules of a reporting unit relating to its finances or financial administration; and
 - e. A civil penalty provision of the RO Act.
- 3.10. The General Manager's power to conduct an investigation includes the investigation of possible offences in subsections 258(1) and 260(4) as set out in paragraph 3.8 above.⁹ The General Manager is not, however, otherwise empowered to investigate possible offences.
- 3.11. At the conclusion of an investigation, the General Manager must notify a reporting unit if he or she is satisfied that the reporting unit has contravened a provision of Part 3 of Chapter 8 of the RO Act, the Reporting Guidelines, a provision of the RO Regulations or a rule of the reporting unit relating to the finances or financial administration of the reporting unit.¹⁰ The General Manager also has discretionary powers which are set out at paragraphs 9.10.c and 9.10.d below regarding the issuance of a rectification notice to the reporting unit, making application for court orders and referral of possible criminal offences to the Commonwealth Director of Public Prosecutions (CDPP), the Australian Federal Police (AFP) or a police force of a State or Territory.
- 3.12. The General Manager's power to conduct inquiries and investigations can be delegated to individuals or bodies that are specified in the RO Act (the Delegate).¹¹
- 3.13. This policy is primarily concerned with the conduct of inquiries and investigations regarding possible contravention of civil penalty provisions of the RO Act and RO Regulations. Additional information regarding inquiries and investigations concerning possible offences under Part 3 of Chapter 8 of the RO Act is set out in the *FWC Offences Policy*.

⁷ See section 330.

⁸ See sections 331 to 334.

⁹ See subsection 331(1)(a) and section 334.

¹⁰ See section 336.

¹¹ See section 343A.

4. Compliance Tools

- 4.1. The Regulatory Compliance Branch of FWC is responsible for ensuring compliance by registered organisations with their regulatory obligations.
- 4.2. Compliance by registered organisations with the RO Act and RO Regulations is monitored by the Regulatory Compliance Branch through:
- a. Examination of lodged documents;
 - b. Regular routine audits of lodgement by all registered organisations/branches and reporting units of documents in accordance with specified legislative timeframes;
 - c. Examination of complaints by members of registered organisations and from the general public;
 - d. Examination of referrals from other government agencies or departments, including referrals from the AEC under the RO Regulations; and
 - e. Media coverage.
- 4.3. Compliance tools used by FWC are:
- a. Assisting registered organisations, their officers, employees and auditors in understanding their obligations under the RO Act and Regulations through the provision of information and education on the FWC website, in correspondence with registered organisations and through public information sessions;
 - b. Direct contact, in writing or by telephone, with a registered organisation regarding whether it has complied with its obligations;
 - c. Inquiries conducted by the Delegate under section 330 of the RO Act. While the Delegate may take such action as he or she considers necessary for the purposes of making such inquiries, he or she cannot compel a person to assist with inquiries which are conducted under section 330; and
 - d. Investigations conducted by the Delegate under:
 - i. section 331 of the RO Act - in order to conduct such an investigation, the Delegate must be satisfied that there are “reasonable grounds” for doing so;¹²
 - ii. section 332 of the RO Act arising from information that is revealed in documents that have been lodged with FWC, including any defect or irregularity or deficiency, failure or shortcoming that has been identified by an auditor;

¹² Note there are other circumstances which the General Manager may conduct investigations under section 331 i.e. in the circumstances set out in the RO Regulations (s331(3)); or where matters arise in the course of an investigation conducted under subsections (1) or (2) that leads the General Manager to form the opinion that there are grounds for investigating the finances or financial administration of the reporting unit.

- iii. section 333 of the RO Act where a specified number or proportion of members of a reporting unit have requested that an investigation occur; and
- iv. section 334 of the RO Act arising from a referral of a matter by the FWC Tribunal to the General Manager.

5. Sanctions

5.1. FWC's key objective in using sanctions is to ensure compliance by registered organisations with their legislative obligations as set out in the RO Act and RO Regulations. Other objectives include ensuring:

- a. high standards of accountability of registered organisations to their members; and
- b. efficient financial management and effective operation of registered organisations.

5.2. Sanctions that may be used by FWC at the conclusion of an investigation (although not an inquiry) are:

- a. Issuance by the General Manager of a rectification notice - see paragraph 9.10.d.i below;
- b. Commencement of proceedings in the Federal Court of Australia - see paragraph 9.10.d.iii below;
- c. Referral of a brief of evidence regarding possible criminal offences to the CDPP - details regarding referral of a brief of evidence to the CDPP regarding possible offences in Part 3 of Chapter 8 of the RO Act are set out in the *FWC Offences Policy*; and
- d. Determination of reporting units of an organisation on an alternative basis - see paragraph 9.10.d.iv below.

5.3. The General Manager's decision to commence proceedings in the Federal Court is typically made at the end of an investigation, although proceedings can be commenced without an investigation so long as the General Manager otherwise has a proper evidentiary basis to commence such proceedings. Such a situation may arise, for example, where the AEC has referred evidence regarding possible contraventions of civil penalty provisions of the RO Regulations to the General Manager.

6. Timeframes for conduct of inquiries and investigations

6.1. The RO Act requires the General Manager to complete an investigation as soon as practicable.¹³

¹³ See section 335B.

6.2. The circumstances of each inquiry and investigation will differ. Conduct of an inquiry or investigation is at the discretion of the Delegate in using reasoned judgement to make the most appropriate decisions to deal with the factors and circumstances of each particular matter.

6.3. Matters that will influence whether an inquiry and/or investigation is undertaken and, if so, the time taken for completion include:

- a. The requirements of the legislative framework, including whether FWC is empowered by the legislation to conduct the inquiry or investigation that is sought;
- b. The requirements of procedural fairness/natural justice, which will vary according to the particular circumstances of the matter. As a general rule, FWC will:
 - i. Inform persons and/or organisations of the nature of potentially adverse findings that are proposed to be made against them; and
 - ii. Allow persons and/or organisations to be heard on relevant points.
- c. The complexity of matter(s), including:
 - i. the volume of documents and evidence - while a large volume of material can increase the time taken to conduct an inquiry or investigation, conversely an absence of documents which requires FWC to seek to establish facts and evidence from other sources can also have an effect upon timeframes;
 - ii. the number of contraventions - while a complaint or media report may make specific allegations, upon examination the number of potential contraventions that may require inquiry and/or investigation can be much larger in both number and scope than were originally identified or alleged;
 - iii. the timeframes over which contraventions may have occurred - generally speaking, the longer the period during which contraventions may have occurred, the longer the inquiry/investigation is likely to take;
 - iv. the number of parties who are potentially involved; and
 - v. the gravity of the contraventions.

6.4. The varying gravity of possible contraventions including:

- i. Minor/technical contraventions of legislative and/or reporting requirements which can be rectified by lodgement of documents - such as where original documents were not properly executed or where all of the documents constituting a general purpose financial report have not been lodged with FWC;
- ii. More serious contraventions of legislative and/or reporting requirements which require financial reports to be prepared and provided to members

- again, such as where members have not been provided with all relevant documents or where there has been no or only partial disclosure of information required under Australian Accounting Standards;
- iii. Where an investigation is not required concerning defects or irregularities or deficiencies, failures or shortcomings raised in an auditor's report if:¹⁴
 - 6.4.a.iii.1. the matter consists solely of the fact that a reporting unit has kept its financial records for membership subscriptions separately on a cash basis;
 - 6.4.a.iii.2. after consultation with the reporting unit and auditor, the Delegate is satisfied that the matters are trivial or will be remedied the following financial year.
 - iv. Contraventions of rules of a registered organisation relating to finances or financial administration - while declaratory relief may be sought by the General Manager in the Federal Court of Australia, the RO Act does not provide for the making of orders regarding such contraventions;
 - v. Contraventions of provisions of the RO Act that are not civil penalty provisions - while declaratory relief may be sought by the General Manager in the Federal Court of Australia, the RO Act does not provide for the making of orders regarding such contraventions;
 - vi. Contraventions of civil penalty provisions of the RO Act or Regulations - for example in relation to the RO Act, various provisions are listed in section 305 as being civil penalty provisions for which pecuniary penalty or compensation orders can be sought in the Federal Court under sections 306 and 307; and
 - vii. Possible criminal offences.
- 6.5. The Delegate retains the discretion to determine that FWC will not conduct or continue to conduct an inquiry and/or investigation. The circumstances in which such a decision may be made include where:
- a. The complaint/request does not meet the requirements for an inquiry or investigation that are set out in Part 4 of Chapter 11 of the RO Act;
 - b. There is no or insufficient evidence to establish a contravention; and
 - c. Documents have been provided by a complainant to FWC and those documents are so voluminous, poorly organised and/or identified and categorised as to require an unreasonable use of FWC's resources in determining whether there may have been a contravention which is capable of inquiry or investigation. FWC is likely to encounter significant difficulties in identifying possible contraventions in such circumstances within a reasonable period of time.

¹⁴ See subsection 332(2).

6.6. While the Delegate will attempt to complete an inquiry or investigation in a timely manner, the integrity of the inquiry or investigation will not be compromised in order to expedite finalisation.

7. Identification of Possible Contraventions and Case Selection

7.1. Complaints can be lodged with FWC by contacting the Regulatory Compliance Branch in Melbourne by:

- a. Email to organisations@fwc.gov.au;
- b. Telephone on (03) 8661 7777;
- c. Mail addressed to:

Director
Regulatory Compliance Branch
Fair Work Commission
GPO Box 1994
MELBOURNE VIC 3001

7.2. Upon the Regulatory Compliance Branch becoming aware of a possible contravention, the matter will be:

- a. Registered in FWC's electronic case management system; and
- b. Evaluated to determine whether FWC is empowered by the RO Act or RO Regulations to conduct an inquiry or investigation. For example:
 - i. A common threshold question is whether the entity in question is a reporting unit under the RO Act or, in fact, registered under a State industrial law (such as the *Industrial Relations Act 1996* (NSW)). FWC is not empowered to investigate contraventions concerning State registered organisations;
 - ii. FWC is not empowered to investigate contraventions of rules of an organisation that do not relate to the organisation's finances or financial administration; and
 - iii. FWC is not empowered to investigate possible criminal offences other than the offences relating to auditors under Part 3 of Chapter 8.

7.3. Once it is determined that FWC is empowered to conduct an inquiry or investigation, the Regulatory Compliance Branch will complete a written evaluation for the purpose of identifying possible contraventions and case selection.

- 7.4. Where the possible contravention involves failure by an organisation, branch or reporting unit to lodge a matter with FWC in accordance with the timeframes specified in the RO Act, RO Regulations or the rules of the organisation, branch or reporting unit:
- a. The Regulatory Compliance Branch will contact the organisation, branch or reporting unit, by telephone and/or in writing, within two weeks to advise that lodgement is overdue;
 - b. If lodgement has not occurred within one month of the timeframe specified in the RO Act, RO Regulations or rules, the Regulatory Compliance Branch will advise the organisation, branch or reporting unit that it is seeking voluntary compliance within a specified timeframe and that, in the absence of such voluntary compliance without cause, FWC will commence an inquiry or investigation or initiate court proceedings; and
 - c. If lodgement has not occurred within the timeframe specified in the correspondence referred to in paragraph b and the organisation, branch or reporting unit has not been able to show cause regarding why it should not do so, FWC will commence an inquiry or investigation or initiate court proceedings in accordance with this policy as soon as reasonably practicable.
- 7.5. Where a complaint has been made to FWC by a member of an organisation or of the general public regarding a possible contravention:
- a. FWC is expected to contact the complainant within 10 working days of receiving the complaint to:
 - i. confirm receipt;
 - ii. provide a contact action officer within the Regulatory Compliance Branch; and
 - iii. advise of a proposed timeframe for consideration of the matter, if appropriate.
 - b. Upon finalisation, a complainant will be notified in writing by FWC of the resolution of the complaint.
- 7.6. Given the relatively small number of registered organisations¹⁵ and reporting units,¹⁶ generally speaking all possible contraventions that come to the attention of the Regulatory Compliance Branch will be evaluated and, if appropriate, the subject of an inquiry and/or investigation.
- 7.7. Upon conclusion of the evaluation of a possible contravention as set out in paragraphs 7.2 and 7.3, it may be determined that:
- a. No action will be taken - see paragraph 6.5 above;

¹⁵ 119 in June 2012

¹⁶ 405 in June 2012

- b. Where FWC is not empowered to conduct an inquiry and/or investigation, the matter may be referred to another agency if appropriate;
- c. Voluntary compliance of the organisation or reporting unit may be sought to rectify the contravention;
- d. The Delegate may conduct an inquiry and/or investigation; or
- e. The General Manager may initiate proceedings in the Federal Court of Australia.

8. Voluntary compliance

- 8.1. FWC may, where practicable, seek to rectify contraventions through voluntary compliance.
- 8.2. It is at the discretion of the General Manager/Delegate to determine whether voluntary compliance should be sought and, if so, at what stage of the matter in question. Voluntary compliance may be sought or achieved as an alternative or precursor to an inquiry or investigation or during, or at the conclusion of, an inquiry or investigation.
- 8.3. Even where there has been voluntary compliance, the General Manager may nevertheless refer the matter to another agency or commence proceedings in the Federal Court of Australia as set out in paragraph 9.10.b.ii below.

9. Conduct of Inquiries and Investigations

- 9.1. FWC conducts inquiries and investigations with no pre-judgement toward one outcome or another. The outcome of any inquiry or investigation is solely determined by the facts and circumstances of the matter in question.
- 9.2. Although inquiries and investigations are often a sequential process, there is flexibility within the process. The Delegate will decide how a matter is progressed through the process of inquiry and investigation.
- 9.3. An inquiry will often, but will not always, precede an investigation.
- 9.4. An inquiry or investigation may commence where voluntary resolution of a matter has been unsuccessful.
- 9.5. It is at the discretion of the Delegate to determine whether to conduct an inquiry or an investigation. Before being able to conduct an investigation under section 331, the Delegate must be satisfied that there are “reasonable grounds” for doing so. No such statutory preconditions exist for the conduct of an inquiry.

- 9.6. In determining whether to commence an investigation under section 331, the Delegate will consider whether the evidence before FWC is sufficient to constitute “reasonable grounds”. In evaluating evidence, the Delegate will consider such matters as:
- a. The amount of evidence before FWC and whether any other documentary or witness evidence may be available and, if so, from where; and
 - b. The veracity of evidence before FWC, including whether it is corroborated elsewhere.
- 9.7. Once the Delegate is satisfied that there are “reasonable grounds” having regard to the matters set out in paragraph 9.6 above, the Delegate retains a discretion regarding whether to conduct an investigation. This is a broad discretion, the exercise of which will be guided by public interest considerations having regard to all relevant matters including:
- a. The number and gravity of possible contraventions;
 - b. Capacity to obtain further information or documents, including the likely extent of voluntary co-operation by the organisation/reporting unit in this regard; and
 - c. The potential for contraventions to be rectified voluntarily by the organisation/reporting unit.
- 9.8. An inquiry or investigation involves FWC obtaining, managing and evaluating evidence in order to determine whether an organisation or reporting unit has complied with legislative and reporting requirements. In managing the conduct of an inquiry or investigation, the Regulatory Compliance Branch will prepare an inquiry or investigation plan which will be periodically reviewed and updated as appropriate during the inquiry or investigation.
- 9.9. The steps that may be appropriate in both an inquiry and an investigation include:
- a. Establishing jurisdiction and threshold issues - this will usually have already occurred during initial evaluation (see paragraph 7.2.b above);
 - b. Gathering and analysing evidence:
 - i. The Delegate cannot compel a person to assist with an inquiry;
 - ii. When conducting an investigation, the General Manager can issue a notice to compel provision of information and production of documents and attendance of current and former officers, employees and auditors to give evidence.¹⁷ If relevant information, documents or evidence cannot be obtained from officers, employees or auditors, third parties can be

¹⁷ Section 335.

compelled to provide such information, documents or evidence.¹⁸ Failure to comply with a notice can attract a penalty.¹⁹

- iii. Issuance of a notice to produce information, provide documents or to attend before FWC is a discretionary tool which may or may not be used as deemed appropriate, considering the facts and circumstances of the matter in question.
- c. Establishing a contravention:
- i. A contravention is established where there is sufficient evidence to prove, on the balance of probabilities,²⁰ a contravention of the RO Act, RO Regulations, Reporting Guidelines, rules of an organisation/reporting unit regarding finances or financial administration or a civil penalty provision. Such a finding of contravention cannot be made until available evidence has been collated, assessed and tested;
 - ii. All findings of contravention by the Delegate must be based on the best available evidence;
 - iii. Determination of whether there has been a contravention may require interpretation of applicable legislation and case law and application and interpretation of Australian Accounting and Auditing Standards; and
 - iv. If the Delegate proposes to make findings of contravention, the relevant parties will be provided with an opportunity to respond before any final findings are made - see paragraphs 6.3.b.
- d. It is important to note that a finding of contravention is not a judicial finding or a final determination of rights. It is an administrative determination which may ultimately be tested in court if the General Manager commences proceedings.
- e. Any findings of contravention by the Delegate during an investigation will be considered, at the conclusion of the investigation, by the General Manager. If he or she is satisfied that there have been contraventions, the General Manager must notify the reporting unit.²¹ The obligation to notify a reporting unit of findings of contravention rests with the General Manager alone and cannot be delegated.²²

9.10. At the conclusion of an inquiry or investigation, the following may occur:

- a. No further action - this may occur where:
 - i. No contraventions have been found of the RO Act, RO Regulations, Reporting Guidelines or the rules of an organisation/reporting unit

¹⁸ Section 335A.

¹⁹ Sections 337 and 337AA.

²⁰ See *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362. Note that the Briginshaw standard does not apply to criminal offences under the RO Act or Regulations. The General Manager's approach to dealing with criminal offences under the RO Act and RO Regulations is set out in a separate policy, *FWC Offences Policy*.

²¹ Section 336(1).

²² The power under section 336(1) cannot be delegated - see section 343A(2)(j).

- regarding finances or financial administration or of a civil penalty provision;
or
- ii. While there has been a contravention, further action is not appropriate in the particular circumstances. For example, where a minor contravention has been found by a reporting unit that has ceased to exist through merger with another reporting unit or amalgamation of two registered organisations.
- b. Voluntary compliance:
- i. This occurs where a reporting unit rectifies a contravention without enforcement action as set out at paragraph d below. For example, lodgement with FWC of a request for overdue elections without a rectification notice²³ having been issued by the General Manager is considered to be voluntary compliance. Such a matter would ordinarily be considered to have been resolved through such voluntary compliance.
 - ii. Depending upon the nature of the contravention, FWC may nevertheless refer the matter to another agency (such as the AFP or State/Territory police force), even where there has been voluntary compliance. For example, if the funds of an organisation may have been fraudulently expended, even where those funds have been voluntarily reimbursed it may nevertheless be appropriate to refer the matter for possible criminal investigation.
 - iii. The General Manager may also determine that it is most appropriate to commence proceedings in the Federal Court even where there has been voluntary compliance, such as where proceedings would have a significant deterrence effect or where they involve significant sums.
- c. Referral of possible criminal offences to the CDPP, AFP or State/Territory police forces:²⁴
- i. The General Manager will generally only refer possible offences under Part 3 of Chapter 8 of the RO Act to the CDPP, given that the General Manager is empowered to investigate such possible offences (see paragraphs 3.8 and 3.10 above);
 - ii. The General Manager is not empowered to investigate any other possible offences under the RO Act or RO Regulations. Apart from those referred to in paragraph i above, where appropriate the General Manager will refer possible offences under the RO Act and RO Regulations to the AFP, given its role in administering Commonwealth criminal laws;
 - iii. Nor is the General Manager empowered to investigate possible offences under State or Territory laws. Where appropriate, the General Manager

²³ See paragraph 9.10.d.i below.

²⁴ See paragraph 336(2)(c). Note that this is separate to the power to disclose information for law enforcement purposes under section 335C.

will refer possible offences under State and Territory laws to the relevant State and Territory police forces.

- d. Sanctions - at the conclusion of an investigation (although not an inquiry), the General Manager:
- i. Must notify the reporting unit of contraventions if he or she is satisfied that the reporting unit has contravened Part 3 of Chapter 8 of the RO Act, the Reporting Guidelines, the Regulations or a rule of the reporting unit relating to the finances or financial administration of the reporting unit;²⁵
 - ii. May issue a rectification notice to a reporting unit requesting that it take specified action, within a specified time, to rectify a matter that has been the subject of the investigation.²⁶ A reporting unit that has been issued with a rectification notice must comply with the request.²⁷ The General Manager may apply to the Federal Court of Australia for orders ensuring compliance with a rectification notice.²⁸ If an organisation fails to comply with such an order, the General Manager may apply to the Federal Court for cancellation of the organisation's registration;²⁹
 - iii. May commence proceedings in the Federal Court of Australia³⁰ for a pecuniary penalty³¹ or compensation order³² or such other orders as the Court considers appropriate in the circumstances (which may include declaratory relief).³³ The process and decision making with regards to commencing proceedings are set out in the *FWC Litigation Policy*;
 - iv. May refer a brief of evidence to the CDPP concerning offences under Part 3 of Chapter 8 of the RO Act,³⁴ and/or
 - v. May determine reporting units of an organisation on an alternative basis to that set out in the rules of the registered organisation where the General Manager is satisfied that it is most appropriate to do so in order to improve compliance with accounting, auditing and reporting requirements of the RO Act.³⁵

9.11. When considering possible enforcement actions, the General Manager will consider the public interest having regard to all relevant matters including:

- a. The nature and circumstances of the alleged contravention, including its seriousness, the number of alleged contraventions and the prevalence of such contraventions amongst registered organisations;

²⁵ See subsection 336(1).

²⁶ See paragraph 336(2)(a).

²⁷ See subsection 336(4).

²⁸ See subsection 336(5).

²⁹ See subsection 28(1A).

³⁰ See paragraph 336(2)(b).

³¹ See section 306.

³² See section 307.

³³ See section 308.

³⁴ See paragraph 336(2)(c) and the FWA Offences Policy.

³⁵ See section 247.

- b. The actual or potential consequences of the alleged contraventions, including harm to the organisation and its members;
- c. Mitigating or aggravating circumstances; and
- d. Any other relevant circumstances.

10. Sharing of information regarding inquiries and investigations

- 10.1. Where a complaint is lodged by a member of a registered organisation or a member of the general public, the general presumption is that the identity of the complainant, the fact that FWC is conducting an inquiry or investigation and the material obtained in the course of the inquiry or investigation will be disclosed to the organisation or reporting unit in question, although not more broadly.
- 10.2. Where a complainant requests that their identity is not revealed to the organisation or reporting unit in question, FWC will make every attempt to keep the complainant's identity and complaint confidential wherever practicable and subject to any legal obligation to do otherwise. The attention of the complainant is also drawn to paragraph 12.2 below of this policy regarding publication of compliance and enforcement activities.
- 10.3. The General Manager may disclose, or authorise disclosure of, information that is acquired in the course of an investigation if the General Manager reasonably believes that it is necessary or appropriate to do so in performing his or her functions or that disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.³⁶ This enables disclosure of information to Commonwealth, State and Territory agencies and police forces, although not to foreign law enforcement agencies.
- 10.4. Schedule 5.2 to the *Fair Work Regulations 2009* sets out information and copies of documents that must be disclosed by the President of FWC to the Minister for Education, Employment and Workplace Relations and the Fair Work Ombudsman under section 654 of the *Fair Work Act 2009*, including some information regarding registered organisations. Such disclosure does not, however, include information or documents regarding the conduct by the General Manager of inquiries and investigations regarding compliance by registered organisations with the RO Act and RO Regulations.
- 10.5. Information about liaison with media and the release of media statements regarding inquiries and investigations is set out in the *FWC Inquiries and Investigations Media Policy*.

11. Performance and Quality Control Measures

- 11.1. FWC staff must act impartially, without bias and avoid conflicts of interest in dealing with any inquiries or investigations. FWC must act only on the basis of logically probative evidence.

³⁶ Section 335C.

- 11.2. FWC staff who are members of the Regulatory Compliance Branch will comply with the following documented procedures:
 - a. *FWC Regulatory Compliance Policy*;
 - b. Australian Public Service (APS) Values; and
 - c. APS Code of Conduct.
- 11.3. FWC will maintain up-to-date versions of all relevant laws and Ministerial Directives.
- 11.4. Information regarding compliance by FWC staff with performance measures is published by FWC in its annual report, which is available from the FWC website at www.fwc.gov.au.
- 11.5. Quality assurance reviews of the conduct by the Regulatory Compliance Branch of inquiries and investigations will be the subject of regular external review by the Australian National Audit Office (ANAO) as part of FWC's general quality assurance review program with ANAO.

12. Publication of Compliance and Enforcement Activities

- 12.1. Publication of the nature and outcome of regulatory and enforcement activities that are undertaken by FWC (including information regarding level of voluntary compliance, issuance of rectification notices and outcome of litigation) draws attention to the consequences of failing to comply with the regulatory requirements of the RO Act. It is therefore valuable both in educating organisations, their officers, employees and auditors and as a method of encouraging compliance.
- 12.2. FWC may publish information about its regulatory and enforcement activities, including in its Annual Report and on the FWC website, as part of its general deterrence activities. Such publication may include personal information³⁷ that has been collected during the course of an inquiry or investigation, including personal information that has been solicited by FWC.
- 12.3. Further information regarding liaison with the media and the release of FWC media statements is set out in the *FWC Inquiries and Investigations Media Policy*.

13. Review of Findings

- 13.1. Where an individual or organisation/reporting unit is not satisfied with the processes that have been adopted by FWC or with the outcome of an inquiry/investigation, a request for a review may be made, in writing, to:

The General Manager
Fair Work Commission
GPO Box 1994
MELBOURNE VIC 3001

³⁷ "personal information" is defined in section 6 of the *Privacy Act 1988* as meaning "information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion."

- 13.2. Where a person is not satisfied with the result of a review by the General Manager, it is open to them to contact the Commonwealth Ombudsman on 1300 362 072 or at www.ombudsman.gov.au.