



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

Our Ref BR13-000734

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

Rob

Dear Mr Oakeshott

I refer to my letter to you of 23 October 2012 and our previous correspondence in relation to the administration of the Fair Work Commission (FWC) (formerly Fair Work Australia).

Pursuant to your request for copies of the FWC reports regarding its progress towards addressing the issues identified by the KPMG review into the FWC investigations of the Health Services Union, please find attached a copy of the second quarterly report received by me on 29 January 2013.

I will be happy to forward future reports and updates to you as they become available.

Regards

BILL SHORTEN

14 MAR 2013



FAIR WORK
COMMISSION

25 January 2013

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

KPMG Review - Quarterly Update

I refer to your letter of 17 September 2012 in which you asked to be provided with quarterly reports outlining the measures and steps taken in relation to KPMG's Process Review of Fair Work Australia's Investigations into the Health Services Union (the KPMG review).

I advise that since my previous update of 25 September 2012 the following further actions have been, or are being, undertaken:

- Half the members of the Regulatory Compliance Branch (the Branch) have commenced training in Certificate IV Government (Investigations). Training occurs over a two week period and the second week of training for this group will be completed on 8 February 2013. The remaining half of the Branch's employees will have completed both weeks of training by 22 March 2013.
- Reporting units that have failed to lodge documents in accordance with the *Fair Work (Registered Organisations) Act 2009* are being dealt with under the *FWC Regulatory Compliance Policy*, a copy of which is available on the Commission's website at <http://www.fwc.gov.au/index.cfm?pagename=regorgsfrguidelines#policies>. The majority of registered organisations have a financial year end of 30 June, meaning that the latest possible date by which financial reports for the year ended 30 June 2012 could be lodged with the Commission is 15 January 2013. Letters are currently being sent to those reporting units that have failed to lodge their financial reports by that date advising that an inquiry or investigation may be commenced should the outstanding documents not be lodged without reasonable cause within timeframes specified in the letter.
- The Branch is currently undertaking eight investigations and two inquiries, details of which are available on the Commission's website at <http://www.fwc.gov.au/index.cfm?pagename=regorgsinvestigations>. While three of these matters arise from complaints that were lodged with the Commission, seven of the eight investigations have been commenced by my delegate seeking compliance

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by the small number of reporting units which have failed to lodge documents over a protracted period of years. The worst case of failure to lodge financial reports is the Sydney Branch of the Musicians' Union of Australia, which has not lodged its financial report for the year ended 30 June 2002 or for any year thereafter.

- Since the conclusion of the HSU investigations, the Commission has experienced an unanticipated increase in its workload for inquiries and investigations which is due partly, to increased public awareness of its regulatory role, but also to the proactive regulatory approach that is now being taken by the Commission.
- A "ready reckoner" of the KPMG recommendations and actions taken in response to those recommendations is included as an attachment to this letter.

With respect to proceedings in the Federal Court of Australia concerning the Victoria No. 1 Branch and the National Office of the Health Services Union (HSU), I currently have three civil proceedings underway. As previously advised, I have issued proceedings against the HSU and former officers of the Victoria No 1 Branch, being Ms Pauline Fegan, Mr Jeff Jackson and Mr Shaun Hudson. Arising from the investigation into the National office, I have separate proceedings underway against Mr Craig Thomson and the HSU. I will briefly deal with each of those proceedings in turn.

Victoria No 1 Branch

This matter is proceeding on an uncontested basis. Each of the respondents has admitted the contraventions against them relating to financial mismanagement. The only exception is one contravention involving the alleged failure to provide receipts as I decided it was not in the public interest to press this matter.

The Court will decide the appropriate outcome. All parties have filed material upon which they intend to rely at the hearing on penalty, as well as section 315 applications seeking relief from liability which have been made by the HSU, Ms Fegan and Mr Hudson. I have the opportunity to file further material in reply to the respondents' material on 4 February 2012, following which the Court will set the date for hearing.

None of the respondents have pressed any jurisdictional argument that the claims for the imposition of civil penalties or compensation are out of time.

Mr Thomson

The statement of claim filed on 15 October 2012 alleges a number of contraventions of the rules of the HSU and general statutory duties imposed on officers of registered organisations. Various relief is sought including the imposition of civil penalties and compensation where appropriate.

Mr Thomson has denied the allegations in his defence, and has raised the jurisdictional objection that aspects of the claim are out of time. The recent decision of the Full Court of the Federal Court in *Fair Work Ombudsman v Toyota Material Handling (NSW) Pty Limited*¹

¹ [2012] FCAFC 193, NSD 406 of 2012, 21 December 2012

suggests that the objection is unsustainable, although I understand that Toyota has now sought special leave to appeal that decision in the High Court of Australia.

The matter is listed for directions on 1 February 2013.

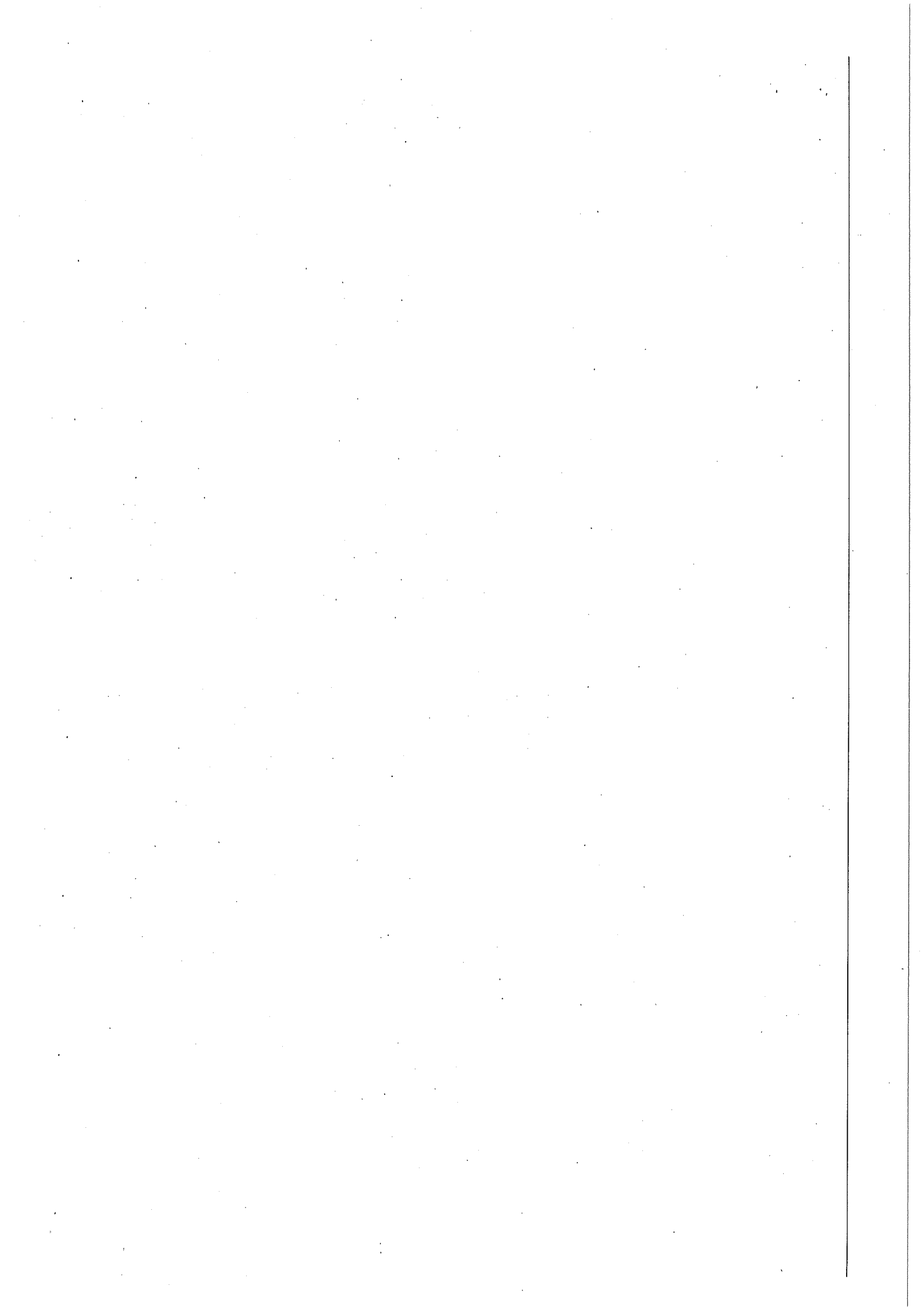
National Office

I filed a statement of claim against the HSU in respect of alleged breaches of the registered organisations legislation and one of the HSU Rules in the Federal Court on 21 December 2012. These allegations relate to financial mismanagement by the National Office during Mr Thomson's term as National Secretary of the HSU from 2002 to 2007. The relief sought includes the imposition of civil penalties where available.

The matter is listed for directions on 8 February 2013.'

Yours sincerely

Bernadette O'Neill
General Manager



Ready reckoner of KPMG recommendations

	Recommendation	FWC Response
1.	<p>AGIS 2011 provide the framework under which procedures for conducting investigations can be developed. Using the AGIS framework as a minimum standard, FWA should develop its own set of procedures to meet its investigative requirements. These procedures should take into consideration the specific legislative framework of RO Act.</p>	<p>Policies and procedures are in place. In August 2012 FWA published new:</p> <ul style="list-style-type: none"> • Regulatory Compliance Policy • Litigation Policy • Media Policy <p>A new <i>Offences Policy</i> will be published in late January/early February 2013.</p> <p>Further, in August 2012 the Branch developed:</p> <ul style="list-style-type: none"> • internal written inquiry/investigation procedures; and • template inquiry/investigation assessment form; • template inquiry/investigation plan
2.	<p>FWA should ensure that the scope and objective of inquiries and investigations are agreed at the outset with all stakeholders¹ and documented. The documented scope and objectives should address all those requirements set out in the investigation criteria under section 4.1.1:</p> <ul style="list-style-type: none"> ○ The scope and objectives of every investigation should be determined at the commencement of an investigation 	<p>Template Inquiry/Investigation Evaluation Form has been developed</p>

¹ The recommendation that scope and objective should be agreed at the outset "with all stakeholders" was relevant to the investigations reviewed by KPMG which considered disagreements between the Industrial Registrar and the Director, ORA regarding timing of the transition from an inquiry to an investigation. Under the RAO Schedule inquiries and investigations were conducted by the Industrial Registrar but in practice the Director, ORA also had a key role in the team. Under the RO Act, in contrast, the GM's conduct of inquiries and investigations is delegated to the Director, Regulatory Compliance Branch. Given this capacity in the RO Act to delegate, there is no similar scope for differing views between two key "internal stakeholders" of the inquiry/investigation team.

	Recommendation	FWC Response
	<p>in consultation with identified stakeholders;</p> <ul style="list-style-type: none"> ○ In determining scope and objectives, investigators should make a preliminary assessment of all available information and documentation to ensure that allegations and/or terms of reference for the investigation are complete; ○ Investigators should consider the extent of known allegations, sources of information (electronic or otherwise), and time period that the scope is to encompass; ○ Where possible, the scope should document any known witnesses or persons that might be the subject of the investigation; ○ The scope and objectives should set out details of procedures anticipated to complete the work; ○ The scopes and objectives should provide an estimate of time to complete the work; ○ The scopes and objectives should be clearly documented; and ○ Appropriate investigation standards should be identified. <p>For example - in determining the scope of an investigation into allegations of financial impropriety, investigators should consider and document:</p> <ul style="list-style-type: none"> ○ All known allegations and whether other additional allegations can be established through the review of available documentation (eg. Bank statements, electronic data and other financial records); ○ All known, or possible sources of information to support the investigation; ○ To the extent possible, the full extent of transactions to be considered in the investigation; and ○ The period of review, or the time parameters that the investigation is to cover, taking the nature of the allegations into account. 	

	Recommendation	FWC Response
3.	As part of the development of investigation procedures recommended above, a requirement should be included to ensure that consideration is given in all investigations to identifying and assessing the skills, experience and quantity of resources required. This process should be revised on a regular basis throughout the life of an investigation, and should be documented.	Included in template Inquiry/Investigation Evaluation Form
4.	FWA should ensure that it has staff available that have the Certificate IV in Government (Investigations) qualification and experience in conducting complex investigations. These staff may be permanent employees of FWA or resources FWA is able to access through panel or other arrangements.	Training in Certificate IV is currently being undertaken. Half of the staff of the Regulatory Compliance Branch will finish training on 8 February 2013. The remainder of the Branch will complete training on 22 March 2013.
5.	The structure of the investigation team, including responsibilities and reporting lines, should also be documented during the preliminary stages of the investigation. This includes contracted staff.	Included in template Inquiry/Investigation Evaluation Form
6.	For large, complex or time critical matters, FWA's investigation resourcing assessment process should include the requirement to consider whether staff allocated to complex matters should have their business as usual commitments removed from them.	Included in template Inquiry/Investigation Evaluation Form
7.	The requirement or otherwise for external specialists should be considered during the formal scoping phase and on an ongoing basis during the investigation and the process should be formally documented.	<p>Template Inquiry/Investigation Evaluation Form (scoping phase)</p> <p>Template Inquiry /Investigation Plan has been developed (investigation phase)</p>
8.	FWA should appoint, or have access to, a panel of skilled external investigation resources to provide FWA with a number of options in obtaining additional resources to	<p>Panel arrangements have been made with:</p> <ul style="list-style-type: none"> • DEEWR -

	Recommendation	FWC Response
9.	<p>assist with investigations.</p> <p>As part of the development of investigation procedures recommended above, a requirement should be introduced for all investigations to consider the need for external assistance from specialists such as:</p> <ul style="list-style-type: none"> ○ Certificate IV Government (Investigations) qualified and experienced staff ○ Document examiners (including handwriting specialists) ○ Computer forensic technology specialists ○ Corporate intelligence specialists (background check and research on companies and individuals) 	<p>accounting services</p> <ul style="list-style-type: none"> • Centrelink - forensic computing • FWO - legal panel • FWO - (Certificate IV) training panel <p>Template Inquiry/Investigation Evaluation Form and Plan require consideration of need for external assistance.</p>
10.	<p>As part of the development of investigation procedures recommended above, FWA should ensure that a procedure is included that requires the investigation team to consider the potential recipients of the investigation report, as well as that a brief of evidence may be required, during the investigation planning stage.</p>	<p>The General Manager will, in all cases, be the recipient of the investigation report.</p> <p>In relation to the two offences concerning auditors in ss.258(1) and 260(4) of the RO Act that FWC is empowered to investigate, a brief of evidence will be produced.</p> <p>The <i>Offences Policy</i> establishes processes for referral of s.258 & 260 offences to CDPP and of all other potentially criminal matters to AFP, State/Territory Police.</p>
11.	<p>As part of the development of investigation procedures recommended above, FWA should introduce an investigation case management system for all investigations to ensure that investigations are properly established, maintained and executed within agreed timeframes.</p>	<p>TRIM is now used as an investigation document database.</p> <p>Matters are managed in accordance with:</p> <ul style="list-style-type: none"> • internal written

	Recommendation	FWC Response
12.	<p>FWA should ensure that the investigation case management system is implemented at the outset of the investigation and addresses all the requirements set out in the investigation assessment criteria:</p> <ul style="list-style-type: none"> ○ Planning ○ Identification of work teams/tasks ○ Allocation of responsibilities ○ Tracking investigation progress ○ Recording critical decisions ○ Suitable investigations management system which records case notes, chronologies or running sheets; ○ Regularly reviewing investigation plan to ensure its purpose and objectives are met. 	<p>inquiry/investigation procedures; and</p> <ul style="list-style-type: none"> • template inquiry/investigation assessment form; • template inquiry/investigation plan
13.	<p>FWA should incorporate a process to review draft investigation reports in a timely manner to mitigate the risk of delays in finalising investigations.</p>	<p>Written internal inquiry/investigation procedures require monthly meetings to review inquiries/investigations</p>
14.	<p>As part of the development of investigation procedures recommended above, a requirement should be introduced for all investigations to be properly planned and documented at the commencement of the investigation and continuously reviewed for relevance and updated as necessary throughout the conduct of the investigation.</p>	<p>Written internal procedures require completion of inquiry / investigation plan and monthly meetings to review plan and progress</p>
15.	<p>FWA should ensure that investigation plans are developed and documented at the outset of investigations and address all the requirements set out in the investigation assessment criteria:</p> <ul style="list-style-type: none"> ○ Summarise nature/background of investigation ○ Outline objectives, potential contraventions, scope, possible outcomes ○ Detail planned activities ○ Identify procedures to complete planned activities ○ Identify and manage risks, including 	<p>Included in template Inquiry/Investigation Investigation Plan</p>

	Recommendation	FWC Response
	<p>necessary knowledge and skills</p> <ul style="list-style-type: none"> ○ Identify possible inquiries, sources and methods to be utilised to obtain relevant information ○ Outline work phases, timelines, milestones 	
16.	Decisions that relate to changes to the planned investigation work, potential delays or any other matters that impact on the investigation ("critical decisions") should be clearly recorded.	Written internal inquiry/investigation procedures require that critical decisions be recorded.
17.	As part of the development of investigation procedures recommended above, a requirement should be introduced for all investigations to properly identify and document potential sources of evidence at the outset of, and be continuously updated throughout, the investigation.	<p>Included in template Inquiry/Investigation Evaluation Form and Plan</p> <p>Written internal inquiry/investigation procedures require monthly meetings to review inquiries/investigations</p>
18.	As part of the development of investigation procedures recommended above, a requirement should be introduced for all investigations to adopt protocols for the collection and retention of information and evidence.	Included in written internal inquiry/investigation procedures
19.	<p>In undertaking investigations, FWA should ensure that it adopts the protocols for the collection and retention of evidence in line with investigation criteria:</p> <ul style="list-style-type: none"> ○ Documents should be referenced to a central document or exhibit log to ensure control over origin, integrity and continuity of documents; ○ Chain of custody should be maintained and documented by creation and maintenance of a record of documents ○ Documents should be securely stored and accessible only to authorised personnel ○ All collected evidence is subjected to review; and ○ Standard preservation of evidence 	<p>Included in written internal inquiry/investigation procedures</p> <p>Documents recorded in TRIM with unique identifying number.</p> <p>Template "running sheet" has been developed for chain of custody.</p> <p>Internal written procedures require documents to be stored in locked office. The Branch has exclusive</p>

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	principles are to be maintained (originals should not be marked or altered; they should remain in the same physical condition as when they were received)	access to a locked conference room in which inquiry/investigation documents are stored.
20.	FWA should ensure that functionality is enhanced in the CMS+ system such that access to case files can be restricted to designated employees, or consider alternative approaches to secure document management.	Superseded - TRIM is now being used as a document management system. Nevertheless, CMS+ now allows for securing matters and matters that were recorded in CMS+ prior to TRIM have been "locked".
21.	As part of the development of investigation procedures recommended above, a requirement should be introduced to adopt protocols for the identification and collection of electronic information.	Collection of electronic information will be outsourced under the Centrelink panel arrangements.
22.	In undertaking investigations, FWA should ensure it follows a process for the identification and collection of electronic information in line with investigation criteria: <ul style="list-style-type: none"> o All potential sources of electronic evidence should be identified at the outset and should be updated as the investigation progresses o Protocols should be developed to ensure that all electronic information is captured and preserved in an evidentiary sound manner. 	The template inquiry/investigation plan requires identification of potential sources. Collection of electronic information will be outsourced under Centrelink panel arrangements. Once collected, documents will be securely stored in TRIM.
23.	Whilst it is noted that the Investigation team prepared and documented interview plans prior to the conduct of interviews, this procedure should be formally documented as part of the development of investigation procedures recommended above.	Included in template inquiry/investigation plan.
24.	FWA should record the rationale for selecting persons for interview.	Included in template inquiry/investigation plan.

	Recommendation	FWC Response
		Will also be recorded separately as a "critical decision".
25.	As part of the development of investigation procedures recommended above, a requirement should be introduced for financial analysis to be considered at the outset of the investigation where that may be appropriate to inform the investigation approach.	Financial Reporting specialist is a key member of each inquiry/investigation team
26.	<p>In undertaking investigations, FWA should ensure that it considers financial analysis in line with the investigation assessment criteria and, in particular, ensure that financial analysis from primary records is undertaken as early as possible in an investigation to allow the investigation team to understand the full extent and impact of any suspected unauthorised expenditure:</p> <ul style="list-style-type: none"> ○ When designing financial analysis procedures, investigators should develop an understanding of the entity's business processes and environment; ○ At a high level, investigators should obtain an understanding of the potential risks in relation to the types of transactions subject to the investigation and the controls in place to manage those risks; ○ The financial analysis must be designed to identify relevant transactions within the scope of the investigation and be performed in a timely manner; ○ Initial financial analysis should be considered at the outset of the investigation, to identify and categorise financial indicators of suspect transactions to assist in guiding the investigation process; and ○ The financial analysis should focus on specific areas to quantify the extent of suspect transactions to assist in guiding the investigation process. 	<p>Financial Reporting specialist is a key member of each inquiry/investigation team</p> <p>FWA has piggy backed onto DEWR's accounting panel in order to access external forensic accounting and auditing advice where necessary.</p>
27.	FWA should ensure that proper consideration	The Regulatory

	Recommendation	FWC Response
	is given to the appropriate skills and experience to undertake financial analysis.	<p>Compliance Branch has appointed a Financial Reporting specialist who is a key member of each inquiry/investigation team</p> <p>FWA is piggy backing onto DEWR's accounting panel in order to access external forensic accounting and auditing advice where necessary.</p>
28.	As part of the development of investigation procedures recommended above, a requirement should be introduced in relation to the planning for and production of investigation reports.	<p>Internal written inquiry/investigation procedures provide for the appointment of a report co-ordinator.</p> <p>From outset, documents are recorded in TRIM under contravention headings/groupings to assist in later report production.</p>
29.	<p>In preparing investigation reports, FWA should establish a plan which considers the investigation assessment criteria that fully considers the amount of work required to develop the report and is aimed at delivering the report within an agreed timeframe. This plan should be considered early in the investigation process and regularly monitored for the ongoing ability to meet required deadlines:</p> <ul style="list-style-type: none"> ○ Communicate reporting timelines and regular status updates; ○ Collect and organise information for the various sections of the report; ○ Review the report for consistency in format, style and content; ○ Clarify ambiguities and provide feedback to authors on drafts; ○ Collate all relevant exhibits and appendices; and 	<p>The template inquiry/investigation plans considers resourcing of team, specification of timelines, grouping of contraventions (including documents in TRIM being grouped from the outset) in order to facilitate report preparation.</p> <p>Internal written inquiry/investigation procedures require monthly meetings of team to review and monitor compliance with plan, including timelines.</p>

	Recommendation	FWC Response
	<ul style="list-style-type: none"> ○ Consider the appointment of a report co-ordinator who will have responsibility for the above tasks. 	Internal written inquiry/investigation procedures provide for appointment of report co-ordinator
30.	<p>As part of the development of investigation procedures recommended above, a requirement should be introduced in relation to the methodology to record the progress of the investigation and how that progress is to be communicated.</p> <p>(Finding 37 discusses formal records as kept in minutes of HSU Strategy meetings.)</p>	Internal written inquiry/investigation procedures require monthly team meetings to review and monitor compliance with plan - notes and/or minutes must be recorded of these meetings and action items recorded. Each meeting must include a review of action items.
31.	<p>In undertaking investigations FWA should ensure that the:</p> <ul style="list-style-type: none"> ○ Recording process is considered and defined at the investigation planning phase. This process should include progress achieved, deviations from initial plans, problems/risks and future actions; and ○ Progress of investigation is reported to relevant people within the investigation team and relevant stakeholders on a regular basis. 	Internal written inquiry/investigation procedures require monthly team meetings to review and monitor compliance with plan - notes and/or minutes must be recorded of these meetings and action items recorded. Each meeting must include a review of action items.