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Dear Ms O'Neill

Disclosure to the police of certain information obtained during an inquiry and investigation

1. Thank you for your request for urgent advice of 9 March 2012 in which you ask whether, in your capacity as General Manager of FWA, you can provide certain information to relevant State law enforcement bodies such as the Victorian and NSW police in response to a request from such a body.
2. You also asked us for advice about the extent to which you and staff of FWA may be under a legal obligation to disclose to the police information relating to the possible commission of crimes.

BACKGROUND

3. Your question relates to information obtained during the course of an inquiry and investigation relating to the Health Services Union of Australia conducted under Part 4 of Chapter 11 of the *Fair Work (Registered Organisations) Act 2009* (the RO Act). It appears that the information in question may relate to the possible commission of crimes against State laws.
4. As you would be aware, there are particular legal risks associated with the disclosure of information while an investigation is on foot. These relate to potential jeopardy to the lawfulness of the investigation process. In particular, there are risks that such action might suggest that an investigation is being conducted for improper or ulterior purposes, or that the investigation process is affected by actual or perceived bias. This advice focuses on statutory questions and, in particular, your power to make the contemplated disclosure.
5. We understand that the relevant investigation is close to completion. We provide this advice on the basis that any disclosure would follow the completion of the investigation.

6. We understand further that you have recently been provided with a legal opinion dated 9 March 2012 by Stuart Wood SC on the question whether certain provisions of the RO Act prohibit the disclosure of information obtained in the course of an investigation by the General Manager of FWA to law enforcement bodies such as the NSW or Victorian police.
7. The conclusion reached by Stuart Wood SC in relation to the question posed to him, in short, is 'no' and, in particular, that:
 - s 336 of the RO Act *permits* the disclosure of information obtained during the course of an investigation in certain circumstances, but this should not be read as suggesting that other forms of disclosure are *prohibited*; and
 - there is nothing in the RO Act that would prevent a good faith disclosure of information to a State law enforcement agency of information suggesting a contravention of State law might have occurred.
8. The opinion of Stuart Wood SC does not deal with the question whether any Act *other* than the RO Act, such as the *Privacy Act 1988* (the Privacy Act), may prohibit the disclosure of information obtained in the course of an investigation by the General Manager of FWA to law enforcement bodies such as the NSW or Victorian police. Nor does it deal with possible breach of confidentiality by the disclosure. Nor does it deal with other legal risks that disclosure might entail.

SUMMARY OF ADVICE

9. In our view, s 657(2) of the *Fair Work Act 2009* (the FW Act) probably enables the General Manager of FWA to disclose to the NSW or Victorian police some information that relates to the possible commission of offences against relevant State laws which was obtained during the course of the investigation. However, some uncertainty attaches to this conclusion.
10. But we do not think that this power would displace obligations of confidentiality in relation to information, whether this obligation arose generally or because the information was obtained under compulsory process. The General Manager would still be bound by such obligations.
11. In our view also, s 655(2) of the FW Act does *not* apply to information acquired by the General Manager or delegate in the course of performing functions or exercising powers under s 330 or s 331 of the RO Act. Section 655(2) therefore does not authorise the disclosure of the information in question to the NSW and Victorian police forces.
12. The appropriate course in the present circumstances, in our view, would be to rely on the *express* power the General Manager has under s 336(2) of the RO Act to refer matters to the Commonwealth Director of Public Prosecutions (the DPP) for action in relation to possible criminal offences. In our view, 'possible criminal offences' in this context encompasses offences under Commonwealth, State or

Territory laws. In the present circumstances, the DPP is the appropriate Commonwealth body to deal with the matters.

13. Disclosure under s 336(2) of the RO Act would clearly displace any obligation of confidence that attaches to information acquired by the General Manager or delegate, whether this obligation arose generally or because the information was obtained under compulsory process, and alleviate other legal risks. Any disclosure to the DPP should be made on a limited and confidential basis.
14. In addition to being authorised by the FW Act or the RO Act, any disclosure of the information in question would need to be consistent with the Privacy Act to the extent that it includes personal information. Disclosure under s 336(2) of the RO Act would comply with the Privacy Act.
15. We do note that it is possible that information in relation to the commission of an offence does not give rise to an obligation of confidentiality, but there is some doubt about this proposition. Also disclosure of particular information 'reasonably necessary for the enforcement of the criminal law' is permitted by the Privacy Act. But in our view it would be safer and preferable for any disclosure in this case to be made in accordance with s 336(2) and thereby be expressly authorised for the purposes of the RO Act and the Privacy Act, and clearly displace confidentiality obligations.
16. In our view, there is no general, positive duty on the General Manager or on APS employees to report to police potentially criminal behaviour. It is possible that there may be a duty to disclose to the police information relating to the commission of crimes in limited circumstances but, for reasons discussed below, whether this was the case would need to be considered carefully. There is discretionary power to disclose information relating to criminal behaviour to appropriate authorities. In the case of investigations under Part 4 of Chapter 11 of the RO Act, the appropriate discretionary power is conferred upon the General Manager by s 336(2).

RELEVANT LEGISLATION

17. The inquiry and investigation have been conducted under Part 4 of Chapter 11 of the RO Act. Your question relates to statutory powers vested in the General Manager of FWA and exercised by staff of FWA as delegate of the General Manager.

The functions and powers of the General Manager

18. The provisions relating to the General Manager of FWA and staff of FWA are set out at ss 656 to 673 of the FW Act.
19. Section 657 sets out the functions and powers of the General Manager of FWA. The functions include any function conferred on the General Manager by a law of the Commonwealth (see s 657(1A)(b) of the FW Act). This includes functions

conferred on the General Manager by the RO Act. In our view it includes the functions conferred on the General Manager by the provisions in Part 4 of Chapter 11 of the RO Act.

20. Section 657(2) of the FW Act provides as follows:

The General Manager has power to do all things necessary or convenient to be done for the purpose of performing his or her functions.

21. In accordance with s 670 of the FW Act, staff of FWA are required to be engaged under the *Public Service Act 1999* (the PS Act).

Inquiries and investigations under RO Act

22. Part 4 of Chapter 11 of the RO Act sets out the provisions of the RO Act relating to inquiries and investigations. Part 4 comprises ss 330 to 337. We note the following matters.

- a. There is a general power in s 330(1) to conduct inquiries.
- b. In conducting an inquiry under s 330, the General Manager (or delegate) has no power to compel a person to assist with that inquiry (see s 330(3)).
- c. Under s 331(1) or (2) the General Manager (or delegate) can conduct an investigation only where satisfied that there are reasonable grounds for doing so. (In accordance with s 331(3), an investigation can also be conducted in the circumstances set out in the Regulations.)
- d. Section 331(5) makes clear that an investigation may, but does not have to, follow inquiries under s 330. Thus, the General Manager (or delegate) can be satisfied that there are reasonable grounds for an investigation either on the basis of inquiries made under s 330 or on some other basis.
- e. Section 335 sets out the compulsory powers available to the General Manager (or delegate) in the conduct of an investigation. As noted, by virtue of s 330(3), compulsory powers are not available to the General Manager in the conduct of inquiries under s 330.
- f. Section 336 sets out the actions that can be taken following an investigation (not an inquiry).
- g. Section 336(1) provides that, if, at the conclusion of the investigation, the General Manager (or delegate) is satisfied of certain contraventions, the General Manager (or delegate) must notify the *reporting unit* accordingly. (Broadly, a reporting unit can be the whole of an organisation or a part of an organisation, such as a branch.) Action under s 336(1) is mandatory, provided that the General Manager (or delegate) is satisfied of the relevant contraventions.

- h. Section 336(2) sets out additional actions which can be taken by the General Manager. These actions are discretionary. In our view these actions are available only where the General Manager (or delegate) is satisfied of the relevant contraventions as referred to in s 336(1).
- i. Action available under s 336(2) to the General Manager includes the issuing of a notice to the reporting unit requesting that the reporting unit takes specified action, within a specified period, to rectify the matter (see s 336(2)(a)). The reporting unit is required to comply with that request (see s 336(4)). If the reporting unit fails to comply with the request, the General Manager (or delegate) can seek orders by the Federal Court to ensure compliance (see s 336(5)).
- j. Action available under s 336(2) to the General Manager includes applying to the Federal Court for an order under Part 2 of Chapter 10 for civil penalties for contraventions (see s 336(2)(b)).
- k. Action available under s 336(2) to the General Manager includes referral of the matter to the DPP for action in relation to possible criminal offences (see s 336(2)(c)).

Delegation under RO Act

- 23. The power of the General Manager to delegate functions and powers under the RO Act is set out in s 343A. Section 343A relevantly provides that:
 - a. the General Manager can delegate the functions or powers of the General Manager to conduct inquiries under s 330 or investigations under s 331;
 - b. the General Manager can delegate the functions or powers of the General Manager to take action under s 336(1);
 - c. the General Manager cannot delegate the powers and functions of the General Manager under s 336(2) (see s 343A(2)(j)).
- 24. The power of the General Manager under s 343A to delegate is confined to delegation to a member of the staff of FWA (see s 343A(1): note also the limitations imposed by s 343A(3)).

Power to disclose under s 655 of the FW Act

- 25. Section 655 of the FW Act permits disclosure of certain information by FWA. It provides as follows:

Information to which this section applies

- (1) This section applies to the following information:
 - (a) information acquired by FWA, or a member of the staff of FWA, in the course of performing functions or exercising powers as FWA;

- (b) information acquired by a person in the course of assisting FWA under section 672, or in the course of performing functions, or exercising powers, as a consultant under section 673.

Disclosure that is necessary or appropriate, or likely to assist administration or enforcement

- (2) The President may disclose, or authorise the disclosure of, the information if the President reasonably believes:
 - (a) that it is necessary or appropriate to do so in the course of performing functions, or exercising powers, of FWA; or
 - (b) that the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.

Statutory immunity or protections

- 26. Section 580 of the FW Act provides that a *FWA member* has the same protection and immunity as a Justice of the High Court. Section 580 is not relevant for present purposes as no powers are being exercised by any FWA member as defined. (FWA members are defined by s 12 of the FW Act to mean only the President, a Deputy President, a Commissioner or a Minimum Wage Panel Member (see also s 575).)
- 27. There is no statutory immunity conferred on the General Manager (or delegate of the General Manager) either by the FW Act or the RO Act.
- 28. The PS Act and the Regulations under the PS Act do not confer on APS employees, such as staff of FWA, any relevant statutory immunity or protection.

DISCUSSION

The power of the General Manager under s 657(2) of the FW Act

- 29. Section 657(2) of the FW Act does not expressly authorise the disclosure of information. Rather, it empowers the General Manager to do all things necessary or convenient to be done for the purpose of performing his or her functions. Such a power is generally given a broad interpretation but the power needs to be considered in the context of the relevant legislation as a whole.

The approach to interpreting such provisions

- 30. The language of a grant of power to do 'all things necessary and convenient to be done for or in connection with the performance of its functions' is of considerable width (see *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 679 per Mason J).
- 31. In *Re Anthony Lagoon Station Pty Ltd v Aboriginal Land Commissioner* (1987) 15 FCR 565 the Full Federal Court considered a cognate form of the phrase in s 51 of the *Aboriginal Land Rights (Northern Territory) Act 1976*. Ryan J considered that:

[A]ny ambiguity or extreme generality which would justify an implied limitation [on the power in s 51] must be looked for in the functions to which the power generally described in s 51 is ancillary or incidental, and in the circumstances in which the power might conceivably be exercised, rather than in the general descriptive words of s 51 itself.

32. Ryan J found that there was nothing 'inherently ambiguous' in the words that described the functions, nor was the scope of the functions so large as to lead one to 'instinctively' doubt that Parliament intended by s 51 to confer on the statutory office-holder a power as wide as that imported by the general words of the section.
33. Morling J considered that the meaning of the phrase was to be determined 'as a matter of construction having regard to the character of the Act as a whole and the nature of its provisions'. In the course of his judgment, he referred to the High Court decision of *Shanahan v Scott* (1957) 96 CLR 254, in which the legislative grant of power to make regulations or do acts necessary or expedient for the administration of an Act was held not to empower the extension of the scope of the Act but was 'strictly ancillary'. The words were held to 'authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions'. Such a power will not support attempts to widen the purpose of the Act, to add new or different means of carrying them out or to depart from or vary the plan that the legislature had adopted to attain it (see also *Utah Construction and Engineering Pty Ltd v Pataky* (1966) AC 629).

Applying that approach in the present context

34. The following aspects of the FW Act and the RO Act (some of which are discussed in more detail below) are relevant to determining the scope of the power conferred by s 657(2) of the FW Act:
 - functions are performed and powers are exercised under Part 4 of Chapter 11 of the RO Act by the General Manager and delegates, not by FWA as FWA;
 - under s 343A, the power under s 336(2) must be exercised by General Manager personally;
 - as a consequence, s 655 of the FW Act (a secrecy provision that both prohibits and then authorises in limited circumstances the disclosure of information), which applies in relation to information acquired by FWA or a member of staff of FWA in the course of performing functions or exercising powers as FWA, does *not* apply in relation to the information in question;
 - the Parliament has clearly considered the possibility that an investigation might reveal potentially criminal activity and chosen to make express provision only in relation to the DPP and only in relation to referring matters at the conclusion of an investigation;

- in the context of an investigation, relevant information can be obtained under compulsion, thereby bringing into play the principles discussed in *Johns v Australian Securities Commission* (1993) 178 CLR 408 (*Johns*); and
 - there is no specific secrecy provision (prohibiting and authorising in limited circumstances the disclosure of information) applicable in relation to the General Manager or delegates who perform functions and exercise powers under Part 4 of Chapter 11 of the RO Act.
35. The main argument for reading down the power in s 657(2) in the present context is that the Parliament has made express and limited provision for some disclosure of information relating to possible criminal offences in s 336(2). This could be taken as suggesting that the disclosure of information relating to possible criminal offences is not permitted in other circumstances.
36. As a general proposition it might be expected that the Parliament would not wish to prevent the ability of public officials to bring to the attention of appropriate authorities information going to the possible or actual commission of crimes. Secrecy provisions typically enable such disclosures as an exception to a general prohibition upon disclosing relevant information and s 655 of the FW Act, for example, does so (but that power is not available here). While s 336(2) provides that the General Manager may take 'all or any' of the three specified actions, there is no clear indication that s 336 is intended to preclude the General Manager from taking *any* other actions, including disclosing to appropriate authorities information relating to possible criminal offences.
37. In the present legislative context, we think that a court would probably hold that s 657(2) enables the General Manager of FWA to disclose to the NSW or Victorian police information that relates to the possible commission of offences against relevant State laws which was obtained during the course of the investigation. However, some uncertainty attaches to this conclusion. This power is however subject to the Privacy Act and confidentiality issues we discuss below. We also note relevant public service employment and criminal law issues further below.

Disclosure under section 336 of the RO Act

38. Section 336 of the RO Act does not expressly authorise the disclosure of information. It requires and enables the taking of certain actions at the conclusion of an investigation. To the extent that taking those actions requires the disclosure of information, then that disclosure would be authorised as an aspect of taking the relevant action.
39. The power of the General Manager under s 336(2) is to be exercised personally (see s 343A). As such, s 336 necessarily contemplates that a delegate of the General Manager who is satisfied of a contravention as referred to in s 336(1) can refer the matter to the General Manager for consideration by the General Manager of possible action in accordance with s 336(2). In our view, such a referral could be

by way of disclosure by the delegate to the General Manager of a report of investigations conducted by the delegate in accordance with s 331 and a report of the outcome of those investigations as referred to in s 336(1).

40. Section 336(2) expressly enables the General Manager to take certain actions following the conclusion of an investigation. Relevantly, the General Manager may 'refer the matter to the Director of Public Prosecutions for action in relation to possible criminal offences'. (The words 'the matter' in this context refer generally to the subject matter of the contravention the General Manager is satisfied has occurred and which may involve criminal offences.)
41. In our view, the reference to 'possible criminal offences' encompasses offences under Commonwealth, State or Territory laws (in the same way that references to 'criminal proceedings' in provisions dealing with the interaction between civil penalties and criminal proceedings would encompass all relevant criminal proceedings within Australia).
42. In the present circumstances, the DPP is the appropriate Commonwealth body to deal with the matter. Relying on s 336(2) to refer a matter at the conclusion of an investigation would mean that any disclosure made in accordance with the provision would be expressly authorised for the purposes of the RO Act and the Privacy Act (discussed below). It would also clearly displace the obligation of confidence that attaches to any information acquired by the General Manager or delegate under compulsion (also discussed below) and alleviate other legal risks.

Disclosure under section 655 of the FW Act

43. When the General Manager or delegate is conducting an inquiry or an investigation in accordance with Part 4 of Chapter 11 of the RO Act, in our view, they are performing functions or exercising powers *of the General Manager* (see also s 657 of the FW Act 'Functions and powers of the General Manager', s 653 of the FW Act 'Reports about making enterprise agreements, individual flexibility arrangements etc.', s 653A of the FW Act 'Arrangements with the Federal Court and the Federal Magistrates Court' and s 343A of the RO Act 'Delegation by General Manager to staff').
44. In our view also, when the General Manager or delegate is conducting an inquiry or an investigation in accordance with Part 4 of Chapter 11 of the RO Act, they are *not* performing functions or exercising powers *as FWA* (see s 576 of the FW Act 'Functions of FWA' and s 13 of the RO Act 'Functions of FWA').
45. Accordingly, s 655(2) of the FW Act does *not* apply to information acquired by the General Manager or delegate in the course of performing functions or exercising powers under s 330 or s 331 of the RO Act. Section 655(2) therefore does not authorise the disclosure of the information in question to the NSW and Victorian police forces.

Privacy issues

46. Personal information collected in the course of an inquiry or investigation will be subject to the Privacy Act.
47. Personal information is defined by the Privacy Act in s 6 to mean information or an opinion, whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.
48. If personal information has been collected only for the purposes of an inquiry or investigation, and persons have not been informed of the possibility of FWA or the General Manager using or disclosing the information for other purposes, then the Privacy Act might prevent disclosure of the information by FWA or the General Manager, except to the extent expressly authorised by law. The relevant constraint on the disclosure of personal information is set out in Information Privacy Principle 11 (IPP 11), which is included in s 14 of the Privacy Act. It provides:

Principle 11

Limits on disclosure of personal information

1. A record-keeper who has possession or control of a record that contains personal information shall not disclose the information to a person, body or agency (other than the individual concerned) unless:
 - (a) the individual concerned is reasonably likely to have been aware, or made aware under Principle 2, that information of that kind is usually passed to that person, body or agency;
 - (b) the individual concerned has consented to the disclosure;
 - (c) the record-keeper believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or of another person;
 - (d) the disclosure is required or authorised by or under law; or
 - (e) the disclosure is reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue.
2. Where personal information is disclosed for the purposes of enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the purpose of the protection of the public revenue, the record-keeper shall include in the record containing that information a note of the disclosure.
3. A person, body or agency to whom personal information is disclosed under clause 1 of this Principle shall not use or disclose the information for a purpose other than the purpose for which the information was given to the person, body or agency.

49. Action taken in accordance with s 336(2) by way of referring 'the matter' to the DPP would be a disclosure of personal information required or authorised by the provision. Such a disclosure would be 'required or authorised by or under law' for the purposes of IPP 11.1(d).
50. By comparison, in our view, a disclosure is *not* authorised in this context because the person making the disclosure has power to do what is 'necessary or convenient' to be done for the performance of relevant statutory functions. Nor is disclosure authorised simply because there is no law *prohibiting* the disclosure. It follows that a disclosure made relying on s 657(2) of the FW Act would not be 'required or authorised by or under law' for the purposes of IPP 11.1(d).
51. Having said that, the disclosure of particular information 'reasonably necessary for the enforcement of the criminal law' is permitted by IPP 11.1(e). Any such disclosures would need to be considered and justified on a case-by-case basis.

Obligations of confidence, disclosure and procedural fairness

52. Depending on the circumstances in which information is gathered in the course of the conduct of an inquiry or investigation, the General Manager (or delegate) might have legal obligations of confidentiality to the person or organisation from whom the information was obtained.
53. This obligation will generally arise where:
 - the information has the necessary quality of confidence about it; and
 - the information is communicated in circumstances importing an obligation of confidence.

A breach of confidentiality will arise where unauthorised use is made of the information to the detriment of the party communicating it (see generally *Laws of Australia* at para 23.6.160).

54. Also an obligation of confidentiality arises where a person exercises a statutory power to compel the disclosure of information (*Johns*). In our view it is clear that where the General Manager or delegate has compelled the provision of information under s 335 of the RO Act, there is a legal obligation of confidentiality.
55. Obligations of confidentiality are subject to any statutory power to disclose the information. Section 336(2) of the RO Act is such a statutory power the exercise of which would override any obligation of confidentiality.
56. The power in s 655 of the FW Act also permits disclosure of certain information by FWA and would, if it were relevant here, override any obligation of confidentiality.

57. The power in s 657(2) the FW Act is very general in nature, and we have significant doubt that it would displace obligations of confidentiality in relation to information obtained, whether this obligation arose generally or because the information was obtained under compulsory process.
58. We do note that it is possible that information in relation to the commission of an offence does not give rise to an obligation of confidentiality. This may be because such information cannot be the subject of an obligation of confidentiality, or because there is a general defence or exception to breach of confidence where disclosure is in the public interest (*Laws of Australia* at para 23.6.440; *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434). We think there would be some risk in relying on this principle in this case, and that it would be preferable to rely on the terms of s 336(2) of the RO Act. If it were to be relied upon, consideration would need to be given to the terms of the principle in Australian law, and to whether a specific proposed disclosure fell within the principle.
59. The exercise of a statutory power to disclose confidential information can be subject to the principles of administrative law, including the requirements of procedural fairness (*Johns*). Any publication to the world of material which is adverse to a person would generally attract an obligation of procedural fairness (that is an obligation to consult the affected person before any decision was made to so disclose) (see *Johns*).
60. Depending on the circumstances, more limited disclosures (that is, to particular persons or bodies rather than the public) might also attract procedural fairness obligations.
61. Accordingly, we suggest that any disclosure to the DPP be made on a limited and confidential basis. We would be happy to consider these issues further in relation to a particular proposed disclosure.

The power of the General Manager to direct staff of FWA

62. For the purposes of the PS Act, the General Manager and staff of FWA constitute a Statutory Agency and the General Manager is the Head of that Agency (see s 670 of the FW Act).
63. As such, the General Manager has, on behalf of the Commonwealth, all the rights, duties and powers of an employer in respect of APS employees in the Agency (s 20 of the PS Act). An APS employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction (s 13(5) of the PS Act).

64. As a general proposition, an Agency Head could give staff a direction to the effect that if they become aware during the performance of their duties of information relating to the possible commission of crimes, they should bring that information to the attention of the appropriate authorities.
65. However, care needs to be taken in applying such general principles to the exercise of particular statutory powers, including in the context of an investigation conducted under Part 4 of Chapter 11 of the RO Act.
66. For the reasons discussed earlier in this advice, it would be legally risky, and possibly unlawful, for the General Manager to direct staff involved in an investigation being conducted under those provisions to disclose information obtained during an investigation otherwise than to the General Manager or a delegate of the General Manager.
67. While it is possible that a specific disclosure might be appropriate in particular circumstances (and the disclosure would, for example, need to be made in accordance with the RO Act and the FW Act and the Privacy Act), it would be prudent for FWA to seek further legal advice before making a disclosure otherwise than through the General Manager relying on s 336(2) of the RO Act.

Is there an obligation to disclose information relating to possible criminal offences?

68. You have also asked us for general advice about the extent to which you and staff of FWA may be under a legal obligation to disclose to the police information relating to the possible commission of crimes.
69. We understand that this advice is intended to encompass the activities of FWA generally including, but not limited to, those undertaken in the context of the investigation discussed earlier. Our advice concerns the statutory issues this question raises and does not discuss the particular terms and conditions of employment of the General Manager or of any staff of FWA.
70. The staff of FWA are required under s 670 of the FW Act to be engaged under the PS Act. As such they would be APS employees for the purposes of the PS Act. The General Manager is appointed under the FW Act and is not an APS employee, but is the Head of the Statutory Agency FWA.

Is there a legal obligation to disclose such information?

71. In our view, there is no general, positive duty on the General Manager or on APS employees to report to police potentially criminal behaviour. It is possible that there may be a duty to disclose to the police information relating to the commission of crimes in limited circumstances but whether this was the case would need to be considered carefully.

72. Misprision of felony was a common law offence committed when a person failed to disclose within a reasonable time, knowledge that a felony had been committed. Our research indicates that there is significant doubt that misprision of felony has application to offences under Commonwealth law. In relation to the other jurisdictions, we understand that the offence has been abolished or does not apply.¹
73. The APS Code of Conduct is set out in s 13 of the PS Act. Section 13(4) requires APS employees acting in the course of their employment to comply with applicable Australian laws, including the laws of the States and Territories. Section 14 of the PS Act provides that an Agency Head is bound by the APS Code of Conduct in the same way as an APS employee.
74. Therefore, if there is a requirement imposed by Commonwealth, State or Territory legislation that a person must report the commission of an offence to the police or other authorities, where information to that effect came into their possession in the course of their duties, the General Manager and APS employees would, generally, be obliged to comply with it.
75. There are some Commonwealth, State and Territory laws that provide that it is an offence (put very broadly) to conceal certain serious crimes².
76. Section 40 of the Commonwealth *Crimes Act 1914* concerns compounding offences which requires that a person asks for or agrees to receive or obtain property or a benefit to conceal an offence.
77. Under the relevant legislation for Western Australia, Tasmania, Queensland, Northern Territory, the Australian Capital Territory and Victoria, it is an offence to conceal certain offences. However again, in each jurisdiction, to commit an offence the person broadly must obtain property or some benefit in return for their agreement to conceal the offence.
78. Subsection 241(1) of the *Criminal Law Consolidation Act 1935* (SA) provides that a person who, knowing or believing that another person has committed an offence, does an act with the intention of impeding an investigation or assisting the principal offender in escaping apprehension or prosecution or to dispose of proceeds of the offence, is guilty of an offence.

¹ See, for example, s 341 of the *Crimes Act 1900* (NSW).

² See, for example, s 44 of the *Crimes Act 1914* (Cth), s 316 of the *Crimes Act 1900* (NSW), s 241(1) of the *Criminal Law Consolidation Act 1935* (SA), s 136 of the *Criminal Code* (WA), Schedule 1 s 102 of the *Criminal Code Act 1924* (Tas), Schedule 1 s 133 of the *Criminal Code 1899* (Qld), Schedule 1, s 104 of the *Criminal Code Act* (NT), s 716 of the *Criminal Code Act 2002* (ACT) and s 326 of the *Crimes Act 1958* (Vic).

79. Section 316 of the *Crimes Act 1900* (**the NSW Crimes Act**) provides that:

316 Concealing serious indictable offence

- (1) If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.

80. Knowing or believing that a 'serious indictable offence' under NSW law has been committed (as compared with mere suspicion that an offence may have been committed) may involve difficult assessments otherwise than in extreme circumstances. The South Australian offence also involves an element of intention, to which the same comment applies.

81. As a general proposition, the various concealment laws are likely to be of limited relevance to FWA and the General Manager. We note also that the extent to which the laws of the States and Territories may apply to the Commonwealth, or Commonwealth officials or public servants acting in the course of their duties, raises complex issues which would need to be assessed on a case-by-case basis. A disclosure of information required by a State law may not in its terms apply to the Commonwealth, or Commonwealth officers or public servants; even if it does it may be inconsistent within the meaning of s 109 of the Constitution with a Commonwealth law, such as a secrecy provision; and even if this is not the case, it may not apply because of the Commonwealth's constitutional intergovernmental immunity.

82. Apart from the laws noted above and matters in relation to which mandatory reporting requirements apply (e.g., suspected child abuse), we are not aware of any general requirement to report the commission of a criminal offence.

Is there discretionary power to disclose such information?

83. It might be suggested that APS employees should, as a general principle, report to appropriate authorities criminal conduct that they come across in the course of their duties, as part of their responsibility to act with integrity and the highest ethical standards (see ss 13 of the PS Act).

84. But APS employees also need to be cognisant of their responsibilities to comply with all applicable laws. APS employees who obtain information in the course of their duties are in a different position from members of the public when it comes to their ability to disclose information that comes to their attention. They operate within a particular statutory and legal framework (which may differ widely according to the circumstances, even within one agency such as FWA).

85. Often there will be a mechanism available by which APS employees are able to reconcile the general principle described above in para 83 with general prohibitions upon the disclosure of information obtained in the course of employment. This will often take the form of a discretionary power to disclose the relevant information. The following laws are relevant in this regard.

86. Subsection 13(13) of the PS Act provides –

13 The APS Code of Conduct

(13) An APS employee must comply with any other conduct requirement that is prescribed by the regulations.

87. Regulation 2.1 of the *Public Service Regulations 1999* (the PS Regulations) relevantly provides –

2.1 Duty not to disclose information

- (1) This regulation is made for subsection 13 (13) of the Act.
- (2) This regulation does not affect other restrictions on the disclosure of information.
- (3) An APS employee must not disclose information which the APS employee obtains or generates in connection with the APS employee's employment if it is reasonably foreseeable that the disclosure could be prejudicial to the effective working of government, including the formulation or implementation of policies or programs.
- (4) An APS employee must not disclose information which the APS employee obtains or generates in connection with the APS employee's employment if the information:
 - (a) was, or is to be, communicated in confidence within the government; or
 - (b) was received in confidence by the government from a person or persons outside the government;

whether or not the disclosure would found an action for breach of confidence.

- (5) Subregulations (3) and (4) do not prevent a disclosure of information by an APS employee if:
 - (a) the information is disclosed in the course of the APS employee's duties; or
 - (b) the information is disclosed in accordance with an authorisation given by an Agency Head; or
 - (c) the disclosure is otherwise authorised by law; or
 - (d) ...

88. We also note that s 70 of the *Crimes Act 1914* (Cth) creates the following offence, punishable by imprisonment for 2 years:
- (1) A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he or she is authorized to publish or communicate it, any fact or document which comes to his or her knowledge, or into his or her possession, by virtue of being a Commonwealth officer, and which it is his or her duty not to disclose, shall be guilty of an offence.
89. APS employees are Commonwealth officers in this context and reg. 2.1 creates a relevant duty of non-disclosure.
90. In our view, the disclosure of information about a crime would not generally be prejudicial to the effective working of government, so r 2.1(3) of the PS Regulations would not prohibit the disclosure.
91. Some information obtained by FWA staff is obtained under compulsion. As such, it would be subject to a duty of confidence in accordance with *Johns*, and there may be other information obtained in confidence on the basis described earlier. As mentioned earlier, it is possible that information in relation to the commission of an offence does not give rise to an obligation of confidence. However, r 2.1(4) of the PS Regulations, on its terms, applies to prohibit disclosure of information obtained in confidence whether or not a disclosure would found an action for breach of confidence.
92. Regulation 2.1(5) of the PS Regulations permits disclosure by an APS employee in a range of circumstances. Most relevant for present purposes would be a disclosure in the course of the APS employee's duties or in accordance with the authority of the relevant Agency Head.
93. Just what is included in the course of, or performance of, an APS employee's duties has been the subject of several court decisions and is generally given a wide interpretation. In *Canadian Pacific Tobacco Co Ltd v Stapleton* (1952) 86 CLR 1, Dixon J (at 6) stated that that phrase:
- ... ought to receive a very wide interpretation. The word 'duty' there is not, I think, used in a sense that is confined to a legal obligation but really would be better represented by the word 'function'. The exception governs all that is incidental to the carrying out of what is commonly called 'the duties of an officer's employment'; that is to say, the functions and proper actions which his employment authorises'.
94. Whether or not a disclosure would be in the course of the employee's duties may depend on the legislative context and the particular APS employee's duties.
95. If a policy approach were to be adopted to the effect that APS employees who have a reasonable suspicion of criminal activities should in general report those suspicions to relevant Commonwealth, State or Territory police authorities, we think

it would be safest for those circumstances to be covered by the express authority of the Agency Head. That authority could be given under r 2.1(5)(b) of the PS Regulations. This would mean that an APS employee who discloses the information would not breach reg. 2.1 or commit an offence. Privacy and confidentiality issues, particularly as they affect the Commonwealth, would still need to be considered.

96. In the context of an investigation under Part 4 of Chapter 11 of the RO Act, for the reasons discussed earlier, we think that the appropriate course would be for the Agency Head (the General Manager) to refer relevant matters as a discretionary matter to the DPP at the conclusion of the investigation, in accordance with s 336(2) of the RO Act. This is the specific mechanism the Parliament considered appropriate in that context.
97. As mentioned earlier, there may be scope to make a specific disclosure by some other means but it would be prudent for FWA to seek further legal advice before doing so.
98. We mention that, in accordance with the *Legal Services Directions*, the FWA should in our view consult with the Department of Education, Employment and Workplace Relations (whose Minister is responsible for administering the relevant provisions of the RO Act and the FW Act) in relation to this advice.
99. Please contact us if we can assist you further.

Yours sincerely

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