



**MINISTER FOR EMPLOYMENT AND WORKPLACE RELATIONS
MINISTER FOR FINANCIAL SERVICES AND SUPERANNUATION**

Mr Robert Oakeshott MP
Committee Chair
Joint Committee of Public Accounts and Audit
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Mr Oakeshott

Thank you for your letter, received on 24 August 2012, seeking additional information to that provided at the private briefing given to the Joint Committee of Public Accounts and Audit on 22 August 2012.

Initiatives to make FWA a more efficient and effective body were outlined at the briefing but, as the KPMG review into FWA's conduct of inquiries and investigations into the Victoria No.1 Branch and the National Office of the Health Services Union (HSU) had not been released until the eve of the briefing, the Joint Committee considered that the participants did not have sufficient time to consider the review and whether the changes outlined would adequately deal with the issues identified in the review.

As you are aware, the investigations by the delegate of the General Manager of FWA into the HSU raised issues with the *Fair Work (Registered Organisations) Act 2009* (RO Act) that have since been addressed by amendments made by the *Fair Work (Registered Organisations) Amendment Act 2012*. Most relevantly, the amendments:

- allow delegation of inquiry and investigation functions to a third party where the General Manager is satisfied that the third party has the necessary skills to conduct the investigation or inquiry.
 - the capacity to delegate will be subject to a range of safeguards to ensure appropriate accountability – e.g. notices to produce documents will only be able to be issued by the General Manager, only the General Manager will be able to disclose information, and the General Manager will still be required to personally determine whether a contravention has occurred and take action.
- provide the General Manager with power to require information from third parties;
- require the General Manager to conduct inquiries within 12 months of concluding an investigation that determined that a contravention had occurred, to ascertain whether the provisions that were previously breached are being complied with;
- allow the General Manager to refer any matters to the Australian Federal Police or relevant State or Territory Police for action in relation to possible criminal offences.

The KPMG review does not identify any further gaps or inconsistencies in either the *Fair Work Act 2009* or the RO Act. Accordingly, no legislative response to the review is warranted or proposed.

However, the KPMG review does identify a number of administrative issues which are being addressed internally by FWA. I note that in releasing the review on 21 August 2012, the General Manager of FWA said that significant changes to relevant FWA policies and processes had already been made and that FWA would adopt all of the review's recommendations. The attached correspondence and submission from the General Manager of FWA clarifies what action has been taken in relation to the matters identified internally and in the review.

So that I may have ongoing confidence that the issues identified in the KPMG review are being addressed, I have requested that the General Manager of FWA provide me with regular reports outlining the measures and steps taken by FWA in relation to these matters. I anticipate the initial report will be provided to me by Friday 28 September 2012, with quarterly updates thereafter.

I trust the information provided is helpful.

Regards

BILL SHORTEN

10 SEP 2012



3 September 2012

BERNADETTE ONEILL
GENERAL MANAGER

The Hon Bill Shorten MP
Minister for Employment and Workplace Relations,
Financial Services and Superannuation
PO Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Minister

Fair Work Australia - KPMG Review of Health Services Union Investigations

I have been provided by the Department of Employment and Workplace Relations with a letter to you from Mr Robert Oakeshott MP, Chair of the Joint Committee of Public Accounts and Audits, regarding Fair Work Australia's (FWA) attendance before that Committee at a private briefing on 22 August 2012.

Mr Oakeshott's letter states that the Committee has decided to seek additional information as to possible follow-up options to ensure that the long-term reforms outlined at the briefing make FWA a more efficient and effective body. Mr Oakeshott has requested a short submission detailing the initiatives under consideration by FWA in response to the KPMG Review, including a short description of how these initiatives will contribute to the improved performance of FWA overall and the timelines envisaged for implementation.

FWA's response to Mr Oakeshott's request is attached.

Yours sincerely

Bernadette O'Neill
General Manager

Submission by Fair Work Australia to Joint Committee of Public Accounts and Audits

The General Manager has accepted the findings and acknowledged the criticisms contained in the KPMG Review concerning the conduct of the recent investigations related to the Health Services Union.

The KPMG Review made 31 recommendations to improve FWA's performance in conducting inquiries and investigations under the Fair Work (Registered Organisations) Act 2009 (RO Act). All of the recommendations have been accepted by the General Manager.

The administration arm of FWA has reviewed the breadth of its responsibilities under the RO Act, including but not limited to the conduct of inquiries and investigations. Significant cultural change is required and underway, to ensure we are an effective regulator of registered organisations.

The KPMG Review identified the *Australian Government Investigation Standards 2011* as "an appropriate and relevant minimum 'standard' from which ... procedures could be developed"¹ by Fair Work Australia (FWA), taking into account the specific legislative framework set out in the *Fair Work (Registered Organisations) Act 2009*.

FWA has implemented the following measures to ensure that it is compliant with relevant standards as benchmarked in the *Australian Government Investigation Standards 2011* and as set out in recommendations in the KPMG Review.

Improved resourcing within FWA

Resourcing of the Registered Organisations Team of FWA has been improved, both in terms of the quantity of staff available to conduct inquiries and investigations and their levels of qualification:

- In-house training will be conducted in Melbourne and Sydney in *Certificate IV in Government (Investigations)* in late 2012. Further, the option will be available for those staff who wish to undertake further units of study to obtain a dual qualification by also obtaining a *Certificate IV in Government (Statutory Compliance)*;
- A financial reporting specialist (who is a Certified Practising Accountant) joined the Registered Organisations Team in early August 2012;
- Three additional APS positions have been added to Melbourne staffing of the Organisations Team as part of a major organisational restructure; and
- Following a major organisational restructure, the General Manager's Delegate is responsible exclusively for the Registered Organisations team, whereas previously the Delegate was a Branch Director with significant responsibilities across the organisation. This has required an application to the APSC for an additional SES-level position (from 3 to 4), as the Delegate is required to be an SES officer.² Implementation of this change is contingent upon approval of the application to the APSC.

¹ Paragraph 1.4.2

² Section 343A(3) of the *Fair Work (Registered Organisations) Act 2009*

Development of new policies and procedures

FWA has developed written policies and procedures regarding the conduct of inquiries and investigations which are benchmarked against, and comply with, the *Australian Government Investigation Standards 2011* and, to the extent it is applicable, the *Prosecution Policy of the Commonwealth* (November 2004). These policies are published on the FWA website.³

In drafting these policies, FWA consulted with peak bodies,⁴ reviewed its policies against those of other agencies within the DEWR portfolio⁵ and has sought comment from FWA's in-house counsel who is currently on secondment from Corrs Chambers Westgarth. The policies that were provided to the Joint Committee of Public Accounts and Audits on 22 August 2012 were:

- o *Regulatory Compliance Policy*
- o *Litigation Policy*
- o *Inquiries and Investigations Media Policy*

FWA is currently developing an *Offences Policy* regarding:

- o The conduct of inquiries and investigations concerning offences under Part 3 of Chapter 8 of the *Fair Work (Registered Organisations) Act 2009*,⁶
- o Referral of a brief of evidence concerning possible offences under Part 3 of Chapter 8 of the *Fair Work (Registered Organisations) Act 2009* to the Commonwealth Director of Public Prosecutions;⁷ and
- o Referral of other possible criminal offences to the Australian Federal Police and State/Territory police forces for their investigation as appropriate.⁸

Public information sessions to launch FWA's new policies were held by the General Manager's Delegate in:

- o Melbourne on 20 August 2012,⁹ and
- o Sydney on 23 August 2012.¹⁰

FWA has developed internal written procedures and templates for conducting inquiries and investigations (Practice Notes). In particular, the procedures and templates concern identification of possible contraventions, case selection and planning and management of inquiries and investigations. These procedures and templates meet the standards set out in the *Australian Government Investigation Standards 2011* and have already adopted the recommendations in the KPMG Review, with the exception of the following 4 recommendations (which are currently being considered and which will be implemented as soon as possible):

³ <http://www.fwa.gov.au/index.cfm?pagename=regorgsfguidelines>

⁴ The Delegate met with representatives of the ACTU, ACCI and AIG and provided draft policies for consultation and comment prior to their public release and publication on the FWA website.

⁵ Specifically, the regulatory and litigation policies that are published by the Fair Work Ombudsman and the Australian Building and Construction Commission.

⁶ See subsections 258(1) and 260(4) regarding offences associated with hindering and obstructing auditors and the attendance of auditors at meetings at which their auditor's report is to be presented.

⁷ See paragraph 336(2)(c) of the *Fair Work (Registered Organisations) Act 2009*

⁸ As permitted by recent amendments under the *Fair Work (Registered Organisations) Amendment Act 2012* that commenced on 29 June 2012 – see paragraph 336(2)(c) and section 335C.

⁹ The Melbourne session was attended by approximately 60 people.

¹⁰ The Sydney session was attended by approximately 50 people.

- o Establishment of an external panel of skilled investigation resources;¹¹
- o Procedures for referral of a brief of evidence regarding offences under Part 3 of Chapter 8¹² of the *Fair Work (Registered Organisations) Act 2009* to the Commonwealth Director of Public Prosecutions¹³ - as set out above, this will be dealt with in the *FWA Offences Policy* which is currently being drafted; and
- o Processes and protocols for identification and collection of electronic information, including preserving such information in an "evidentiary sound manner".¹⁴

Timelines for the conduct of inquiries and investigations are addressed in the *Regulatory Compliance Policy* and accompanying FWA Practice Notes and in section 335B of the *Fair Work (Registered Organisations) Act 2009*, which requires investigations to be completed "as soon as practicable". Specifically:

- o The Initial Inquiry/Investigation evaluation form¹⁵ requires an assessment of the recommended resourcing of an inquiry/investigation, including how many staff are likely to be required, staffing and/or skills that need to be resourced externally, whether a team is likely to be required to work on a matter full-time and details of proposed team members and team structure;
- o Once an inquiry or investigation is commenced by the Delegate, an Inquiry/Investigation Plan template must be completed which includes resourcing and timelines;¹⁶
- o The Delegate and team leaders (and other team members as appropriate) must meet with the Delegate at least monthly to review the progress of current inquiries and investigations and to update the Inquiry/Investigation plan as appropriate;¹⁷
- o If a matter has come to the attention of FWA through lodgement of a complaint, FWA will advise the complainant of the action officer who is handling the matter and of expected timeframes for conduct of the inquiry/investigation. The complainant will also be notified of the outcome of the inquiry/investigation.¹⁸

FWA intends to programme a performance audit of the Registered Organisations functional area by the Australian National Audit Office early in 2014.

¹¹ Recommendation 8 of the KPMG Review. FWA is proposing to explore whether there are panels used by other regulatory agencies (such as ASIC, FWO, FWBC) onto which FWA may be able to "piggy back".

¹² See subsections 258(1) and 260(4) regarding offences associated with hindering and obstructing auditors and the attendance of auditors at meetings at which their auditor's report is to be presented.

¹³ Recommendation 10 of the KPMG Review

¹⁴ Recommendations 21 and 22 of the KPMG Review. It is recognised that implementation of these recommendations requires expert, external technical advice.

¹⁵ Paragraph 2.2 of FWA Practice Note 1 requires a matter of which FWA becomes aware to be evaluated using the template Inquiry/Investigation Evaluation Form within 10 working days of FWA becoming aware of the matter. Discussions regarding the initial assessment must be held with the Delegate within 5 working days of completion of the template (paragraph 2.3 of PN1).

¹⁶ FWA Practice Note 4

¹⁷ Paragraph 2.3 of FWA Practice Note 3.

¹⁸ Clause 7.5 of the *Regulatory Compliance Policy*.

Compliance audits

Audits of compliance by registered organisations with their recurring obligations were completed in early August 2012 for:

- o *Lodgement of financial returns:*
 - 405 reporting units in total - compliance rates of:
 - 97% of financial reports required to be lodged by 31 December 2010;
 - 95% of financial reports required to be lodged by 31 December 2011;
 - 93% of financial reports required to be lodged by 30 June 2012.
 - All currently non compliant employer and employee organisations are being dealt with in accordance with the new Regulatory Compliance Policy.
- o *Conduct of elections:*
 - 413 election entities in total - 17 elections outstanding (96%) over the past decade.

A further audit of the conduct of elections by the 25 election entities that have an exemption which allows them to conduct their own elections will be held before the end of 2012.¹⁹

All organisations and branches which have been identified by these audits as having failed to meet requirements regarding lodgement of financial returns and conduct of elections are currently being dealt with in accordance with clause 7.4 of the *Regulatory Compliance Policy*.²⁰

Additional disclosure requirements for reporting units

A review of the *Reporting Guidelines* is currently being undertaken to identify appropriate additional financial disclosure requirements.²¹ The current Reporting Guidelines commenced in November 2004.

¹⁹ Elections must be conducted by the Australian Electoral Commission unless the General Manager has granted an exemption under section 186 of the *Fair Work (Registered Organisations) Act 2009*.

²⁰ Clause 7.4 provides that the organisation/branch is contacted by FWA and advised that lodgement of the outstanding document is required within a specified timeframe. If lodgement does not occur within that specified timeframe without cause, an inquiry, investigation or proceedings will be commenced by FWA.

²¹ The Reporting Guidelines, which are made under section 255 of the *Fair Work (Registered Organisations) Act 2009*, allow the General Manager to prescribe disclosures which are in addition to the Australian Accounting Standards having in mind the nature of registered organisations.

Provision of information to organisations

In early August 2012 a fact sheet was circulated by the Delegate to all registered organisations summarising amendments made by the *Fair Work (Registered Organisations) Amendment Act 2012*, which received Royal Assent on 29 June 2012. The public information sessions that were conducted by the Delegate in Sydney and Melbourne in August 2012 also provided information to registered organisations and practitioners regarding these requirements:

- By the date of Proclamation,²² registered organisations and their branches must amend their rules to require:
 - Disclosure of remuneration paid to officers;²³
 - Disclosure of material personal interests;²⁴
 - Disclosure of payments to related parties and declared persons;²⁵
 - Training of officers regarding financial responsibilities;²⁶ and
 - The development and implementation of policies relating to expenditure.²⁷
- Penalties for contraventions of the *Fair Work (Registered Organisations) Act 2009* have trebled;²⁸ and
- FWA's powers of investigation have been strengthened.²⁹

²² If the *Fair Work (Registered Organisations) Amendment Act 2012* is not proclaimed, it will commence on 30 June 2013.

²³ Section 148A

²⁴ Section 148B

²⁵ Section 148C

²⁶ Section 154D

²⁷ Section 141(1)(ca)

²⁸ Section 306

²⁹ Section 335A - the General Manager can compel third parties (such as banks and telephone companies) to produce information and documents or to attend before FWA.



FWA Inquiries and Investigations Media Policy

Publication History:

First edition: August 2012

**Relevant
Legislation
or materials:**

Fair Work Act 2009
*Fair Work (Registered
Organisations) Act 2009*

1. FWA policies

1.1. The purpose of this policy is to publish advice on Fair Work Australia's (FWA) policies and procedures regarding liaison with the media and the release of media statements concerning inquiries and investigations that are conducted under Part 3 of Chapter 8 of the *Fair Work (Registered Organisations) Act 2009* (RO Act).

1.2. This policy addresses the following topics:

- a. **About Fair Work Australia** (paragraph 2);
- b. **Regulation of registered organisations, their officers, employees and auditors** (paragraph 3); and
- c. **Media management during inquiries and investigations** (paragraph 4).

1.3. FWA policies do not have the force of statute. While FWA will seek to meet the requirements of its policies in carrying out functions, failure by FWA to comply with a policy cannot affect the validity of the conduct in question. This policy is not a direction for the purposes of subsection 343A(4) of the RO Act.

2. About Fair Work Australia

2.1. FWA is established by section 575 of the *Fair Work Act 2009* (FW Act).

2.2. FWA is divided into two arms, the FWA Tribunal and the administrative arm.

2.3. The General Manager of FWA 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 the commencement of FWA on 1 July 2009, FWA'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 General Manager of FWA is empowered by Part 4 of Chapter 11 of the RO Act to conduct inquiries and investigations regarding compliance by registered organisations and their branches, officers, employees and auditors with Part 3 of Chapter 8 of the RO Act, the Reporting Guidelines made under that Part, the *Fair Work (Registered Organisations) Regulations 2009* (RO Regulations), rules of the organisation/branch relating to its finances and financial administration and civil penalty provisions of the RO Act.¹ Detailed information regarding inquiries and investigations is set out in the *FWA Regulatory Compliance Policy*.

3.2. The General Manager is empowered by the RO Act to commence civil proceedings in the Federal Court of Australia.² While this will often occur at the conclusion of an investigation, the General Manager may commence proceedings without an investigation so long as the General Manager otherwise has a proper evidentiary basis to commence such proceedings. Detailed information regarding the conduct of litigation by the General Manager is set out in the *FWA Litigation Policy*.

3.3. The General Manager is also empowered to conduct inquiries and investigations concerning two offences that are contained within Part 3 of Chapter 8.³ At the conclusion of an investigation the General Manager will, where appropriate, refer a brief of evidence concerning possible criminal offences to the Commonwealth Director of Public Prosecutions (CDPP). Detailed information regarding the conduct of inquiries and investigations regarding offences in Part 3 of Chapter 8 of the RO Act and the referral of such matters to the CDPP is set out in the *FWA Offences Policy*.

4. Media management during inquiries and investigations

4.1. Inquiry and investigation plans that are prepared by FWA as set out in the *FWA Regulatory Compliance Policy* must evaluate the likelihood of media interest in the inquiry or investigation in question.

4.2. Where it is considered that media interest in an inquiry or investigation is likely, media management strategies will be developed as part of an inquiry or investigation plan, including briefing FWA's Media and Communications Manager regarding the circumstances of the inquiry or investigation.

4.3. Any briefing that is provided to the Media and Communications Manager should be given by the General Manager and/or the General Manager's delegate and should indicate the information that can be provided to the media concerning the inquiry or investigation.

¹ Sections 330 to 334 of the RO Act.

² Subsection 336(2).

³ Subsections 258(1) and 260(4).

- 4.4. As a general policy, only FWA's Media and Communications Manager should have contact with the media. Except in exceptional circumstances, other FWA staff should not provide information to the media unless authorised by the General Manager or, in his or her absence, the delegate.
- 4.5. Any information that is released by FWA to the media regarding an inquiry or investigation should not:
- a. Prejudice a person's right to a fair hearing or the legal process;
 - b. Impinge on the privacy or safety of others involved in the inquiry or investigation; or
 - c. Prejudice any actions taken or future actions of FWA or other agencies.
- 4.6. FWA's Media and Communications Manager may be contacted at FWA's Melbourne office:
- a. By telephone on (03) 8661 7777; and
 - b. By email to inquiries@fwa.gov.au.



FAIR WORK
AUSTRALIA

FWA Litigation Policy

Publication History:

First edition: August 2012

**Relevant
Legislation
or materials:**

Fair Work Act 2009

*Fair Work (Registered
Organisations) Act 2009*

Legal Services Directions 2005

*Prosecution Policy for the
Commonwealth (Nov 2008)*

1. FWA policies

- 1.1. The purpose of this policy is to publish advice on Fair Work Australia's (FWA) policies and procedures regarding its conduct of litigation 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 FWA in making decisions relating to the commencement of civil proceedings in the Federal Court of Australia under subsection 336(2) of the RO Act in relation to contraventions of the RO Act.
- 1.2. The FWA Litigation Policy is based upon the *Prosecution Policy of the Commonwealth* (November 2008) which sets out guidelines for the making of decisions in all Commonwealth prosecutions, whether or not conducted by the Commonwealth Director of Public Prosecutions (CDPP). The Prosecution Policy of the Commonwealth is, however, concerned with the decision to institute (or continue) criminal proceedings. While FWA does have a limited power to investigate offences under Part 3 of Chapter 8 of the RO Act, at the conclusion of any such investigation the General Manager will, where appropriate, refer a brief of evidence to the CDPP concerning possible prosecution of those offences by the CDPP. As such, FWA does not prosecute criminal contraventions of the RO Act.
- 1.3. This FWA Litigation Policy has been developed concerning the commencement of civil proceedings by FWA in the Federal Court of Australia.
- 1.4. Information concerning FWA's conduct of inquiries and investigations concerning possible civil penalty contraventions and offences is set out in the *FWA Regulatory Compliance Policy* and the *FWA Offences Policy* respectively.

1.5. This policy addresses the following topics:

- a. **FWA policies** (paragraph 1);
- b. **About Fair Work Australia** (paragraph 2);
- c. **Regulation of registered organisations and their officers, employees** (paragraph 3);
- d. **Litigation as a compliance tool** (paragraph 4);
- e. **Nature of contraventions** (paragraph 5);
- f. **The decision to commence civil proceedings** (paragraph 6);
- g. **Sufficient evidence** (paragraph 7);
- h. **Public interest** (paragraph 8);
- i. **Choice of contraventions to be litigated** (paragraph 9);
- j. **Breach bargaining** (paragraph 10);
- k. **Discontinuance of proceedings** (paragraph 11); and
- l. **Submissions on penalty** (paragraph 12).

1.6. FWA policies do not have the force of statute. While FWA will seek to meet the requirements of its policies in carrying out functions, failure by FWA to comply with the FWA Litigation Policy cannot affect the validity of decisions that are made concerning litigation or the conduct of litigation.

2. About Fair Work Australia

2.1. FWA is established by section 575 of the *Fair Work Act 2009* (FW Act).

2.2. FWA is divided into two arms, the FWA Tribunal and the administrative arm.

2.3. The General Manager of FWA 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 the commencement of FWA on 1 July 2009, FWA'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 and their officers, employees and auditors

3.1. FWA's litigation activities are part of a broader regulatory framework which includes a combination of education and voluntary compliance and the conduct of inquiries and investigations which are aimed at bringing about compliance with obligations that are placed by the RO Act upon registered organisations, their officers,

employees and auditors. The FWA Regulatory Compliance Policy sets out detailed information about the regulatory framework.

4. Litigation as a compliance tool

- 4.1. The key aim of FWA in commencing litigation against registered organisations, their officers, employees and auditors is to ensure compliance with legislative obligations set out in the RO Act and RO Regulations. In particular, FWA is concerned with ensuring that there are high levels of accountability of registered organisations to their members.
- 4.2. At the conclusion of an investigation under Part 4 of Chapter 11 of the RO Act, actions that are available to the General Manager under section 336 of the RO Act are to:
- a. issue a notice to the reporting unit requesting that the reporting unit take specified action, within a specified period, to rectify the matter (rectification notice).¹ The General Manager may commence proceedings in the Federal Court:²
 - i. to enforce a rectification notice;³ and
 - ii. seeking cancellation of the registration of a registered organisation for failure to comply with an order of the Federal Court that was made with respect to a rectification notice;⁴ and
 - b. for an order under Part 2 of Chapter 10 of the RO Act regarding civil penalty provisions.⁵ Orders may be sought for:
 - i. imposition of a pecuniary penalty;⁶
 - ii. compensation⁷ or other orders;⁸ or
 - iii. declaratory relief.
- 4.3. Civil penalty provisions of the RO Act are set out 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 Paragraph 336(2) (a).

² The General Manager can authorise another person in writing under subsection 310(1) to commence proceedings.

³ Subsection 336(5).

⁴ Subsection 28(1A).

⁵ Paragraph 336(2)(b).

⁶ Section 306.

⁷ Section 307.

⁸ Section 308.

- d. lodgement of membership records under section 233;
- e. access to membership records under section 235;
- f. lodgement with FWA 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 FWA under section 268;
- q. provision of information under section 272;
- r. general duties that are placed upon officers under sections 285, 286, 287 and 288; and
- s. provision to members of copies of rules and information regarding offices under section 347.

4.4. 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 by the AEC under the RO Regulations, he or she may initiate Federal Court proceedings.⁹

4.5. While the decision to commence proceedings in the Federal Court is typically made at the end of an investigation, 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,

⁹ 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.

where the AEC has referred evidence regarding possible contraventions of civil penalty provisions of the RO Regulations to the General Manager.

5. Nature of contraventions

- 5.1. 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. The FWA Litigation Policy only relates to proceedings instituted by FWA with respect to contraventions of civil penalty provisions.
- 5.2. As set out in paragraph 1.2 above, FWA is not empowered to investigate possible criminal offences other than those found in Part 3 of Chapter 8 of the RO Act that deal with obstruction of auditors¹⁰ and their right to attend meetings at which their report is being presented.¹¹ At the conclusion of any such investigation, the General Manager will, where appropriate, refer a brief of evidence to the CDPP concerning possible prosecution of those offences by the CDPP.¹² FWA does not prosecute criminal contraventions of the RO Act.
- 5.3. The RO Act and RO Regulations set out other offences in addition to those found in Part 3 of Chapter 8 of the RO Act. The General Manager is not, however, empowered to investigate such offences.¹³ Where appropriate, possible offences under the RO Act other than those set out in Part 3 of Chapter 8 will be referred by the General Manager to the Australian Federal Police (AFP),¹⁴ given its role in administering Commonwealth criminal laws.
- 5.4. The General Manager is not empowered to investigate possible criminal offences under other Commonwealth, State or Territory laws. Investigations of possible criminal offences under Commonwealth, State and Territory laws are carried out by the AFP, State or Territory police forces according to their jurisdiction. Upon receipt of a brief of evidence, criminal prosecutions can be initiated by the Commonwealth Director of Public Prosecutions (CDPP), their State/Territory counterparts or police prosecutors, depending upon the nature of the offence. Prosecutors have sole discretion to commence, or not commence, a criminal prosecution and for the conduct of any case taken to court in respect of an offence.
- 5.5. In a criminal matter the prosecution must prove the facts to the strictly applied legal standard of "beyond reasonable doubt". However, the facts of a civil case need only be proved to the lesser standard of "on the balance of probabilities" - see *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362.

¹⁰ Subsection 258(1).

¹¹ Subsection 260(4).

¹² Paragraph 336(2)(c).

¹³ See paragraph 331(1)(a) and section 334.

¹⁴ Paragraph 336(2)(c).

6. The decision to commence civil proceedings

- 6.1. The decision to commence civil proceedings under paragraph 336(2)(b) of the RO Act rests with the General Manager alone and cannot be delegated.¹⁵
- 6.2. Application may be made for an order in the Federal Court by the General Manager or by some other person authorised in writing by the General Manager under subsection 310(1) of the RO Act.
- 6.3. To the extent that it is applicable, FWA will have regard to the Prosecution Policy for the Commonwealth in making its own decisions regarding commencement of civil proceedings under the RO Act. In determining whether (or not) to commence civil proceedings, the General Manager is mindful of the need to maintain public confidence in FWA's regulatory role under the RO Act and RO Regulations and of the need to meet standards of fairness, openness, consistency and accountability and efficiency in commencing proceedings concerning contraventions of the RO Act.
- 6.4. Not all contraventions will automatically result in proceedings in the courts. The resources available for court proceedings are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that available resources should be employed to pursue with appropriate vigour those cases that are worthy of prosecution. Further, the General Manager is required by section 44 of the *Financial Management and Accountability Act 1997* to manage the affairs of the administrative arm of FWA in a way that promotes "proper use" of Commonwealth resources. The term "proper use" is defined in that section as meaning "efficient, effective, economical and ethical use that is not inconsistent with the policies of the Commonwealth".
- 6.5. The decision whether to commence proceedings is the most important in the litigation process. In every case, great care must be taken in the interests of the party against whom proceedings will be brought and the community at large to ensure that the right decision is made. A wrong decision to commence proceedings or, conversely, a wrong decision not to commence proceedings both tend to undermine the confidence of the community in the regulatory system.
- 6.6. The objectives of fairness and consistency are of particular importance but it must be recognised that general principles must be tailored in their application to individual cases.
- 6.7. In determining whether to commence proceedings, the General Manager will consider:
 - a. Firstly, whether there is sufficient evidence to justify the commencement of proceedings and which indicates that there is a reasonable prospect of success; and
 - b. Secondly, whether it is in the public interest taking into account the facts of the case and the surrounding circumstances.

¹⁵ Paragraph 343A(2)(j).

6.8. Similarly, in determining whether to institute an appeal against a decision at first instance, the General Manager will consider the merits of such an appeal and the public interest, including the expenditure of public monies and the creation of legal precedents.

7. Sufficient evidence

7.1. It is not sufficient that there simply be a prima facie case. It is also necessary to consider the prospects of success. A matter should not be commenced if there is no reasonable prospect of success.

7.2. In determining whether there is sufficient evidence to indicate that there is a reasonable prospect of success, the General Manager:

- a. Will consider whether there is admissible, substantial and reliable evidence that a contravention of the RO Act has occurred;
- b. Will evaluate the strength of the case that is likely to be presented to the court. This must take into account such matters as:
 - i. The availability, competence and credibility of witnesses;
 - ii. Any admissions that have been, or are likely to be, made by parties against whom proceedings are to be brought;
 - iii. Any defences that are available to, or have been identified by, parties against whom proceedings are to be brought; and
 - iv. Any other factors that the General Manager is of the view may affect the likelihood or otherwise of the litigation succeeding.

7.3. Before commencing proceedings, clause 4.7 of the *Legal Services Directions 2005* requires FWA (except in urgent circumstances) to obtain written legal advice from lawyers whom FWA is permitted to use in the proceeding indicating that there are reasonable grounds for starting the proceedings.

8. Public interest

8.1. Once it is established that there is sufficient evidence justifying the commencement of proceedings and that there is a reasonable prospect of success, the General Manager will consider whether it is in the public interest to commence litigation in light of the provable facts and the whole of the surrounding circumstances.

8.2. Not all contraventions of the RO Act will warrant the commencement of proceedings. The factors that can properly be taken into account in deciding whether the public interest requires that proceedings be commenced will vary from case to case.

8.3. Public interest factors which operate in favour of commencing proceedings include the seriousness of the contravention and the need for deterrence. Generally speaking, the more serious the contravention, the more likely it will be that the public interest will require that the matter be litigated. Deterrence can be of a specific or general nature.

8.4. The factors that will arise for consideration by the General Manager in determining whether the public interest requires that proceedings be commenced include the following matters:

a. The nature and circumstance of the alleged contravention:

i. The seriousness or, conversely, the relative triviality of the alleged contravention, including whether it is of a "technical nature" only.

For example, a "technical" contravention may arise where a GPFR has not been prepared in full accordance with Australian Accounting Standards but members of a registered organisation were nevertheless initially provided with most of the information that is required and full disclosure was subsequently achieved through redistribution of the GPFR in question; and

ii. The actual or potential consequence of the alleged contravention, including in particular the consequence for members of the registered organisation. Consistent with the objects of the RO Act, FWA is concerned with ensuring that there are high levels of accountability of registered organisations to their members.

b. Factors relevant to the parties against whom proceedings may be commenced:

i. The degree of culpability of the party against whom proceedings may be commenced.

For example, the degree or extent to which a party voluntarily complied with any advice that had been given by FWA in relation to complying with regulatory requirements and whether there was a genuine misunderstanding of legislative regulatory requirements;

ii. The compliance history of the organisation and its officers, employees and auditors (including, where relevant, responses to previous enforcement and prevention activities undertaken by FWA);

iii. The attitude of parties (including any measures taken towards voluntary compliance); and

iv. The degree of involvement of officers and members of the committee of management and of members of the registered organisation in the alleged contravention.

c. Whether the nature of the alleged contravention is of considerable public concern. FWA assumes that, in all cases, the public is concerned about compliance with the RO Act.

d. The likely impact of proceedings on:

i. General deterrence (ie. reducing the likelihood that other registered organisations, their officers, employees and auditors will commit similar contraventions or otherwise contravene the RO Act); and

- ii. Specific deterrence (ie. reducing the likelihood that the registered organisation in question will further contravene the RO Act).
- e. The effect of litigation:
 - i. The likely orders that may be made by the court in the event of a finding of contravention;
 - ii. The availability and efficacy of any alternatives to litigation, such as the issuance of a rectification notice and voluntary compliance; and
 - iii. Whether the consequences of any finding of contravention by the court would be unduly harsh and oppressive.
- f. Administrative considerations:
 - i. The necessity to maintain public confidence in the administration of the RO Act by FWA;
 - ii. The likely length and expense of litigation;
 - iii. The obsolescence or obscurity of the law;
 - iv. Whether the commencement of proceedings would be perceived as counter-productive, for example by bringing the law into disrepute;
 - v. Whether there is a need for judicial clarification of the requirements of the RO Act; and
 - vi. The period of time that has elapsed since the alleged contraventions occurred.

8.5. The General Manager's decision whether or not to commence proceedings will not be influenced by:

- a. Race, religion, sex, national origin or political association, activities or beliefs of any person involved in the alleged contraventions;
- b. Personal feelings concerning the registered organisation, its officers, employees or auditor;
- c. Possible political advantage, disadvantage or embarrassment to the government or any political group or party; or
- d. The possible effect of the decision on the personal or professional circumstances of the General Manager.

9. Choice of contraventions to be litigated

- 9.1. In many cases the evidence will disclose a number of possible contraventions of the RO Act and RO Regulations.
- 9.2. The General Manager will take care to choose to commence proceedings only with respect to those possible contraventions which adequately reflect the nature and

extent of offending conduct disclosed by the evidence and which will provide the court with an appropriate basis for determining a penalty.

- 9.3. In the ordinary course, the General Manager will proceed with possible contraventions that are substantiated by the admissible evidence. There may be cases where there is public interest in commencing proceedings concerning a number of contraventions. Under no circumstances will the General Manager commence proceedings with respect to a particular proposed contravention for the purpose of providing scope for subsequent "breach bargaining".

10. Breach bargaining

- 10.1. Breach bargaining involves seeking a resolution of a proceeding by consent between the respondent and the General Manager. If breach bargaining is successful, the parties will seek orders from the court by consent to resolve the proceeding.
- 10.2. A breach bargaining decision may only be made by the General Manager.
- 10.3. Once the General Manager has decided to pursue contraventions in a proceeding based on a careful assessment of the public interest, the General Manager will usually only agree to resolve the proceeding on the basis of admissions to all pleaded contraventions. Nevertheless, circumstances may change or new facts may come to light which will make it appropriate, in the interests of justice or in the public interest, to proceed with fewer contraventions or to accept admissions to only some of contraventions.
- 10.4. Discussions between the General Manager and the respondent are to be encouraged and may occur at any stage of the progress of a matter through the courts and may be initiated by FWA.
- 10.5. Before agreement on a resolution is reached, the General Manager must be satisfied that the contraventions regarding which admissions have been made:
- a. bear a reasonable relationship to the nature of the offending conduct;
 - b. provide an adequate basis for an appropriate penalty in all the circumstances of the case; and
 - c. are supported by evidence, such as an agreed statement of facts.
- 10.6. In many cases, the interests of justice will be served if a respondent admits agreed contraventions in circumstances described in paragraph 10.5 and the community is not put to the burden of funding a long and expensive hearing.
- 10.7. A proposal by a respondent that it will agree to particular contraventions or accept a lesser number of contraventions may include a request that FWA not oppose a submission by the respondent to the court that the penalty falls within a nominated range. The General Manager may accept the proposal provided the range of penalty nominated is within appropriate limits having regard to all relevant matters including balancing the need for general and specific deterrence against any

mitigating circumstances - refer also to paragraph 12 below. Ultimately, the penalty that is imposed remains a matter for the court's discretion.

- 10.8. Under no circumstances will FWA entertain a breach bargaining proposal if the respondent maintains their innocence with respect to the contraventions it has offered to concede. The respondent must genuinely accept wrong-doing on their behalf and be prepared to admit that publicly and to the court.

11. Discontinuance of proceedings

- 11.1. Consistent with the objective of ensuring that only appropriate cases are brought before the courts, FWA will discontinue proceedings if appropriate.
- 11.2. The decision whether or not to discontinue proceedings rests with the General Manager.
- 11.3. Having regard to the considered assessment undertaken by the General Manager as to the public interest before the commencement of proceedings and the opportunity generally afforded for voluntary compliance, discontinuance is not usually agreed to.

12. Submissions on penalty

- 12.1. Where litigation results in a finding that the registered organisation laws have been contravened, the court will move to consider what penalty, if any, should be imposed.
- 12.2. With amendments to the RO Act that commenced on 29 June 2012, the maximum penalty that can be imposed on a registered organisation (body corporate) has increased from 100 to 300 penalty units for each separate contravention.¹⁶ Given the definition of a penalty unit under s.4AA of the *Crimes Act 1914*, it follows that the maximum penalty that may be imposed on a registered organisation for each contravention is \$33,000. Similarly, the maximum penalty that may be imposed in any other case (such as on an individual) has increased from 20 to 60 penalty units for each contravention, namely to a maximum of \$6,600.
- 12.3. Where appropriate, FWA will seek penalties that balance the aims of general and specific deterrence with those circumstances that, in individual cases, constitute relevant penalty considerations. Where wrongdoers have co-operated with FWA and also made admissions early in the course of an investigation or soon after the commencement of proceedings, it is appropriate to allow a discount on penalty if the wrongdoer demonstrates contrition and a willingness to facilitate the course of justice (see the decision in *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 (at 71-76 per Stone and Buchanan JJ).
- 12.4. As noted at paragraph 12.2 above, the maximum penalties have recently increased. The size of, and recent increases to, the prescribed penalties is a relevant consideration in determining an appropriate penalty in all of the circumstances. The increase in the penalty reflects the importance of compliance with the RO Act and

¹⁶ See section 306.

the subsequent significance that should attach to contraventions of these provisions.¹⁷

¹⁷ See item 10 of the Explanatory memorandum to the *Fair Work (Registered Organisations) Amendment Bill 2012*.



FAIR WORK
AUSTRALIA

FWA 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>
		<i>Fair Work (Registered Organisations) Regulations 2009</i>
		<i>Industrial Registrar's Reporting Guidelines (Oct 2004)</i>

1. FWA policies

1.1. The purpose of this policy is to publish advice on Fair Work Australia's (FWA) 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 FWA in regulating employee and employer organisations that are registered under the RO Act (registered organisations).

1.2. This policy addresses the following topics:

- a. **FWA policies** (paragraph 1);
- b. **About Fair Work Australia** (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. **Identification of Possible Contraventions and Case Selection** (paragraph 7);
- i. **Voluntary compliance** (paragraph 8);
- j. **Conduct of Inquiries and Investigations** (paragraph 9);

- k. **Sharing of Information regarding inquiries and investigations** (paragraph 10Error! Reference source not found.);
- l. **Performance and Quality Control Measures** (paragraph 11);
- m. **Publication of Compliance and Enforcement Activities** (paragraph 12); and
- n. **Review of Findings** (paragraph 13).

1.3. FWA policies do not have the force of statute. While FWA will seek to meet the requirements of its policies in carrying out functions, failure by FWA 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 FWA. This Regulatory Compliance Policy is not a direction for the purposes of subsection 343A(4) of the RO Act.

2. About Fair Work Australia

- 2.1. FWA is established by section 575 of the *Fair Work Act 2009* (FW Act).
- 2.2. FWA is divided into two arms, the FWA Tribunal and the administrative arm.
- 2.3. The General Manager of FWA 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 the commencement of FWA on 1 July 2009, FWA'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 FWA'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;
 - d. lodgement of membership records under section 233;
 - e. access to membership records under section 235;

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.

- f. lodgement with FWA 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 FWA 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
- 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).

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.

- 3.9. The General Manager of FWA 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 *FWA Offences Policy*.

4. Compliance Tools

- 4.1. FWA has a Registered Organisations Team within the Client Services Branch that is responsible for ensuring compliance by registered organisations with their regulatory obligations.

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.

4.2. Compliance by registered organisations with the RO Act and RO Regulations is monitored by the Registered Organisations Team 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 FWA 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 FWA 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 FWA, including any defect or irregularity or deficiency, failure or shortcoming that has been identified by an auditor;
 - 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

¹² Note there are other circumstances which the General Manager may conduct investigations under section 331 ie 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.

- iv. section 334 of the RO Act arising from a referral of a matter by the FWA Tribunal to the General Manager.

5. Sanctions

5.1. FWA'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 FWA 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 *FWA 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

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.

¹³ See section 335B.

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 FWA 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, FWA 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 FWA 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 FWA;
- 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 FWA 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 FWA and those documents are so voluminous, poorly organised and/or identified and categorised as to require an unreasonable use of FWA's resources in determining whether there may have been a contravention which is capable of inquiry or investigation. FWA is likely to encounter significant difficulties in identifying possible contraventions in such circumstances within a reasonable period of time.
- 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.

¹⁴ See subsection 332(2).

7. Identification of Possible Contraventions and Case Selection

7.1. Complaints can be lodged with FWA by contacting the Registered Organisations Team in Melbourne by:

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

Registered Organisations Team
Fair Work Australia
GPO Box 1994
MELBOURNE VIC 3001

7.2. Upon the Registered Organisations Team becoming aware of a possible contravention, the matter will be:

- a. Registered in FWA's electronic case management system; and
- b. Evaluated to determine whether FWA 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)). FWA is not empowered to investigate contraventions concerning State registered organisations;
 - ii. FWA 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. FWA 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 FWA is empowered to conduct an inquiry or investigation, the Registered Organisations Team 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 FWA 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, FWA 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, FWA 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 FWA by a member of an organisation or of the general public regarding a possible contravention:

- a. FWA 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 Registered Organisations Team; 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 FWA 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 Registered Organisations Team 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;
- b. Where FWA 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.

¹⁵ 119 in June 2012

¹⁶ 405 in June 2012

8. Voluntary compliance

- 8.1. FWA 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. FWA 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 FWA is sufficient to constitute "reasonable grounds". In evaluating evidence, the Delegate will consider such matters as:
 - a. The amount of evidence before FWA and whether any other documentary or witness evidence may be available and, if so, from where; and
 - b. The veracity of evidence before FWA, 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 FWA 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 Registered Organisations Team 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 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 FWA is a discretionary tool which may or may not be used as deemed appropriate, considering the facts and circumstances of the matter in question.

¹⁷ Section 335.

¹⁸ Section 335A.

¹⁹ Sections 337 and 337AA.

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 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.

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 Regulations is set out in a separate policy, *FWA Criminal Offences Policy*.

²¹ Section 336(1).

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

- 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 FWA 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, FWA 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 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

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.

- 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;²⁸
 - 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 FWA 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;
- 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.

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.

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 FWA 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, FWA 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 FWA 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 *FWA Inquiries and Investigations Media Policy*.

11. Performance and Quality Control Measures

- 11.1. FWA staff must act impartially, without bias and avoid conflicts of interest in dealing with any inquiries or investigations. FWA must act only on the basis of logically probative evidence.
- 11.2. FWA staff who are members of the Organisations Team will comply with the following documented procedures:
 - a. FWA Regulatory Compliance Policy;
 - b. Australian Public Service (APS) Values; and

³⁶ Section 335C.

c. APS Code of Conduct.

- 11.3. FWA will maintain up-to-date versions of all relevant laws and Ministerial Directives.
- 11.4. Information regarding compliance by FWA staff with performance measures is published by FWA in its annual report, which is available from the FWA website at www.fwa.gov.au.
- 11.5. Quality assurance reviews of the conduct by the Registered Organisations Team of inquiries and investigations will be the subject of regular external review by the Australian National Audit Office (ANAO) as part of FWA'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 FWA (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. FWA may publish information about its regulatory and enforcement activities, including in its Annual Report and on the FWA 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 FWA.
- 12.3. Further information regarding liaison with the media and the release of FWA media statements is set out in the *FWA 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 FWA or with the outcome of an inquiry/investigation, a request for a review may be made, in writing, to:

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

- 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.

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."



Fact sheet

Fair Work (Registered Organisations) Amendment Act 2012

The *Fair Work (Registered Organisations) Amendment Act 2012* (the Amendment Act) received Royal Assent on 29 June 2012.

The Amendment Act amends the *Fair Work (Registered Organisations) Act 2009* (the RO Act) in order to increase the financial accountability of registered organisations and their office holders, to strengthen the investigative powers of Fair Work Australia and to increase penalties under the RO Act.

Schedule 1 to the Amendment Act is divided into two parts:

- Part 1 sets out provisions of the Amendment Act that commenced on Royal Assent (29 June 2012);
- Part 2 sets out provisions of the Amendment Act that will commence on Proclamation. If a day is not proclaimed, they will commence 12 months from the date on which the Bill received Royal Assent—that is, on 29 June 2013. For ease of reference, this fact sheet refers to the commencement date of Part 2 as being 'on Proclamation'.

The purpose of this fact sheet is to provide information about the Amendment Act and to assist registered organisations in understanding their obligations and the timeframes within which they must meet these obligations.

Part 1: Summary of key amendments commencing on Royal Assent

The amendments to the RO Act that are set out in this part are now in force.

Strengthening of penalties—s.306

The maximum penalties that can be imposed by the Federal Court upon bodies corporate (including registered organisations) and individuals for contraventions of civil penalty provisions of the RO Act have been tripled. The new maximum penalties are:

- 300 penalty units for a body corporate (currently equivalent to \$33,000);
- 60 penalty units for an individual (currently equivalent to \$6600).

These new penalties mirror penalties in relation to breaches of civil penalty provisions of the *Fair Work Act 2009*.

Strengthening of investigative powers of General Manager—s.335A

The Amendment Act strengthens Fair Work Australia's investigative powers. The General Manager is now able to issue compulsory notices to third parties such as banks or telephone companies compelling them to provide information or documents to, or to attend before Fair Work Australia. Previously this power was limited to registered organisations, their current and former officers and employees and auditors. It is an offence for a third party not to comply (s.337AA).

Under a new provision of the RO Act, the General Manager must complete an investigation 'as soon as practicable' (s.335B). In addition, once an investigation has been completed the General

Manager must conduct a further inquiry under s.330 of the RO Act within 12 months as part of the continuing monitoring of organisations which have previously been found to have contravened the RO Act (s.336(1A)).

In addition to being able to refer matters to the Commonwealth Director of Public Prosecutions at the conclusion of an investigation, the General Manager is now also able to refer a matter to the Australian Federal Police or a State/Territory police force for action in relation to criminal offences (s.336(2)(c)). The General Manager also has a new express power to disclose information that is acquired in the course of an investigation to third parties where such disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, or a state or territory (s.335C). This is consistent with powers of the Fair Work Ombudsman to disclose information under the *Fair Work Act 2009*.

Approval of training

Information is set out below in Part 2 regarding training which must be undertaken by each officer of an organisation or branch who has financial duties.

While officers are not required to undertake training before Proclamation, the General Manager must approve training prior to that date covering all of the duties of officers of organisations and branches that relate to their financial management (see Item 4 of Schedule 1 to the Amendment Act). This will allow officers to undertake training as soon as the relevant provisions commence.

Training may be provided by:

- a registered organisation;
- a peak council; or
- another body or person with skills and expertise to provide training—such as a peak body for a particular industry, or a recognised education provider.

The General Manager can approve a range of training of different formats, styles and lengths in recognition of the different significance that financial management duties have to the roles of different officers as well as the backgrounds, experience and qualification of officers. Similarly, the General Manager can approve general training that covers a range of financial management duties as well as more specific training that is tailored to a particular area or areas of financial management.

Commencing in August 2012, the delegate of the General Manager will be engaged in discussions with peak councils regarding the process for approval of training by peak councils, where appropriate. Any registered organisation wishing to seek approval of its own training should contact one of the following Leaders in the Organisations team at Fair Work Australia as soon as possible:

Ms MaryAnne Guina at maryanne.guina@fwa.gov.au

Ms Eve Anderson at eve.anderson@fwa.gov.au

Mr David Vale at david.vale@fwa.gov.au

Capacity to alter rules prior to their commencement

The Amendment Act requires each registered organisation and its branches to alter its rules under s.159 of the RO Act to make provision for:

- rules relating to the development and implementation of policies relating to expenditure—paragraph 141(1)(ca);

- rules relating to disclosure—Division 3A of Part 2 of Chapter 5; and
- rules relating to officers undertaking approved training—Subdivision BB of Division 4 of Part 2 of Chapter 5.

Organisations are not required to alter their rules to include these provisions until Proclamation (see Part 2 below).

Although rules generally commence on the day on which they are certified (s.159), transitional provisions in the Amendment Act (see Item 38 of Schedule 1 to the Amendment Act) allow organisations to make, and Fair Work Australia to approve, amendments to rules about the matters listed above before Proclamation. The new rules will not commence operation, however, until the date on which they are certified or Proclamation, whichever is later.

Part 2: Summary of key amendments commencing on Proclamation

From Proclamation, the rules of all registered organisations must provide for the following.

Training regarding financial management—s.154D

The rules of an organisation or branch must require each officer whose duties include duties relating to the financial management of the organisation or branch to undertake approved training covering each of the officer's financial duties.

The rules must require that training is undertaken within six months of the person assuming office. Where a person already holds office at Proclamation, training must be undertaken within six months of Proclamation (see Item 60 of Schedule 1 to the Amendment Act).

Policies relating to expenditure—s.141(1)(ca)

The rules of an organisation must require the organisation and each of its branches to develop and implement policies relating to the expenditure of the organisation or branch.

Rules relating to disclosure—Division 3A of Part 2 of Chapter 5

Division 3A establishes new requirements regarding disclosures which will promote financial accountability and transparency. The rules of organisations and branches must provide as follows:

Remuneration paid to officers—s.148A

Rules must require officers of an organisation and its branches to disclose to the organisation/branch, as soon as practicable after its receipt, any remuneration that is paid to the officer:

- because the officer is a member of a board and they hold that position only because of their position as an officer or because they were nominated for the position on the board by the organisation, a branch or a peak council; or
- by a related party to the organisation or branch in connection with the performance of the officer's duties.

'Related party' is defined in s.9B.

Rules must also require disclosure to members of an organisation/branch, within a maximum of six months of the end of each financial year and with respect to each financial year, of the identity, relevant remuneration and relevant non-cash benefits of:

- the five highest paid officers of an organisation;
- the two highest paid officers of a branch.

Disclosure requirements regarding 'relevant remuneration' (which is defined in s.148A(9)) are set out in further detail in s.148A(6). Disclosure requirements regarding 'relevant non-cash benefits' (which is defined in s.148A(10)) are set out in further detail in s.148A(7).

Material personal interests of officers and relatives—s.148B

Rules must require officers of an organisation and its branches to disclose to the organisation/branch any 'material personal interest' in a matter that the officer or a relative of the officer has or acquires that relates to the affairs of the organisation/branch. Such disclosure must be made as soon as practicable after the interest is acquired.

Rules must also require disclosure to members of an organisation/branch, within a maximum of six months of the end of each financial year and with respect to each financial year, of any material personal interests that have been disclosed by officers to the organisation/branch.

The expression 'material personal interest' is not defined in the RO Act. While the same expression is also used in the *Corporations Act 2001*, it is not defined in that legislation either.

Payments made by an organisation or branch—s.148C

Rules of an organisation/branch must require the disclosure to members, within a maximum of six months of the end of each financial year and with respect to each financial year, of either or both of:

- each payment that has been made during the financial year (or shorter period):
 - to a related party of the organisation/branch (such as officers or their family members); or
 - to a 'declared person or body' of the organisation/branch; and
- the total of the payments made by the organisation/branch during the financial year (or shorter period) to:
 - each related party of the organisation/branch; and
 - each 'declared person or body' of the organisation/branch.

A 'declared person or body' is defined in s.148C(5) to mean any person or body in which an officer has declared a material personal interest under the rules of the organisation/branch, as required by s.148B. The term 'related party' is defined in s.9B.

An exemption from the requirements of s.148C can be granted by the General Manager, but only where the organisation/branch already has a rule that complies with s.148C and where compliance with that rule would be too onerous (see s.148D). Application for an exemption from s.148C can be made before Proclamation (see transitional provisions in Item 39 of Schedule 1 to the Amendment Act).

Model rules relating to expenditure and disclosure

The Minister may, by notice published in the Commonwealth of Australia Gazette, issue guidelines containing one or more sets of model rules dealing with policies relating to expenditure and disclosure. Model rules may be adopted by organisations (in whole or in part) and with or without modification (ss.142A and 148F of the RO Act respectively).

New definitions

New definitions of the following have been inserted into s.6 of the RO Act:

child, control, de facto partner, disclosure period, entity, evidential burden, non-cash benefit, parent, related party, relative, remuneration, spouse, stepchild and step parent.

Further, new s.7, which deals with relationships, defines the relationship of a child to another person and s.9B defines the meaning of related party.

Actions required of organisations

Fair Work Australia strongly encourages all registered organisations to become familiar with the changes introduced by the Amendment Act. A copy of the Amendment Act is available on the ComLaw website at www.comlaw.gov.au/Details/C2012A00093 and its Explanatory Memorandum is available at www.comlaw.gov.au/Details/C2012B00113/Explanatory%20Memorandum/Text.

Organisations are also strongly encouraged to use the transitional provisions in the Amendment Act to apply for certification of alterations to their rules under s.159 of the RO Act prior to Proclamation.

© Commonwealth of Australia 2012

This fact sheet is not intended to be comprehensive, but is designed to help employers and employees gain an understanding of Fair Work Australia and its work. Fair Work Australia does not provide legal advice.