

Guidance Note No.	1	Guidance Note Title	Litigation Policy of the Office of the Fair Work Ombudsman ¹
Publication History		Relevant legislation or materials	<i>Fair Work Act 2009</i> <i>Prosecution Policy of the Commonwealth 2nd Edition (1990)</i> ² <i>WO Litigation Policy GN1, 2nd Edition (2008)</i> ^{3 4}
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1. The purpose of FWO Guidance Notes

- 1.1. Guidance Notes are a means by which the Office of the Fair Work Ombudsman (FWO) publishes and disseminates advice on the interpretation of the laws it enforces or about its internal policies and or procedures.
- 1.2. The FWO will publish Guidance Notes from time to time on a range of subject matters concerning the *Fair Work Act 2009 (FW Act)*. The general public are welcome to suggest subject matter for future Guidance Notes.

2. This Guidance Note

- 2.1. This Guidance Note sets out guidelines to be followed by the FWO in the making of decisions relating to the commencement of litigation (proceedings) in relation to a contravention or proposed contravention of the FW Act, the *Fair Work Regulations 2009*, a fair work instrument⁵, the National Employment Standards⁶, a national minimum wage order, an equal remuneration order, a safety net contractual entitlement or other legislation over which it has jurisdiction (collectively referred to as **Commonwealth workplace laws**).

¹ This Guidance Note 1 ("FWO Litigation Policy") was endorsed by the FWO Executive Board on 15 July 2009.

² FWO Litigation Policy is substantially based upon the *Prosecution Policy of the Commonwealth 2nd Edition (1990)* ("Commonwealth Prosecution Policy"). In many parts it deliberately draws upon or reproduces the Commonwealth Prosecution Policy. However, because the FWO does not prosecute criminal breaches the Commonwealth Prosecution Policy is not the most relevant policy and, as such, where there is a difference between the Commonwealth Prosecution Policy and the FWO Litigation Policy that is intended.

³ WO Litigation Policy GN1 (1st Edition) was endorsed by the Executive Board of the Workplace Ombudsman on 19 October 2007. It was issued internally on 7 November 2007 and then publicly on 26 November 2007. It applied to all decisions to commence litigation on and from 26 November 2007.

⁴ WO Litigation Policy GN1 (2nd Edition) was amended by the Executive Board of the Workplace Ombudsman on 24 December 2008 with effect from 9 January 2009.

⁵ A fair work instrument includes a Modern Award. Modern Awards will not begin to operate until 1 January 2010 or such later date as may be specified in the Modern Award.

⁶ The National Employment Standards will apply from 1 January 2010.

- 2.2. It is to be referred to as:
- (a) Guidance Note 1; or
 - (b) the FWO Litigation Policy.
- 2.3. This Guidance Note addresses the following topics:
- (a) The purpose of FWO Guidance Notes (paragraph 1);
 - (b) This Guidance Note (paragraph 2);
 - (c) About the Fair Work Ombudsman (paragraph 3);
 - (d) Litigation as a compliance tool (paragraph 4);
 - (e) Nature of contraventions (paragraph 5);
 - (f) Persons involved in contraventions (paragraph 6);
 - (g) Direction to Inspectors and Consent to Litigation (paragraph 7);
 - (h) Fair Work Ombudsman's independence and discretion unfettered (paragraph 8);
 - (i) The decision to commence litigation – the two step process (paragraph 9);
 - (j) Sufficient evidence (paragraph 10);
 - (k) Public interest (paragraph 11);
 - (l) Relevant public interest factors (paragraph 12);
 - (m) Determination of appropriate enforcement mechanism (paragraph 13);
 - (n) The commencement and conduct of FWO litigation (paragraph 14);
 - (o) Breach bargaining (paragraph 15);
 - (p) Discontinuance of proceedings (paragraph 16);
 - (q) Submissions on penalty (paragraph 17);
 - (r) Notification of enforcement decisions (paragraph 18);
 - (s) Publishing and utilising enforcement activity (paragraph 19).
- 2.4. The purpose of this Guidance Note is two fold. First, it operates as a guide for the FWO in the exercise of its function to commence litigation.

- 2.5. Secondly, it aims to provide the community with a better understanding of the manner in which the FWO exercises that function.
- 2.6. This Guidance Note does not have the force of statute. Accordingly, any failure by the FWO to act in accordance with this Guidance Note cannot affect the validity or conduct of proceedings commenced by the FWO or prosecutorial rights of the Commonwealth Director of Public Prosecutions (CDPP).
- 2.7. The Guidance Note sits within any Directions to Inspectors issued by the Fair Work Ombudsman (see paragraph 7 below) and neither diminishes nor amends those Directions. Where there is an inconsistency, the Directions to Inspectors prevail.
- 2.8. This Guidance Note is to be read in conjunction with the FWO's obligations under the *Legal Services Directions 2005 (Legal Services Directions)* issued by the Attorney General under section 55ZF of the *Judiciary Act 1903*.

3. About the Fair Work Ombudsman

- 3.1. The Fair Work Ombudsman, Nicholas Wilson, is a statutory office holder pursuant to section 681 of the FW Act.
- 3.2. The Office of the Fair Work Ombudsman is a statutory office pursuant to section 696 of the FW Act.
- 3.3. Prior to the commencement of operations of the FWO on 1 July 2009, the FWO's functions were largely fulfilled by the Office of the Workplace Ombudsman (previously the Office of Workplace Services (OWS)) and the Workplace Authority (previously the Office of the Employment Advocate (OEA)). Prior to 27 March 2006 the functions were fulfilled by the then Department of Employment and Workplace Relations. The FWO is independent of the management of the Department of Education, Employment and Workplace Relations.
- 3.4. In broad terms, the Fair Work Ombudsman:
 - (a) promotes harmonious, productive and cooperative workplace relations;
 - (b) assists employees and employers to understand their rights and obligations;
 - (c) provides advice and disseminates information;
 - (d) promotes and monitors compliance with Commonwealth workplace laws;

- (e) investigates complaints;
 - (f) inquires into, and investigates, any act or practice that may be contrary to Commonwealth workplace laws;
 - (g) commences proceedings or makes applications to enforce Commonwealth workplace laws and, where appropriate, seeks a penalty for contravention of Commonwealth workplace laws; and
 - (h) represents workers who are, or might become, a party to proceedings.
- 3.5. The Fair Work Ombudsman appoints Fair Work Inspectors empowered to investigate and enforce compliance with a range of Commonwealth workplace laws including but not limited to:
- (a) provisions of the FW Act, such as:
 - (i) terms and conditions of employment
 - (ii) general protections, including workplace rights, freedom of association, discrimination, sham arrangements, coercion and undue influence;
 - (iii) right of entry;
 - (iv) unprotected industrial action; and
 - (v) employee records and pay slip requirements.
 - (b) provisions of the *Independent Contractors Act 2006*, including regarding prohibited conduct in relation to reform opt-in agreements;
 - (c) the Australian Fair Pay and Conditions Standard, including minimum pay and conditions of employment;
 - (d) enterprise agreements (including Australian Workplace Agreements and other agreements made prior to 1 July 2009);
 - (e) federal awards;
 - (f) orders of Fair Work Australia (FWA);
 - (g) the National Employment Standards (from 1 January 2010); and
 - (h) provisions of the *Workplace Relations Act 1996 (WR Act)*⁷.

⁷ See Schedule 18, Part 3, *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

4. Litigation as a compliance tool

- 4.1. The functions of the Fair Work Ombudsman are specified in section 682 of the FW Act and include:
- (a) “to commence proceedings in a court, or make applications to FWA to enforce this Act, fair work instruments and safety net contractual entitlement” (section 682(d) of the FW Act); and
 - (b) “to represent employees who are, or might become, a party to proceedings in a court, or a party to a matter before FWA, under this Act, or a fair work instrument, if the Fair Work Ombudsman considers that representing the employees will promote compliance with this Act or the fair work instrument” (section 682(f) of the FW Act).
- 4.2. The FWO’s litigation activities are part of a broader compliance system which comprises a combination of positive motivators and deterrents aimed at bringing about compliance with Commonwealth workplace laws. Litigation may also be appropriate when there is a need for judicial clarification of Commonwealth workplace laws.
- 4.3. As part of the FWO’s compliance system the FWO provides information and education to encourage voluntary compliance with Commonwealth workplace laws. Where appropriate the FWO will move to a formal investigation of alleged contraventions of Commonwealth workplace laws. Where a contravention is identified, and the matter is not resolved through voluntary compliance, enforcement measures (including in appropriate cases, the issue of Compliance Notices, the acceptance of Enforceable Undertakings or the commencement of proceedings) may be used to secure compliance.
- 4.4. In certain circumstances proceedings may be commenced, notwithstanding any voluntary compliance, if the FWO considers such proceedings to be the most appropriate means of dealing with the contravention or deterring others from contravening Commonwealth workplace laws (for example, where there are significant amounts underpaid, a number of employees or vulnerable employees involved).

5. Nature of contraventions

- 5.1. The FW Act includes both civil remedy provisions and offences. Litigation action under this Guidance Note relates only to contraventions of civil remedy provisions.
- 5.2. In the FW Act "offence" denotes criminal liability and is to be distinguished from civil penalty liability. Criminal prosecutions are initiated by the CDPP. Where the FWO becomes aware of offences having occurred it will, in the ordinary course of events, refer a brief to the CDPP. The CDPP has the sole discretion for commencing, or not commencing a criminal prosecution, and for the conduct of any case taken to court in respect of an offence.
- 5.3. In a criminal case, 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": *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362.

6. Persons involved in contraventions

- 6.1. Section 550(1) of the FW Act provides that:

A person who is involved in a contravention of a civil remedy provision is treated as having contravened that provision.
- 6.2. "Involved in"⁸ requires that a person has:
 - (a) aided, abetted, counselled or procured the contravention; or
 - (b) induced the contravention, whether by threats or promises or otherwise; or
 - (c) been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
 - (d) conspired with others to effect the contravention.
- 6.3. The FWO takes seriously the need to enforce compliance with Commonwealth workplace laws. The FWO considers that holding individuals accountable for contraventions in which they are involved in is an appropriate compliance tool.
- 6.4. Accordingly, in each and every matter considered for litigation action the FWO will look to determine if s.550 proceedings can also be commenced. The FWO

⁸ Guidance as to the operation of s.550 can be taken from the operation of s.79 of the Corporations Act 2001, s.74B of the Trade Practices Act 1974 and s 728 of the Workplace Relations Act 1996 which contain similarly worded provisions. Usually, but not always, the conduct of the individual will require "actual knowledge" of the contravention.

then applies the same two step process (described in paragraph 9 below) in determining whether to commence such a proceeding.

6.5. A person “involved in” a contravention may include:

- (a) a Company Director⁹;
- (b) a sole director and shareholder who abrogated his authority to others¹⁰; or
- (c) the principal employer (through the actions of its contracted “employment issues” consultant who made offers of Australian Workplace Agreements)¹¹.

7. Direction to Inspectors and Consent to Litigate

7.1. On 1 July 2009¹² the Fair Work Ombudsman, acting under section 704 of the FW Act, issued directions to Fair Work Inspectors [Legislative Instrument F2009L02679] (**Direction to Inspectors**), providing that, before commencing litigation relating to alleged contraventions of Commonwealth workplace laws a Fair Work Inspector must, among other things (including complying with this Guidance Note), obtain the consent of the Fair Work Ombudsman or the consent of a member of the staff of the FWO authorised by the Fair Work Ombudsman to give such consent.

7.2. On 3 July 2009 the Fair Work Ombudsman issued a “General Authorisation to Consent to Litigation” (**General Authorisation**) under the Direction to Inspectors, in which the Fair Work Ombudsman authorised the:

- (a) Chief Counsel, FWO,
- (b) Executive Director – National Litigation Practice, FWO;
- (c) Executive Director – Legal Services, FWO; and
- (d) Group Manager – Field Operations Group, FWO.

as members of the staff of the FWO authorised by the Fair Work Ombudsman to consent to the commencement of litigation (**Authorised SES Officers**).

7.3. In the Direction to Inspectors, the Fair Work Ombudsman directs that, before commencing, or intervening in, litigation, a Fair Work Inspector must:

- (a) comply with any Guidance Note concerning the litigation policy of the FWO;

⁹ *Hortle v APrint (Aust) Pty Ltd and Anor* [2007] FMCA 1547

¹⁰ *Fleming v Restaurant Services Group & Ors* [2008] FMCA 455

¹¹ *Balding v Ten Talents Pty Ltd & Anor (No.3)* [2008] FMCA 255.

¹² With effect from 3 July 2009 when the Directions were registered as a legislative instrument F2009L02679.

- (b) be satisfied that:
- there is sufficient evidence to commence civil proceedings; and
 - the facts in the matter and all the surrounding circumstances demonstrate that civil proceedings are in the public interest (including that the contraventions are not trivial or minor).

7.4. Notwithstanding the need for consent, the decision whether to recommend that proceedings be commenced (or some other enforcement activity) rests with the Fair Work Inspector and their Executive Level 2 Manager in consultation with relevant Field Operations Executive Directors and the Group Manager of Field Operations. If an Executive Level 2 Manager has a query about their capacity to recommend the commencement of proceedings, they must immediately consult with the Group Manager of Field Operations.

8. Fair Work Ombudsman's independence and discretion unfettered

- 8.1. Section 684 of the FW Act provides that the Minister for Education, Employment and Workplace Relations (**Minister**) may give directions to the Fair Work Ombudsman in relation to the performance of their functions.
- 8.2. However, any directions given by the Minister under the FW Act must be of a general nature only (section 684(2)).
- 8.3. In this respect the independence of the Fair Work Ombudsman in the exercise of his discretion to commence proceedings is unfettered.

9. The decision to commence litigation - the two-step process

- 9.1. The key aim of the FWO's enforcement activities is to achieve compliance with Commonwealth workplace laws. Litigation may be appropriate to achieve this aim or if there is a need for judicial clarification of Commonwealth workplace laws.
- 9.2. Therefore, the decision by the Fair Work Inspector and their Executive Level 2 Manager (in consultation with relevant the Field Operations Executive Directors, the Group Manager of Field Operations and the FWO's Legal Group) to commence (or not commence) proceedings is an important one. In every case, great care must be taken so that the right decision is made. A wrong decision about whether or not to commence proceedings might tend to undermine the confidence of the community in the Australian Government's workplace relations

system and in the FWO as the national regulator of Commonwealth workplace laws.

9.3. All FWO litigation related activities should be transparent, accountable, constructive and effective. In addition, all FWO litigation related activities should be targeted, proportionate, consistent and fair, and conducted in accordance with this Guidance Note and the requirements of the Legal Service Directions.

9.4. Any decision to commence proceedings requires a two-stage test be satisfied:

- (a) First, there must be sufficient evidence to prosecute the case; and
- (b) Secondly, it must be evident from the facts of the case, and all the surrounding circumstances, that commencing proceedings is in the public interest.

9.5. The two-step process also applies to decisions the FWO makes about the institution of appeals in that the FWO will consider:

- (a) the merits of an appeal; and
- (b) the public interest in pursuing an appeal.

9.6. The FWO does not make decisions about appeals for criminal prosecutions (see 5.2). The CDPP has sole responsibility for such decisions and the conduct of the appeal.

10. Sufficient evidence

10.1. In determining whether there is sufficient evidence to commence proceedings the FWO will consider if there:

- (a) is admissible, substantial and reliable evidence of a contravention of Commonwealth workplace laws;
- (b) are available, competent and credible witnesses (where relevant);
- (c) are admissions, or there are likely to be admissions, made by the alleged wrongdoer;
- (d) are any lines of defence which are plainly open to, or have been indicated by, the alleged wrongdoer; and
- (e) are any other factors which in the view of the FWO could affect the likelihood or otherwise of a successful litigation.

10.2. Having regard to the evidentiary considerations the FWO will consider whether there:

- (a) is a prima facie case against the alleged wrongdoer; and
- (b) are reasonable prospects of an order being made that the alleged wrongdoer contravened Commonwealth workplace laws.

10.3. Under the Legal Services Directions, the FWO must not (except in urgent circumstances) commence proceedings unless it has received written legal advice from an external legal provider indicating that there are reasonable grounds for starting the proceedings. Legal advice of this nature is covered by legal professional privilege.

11. Public Interest

11.1. Once satisfied that the evidence justifies the commencement of proceedings against the alleged wrongdoer, the FWO will usually proceed to litigation unless, having regard to the provable facts and the whole of the surrounding circumstances, the public interest dictates that proceedings not be commenced.

11.2. The Commonwealth Prosecution Policy makes clear that, as a general proposition:

"It is not the rule that all offences brought to the attention of the authorities must be prosecuted."

11.3. Generally speaking, the more serious the civil remedy provision which has been contravened :

- (a) the more likely it will be that the public interest will require that proceedings be commenced; and
- (b) the more compelling the reasons would have to be for proceedings not to be pursued if the evidence is strong and the prospects good.

11.4. Although there may be mitigating factors present in a particular case, often the proper decision will be to commence proceedings and for those factors to be put to the court in mitigation when the penalty is being considered.

11.5. Where the contravention of Commonwealth workplace laws is not so serious as to plainly require the commencement of proceedings, the FWO may be more lenient to the person under investigation in considering whether the public interest dictates that proceedings not be commenced.

- 11.6. The factors which can properly be taken into account in deciding whether the public interest requires that proceedings be commenced will vary from case to case.
- 11.7. However, a decision whether or not to commence proceedings must not be influenced by:
- (a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged wrongdoer or any other person involved (although, an employee's status as a vulnerable worker¹³ may be relevant and appropriate to have regard to);
 - (b) personal feelings concerning the alleged wrongdoer or the victim;
 - (c) possible political advantage or disadvantage to the Government or any political group or party;
 - (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the litigation decision;
 - (e) whether the matter has been, or is likely to be, the subject of media attention; or
 - (f) possible advantage or disadvantage to any employer, employer group, industrial or other association or union, or an office holder or member of such a group.

12. Relevant public interest factors

Factors which may arise in considering whether the public interest dictates that proceedings be, or not be, commenced are listed below:

12.1. Nature and circumstances of the alleged contravention

- (a) the seriousness of the alleged contravention or, conversely, the triviality of the alleged contravention, including whether it is of a "technical nature" only.

Generally, and by way of example, the FWO does not regard the following as 'trivial':

¹³ "Vulnerable worker" includes (but is not limited to): young people, trainees, apprentices, people with a physical or mental disability or literacy difficulties, recent immigrants and people from non-English speaking backgrounds, the long-term unemployed and those re-entering the workforce, outworkers, people with carer responsibilities, indigenous Australians, employees in precarious employment (e.g. casual employees) and people residing in regions with limited employment opportunities and/or with financial and social restraints on their ability to relocate to places where there might be greater job opportunities.

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- (i) contraventions relating to agreement making, bargaining orders, industrial action or right of entry;
 - (ii) contraventions of the general protections contained in Part 3-1 of the FW Act;
 - (iii) contraventions giving rise to significant underpayments (upward of \$5,000 in total (not per employee)) particularly where there is evidence the employer knowingly contravened their obligations or did not properly discharge their duty to ascertain their obligations¹⁴;
 - (iv) contraventions giving rise to underpayments (including those less than \$5000 in total), where special circumstances exist. Examples of such circumstances may include underpayments in respect of vulnerable workers, numerous employees, or where the employer is a repeat wrongdoer (whether or not taken to court) or where there is evidence the employer knowingly contravened its obligations (e.g. deliberate exploitative behaviour) or did not promptly acknowledge their obligations and remedy them when they were brought to the employer's attention by the FWO; and
 - (v) failure to comply with a Compliance Notice issued by a Fair Work Inspector.

It can be expected that in most circumstances the FWO will consider that there is public interest in commencing proceedings to obtain a civil penalty in respect of such contraventions.

Where an alleged contravention is considered to be of a less serious nature, the FWO will consider appropriate enforcement or dispute resolution mechanisms and alternatives to litigation including, where appropriate, mediation, Compliance Notices (see 13.4 below) or small claims procedures (which may include Fair Work Inspector assisted small claims).

- (b) the actual or potential consequence of the alleged contravention;

¹⁴ The FWO notes the judicial observations of Mowbray FM in *Flattery v The Italian Eatery t/as Zeffirelli's Pizza Restaurant* [2007] FMCA 9 (2 February 2007) "Employers have a responsibility to make themselves aware of their obligations under the law."

- (c) the prevalence within the community of the alleged contravention;
- (d) mitigating or aggravating circumstances.

Generally, and by way of example, mitigating circumstances might include:

- (i) where the matter has come before the FWO through a complaint or audit, there is no evidence admissible in a court that the employer either deliberately or recklessly underpaid its employees, but, rather, there is evidence that the employer had a genuine misunderstanding (having made reasonable attempts to understand its legal obligations) and, when it was brought to the employer's attention by the FWO (or before the FWO's investigation began), the employer readily rectified the contravention, made good the underpayments and put in place systems to ensure that no contraventions will occur in the future.
- (ii) where the employer has approached the FWO to make admissions of contravention and worked with the FWO to readily rectified the contravention, made good the underpayments and put in place systems to ensure that no contraventions will occur in the future.

Conversely, an aggravating circumstance might include those where, although the underpayment is less than \$5,000 or the employer has approached the FWO to make admissions but, the employer has failed to comply with an agreed payment plan or has refused, impeded or delayed attempts at voluntary compliance; and

- (e) any other relevant circumstances.

12.2. Characteristics of the alleged wrongdoer

- (a) the degree of culpability of the alleged wrongdoer in connection with the contravention. This may include, for example:
 - (i) the degree or extent to which the alleged wrongdoer acted in accordance with any advice given by the FWO or other statutory authority in relation to complying with a duty or obligation under Commonwealth workplace laws;

- (ii) the relevant compliance history of the alleged wrongdoer (including the alleged wrongdoer's response to previous enforcement and prevention activities undertaken by FWO or its predecessors); and
 - (iii) the attitude of the alleged wrongdoer (including any relevant proactive measures taken to comply with Commonwealth workplace laws).
- (b) history and other relevant characteristics of the alleged wrongdoer (e.g. age, intelligence, physical health, mental health, special infirmity, etc);
 - (c) subject to any rights or privileges (such as the privilege against self-exposure to penalties), whether the alleged wrongdoer is willing to co-operate in the investigation or litigation, including the investigation and prosecution of others, or the extent to which the alleged wrongdoer has done so;
 - (d) the level of contrition demonstrated by the alleged wrongdoer; and
 - (e) the degree of involvement of senior management of the employer in the alleged contravention, or the degree of involvement by office holders or members of a registered organisation or other association.

12.3. Level of public concern

- (a) whether the nature of the alleged contravention is of considerable public concern. The FWO assumes that, in all cases, the public is concerned about compliance with Commonwealth workplace laws.

12.4. Impact of the contravention

- (a) the attitude to the commencement of proceedings which is held by the person who was injured or otherwise affected by the alleged contravention;
- (b) the impact of the alleged contravention on such persons or on any other relevant persons (e.g. family members); and
- (c) any other relevant impact of the alleged contravention.

12.5. Deterrence

- (a) the likely impact of proceedings on:

- (i) general deterrence (i.e. reducing the likelihood that other workplace participants will commit similar contraventions or otherwise contravene Commonwealth workplace laws); and
- (ii) specific deterrence (i.e. reducing the likelihood that the alleged wrongdoer will commit a further contravention of Commonwealth workplace laws).

12.6. Effect of litigation

- (a) the likely outcome in the event of a finding of a contravention, having regard to the penalty options available to the court;
- (b) the availability and efficacy of any alternatives to litigation; and
- (c) whether the consequences of any resulting finding of a contravention would be unduly harsh and oppressive.

12.7. Administrative considerations

- (a) the necessity to maintain public confidence in the administration of Commonwealth workplace laws;
- (b) the likely length and expense of litigation;
- (c) whether the commencement of proceedings would be perceived as counter-productive, for example, by bringing the law into disrepute; and
- (d) the staleness of the alleged contravention.

13. Determination of appropriate enforcement mechanism

13.1. After consideration of all the relevant criteria (i.e. sufficient evidence and public interest), a FWO investigation may result in:

- (a) the commencement of litigation;
- (b) the issuing of a Compliance Notice¹⁵;
- (c) the giving of an Enforceable Undertaking by the wrongdoer;
- (d) the issuing of a letter of caution (defined below);
- (e) a referral to small claims procedures;
- (f) a referral to other dispute resolution mechanisms (i.e. mediation); or

¹⁵ Compliance Notices may only be issued in relation to certain contraventions that occurred after 1 July 2009.

- (g) no further action.

13.2. Commencement of litigation

Where sufficient admissible evidence exists of a contravention, and the commencement of proceedings is in the public interest, the FWO will commence proceedings in accordance with this Guidance Note.

13.3. Compliance Notice

If a Fair Work inspector reasonably believes that a person has contravened one or more of the following:

- (a) a provision of the National Employment Standards¹⁶;
- (b) a term of a modern award¹⁷;
- (c) a term of an enterprise agreement
- (d) a term of a workplace determination
- (e) a term of a national minimum wage order; or
- (f) a term of an equal remuneration order (collectively referred to as 'entitlement provisions')

the Fair Work Inspector may issue a Compliance Notice under section 716 of the FW Act.

A Compliance Notice may be issued by the Fair Work Inspector in lieu of commencing proceedings, and in circumstances where an Enforceable Undertaking under section 715 of the FW Act has not previously been accepted in relation to the contravention. Compliance Notices cannot be issued in respect of contraventions occurring before 1 July 2009.

The Compliance Notice may require the wrongdoer, within the timeframe specified in the notice, to:

- take specified action to remedy the direct effects of the contravention; and/or
- produce reasonable evidence of compliance with the notice.

If the Compliance Notice is not complied with, the FWO will likely commence proceedings seeking penalties and remedies (including interest on any

¹⁶ The National Employment Standards will apply from 1 January 2010.

¹⁷ Modern awards will not begin to operate until 1 January 2010 or such later date as may be specified in the modern award.

underpayments) in relation to the contravention of the entitlement provision, and for failing to comply with the Compliance Notice. Non compliance with a Compliance Notice will also be a factor taken into account in any future dealings involving that party.

13.4. **Enforceable Undertakings**

Under section 715 of the FW Act, the Fair Work Ombudsman may accept a written undertaking in relation to a contravention of a civil remedy provision.

An Enforceable Undertaking may be accepted by the Fair Work Ombudsman (or his delegate under a Delegation of Powers and Functions signed by the Fair Work Ombudsman on 2 July 2009) in lieu of commencing proceedings, and in circumstances where a Compliance Notice under section 716 of the FW Act has not previously been given in relation to the contravention.

An Enforceable Undertaking is an alternative to litigation. Its purpose is to focus the wrongdoer on the tasks to be carried out to remedy the contravention and/or prevent a similar contravention of Commonwealth workplace laws in the future.

In giving an Enforceable Undertaking, the wrongdoer must, as a minimum, admit the contravention, undertake to remedy the contravention in the manner specified and acknowledge that application may be made to the court for orders against them if they fail to comply with the undertaking. An Enforceable Undertaking may also contain a broad range of commitments, including but not limited to regular audits and compliance plans, payment plans for underpayments, training for managers and staff (at the employer's expense), management plans for work systems and keeping the FWO informed of ongoing steps taken to ensure compliance with Commonwealth workplace laws. The undertaking may require a public notice by the wrongdoer about the contraventions and the remedial action they have agreed to carry out.

If an Enforceable Undertaking is not complied with, the FWO will likely apply to the court for an order directing the wrongdoer to comply with the terms of the undertaking and such other orders as the court considers appropriate. Non compliance with an Enforceable Undertaking will also be a factor taken into account in any future dealings the FWO has with that party.

13.5. **Letter of caution**

Where it is in the public interest (in limited circumstances for relatively minor contraventions) a letter of caution may be issued as an alternative to litigation.

13.5. **Small claims referral**

In appropriate circumstances complainants may be referred to the small claims procedures available under section 548 of the FW Act as an effective means of finalising their complaint. A small claims action is not an action taken by the FWO, however Fair Work Inspectors may provide assistance where appropriate.

13.6. **Alternative Dispute Resolution (mediation)**

In the interest of promoting harmonious, productive and cooperative workplace relations, in appropriate cases, FWO may offer mediation as an alternative to more formal enforcement mechanisms. FWO mediation is a voluntary process. An appointed FWO mediator facilitates this process in order to develop options, consider solutions and if possible reach a settlement that will accommodate both parties' needs. The FWO mediator may, throughout the process, offer suggestions to the parties for resolution of the matter but does not impose a decision.

13.7. **No further action**

No further action will be taken, where:

- (a) no contravention of Commonwealth workplace laws is established by the comprehensive investigation; or
- (b) taking into account the litigation criteria of this Guidance Note:
 - (i) there is insufficient admissible evidence of a contravention; or
 - (ii) it is not in the public interest to commence proceedings, accept an Enforceable Undertaking, issue a Compliance Notice, issue a letter of caution or to refer the matter to small claims or other dispute resolution mechanisms (i.e. mediation).

14. **The commencement and conduct of FWO litigation**

- 14.1. In many cases the evidence will disclose a number of potential contraventions of Commonwealth workplace laws. The FWO (namely the Fair Work Inspector and

their Executive Level 2 Manager in consultation with relevant Field Operations Executive Directors and the Group Manager of Field Operations) will take care to identify the contraventions which adequately reflect the nature and extent of the offending conduct disclosed by the evidence and which will provide the court with an appropriate basis for deciding upon a penalty.

14.2. The contraventions proceeded against will be those disclosed by the admissible evidence. Consequently, there may be cases where there is public interest in pleading a number of contraventions. However, under no circumstances will the FWO assert contraventions with the intention of providing scope for subsequent “breach bargaining”.

14.3. All litigation commenced by the FWO will be conducted honestly, fairly, consistently and in accordance with *The Commonwealth’s Obligation to Act as a Model Litigant* (Appendix B to the Legal Service Directions).

15. Breach bargaining

15.1. Breach bargaining involves negotiations between the defendant/respondent and the FWO (namely the Fair Work Inspector and their Executive Level 2 Manager in consultation with relevant Field Operations Executive Directors and the Group Manager of Field Operations) in relation to the contraventions to be proceeded against. A breach bargaining decision may only be made with the consent of the Fair Work Ombudsman or an Authorised SES Officer.

15.2. While the FWO must demonstrate care and consideration in identifying the contraventions that will be alleged, circumstances may change or new facts come to light which make it appropriate to proceed on fewer contraventions or to accept a plea to only some of the contraventions. It may be in the interests of justice or it might be in the public interest that the FWO accepts an offer by a person to plead to some of the contraventions and discontinue others.

15.3. Before such an agreement is reached the FWO must be satisfied that:

- (a) the contraventions to be proceeded against bear a reasonable relationship to the nature of the offending conduct of the wrongdoer;
- (b) the contraventions provide an adequate basis for an appropriate penalty in all the circumstances of the case; and
- (c) there is evidence to support the contraventions alleged.

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- 15.4. In many cases, the interests of justice will be served if a defendant/respondent pleads to agreed contraventions in the circumstances described above and the community is not put to the burden of funding a long and expensive hearing.
- 15.5. Accordingly, while the FWO will never initiate breach bargaining, in appropriate circumstances, the FWO will promptly consider any proposal and put its position to the defendant/respondent. However, the process is not one of "negotiation". The FWO is concerned with appropriately reflecting its perception of the public interest and its position in relation to disposition of the matter generally.
- 15.6. A proposal by the defendant/respondent that it will agree to particular contraventions or accept a lesser number of contraventions may include a request that the FWO not oppose a submission made by the defendant/respondent to the court that the penalty falls within a nominated range. The FWO will consider such a request provided the range of penalty nominated is considered to be within acceptable limits having regard to the FWO's desire to balance its aims of general and specific deterrence with those circumstances which, in individual cases, constitute relevant penalty considerations.
- 15.7. Under no circumstances will the FWO entertain a breach bargaining proposal if the defendant/respondent maintains their innocence with respect to the contraventions it has offered to concede. The defendant/respondent must genuinely accept wrong-doing on their behalf and be prepared to admit that publicly and to the court.
- 15.8. If the breach bargaining might affect the substantive interests of the person who was injured or otherwise affected by the contravention, then, where possible, they will be consulted before any breach bargaining decision is made. Complainants will be advised when decisions made by the FWO do not compromise the complainant's rights to pursue actions themselves.
- 16. Discontinuance of proceedings**
- 16.1. Consistent with the objective of ensuring that only appropriate cases are brought before the courts, the FWO will discontinue proceedings if appropriate.
- For example, if a wrongdoer who is a first time "offender", agreed to make good a small underpayment (e.g. less than \$1,000) to an employee after proceedings are commenced and agreed to reimburse the FWO's legal costs, the FWO would consider discontinuing the proceedings.

However, having regard to the considered assessment undertaken by the FWO as to the public interest before the commencement of proceedings and the usual opportunity afforded to wrong-doers to allow for voluntary compliance, discontinuance is not usually countenanced. For example, the making good of large underpayments (especially involving vulnerable workers) either immediately before or just after proceedings are commenced will not likely result in a decision not to commence proceedings or to discontinue them. However, the making of the payment and the admissions made would be relevant to the question of penalty in a matter.

16.2. The decision whether or not to discontinue proceedings rests with the Fair Work Inspector and their Executive Level 2 Manager in consultation with relevant Field Operations Executive Directors and the Group Manager of Field Operations (subject to the need to obtain consent from the Fair Work Ombudsman or an Authorised SES Officer).

16.3. Where appropriate the person who was injured or otherwise affected by the contravention will be consulted before any decision is made to discontinue proceedings. Complainants will be advised when the decision made by the FWO does not compromise the complainant's rights to pursue actions themselves.

17. Submissions on penalty

17.1. Where litigation results in a finding that Commonwealth workplace laws have been contravened the court will move to consider what penalty, if any, should be imposed.

17.2. Where appropriate, the FWO will seek penalties that balance its aims of general and specific deterrence with those circumstances which, in individual cases, constitute relevant penalty considerations.

17.3. The FWO notes that where wrong-doers have co-operated with the FWO 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 (in the vicinity of up to 25-30%). However, consistent with decision in *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 (at 74 - 76 per Stone and Buchanan JJ), "...the benefit of such a discount should be reserved for cases where it can be fairly said that an admission of liability:

- (a) *has indicated an acceptance of wrongdoing and a suitable and credible expression of regret; and/or*
- (b) *has indicated a willingness to facilitate the course of justice*".

17.4 The comments of Federal Magistrate Mowbray in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 (16 January 2007)¹⁸ are also to be considered carefully,

"[22] It is also relevant to note that the maximum penalty has been increased very significantly in the last two years. It was raised from \$10,000 to \$33,000, an increase of 230 per cent. In view of this large increase the following comments of Merkel J in a slightly different context at [72] in *Finance Sector Union v Commonwealth Bank of Australia* [2005] FCA 1847 are apposite – also noting that the maximum penalty for each contravention that Merkel J was considering was \$10,000

Finally I note that the penalties imposed in the present case ... greatly exceed penalties imposed under the WR Act or its predecessors in previous cases. It may be that breaches by unions and employers of industrial legislation from time to time have been accepted as part of the give and take of industrial disputation. However, in recent years industrial legislation has increasingly codified and prescribed what is acceptable, and what is unacceptable, industrial conduct. The legislature has, over time, also moved to increase the penalties that may be imposed in respect of unlawful industrial conduct. In my view, any light handed approach that might have been taken in the past to serious, willful and ongoing breaches of the industrial laws should no longer be applicable.

- 17.5. The FWO may make submissions for a range of penalties. However, the FWO will not, ordinarily, reach agreement with the wrongdoer about the exact penalty to be imposed.
- 17.6. In appropriate cases, the FWO will usually be prepared to indicate to the court that a "Lower", "Middle" or "Higher" range penalty should be awarded.
- 17.7. Defendants/respondents should note that an eligible court will be guided, but not bound, by any submission the FWO makes in relation to penalty.

18. Notification of enforcement decisions

¹⁸ Note, this decision relates to the Workplace Relations Act 1996, as the predecessor to the FW Act.

18.1. When a decision is made by the FWO as to what, if any, action will be taken following an investigation (i.e. litigation, Enforceable Undertaking, Compliance Notice, letter of caution or no further action) the following persons will (where practicable and subject to paragraph 18.2 below), be notified in writing of the decision:

- (a) the alleged wrongdoer, and their representative(s) such as an industrial association or a State workplace rights advocate;
- (b) any person who was injured or otherwise affected by the contravention;
- (c) witnesses who have provided formal statements to a comprehensive investigation; and
- (d) any other interested party whom it is appropriate to notify.

18.2. Disclosure to the persons referred to in paragraph 18.1(b), (c) and (d) will not occur where, in the opinion of the Fair Work Ombudsman or an Authorised SES Officer, disclosure is not appropriate taking into account privacy considerations, confidentiality obligations or other relevant matters.

19. Publishing and utilising enforcement activity

19.1. Fair and accurate publication of the nature and outcome of enforcement activities (whether litigation, Enforceable Undertakings, Compliance Notices or letters of caution) draws attention to the consequences of contravening Commonwealth workplace laws. It is a valuable tool both for educating workplace participants and deterring non-compliance.

19.2. Therefore, the FWO may decide to publish (including on its website) and/or utilise information about its enforcement activities to leverage the outcome of inspection and enforcement activity, including litigation.

For example, the FWO may:

- (a) in respect of a litigation matter, publicise the decision to commence proceedings, the lodgement of court processes, directions hearings, decisions (whether the litigation results in a penalty being imposed or not), penalty hearings and the final penalty, if the FWO determines that publicising any (or all) of these stages will support compliance with Commonwealth workplace laws;

- (b) publish information about its enforcement activities to enhance specific and general deterrence;
- (c) inform workplace participants in the same and similar industries of the nature and outcome of enforcement activities and provide advice in relation to how to prevent similar contraventions; and
- (d) utilise information from enforcement activities to inform future inspection activity particularly on a systemic level.

Leigh Johns
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Fair Work Ombudsman
5 July 2009