

6 March 2012

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Your Ref FR2010/2505

Private & Confidential
By express post

Dear Ms O'Neill

General Manager Investigation - Health Services Union – FR2010/2505

We act on behalf of Mr Craig Thomson MP.

As you know, Mr Terry Nassios has been delegated by the General Manager of Fair Work Australia to investigate a number of matters concerning the Health Services Union and/or officials or employees of the National Office of the Health Services Union in relation to transactions occurring between 16 August 2002 and 1 March 2008 and record keeping, reporting and auditing issues arising from transactions during that period.

On 12 December 2011 Mr Nassios wrote to our client enclosing his preliminary findings and offering our client the opportunity to address Mr Nassios prior to Mr Nassios making any final decisions.

A copy of our client's response was provided to Mr Nassios by email and by express post on Friday, 2 March 2012.

We are writing to you in your capacity as General Manager of Fair Work Australia to request that Mr Nassios be removed from the investigation he is conducting because he has failed to meet the obligation of fairness owed by him to Mr Thomson, and the investigation and the process adopted by him show demonstrable bias.

In this regard, annexed to this letter is a copy of paragraphs 24 to 28 and 40 to 47 (inclusive) of our client's response to Mr Nassios which outlines our client's arguments in respect of fairness and bias.

We look forward to your response which we request be provided by Friday, 22 March 2012.

Yours sincerely


HOLDING REDLICH

Enclosures: 1

RELEVANT EXTRACTS FROM THE RESPONSE OF MR CRAIG THOMSON TO
PRELIMINARY FINDINGS DATED 12 DECEMBER 2011

The Delegate has failed to meet the obligation of fairness to Mr Thomson

- 1 In exercising powers under section 331 of the RO Act the Delegate is obliged to afford Mr Thomson procedural fairness. See ***National Companies and Securities Commission v News Corporation*** (1984) 156 CLR 296; ***Annetts v McCann*** (1990) 170 CLR 596. This is trite law which the Delegate accepts by the terms of his covering letter to the Preliminary Findings. The Delegate, in the covering letter to the Preliminary Findings, asserts that he is able to make adverse findings in respect of Mr Thomson, and gives Mr Thomson the opportunity to address him on the issues prior to making a final decision. The Delegate states that “[he] will take into account any relevant considerations you wish to place before me”. In allowing Mr Thomson the opportunity to respond to the Delegate prior to forming final conclusions, the Delegate has an obligation of fairness to Mr Thomson. See ***Morley & Ors v Australian Securities and Investments Commission*** [2010] 247 FLR 140 at [732] to [756]. The Delegate’s failure to interview available and important relevant persons is a breach of the obligation of fairness to Mr Thomson. This is particularly so when the Delegate has the coercive powers of section 335 of the RO Act available to him to facilitate such interviews.
- 2 A major focus of the Delegate’s Investigation has been the financial management of the HSU and, in part, the role of the National Finance Committee established by the National Executive on 25 February 2003. The Delegate would be expected to interview, but has failed to interview, Mr Dan Hill and Mr Peter Mylan - two of the five members of the National Finance Committee including the two national trustees of the HSU throughout most of the relevant period.
- 3 In addition, a major focus of the Delegate’s Investigation into the financial management of the HSU has focused on the meaning to be attributed to the HSU National Executive resolution carried at the meeting of 25 and 26 February 2003 relating to the Terms of Reference for the Finance Subcommittee (and discussed in more detail below in paragraph 52). However, the Delegate has hardly questioned any persons who were present at the meeting as to their purpose and/or intention in adopting that resolution.
- 4 The Delegate has also placed considerable weight on the evidence given by Ms Kathy Jackson. However, it is clear from the minutes of the National Executive relied on by the Delegate and provided by the Delegate to Mr Thomson, that Ms Jackson was absent from a number of National Executive meetings. These absences are noted in the attached Timeline. In particular, it is noted that Ms Jackson was absent from the National Executive meeting in February 2003.

5 Because the Delegate has failed to interview available and important witnesses, which is in breach of the Delegate's obligation of fairness, the Delegate cannot (and therefore must not) make adverse findings with the requisite satisfaction on the balance of probabilities. See ***Morley & Ors v Australian Securities and Investments Commission*** op cit at [795].

Bias

40 It is of concern that the investigation and the process adopted by the Delegate demonstrate demonstrable bias on the part of the Delegate. It is clear from the Preliminary Findings that the Delegate conducted selective interviews and failed to interview all relevant parties.

41 The Delegate has failed to interview, or seek comments from, those who worked with Mr Thomson, including:

- Mr Struan Robertson – Industrial Officer
- Mr Dan Hill – Communication and Policy Advisor
- Ms Ruth Kershaw – Research Economist
- Ms Pauline Fegan – Victorian No 1 President
- Ms Jane Hill – No 1 Branch
- Ms Farina Flavell – Research Officer

42 In addition, it appears that the questions and comments of the Delegate have focused only on the actions of Mr Thomson, rather than considering the activities of the HSU, and its other key staff, in totality. In particular, the Delegate appears to have formed a preliminary (and incorrect) view that there were a number of obligations that rested solely with the National Secretary, in particular that Mr Thomson as National Secretary without considering the obligations or role of the National Executive or previous HSU National Secretaries. Similarly, many of the proposed allegations are based on a disregard and rejection of the evidence given by Mr Thomson, with the Delegate forming his own conclusions based on no evidence or inaccurate material or both.

43 As the Delegate may be aware, the HSU has a history of factional rivalry and there were a number of officials who did not support Mr Thomson as National Secretary. In addition, had the Delegate interviewed the people listed in paragraph 41, in particular Mr Struan Robertson, the Delegate would have become aware of threats made against Mr Thomson by at least one other official of the HSU who, in 2004, threatened to ruin Mr Thomson's life, to destroy his political ambitions and to "*set him up with a bunch of hookers and ... ruin him.*"

- 44 As noted in paragraph 27 above, the Delegate has also placed considerable weight on the evidence given by Ms Kathy Jackson. However, it is clear from the minutes of the National Executive relied on by the Delegate and provided by the Delegate to Mr Thomson, that Ms Jackson was absent from a number of National Executive meetings. These absences are noted in the Timeline.
- 45 Further, the Delegate has failed to make sufficient enquiry as to the existence of National Council and National Executive meetings and minutes, and has assumed that they do not exist and that relevant meetings, resolutions and actions did not occur. This is a failure of process and is factually incorrect.
- 46 The Delegate has also failed to take into account or to have any regard to the substantial achievements of Mr Thomson as National Secretary. As discussed in paragraphs 2 to 4 above, these achievements include –
- substantially decreasing the HSU's debts;
 - raising the profile of the HSU; and
 - increasing the membership of the HSU.
- 47 It is also of concern that the Delegate has concluded that any failure at all of Mr Thomson to perform an administrative task or duty amounts to a breach of subsection 285(1) of the schedule contained in the RO Act (**RAO Schedule**). This is an incorrect construction of the law and clearly not the case.