Chapter 1 Introduction

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1.1 Introduction

This chapter provides Inspectors with an overview of the role of the Office of Fair Work Building and Construction (FWBC) in regulating Commonwealth workplace laws in the building and construction industry. It provides Inspectors with information on the context in which FWBC conducts its investigations and other compliance activities. Additionally, this chapter briefly outlines the obligations of Inspectors as public servants in conducting professional, accountable, timely and transparent investigations.

1.2 Role of FWBC

Inspectors should use the following information which sets out the role of FWBC.

- The Office of the Inspectorate is established under section 26J of the *Fair Work (Building Industry) Act 2012* (FWBI Act)
- This Office is referred to as *Fair Work Building & Construction* or *FWBC*
- The Director of FWBC is appointed under section 9 of the FWBI Act
- The Minister may appoint an acting Director under section 16 of the FWBI Act
- The Director is appointed to provide a balanced framework for cooperative, productive and harmonious workplace relations in the building industry.

Section 10 of the Act provides the Director has the following functions:

- to promote harmonious, productive and cooperative workplace relations in the building industry, and promote compliance with designated building laws and the Building Code by building industry participants; including by providing education, assistance and advice to building industry participants;
- to monitor compliance with designated building laws and the Building Code by building industry participants;
- to inquire into, and investigate, any act or practice by a building industry participant that may be contrary to a designated building law, a safety net contractual entitlement or the Building Code;
- to commence proceedings in a court, or to make applications to FWC, to enforce designated building laws and safety net contractual entitlements as they relate to building industry participants;
- to refer matters to relevant authorities;
- to represent building industry participants who are, or may become, a party to proceedings in a court, or a party to a matter before FWC, under a designated building law, if the Director considers that representing the building industry participants will promote compliance with designated building laws;
- to disseminate information about designated building laws and the Building Code, and about other matters affecting building industry participants, including disseminating information by facilitating ongoing discussions with building industry participants;
- to make submissions and provide information to the Independent Assessor in accordance with this Act; and
- any other functions conferred on the Director by any Act.

1.3 Structure of Operations

The Chief of Operations is responsible for overseeing the Operations Group, in association with the two Operations' Executive Directors.

Operations is managed on a geographic basis with Inspectors answering to the relevant State Director with responsibility for their region.

In general, Inspectors will most commonly seek the advice and assistance of their Assistant Director in the first instance, with matters requiring escalation being referred to their manager or State Director. However, certain investigative processes (e.g. case conference) will involve consultation with other FWBC staff.

The Professional Standards Branch consists of the Strategic Policy Team and the Quality Assurance Team. Strategic Policy assists FWBC Operations to drive national consistency, continual improvement and strategic innovation of core business processes across Operations. Also, the Quality and File Review team within the Professional Standards Branch conducts quality reviews of FWBC files.

Both the Strategic Policy Team and the Quality Assurance Team report to the Executive Director – Legal (Central/West), and ultimately to the Chief of Operations.

In relation to Chapter 2.2.1 of the FWBC Manual, FWBC staff should note that FWBC does not have partnership arrangements with state governments.

1.4 Role and Powers of Inspectors

The functions of FWBC include the advancement of harmonious and co-operative workplace relations by promoting compliance with Commonwealth workplace laws, particularly those relating to provisions of the FW Act and the *Fair Work Regulations 2009* (Cth) (FW Regulations) including but not limited to:

- unlawful industrial action
- right of entry by unions
- freedom of association and general protections
- sham contracting arrangements
- underpayments of wages and entitlements, including post-termination entitlements
- coercion, undue influence or pressure, and misleading and deceptive conduct in agreement making
- pay slip and record keeping requirements
- transfer of business
- discrimination.

Inspectors are appointed and empowered to perform the functions under the FW Act. Importantly there is no requirement for a complaint to be made before an Inspector can exercise compliance powers.

Inspectors are appointed under section 59 of the FWBI Act.

Section 59C of the FWBI Act provides that Inspectors have the same functions and powers as Fair Work Inspectors (in accordance with sections 703 to 717 FW Act).

Fair Work Inspectors are empowered to commence or continue the investigation of suspected contraventions of the *Workplace Relations Act 1996* (Cth) (WR Act) regarding conduct that occurred before 1 July 2009 (see 1.8.1 below).

Throughout this FWBC Operations Guide, the legislative instruments specified above are referred to collectively as Commonwealth workplace laws.

1.4.1 Powers of Inspectors to Enter Premises

An Inspector may, without force, enter premises if the Inspector reasonably believes that the FW Act or a Fair Work instrument applies to work being performed on the premises, or if documents relevant to compliance purposes are on the premises (including documents accessible from a computer). Inspectors must identify themselves and show their identity card before, or as soon as practicable after entry onto the premises, to the occupier or their representative.

An Inspector must not enter any premises used for residential purposes unless they have a reasonable belief that work, as referred to above, is being performed on that premises.

1.4.2 Powers of Inspectors while on premises

While on premises an Inspector may:

- inspect any work, process or object
- interview any person (however the person can decline to be interviewed)
- require a person to tell the Inspector who has custody of, or access to, a record or document
- require a person who has access to a record or document, to produce the record or document to an Inspector while on the premises or within a specified period
- inspect, and make copies of, any record of document that is kept on premises or is accessible from a computer kept on premises
- take samples of any goods or substances in accordance with any procedures prescribed by the regulations.[1]

1.4.3 Persons assisting Inspectors

A person, referred to as an assistant, may accompany an Inspector onto the premises if FWBC is satisfied that the assistant is both required and suitably qualified to assist the Inspector.

[1] FW Act; s709

The assistant may assist the Inspector to exercise compliance powers, but may not exceed or deviate from those powers. Any action performed by an assistant is taken to have been performed by the Inspector.[2] Examples of assistants which may be engaged include IT specialists, forensic accountants or interpreters.

Should an Inspector seek to use an assistant, such request first must be approved by the State Director, or by the Executive Director - Operations

1.4.4 Power to ask for a person's name and address

An Inspector has the power to require a person to provide their name and address if the Inspector *reasonably believes* the person has contravened a civil remedy provision. Supporting evidence can be required if the Inspector *reasonably believes* the information they have been given is false (see s711).

In order to exercise this power, the Inspector must show their identity card and advise the person that it may be a contravention of a civil remedy provision if they do not comply with the request.

1.4.5 Power to require persons to produce records or documents

The mechanism used by Inspectors to obtain records or documents will depend largely upon the nature of the investigation. Where an Inspector visits the premises of a suspect, they may require, under s709(d) of the FW Act that any person who has custody of, or access to, a record or document produce the document or record to the Inspector. Where this power is exercised, best practice dictates that a receipt must be issued when any records or documents are supplied to the Inspector. Failure to comply with a requirement under s709(d) does not render the person liable to either a civil penalty or a penalty infringement notice.

The power to require a person by notice to produce records or documents contained in s712 of the FW Act is similar to that under s169 of the WR Act. The notice must be:

- in writing; and
- be served on the person; and
- require the person to produce the record or document at a specified place within a specified period of at least 14 days.

The notice may be served by sending the notice to the person's facsimile. However, in some circumstances evidence of personal service is required. Failure to comply with a notice to produce renders the person liable to a civil penalty.

Further information on these provisions can be found in Chapter 3.

1.4.6 Power to keep records or documents

[2] FW Act; s710(3)

If a record or document is produced to an Inspector in accordance with s712 of the FW Act, they may inspect, make copies or record the document, and keep the record or document for such period as is necessary.

If an Inspector keeps a record or document they must allow the person who produced the document, anyone entitled to possession of the record or document, or their representative, access to inspect, make copies or record the record or document.[3]

1.4.7 Power to obtain records or documents through Examination Notice

Inspectors should also be aware of their ability to obtain records or documents through the Examination Notice process, detailed in Chapter 3 of this Guide.

1.4.7.1 Limitation on Powers

Subsection 59C(2) of the FWBI Act provides that the functions and powers of an Inspector:

- may only be performed or exercised in relation to a ***building matter***; and
- are subject to such conditions and restrictions as are specified in his or her instrument of appointment.

Subsection 59C(3) of the FWBI Act states that a matter is a ***building matter*** if it relates to a ***building industry participant***.

Section 4 of the FWBI Act states that a ***building industry participant*** means any of the following:

- a building employee
- a building suspect
- a building contractor
- a person who enters into a contract with a building contractor under which the building contractor agrees to carry out building work or to arrange for building work to be carried out
- a building association
- an officer, delegate or other representative of a building association; or
- an employee of a building association.

1.4.8 Relationship between this Manual and Guidance Notes

FWBC's Guidance Notes are a means by which FWBC publishes and disseminates advice on its policies and procedures and on the interpretation of the laws it enforces. Inspectors need to have regard to FWBC's Guidance Notes when making decisions, in conjunction with the information contained in this manual.

An important distinction is that while the manual is an internal document, FWBC's Guidance Notes are available to the public on FWBC's internet page. Because Guidance Notes are

[3] FW Act; s714(2)

public documents, they are a useful tool to help Inspectors explain FWBC's policies to the public on a range of topics.

The FWBC has produced the following Guidance Notes:

- FWBC Guidance Note 1 – Litigation Policy
- FWBC Guidance Note 2 – Investigative Process
- FWBC Guidance Note 3 – Non Litigation Outcomes
- FWBC Guidance Note 4 – Stakeholder & Witness Management
- FWBC Guidance Note 5 – Document Access Policy
- FWBC Guidance Note 6 – Examination Notice Policy
- FWBC Guidance Note 7 – Sham Contracting Policy

Chapter 2 Enquiries and Complaints

Please also refer to the AIMS User Guide for information on entering enquiries into AIMS - **Aims User Guide 2013**

2.1 Introduction

Enquiries and complaints can be received by FWBC through a number of means, including:

- 1800 line;
- other phone calls, fax, mail, email or through an online enquiry;
- lodgement of a FWBC complaint form;
- reports from industry participants;
- items in the media or enquiries from the media
- referrals from other federal or state departments and agencies;
- ministerials;
- contraventions identified from other investigations; or
- referrals from the Fair Work Ombudsman.

Complaints from the FWO enter FWBC through either a referral from:

- the FWO Complaints Registration Team; or
- the FWO AVR Team.

Once a complaint has been received by FWBC, the relevant director will allocate the complaint to a manager who in turn allocates them to a Fair Work Building Industry Inspector for investigation.

Inspectors directly answer enquiries that relate to the work of the FWBC. These enquiries may require the Fair Work Building Industry Inspector to provide advice on:

- the FW Act;
- enterprise agreements and agreement based transitional instruments;
- modern awards and award based transitional instruments;
- general protections; and
- the FWBC complaints/investigation process

An enquiry may involve a request for a meeting to discuss workplace laws or a formal presentation.

2.2 Registration of Enquiries and Complaints

Inspectors must register all enquiries and complaints on AIMS.

Definition - Enquiries and Investigations
In recording work in AIMS, Inspectors should be aware of the distinction between 'enquiries' and 'investigations'.

> **Enquiries** are matters that are either outside FWBC's jurisdiction (and are therefore referred to another agency) or are resolved by the provision of advice or information by the Fair Work Building Industry Inspector.
>
> **Investigations** are matters that require further efforts such as undertaking more complex inquiries requiring speaking to multiple persons, seeking documents, reviewing documents, conducting interviews or attending sites.

Inspectors must attend to an enquiry in one day, this includes opening and either closing or upgrading to an investigation. The enquiry should be upgraded or closed within three days. Inspectors should refer to the AIMS User Guide for instructions on registration of complaints.

2.3 Ministerial Complaints

Ministerial Complaints are received at the FWBC by Prevention, Performance & Innovation (PP&I) and allocated to a regional FWBC office for action as appropriate.

For further information on PP&I, please refer to the FWBC Intranet.

2.4 Referrals from other agencies

FWBC has established information sharing relationships with other Commonwealth and state government agencies such as the Department of Immigration and Citizenship (DIAC), Office of the Fair Work Ombudsman (FWO), the Australian Taxation Office (ATO) and the Australian Securities and Investment Commission (ASIC). Some of these relationships have been formalised through memoranda of understanding (MOUs) or written agreements.

Memoranda of Understandings can be viewed on the FWBC Inspector Resources page.

Complaints received by FWBC from the FWO are lodged with the FWO via the appropriate electronic or hard copy complaint form. The complaint is then registered before being sent to the relevant FWBC state or territory office for allocation to a Fair Work Building Industry Inspector.

Please note that the FWO may conduct some enquiries and undertake their AVR process prior to forwarding the matter to FWBC. Complainants may also contact a FWBC office (by phone, fax or at the counter) and lodge their complaint directly with that office.

2.5 Fair Work Building Industry Inspector's practice when approached by the media

If a Fair Work Building Industry Inspector is approached by the media they should follow the protocols based on the relevant situation (as outlined below):

2.5.1 Counter enquiries

If a media representative or crew arrives at the front counter of an office, the Fair Work Building Industry Inspector attending the counter should state that they are not authorised to comment, and advise the reporters that their enquiry will be referred to the FWBC primary media contacts. Fair Work Building Industry Inspectors must be mindful that they may be being taped with a view to airing or publishing anything that is said. The reporter's objective may be to portray the Fair Work Building Industry Inspector or the FWBC in a particular light, while the Fair Work Building Industry Inspector must remain professional and objective at all times. The Fair Work Building Industry Inspector should obtain the following details from the media representative:

Deleted: i

- full name
- organisation
- contact details (including phone number)
- nature of the enquiry
- any applicable publication deadline(s).

The Fair Work Building Industry Inspector must advise their director, who will in turn advise the FWBC primary media contacts.

2.5.2 Telephone enquiries

If a journalist calls, Fair Work Building Industry Inspectors must advise the caller that they are not authorised to comment, but that they will pass on their request to FWBC primary media contacts. Fair Work Building Industry Inspectors should obtain the relevant details from the journalist (as for counter enquiries).

Fair Work Building Industry Inspectors should not provide any information directly to reporters, but should immediately advise their director, who will pass on the request to the primary media contacts.

2.5.3 Enquiries in the field

If approached while in the field by a TV crew or journalist regarding an investigation, Fair Work Building Industry Inspectors must politely advise that they are unable to comment. The Fair Work Building Industry Inspector should obtain relevant details from the journalist (as for counter enquiries) and inform them that their request will be passed onto the FWBC primary media contacts. In this situation, a reporter probably does not expect to obtain information immediately, but might use anything offered up by the Fair Work Building Industry Inspector during the discussion. Again it is important for the Fair Work Building Industry Inspector to remain professional and objective and be mindful that the encounter may be recorded. When the discussion with the journalist has concluded, the Fair Work Building Industry Inspector

should advise their director, who will pass on the request to the FWBC primary media contacts.

2.5.4 Written or text enquiries

It is possible that a Fair Work Building Industry Inspector may be contacted by a media representative through written means, such as letter, fax, email, or short message service (sms). In such cases, the Fair Work Building Industry Inspector should not respond to the media representative directly, but should advise their director of the contact and provide a copy of the text or document for the director to forward to the FWBC primary media contacts.

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3.1 What is an Investigation by Field Staff?

An investigation involves Inspectors obtaining, managing and evaluating evidence in order to determine whether a contravention of Commonwealth workplace laws has occurred. FWBC has adopted a nationally consistent process which identifies uniform escalation and management intervention points for the conduct of investigations into alleged contraventions of Commonwealth workplace laws.

During the early stages of an investigation, it is advantageous for the Inspector to assess the likelihood of the potential contravention fitting within the parameters of Guidance Note 1 – FWBC Litigation Policy. While all investigations will require the collection of records and other evidence, early awareness of the potential outcome will enable Inspectors to more appropriately determine the necessity of obtaining additional, supporting information such as formal statements and records of interview.

Inspectors are required to ensure that the evidence obtained during an investigation is subjected to critical evaluation both before a matter is completed (investigative evaluation) and before any recommendation to litigate is made (evidential evaluation).

An investigation may be field based (involving a field visit) or office based. Inspectors should ensure they record the investigation type on the relevant investigation line in AIMS.

3.2 Investigative Evaluation

Investigative evaluation is an ongoing process throughout an investigation that Inspectors must undertake to ensure a critical evaluation of the material gathered. In addition, a formal investigative evaluation session that includes both the Inspector and Assistant Director can add value by providing a natural management intervention and escalation point where Inspectors can discuss concerns with their Assistant Directors.

Following a standardised process for evaluating investigative progress and evidence ensures best practice principles are applied to every investigation. By using a standard approach and structure, Inspectors ensure that their evaluation is not only competent, but consistent, transparent, accountable and auditable. This standardised model involves two phases of evaluation – investigative and evidential.

Investigative evaluation must focus on identifying:

- information that has been discovered
- additional information that may be needed
- consistency between versions of events and occurrences
- conflicts between different material gathered (including contradictory statements, difference between statements and records, etc).[1]

[1] National Centre for Policing Excellence (UK), Core Investigative Doctrine, 2005. Ch 5.4

Strong and effective leadership early in an investigation minimises the risk of poor quality investigations and/or outcomes. Investigative evaluation not only allows Assistant Directors to objectively assess an investigation, it enables them to complete investigations or guide Inspectors to alternative avenues of inquiry.

Evidential evaluation is discussed in detail in Chapter 14 – Non litigation outcomes and Chapter 15 - Litigation.

3.3 Investigation management

The keys detailed throughout this chapter form part of the entire investigation management process, as detailed herein.

A workplace investigation is a probative search for the truth that uses evidence of fact to establish whether Commonwealth workplace laws are being observed. In the course of an investigation, the Inspector will attempt to determine whether a contravention has occurred, who is responsible for the contravention and what rectification (if any) is required.

An investigation begins as soon as it has been received by FWBC, although the initial stages may be conducted by FWBC employees other than Inspectors. A key concept for all stages of investigations is the requirement to maintain contemporaneous file notes. All FWBC employees who have contact to any party in relation to a FWBC investigation are required to make a file note containing details of the event, for example a phone call to a complainant, or a meeting with a suspect during an investigation. A file note template has been developed which contains all relevant information which may be required should the matter proceed to litigation.

The investigation management processes are to be followed when a complaint has been progressed to investigation.

3.3.1 Definition of investigation management

Investigation management is a system of planning, organising and undertaking an investigation in a manner that maintains the quality and integrity of the decision making process within the investigation. Investigation management also ensures that investigations are conducted thoroughly, properly and in a timely manner.

Workplace relations investigations will vary and the level of investigation will differ, depending on the complexity and seriousness of the alleged contravention. For example, in wages and conditions investigations most of the information an Inspector requires will be provided by the time and wage records and industrial instruments, whereas in investigations into complex matters witness statements and records of interview can be the focus of the evidence.

What remains consistent is the investigative process and the management of the stages in an investigation. The common features of all investigations by Inspectors are:

- planning and preparation
- decision making

- collation and assessment of evidence
- determination
- outcome.

3.3.2 Benefits of investigation management

Effective investigation management ensures that each investigation regardless of subject matter or complexity is completed in a methodical and professional manner. Investigation management simplifies the investigation process into key areas that are equally applicable to all Inspectors.

By following the keys in sound investigation management, resources are used to best effect, and sources of evidence are less likely to be overlooked. This produces a holistic investigation that encompasses all possible avenues of inquiry.

Investigation management also supports the quality and integrity of the decision making process within investigations by ensuring that appropriate management review and sign-off are key features of all investigations. Applying quality assurance and management intervention points in the investigation process ensures that the minimum standards of an investigation are met.

3.3.3 Planning and preparation

Planning and preparation for an investigation is necessary in order to assist the Inspector to have a clear understanding of the objectives of the investigation and a systematic approach to achieving those objectives.

Planning and preparation begins with identifying the relevant parties to the complaint and establishing the precise nature of the complaint. Each allegation is comprised of elements, or points of proof, that are required to be established in order to prove whether or not there has been a contravention of Commonwealth workplace laws. In many cases, initial discussions with the suspect and the complainant will establish whether any points of proof are agreed. The points of proof that remain in dispute then become the facts in issue.

Within seven days of commencing an investigation, an Inspector must:

- Commence a *File Initiation Checklist*
- Complete a *Record of Decision to Investigate*
- If the case is expected to exceed 30 days or has a measure of complexity, complete an investigation plan and evidence matrix (see 3.3.3.2)
- If the investigation is not expected to exceed 30 days, complete the *30 Day Checklist*
- Send appropriate correspondence to the complainant, and if appropriate the suspect.

During planning and preparation the Inspector evaluates the facts in issue and identifies the possible avenues of inquiry to be pursued. Avenues of inquiry are the various sources an Inspector can utilise in order to obtain the evidence required to substantiate or disprove the facts in issue. The available avenues of inquiry may vary between investigations dependent on the nature of the allegations but include documentary evidence such as time and wage

records, correspondence between the suspect and the complainant, statements from the complainant and other witnesses, and records of interview.

3.3.3.1 Record of decision to Investigate

Before an Inspector commences an investigation, a Record of Decision to Investigate form must be completed, actioned and attached to AIMS and a copy placed onto the hard copy TRIM file.

Inspectors should refer to the AIMS User Guide for instructions on actioning and attaching the Record of Decision to Investigate to the AIMS case management system.

3.3.3.2 Investigations plans

Within 7 days of an investigation commencing an Investigation Plan will be developed by the Lead Case Officer and oversighted by the Assistant Director

Investigations Plans will be reviewed by the Assistant Director and State Director at case management meetings to ensure it meets current and future requirements for the conduct of the investigation

The Investigation Plan is ***the first of a two stage*** phase to be completed when preparing your investigation.

Once completed this plan should be printed and signed (electronically) by the Lead Case Officer and Assistant Director in the appropriate sections. The document should then be saved to DM and linked to the AIMS Investigation data sheet on the 'Administration' page. There is provision within the Investigation Plan for the following document the 'Evidence Matrix' to be hyperlinked to it.

The second stage is the Evidence matrix. This matrix can and should be varied to reflect the changes that inevitably occur during the course of an investigation. This matrix should be hyperlinked within the Investigation Plan in the appropriate section.

A copy of the CDR must be attached to your AIMS running sheet under the 'Investigation Review' tab, and where necessary changes to the investigation are to be reflected in amendments to the 'Evidence Matrix'.

3.4 Decision making

Decision making is an integral skill that is utilised throughout the investigation management process.

Having established the facts in issue and the possible avenues of inquiry, the Inspector utilises the investigative mindset approach to prioritise tasks (refer 3.10.1). Prioritisation does not refer to the inherent importance of the task to be performed but to the advantages of performing one task in preference to another. For example, witness statements are often more reliable when taken as close to the event as possible and will subsequently be given a high priority, whereas lodgement documents can be obtained at any time and so can be afforded a lower priority.

The decision making process is also an appropriate time for Assistant Director engagement to ensure that the minimum standards are met. The evidence matrix is utilised at this time as a planning tool to map the methodology to be followed during an investigation and as an evaluation tool for Assistant Directors.

3.5 Preliminary Investigative Steps - Establishing Jurisdiction

3.5.1 To determine jurisdiction under the FWAct

For an Inspector to be authorised to investigate a complaint under Commonwealth workplace laws, the Inspector usually will need to establish that there is an employment relationship (subject of the complaint) that falls within the jurisdiction of FWBC.[2]

For the period from 1 July 2009 onwards, the following provisions of the FW Act and the T&C Act will need to be considered:

- whether the suspect is a national system suspect (as defined in Section 14 of the FW Act).
- whether the complainant's wages and/or casual loadings are provided by any national minimum wage order set or varied by the Minimum Wages Panel within Fair Work Commission)
- whether the terms and conditions of the complainant's employment are provided by an enterprise agreement under the FW Act, including a single-enterprise agreement, a multi-enterprise agreement, or a greenfields agreement
- the application of any transitional provisions and instruments that operate during the bridging period from 1 July 2009 to 31 December 2009
- whether any alleged adverse action relating to discrimination occurred or continued on or after 1 July 2009 (see Chapter 11 – Discrimination).

In addition, for the period from 1 January 2010, the following further provisions of the FW Act and the T&C Act will need to be considered:

[2] There are also some matters (discrimination) relating to prospective employees and contractors where FWBC has jurisdiction (refer Chapter 11 - Discrimination, and Chapter 8 – Wages and conditions investigations).

- whether any of the complainant's entitlements are provided by the National Employment Standards (NES) under the FW Act
- whether the terms and conditions of the complainant's employment are provided by a modern award
- whether any other terms and conditions of the complainant's employment are inferior to (and hence displaced by) those terms and conditions provided by the NES and the applicable modern award
- the application of any transitional provisions and instruments that continue in operation after the bridging period
- whether a state referral of powers means that the employment terms and conditions are now provided by Commonwealth workplace laws.

3.5.2 To determine jurisdiction under the FWBI Act

To establish if FWBC has jurisdiction over the matter, the Inspector should determine if:

i. The parties to the complaint are (as defined in s4 FWBI)
   - o building employees
   - o building suspects or
   - o building industry participants

ii. The matter involves 'Building Work' as defined in s5 of the FWBI

3.5.3 Determining if a suspect is a constitutional corporation

The most common way of identifying a suspect as a constitutional corporation is to check whether the organisation is incorporated. This information is obtained from an Australian Securities and Investment Commission (ASIC) search, which is done routinely by WCR Team when registering a complaint. A suspect's incorporated status is usually sufficient for Inspectors to assume that FWBC has jurisdiction.

In some matters the suspect will raise questions about FWBC's jurisdiction. This is particularly common where the suspect is an incorporated not for profit or government funded organisation (i.e. charity, sporting club). In such cases it is necessary to determine whether the suspect is either:

- a foreign corporation
- an Australian financial corporation (i.e. banks, building societies) or
- an Australian trading corporation.

Most commonly, FWBC deals with trading corporations. The test for whether an entity is a trading corporation so as to give FWBC jurisdiction is:

- is the organisation incorporated?
- is the organisation involved in trading activities?
- are the trading activities of the organisation substantial or significant part of its overall activities?

Trading activities generally include buying, selling or exchanging goods and services for reward. A corporation will not be excluded from the definition of trading corporation merely

because it does not, or does not desire to, make profit (many trading companies are not profitable).

The Inspector should make inquiries about the entity's operating activities. If any such trading activities are identified, the Inspector must consider the nature of the overall activities of the organisation, to determine whether they form a substantial or significant part of the whole of the suspect's activities.

Inspectors should consult their Assistant Director and/or Legal Group if they require further assistance on jurisdictional matters.

3.5.4 Statute of limitations

As the capacity of FWBC to litigate is restricted by the time limits set within the FW Act (six years), Inspectors must ensure that due consideration is given to this issue.

Section 544 of the FW Act specifies limitation of time periods for FW Act contraventions.

The BCII Act did not previously specify a limitation period. When dealing with former BCII Act contraventions, FWBC staff should be aware that paragraph 79(3)(a) of the *Judiciary Act 1903* (Cth) will have application. This paragraph states that the limitation period will be that specified in the relevant jurisdiction's (state or territories) limitations act. In some jurisdictions this may be as short as two years from the date of the contravention.
Because time limitations may vary from state to state, if there is any doubt as to the limitation period to apply in relation to a contravention, it is recommended that advice be sought from FWBC Legal Group.

3.6 Dealing with Complainants

3.6.1 Checking History of Complaints

Firstly, when a complaint is received, Inspectors should conduct a search to check whether either party to a complaint has any history with FWBC recorded in AIMS. This information may assist Inspectors in planning their investigations.

3.6.2 Complainant with a history of lodging complaints

A complainant with a history of lodging complaints may meet the definition of a persistent complainant. Where the Inspector determines that the person is a persistent complainant, the Inspector may elect to inform the complainant that the matter is not going to be investigated further by FWBC at this time and advise the complainant of their options for seeking resolution. This decision should be made in conjunction with the Inspector's Assistant Director and with the approval of the director on a case by case basis.

This practice in no way limits the ability of Inspectors to initiate or participate in investigations where the complainant may have had a prior matter investigated by FWBC. However, this practice does present the complainant and Inspector with alternative appropriate options,

where the public interest and interests of the agency require that resources should be directed to other matters.

3.6.3 Persistent complainants

Within the context of FWBC's investigation functions, a complainant can be categorised as a persistent complainant by being a repeat complainant or a vexatious complainant. Whether the complainant is determined to be repeat or vexatious, they are treated in the same manner, i.e. as a persistent complainant.

3.6.4 Repeat complainants

Where a complainant has two or more complaints with a different suspect in a 12 month period and the complaint appears to be minor, the complainant may be categorised as a repeat complainant.

The rationale for this is that once FWBC has informed the complainant of their lawful entitlements and assisted in the resolution of a recent previous complaint, the complainant should be in a position to safeguard their own interests with subsequent employment in that industry.

If the subsequent complaint is about the same suspect, the complainant is not to be categorised as persistent. Rather, the investigation process is to be undertaken as per normal procedures and follow-up of continuing or repeated non-compliance by the suspect is to be given priority.

3.6.5 Vexatious complainants

Where a complaint is brought for a collateral purpose, as a means of obtaining some advantage for which the proceedings were not designed, it is a vexatious complaint. It is necessary to recognise the right of people to instigate a complaint about a workplace issue and this right should not be unnecessarily or inappropriately curtailed. However, in order to manage workloads, optimise efficiencies and ensure that agency resources are being utilised appropriately, there are situations in which the discretion should be applied to determine a complainant as vexatious.

3.6.6 Limitations and guidance

Inspectors must take great care when categorising complaints and ensure that sufficient inquiries are undertaken prior to reaching this conclusion. A vulnerable person (as defined in the FWBC Guidance Note 1 - Litigation Policy) would not be categorised as a vexatious complainant.

Where a complainant is identified as a persistent complainant and no extenuating or special circumstances exist, the Inspector assigned to the matter **may elect** to refer the complainant to alternative methods of resolution. These methods may include mediation+
with the suspect, small claims litigation (conducted by the complainant or with the assistance of FWBC) or any other avenue available to the complainant. Such a decision

should be made in conjunction with the Inspector's Assistant Director and with the approval of their director on a case by case basis.

This practice in no way limits the ability of Inspectors to initiate or participate in investigations where the complainant may have had a prior matter investigated by FWBC. This practice does, however, present the complainant and Inspector with alternative appropriate options, where the public interest and interests of the agency dictate that resources should be directed to other matters.

3.6.7 Process when a person is a persistent complainant

Where the Inspector determines that the person is a persistent complainant, the Inspector may decide that the matter should not be investigated further by FWBC.

The Inspector should make this decision in conjunction with the Assistant Director and with the approval of their director on a case by case basis. In addition to the criteria listed above Inspectors should also consider a number of important factors which may guide their decision making. These include:

- the level of malice or culpability of the suspect
- the likelihood of the alleged contravention continuing or being repeated
- the most appropriate response to ensure an effective deterrent against continuing contravention or contravention by others
- whether the suspect has a history of prior contraventions
- the extent to which the complainant is prepared to cooperate in relation to the investigation
- the cost to any complainants as a result of the alleged contravention
- the ability and capacity of the agency to undertake the investigation (issues to consider include resources available and other investigations already underway)
- whether the proposed response option could be counter-productive in terms of maximising compliance with legislation and
- the likely effect of classifying the complainant as a "persistent complainant" in terms of ability of the complainant to pursue the matter on their own behalf.

In the case where it is determined that such a complaint is not going to be investigated further by FWBC, the Inspector must:

- confirm the decision with the Assistant director, including the reasons leading to the decision, and obtain sign-off
- notify the complainant that the matter is not going to be investigated further by FWBC at this time and advise the complainant of their options for seeking resolution, including through small claims where appropriate (see Chapter 14 – Non Litigation Outcomes and Chapter 15 - Litigation)
- advise the complainant of the appropriate methods for seeking review of the decision should they wish to do so
- make a note on AIMS and include a hard copy on the file detailing the determination and the reasons
- complete the complaint.

In reaching any decision regarding persistent complainants, Inspectors must ensure that they abide by the principles of natural justice and procedural fairness. In short, this involves, but is not limited to, the following principles:

- all parties must have the right to be heard
- all relevant submissions must be considered
- matters which are not relevant must not be taken into account
- the decision-maker must be fair and just.

There are no specific requirements relating to "persistent complainants" within the FW Act and the FW Regulations. There are, however, detailed provisions in the *Public Service Act 1999 (Cth)* which proscribe the manner in which Inspectors (as APS employees) must conduct themselves in the course of their employment.

In summary, APS employees must treat the public with respect and courtesy, and without harassment. They should provide reasonable assistance and help the public to understand their entitlements and obligations. APS employees must administer the law fairly and equitably and provide responsive, efficient and effective services. In addition, Inspectors must ensure that they comply with the APS Code of Conduct and Values.

3.6.8 Suspect with a series or history of complaints

Where a search on AIMS identifies multiple active complaints against a single suspect, the Inspectors assigned to the complaints should liaise with each other to determine the best strategy for conducting the investigations and ensure resources are used as effectively as possible.

Where AIMS reveals that a particular suspect has a history of complaints and these complaints have been sustained, it may be an indication that the suspect is intentionally failing to meet their obligations under Commonwealth workplace laws. Inspectors must bring these matters to the attention of their Assistant Director to assess how to progress the investigation.

3.6.9 Confidential complaints

FWBC has the capacity to investigate confidential complaints in most instances. The complainant should be asked to confirm if they authorise FWBC to reveal their identity, and this authorisation should be obtained in writing. If the complainant does not clearly authorise FWBC to reveal their identity, it must be assumed that they have not agreed to reveal their identity, and that the complaint is confidential.

Where the complainant has indicated that the complaint has been submitted on a confidential basis, the Inspector must not contact the suspect without first obtaining the permission of the complainant.

3.6.9.1 Contacting the confidential complainant

The Inspector is restricted in the range of activities they may undertake in the investigation of a confidential complaint. Before making any contact with the suspect, the Inspector should contact the complainant, ascertain the nature of the alleged contraventions, and ensure the complainant's expectations are in line with the potential actions and outcomes available to FWBC.

The complainant can be advised that they may wish to withdraw and re-lodge the complaint at a later stage, when they are no longer concerned with having their confidentiality. If the complainant does agree to withdraw the complaint, the Inspector should seek written confirmation from the complainant.

It should be explained to the complainant that the Inspector's ability to investigate a complaint and observe natural justice may be impeded by the complaint's confidentiality. In addition, Inspectors should ensure that complainants understand they may be inadvertently identified if they wish to remain confidential, and work for a very small business. It should further be explained to the complainant that if contraventions are identified and a suspect does not voluntarily comply, the ability for FWBC to use enforcement and litigation options will be severely limited while the complaint remains confidential. Complainants should also understand that if FWBC decides to proceed a matter to litigation, the confidential nature of a complainant will come under review.

3.6.9.2 Where complaints cannot be investigated confidentially

If it appears that a complaint cannot be investigated on a confidential basis, it is essential for the Inspector to advise the confidential complainant of this (before any contact is made with the suspect). In such cases, the Inspector should seek instruction from the complainant as to whether or not they wish to waive confidentiality.

If the complainant does agree to waive confidentiality, the Inspector should seek written confirmation from the complainant. When the written confirmation is received, the Inspector should remove the confidential status of the complaint in AIMS, and investigate the complaint further as a non-confidential complaint, according to the relevant procedures detailed elsewhere in this Guide.

Where the complainant elects not to waive confidentiality, the Inspector should seek direction from their Assistant Director as to what actions remain available. In particular, a decision should be made as to whether FWBC will progress the confidential complaint (see 6.4.3 below) or complete the complaint.
If the confidential complaint is completed at this point, the information provided by the complainant may further:

- inform strategic decisions about FWBC's future targeted campaigns, including the industries and locations to be included
- result in the suspect specifically being audited as part of a future targeted campaign in the suspect's industry or location
- be otherwise noted and monitored for intelligence purposes.

3.6.9.3 Progressing a confidential complaint

Confidential complaints may be progressed in a variety of ways, and the initial approach made to the suspect will differ depending on the method chosen.

The chief method of approach to progress a confidential complaint is to advise the suspect that FWBC has received a confidential complaint (without revealing the identity of the complainant).

There is the practical need to withhold some information from the suspect (either the identity of the complainant or that a complaint has been lodged).

Before contacting the suspect, the Inspector should decide the best method of progression in consultation with their Assistant Director, and in consideration of the circumstances of the case. Issues to consider would include:

- the complainant's views, including the reasons sought for confidentiality
- the likelihood that a suspect could identify a confidential complainant (e.g. the size of the business or community)
- the consequences if the confidential complainant is identified.

There is some risk of the complainant being identified if the suspect is notified that a confidential complaint has been lodged. For this reason, the suspect should not be notified that there is a confidential complaint unless:

- the complainant has been advised beforehand; and
- the Inspector reasonably expects that the complainant could not be identified by the disclosure of a confidential complaint's existence.

If the Inspector and Assistant Director have decided that progression of the matter as an audit (without revealing the existence of a complaint to the suspect) is required, this decision should be approved by the relevant director before proceeding.

3.6.9.4 Requests regarding the details of confidential complaints

In the course of actioning the matter, the Inspector might be asked for information regarding the identity of a complainant, or the existence of a complaint. Typically, such questions would be asked by the suspect, but they may also be asked by the suspect's representatives, employees, or other persons.

As noted above, a confidential complaint often is actioned by revealing to the suspect that a confidential complaint has been lodged. If the Inspector is asked by anyone for the identity of the complainant, the Inspector should explain that they cannot discuss who has lodged the complaint. The Inspector is not required to provide further detail.

In exceptional circumstances, a confidential complaint may be actioned as an audit. In this case, if the Inspector is asked if a complaint has been lodged, the I Inspector should explain that an audit is being conducted, that audits originate for a variety of reasons, and that this is

the fullest appropriate information[3] that can be provided at this time. The Inspector is not required to provide further detail. The Inspector should not reveal that a confidential complaint has been lodged when the matter is actioned as an audit.

3.6.9.5 Where a complainant decides to waive confidentiality during the investigation

In some instances, a complainant may decide after the Inspector has made initial contact with the suspect that they no longer wish to remain confidential. This can pose difficulties for the Inspector depending on the stage of the investigation, particularly if an investigation is reaching its end.

Where a complainant seeks to remove confidentiality during an investigation, the Inspector should discuss the matter with their Assistant Director, in order to reach a decision as to the appropriate course of action. This may result in:

- the investigation continuing as a confidential complaint (or audit)
- the investigation ceasing
- the identity of the complainant being revealed to the suspect, and the investigation continuing as appropriate (including as an investigation by field staff).

In the case where the identity of the complainant is revealed, the Inspector should explain to the suspect that they were not at liberty to reveal the identity of the complainant (or the existence of a complaint) previously, but that they are able to do so now.

3.6.9.6 Where a confidential complaint does not result in voluntary compliance

Where there are identified contraventions and the suspect is unwilling to rectify them, consideration will be given to the relevant enforcement and litigation. At this stage, the Inspector must ensure that the confidential complainant is advised that confidential status cannot be maintained once the decision has been made by FWBC to proceed to enforcement or litigation (including small claims). The Inspector should consider the complainant's own views in this regard concerning their confidentiality, and these views will be a factor in considering whether FWBC proceeds with enforcement and litigation option.

3.6.9.7 Complainants with special needs

There are no specific requirements relating to complainants with special needs in the FW Act. However, any complaint involving parties with special needs should be dealt with particular sensitively. This can often involve using different, high level investigative techniques.

Vulnerable workers may present Inspectors with a discrete array of issues for consideration in the investigation of a complaint. Therefore Inspectors must be able to identify a vulnerable worker, in the context of an FWBC investigation. In identifying a worker as vulnerable, the Inspector will also need to understand the conditions of employment of special categories of potentially vulnerable workers. There is a particular public interest in FWBC protecting the

[3] For the phrase "fullest appropriate information", see Ord, Brian, Shaw, Gary and Green, Tracey, *Investigative Interviewing Explained (Second Edition)*, Chatswood NSW: LexisNexis Butterworths, 2008 p 85.

rights of vulnerable workers, because their capacity to protect their own rights is often inhibited.

3.6.9.8 Definition of a vulnerable worker

A vulnerable worker for FWBC purposes is a person who may find it difficult to seek and/or access assistance to resolve issues in the workplace.

Often, vulnerable workers are people who belong in one or more of the following groups:

- young people
- trainees
- apprentices
- people with a physical or mental disability or literacy difficulties
- recent immigrants and people from non-English speaking backgrounds (NESB)
- the long-term unemployed and those re-entering the workforce
- outworkers
- people with carer responsibilities
- Indigenous Australians
- employees in precarious employment (e.g. casual workers).

The categories outlined above are a guide to potential vulnerability only. Not all employees from these groups will necessarily be vulnerable and it should be noted that this is not an exhaustive list. For further information on FWBC definition of vulnerable workers, please refer to FWBC Guidance Note 1 - Litigation Policy.

3.6.9.9 Assisting vulnerable workers with complaint lodgement

Vulnerable workers are provided with a different wages and conditions complaint kit.. This kit places less emphasis upon the vulnerable worker pursuing self-resolution of the issue(s) prior to FWBC escalating the matter for investigation by field staff.

It may also be appropriate for an Inspector to assist a vulnerable worker in completing a complaint form (or other correspondence that details their complaint). However, in doing so, an Inspector must exercise caution to ensure that they are assisting to accurately record the complaint.

The assistance provided by Inspectors should be appropriate to the vulnerable worker's particular circumstances. There is no prescribed means by which Inspectors should assist vulnerable workers. Rather, Inspectors should consider each vulnerable worker's individual circumstances and evaluate how FWBC can best assist them.

FWBC has a pro-active focus on protecting vulnerable workers. It has displayed this by conducting targeted education and compliance campaigns in industries that employ high numbers of vulnerable groups. In addition, the fact that a complainant is a vulnerable worker will be relevant to FWBC's decisions whether to litigate in respect of the complaint (refer Guidance Note 1 - Litigation Policy).

3.6.9.10 Assisting vulnerable workers during the investigation process

Where appropriate, Inspectors may need to provide additional assistance to vulnerable workers to overcome the particular challenges their vulnerabilities create. The type of assistance required will vary, but may include:

- taking extra time to explain issues
- utilising interpreters or translators
- using specialist services for people who are deaf or have a hearing or speech impairment
- offering vulnerable workers the option of having a friend, family member or support worker present during interviews and meetings
- conducting meetings and interviews in non–threatening location (e.g. their home)
- providing practical support in attending court for small claims procedures (refer Chapter 14 Non Litigation Outcomes)
- referring the worker to other appropriate support services (legal aid, union, etc).

Typically, unless the vulnerable worker has requested that their complaint be treated as confidential, the Inspector will contact the suspect directly to advise them of the complaint. **In every situation the assistance provided to the complainant should be tailored to the vulnerable worker's particular circumstances.** There are a range of services available to assist in specific situations such as interpreters, and the National Relay Service for people who are deaf or have a hearing or speech impairment.

Additional educational assistance should be considered when dealing with a vulnerable worker. There is a range of tools available which are specifically tailored for foreign workers, international students, young workers, and their suspects. For example, an Inspector may refer a suspect of a young worker to 'An employer's guide to employing young workers' Best Practice Guide. Where the Inspector refers a vulnerable worker to educative material, this could be combined with an explanation on how to use the resource.

3.6.10 Dealing with aggressive people

Aggressive behaviour encompasses unacceptable, hostile behaviour directed against an Inspector. It includes behaviour which creates an intimidating, frightening or offensive situation, and/or adversely affects the Inspector's work performance. The issue of dealing with aggressive people is dealt with extensively in the FWBC's Human Resources document entitled the Client Aggression Guide. The Client Aggression Guide provides guidance in areas that Inspectors may encounter, such as aggression over the telephone, at the Inspector's office, and in the suspect's premises, as well as procedures for dealing with persons who threaten self-harm.

As a summary, it is useful to note that Inspectors have a responsibility to provide a professional service at all times. When dealing with aggressive people the following principles may assist in handling the situation:

- stay objective and do not provide personal views
- explicitly state the factors taken into account in the decision making process to the aggressive person

- make every effort to put the affected person at ease, terminating discussions only at such time that all attempts to communicate have failed
- where the behaviour disrupts the Inspector's ability to provide a service to others, consider asking the aggressive person to leave the premises or seek the assistance of the Assistant Director
- with regard to aggressive language and/or abuse during telephone conversations, advise the aggressive person that the conversation will be terminated if the offensive language or other aggressive behaviour does not cease
- do not risk personal injury in defence of agency material (such as files or vehicles)

3.6.10.1 Site Visits

In addition, FWBC takes a proactive approach to managing potential risks to FWBC staff. In particular, before undertaking a site visit, Inspectors should:

3.6.10.2 Assess the Site Visit

- Inspectors to complete 'Pre-site Visit Assessment' where a known or likely risk to the Inspector may occur.
- If serving a notice, taking a statement or interviewing a client, identify if this can be done by arrangement at some other location.
- Consider the site itself. Are there any known or suspected safety concerns which Inspectors should take into consideration prior to undertaking the visit?
- What is the purpose of the visit, will Inspectors simply be visiting the front office or is there a need to enter the work areas on that site?

3.6.10.3 Involve Assistant Director

- Discuss proposed site visit with their Assistant Director and obtain prior approval from Assistant Director.
- A minimum of two Inspectors should take part in all site visits.
- Assistant Directors should receive feedback and conduct site visit de-briefing as soon as practicable after the site visit to ensure any issues are recorded and acted upon.

3.6.10.4 Be Prepared

- Inspectors must have attended and completed the appropriate WH&S course and then carry with them a current Safety Induction Course Card.
- Inspectors must take with them and wear when required the appropriate Personal Protective Equipment (PPE).
- Inspectors must identify themselves and produce Inspectors identity card upon arrival at site.
- Inspectors need to know that if a person hinders, obstructs, intimidates or resists an Investigator performing his or her official duties, he/she may be guilty of an offence under Section 149.1 of the Commonwealth Criminal Code Act 1995. Penalty: Imprisonment for 2 years.
- if necessary, an Inspector may consider warning a person of the offence, but care should be taken if this might inflame a situation.

- Plan an exit strategy before visiting a site. If safety is or could be compromised, immediately retreat from the situation. If prevented or unable to retreat, call the police on 000.

3.6.10.5 No incident (Proactive and Reactive Visits)

Where there were no incidents or staff safety issues noted, the post-visit evaluation will be debriefed at the discretion of the Assistant Director.

3.6.10.6 Incident or staff safety issue (Proactive and Reactive Visits)

If an incident occurs and an Inspector is subject to an assault, all staff involved are to follow the procedures set out in the Incident Response Guide located on the Inspector Resource Page.

3.6.11 Identifying the need for interpreters

The need for an interpreter should be identified as early in the investigation process as possible. Once identified the Inspector should seek the approval of their Assistant Director to engage an interpreter. The Translating and Interpreting Service (TIS) (www.immi.gov.au) is FWBC's preferred provider of accredited interpreters/ translators. Fuller details are contained in 11.9 below.

3.6.12 Use of interpreters

Where a complainant, suspect, or other witness is from a non-English speaking background, or is subject to some other form of communication barrier such as deafness or speech impairment, then an interpreter may be required. This need should be identified and addressed in the planning and preparation phase of the investigation management process.

The need for an interpreter may be identified from the complaint form, a referral form, or from the Inspector's initial contact with the person. Where such a need is identified the r Inspector should gain approval from their Assistant Director to engage an interpreter
.
The need for an interpreter should be identified as early in the investigation process as possible. Once identified the Inspector should seek the approval of their State Director to engage an interpreter, and complete the following actions:

- Complete the FMA Regulation 9 Form (located on FWBC Intranet under Finance)
- Part A and B of the form must be completed; the State Director (or other financial delegate) is to approve part C
- A copy of the FMA Regulation Form 9 must be kept on the TRIM file for audit purposes. Inspectors should also scan and attach a copy to a file note in AIMS.

The Translating and Interpreting Service (TIS) is FWBC's preferred provider of accredited interpreters/ translators.

National Interpreting and Translation Guide

Bookings:

1. Seek approval from your State Director to use an Interpreter for your investigation

2. FWBC's preferred provider is Translating and Interpreting Service (TIS) National
3. FWBC's client code is: **C653407**
4. To book an on-site interpreter to attend an appointment- 1300 655 082
5. To use an interpreter over the telephone- 131 450

Information you need to know prior to booking:

1. Language required and any special language needs (i.e. dialect)
2. Interpreter gender preference
3. Site address
4. Non English speaker's name
5. Specific requirements/ nature of appointment
6. Appointment date and time
7. Appointment finish time (minimum appointment is 90 minutes)

Victorian Interpreting and Translation Guide

On-site bookings:

1. Seek approval from your State Director to use an Interpreter for your investigation
2. FWBC's preferred provider in Victoria is VITS Language Link (http://www.vits.com.au/default.htm)
3. FWBC's client code is: 30229
4. To book an on-site interpreter to attend an appointment- 03 9280 1955

Information you need to know prior to booking:

1. Language required and any special language needs (i.e. dialect)
2. Interpreter gender preference
3. Site address
4. Non English speaker's name
5. Specific requirements/ nature of appointment
6. Appointment date and time
7. Appointment finish time (minimum booking is 1.5 hours)

Telephone bookings:

VITS has an automated telephone interpreting system. Before using this service ensure your non-English speaker is present, and utilise a speakerphone if possible. If you need to contact the non-English speaker (NES) by phone, you must use a telephone with conference (three-way call) facilities.

1. Dial the phone number that corresponds to the language required:

(03) 9280 1901	Vietnamese; Bosnian; Amharic
(03) 9280 1902	Greek; Somali; Thai
(03) 9280 1903	Turkish; Polish; Cambodian
(03) 9280 1904	Arabic; Serbian; Mandarin
(03) 9280 1905	Italian; Macedonian; Cantonese
(03) 9280 1906	Spanish; Croatian; Russian
(03) 9280 1907	All other languages

2. Enter FWBC's client code: **30229**
3. Say your name and the name of your organisation.
4. If you require VITS to make the conference call connection, enter the phone number of your client, or press #.
5. Enter 1, 2 or 3 to select the particular language your NES client requires.
6. Once connected to the telephone interpreter, proceed to talk to your NES client and the telephone interpreter.
7. If you dial the 'all other languages' number 9280 1907, your call will transfer to a VITS operator who will assist in connecting you to an interpreter.
8. You must have a conference call facility to dial out to your NES client if they are not present with you, as VITS cannot connect you to your client.

Interpreters should not be sourced from the interviewee's friends, family members, or any other person connected to the case, as it may compromise the integrity of the evidence collected due to the interviewee's reluctance to speak freely, and/or the interpreter's failure to understand their role and the importance of impartiality in the interpretation process. The ultimate aim of using an interpreter is so that no person is disadvantaged in the investigation process.

In conducting interviews with or taking statements from non English speaking witnesses it is best practice to:

- have the actual words spoken by the interviewee electronically recorded to allow the interview to be independently interpreted or translated later, if required
- have any statements written and signed in the witness's native tongue, with a translated English statement attached.

Where an interpreter is required for a witness in a litigation matter, the Inspector should advise the Legal Group as early as possible so that suitable arrangements can be made with the court.

3.7 Investigation Management

3.7.1 Investigation Mindset

The *Investigative Mindset*, a concept originating from international investigative best practice, involves applying a set of principles to the investigation process. This enables

Inspectors to develop an approach that ensures that decisions made are appropriate to the case, are reasonable and can be explained to others. While this section on the investigative mindset is based on materials developed by the UK National Centre for Policing Excellence, it has been appropriately adapted to meet the requirements of FWBC's jurisdiction. This includes amendment of evidential standards to reflect the less substantial burden of proof for civil matters, and other measures designed to appropriately reflect the context within which FWBC functions.

The application of the investigative mindset will encourage continuous improvement to the way in which Inspectors examine material and make decisions. There is no step-by-step process that will assist the Inspector to develop the mindset. The doctrine highlights that the investigative mindset is a state of mind or attitude and can be adopted by Inspectors over time through continued use.

The investigative mindset can be broken down into the five following principles:

- **understanding the source of the material** so as to best appreciate the value of the material itself
- **planning and preparation** of the investigation so as to maximise effectiveness and minimise duplication and double handling
- **examination** of records and the contents of statements to ensure that the account is accurate, clear and able to withstand challenge.
- **recording and collation** of decisions made and evidence obtained in order to ensure the integrity of both the decision making process and the evidentiary basis of any contravention letter, compliance notice or litigation
- **evaluation** on a regular basis of both the progress of the investigation and further steps required.

The investigative mindset can be summed up by the ABC approach:

- **A**ssume nothing
- **B**elieve nothing
- **C**hallenge everything.

Inspectors must keep an open mind and be receptive to alternative views or explanations. Inspectors should never rush to premature judgements about the meaning of any material or the reliability of its source. To accept material at face value risks overlooking alternative sources of material or alternative interpretations.
Applying the investigative mindset to the examination of all sources of material will ensure that:

- the maximum amount of relevant material is gathered
- its reliability is tested at the earliest opportunity
- immediate action is taken in relation to it
- relevant records are made
- the material is appropriately stored.

In applying the investigative mindset, Inspectors should be aware of factors which adversely affect the quality of decisions taken. In general, FWBC managers must be aware of and manage the following limitations in the decision making of Inspectors:

- personal experience
- unconscious adherence to working rules (following familiar practices that may be out of date)
- personal bias
- early acceptance of a particular view point
- subjective personal perceptions.

By being conscious of these potential investigation pitfalls, Inspectors can enhance their objective and disciplined approach to decision making.

3.7.2 Investigation pitfalls

All workplace investigations demand planning, organisation, evaluation and review. At any one time, an Inspector may have to manage numerous resources and issues in an investigation while also managing a heavy caseload and supervising other Inspectors. It is essential that an Inspector manage all aspects of an investigation simultaneously in order to minimise the risk to the credibility and efficacy of both the individual Inspector and the agency as a whole.

There is potential for error in any investigation. Assistant Directors must remain cognisant of the common potential pitfalls of an investigation, such as:

- lack of planning
- lack of clear investigational objectives
- lack of objectivity (resulting from bias, conflict of interest, or rigid adherence to preconceived views)
- failure to follow due process and/or taking shortcuts
- lack of leadership
- poor investigation documentation
- lack of training.

The measures taken to deal with investigation pitfalls can vary from case to case. Inspectors must be able to:

- recognise risks that may occur during an investigation and their likely impact upon individuals, the investigation or the agency
- make appropriate decisions to manage identified potential pitfalls
- keep detailed records demonstrating the steps taken to manage and monitor risk
- communicate details to others of the potential risks, or the strategies established to deal with it (colleagues, complainants or witnesses.)

If something does go wrong in the course of an investigation, an Inspector should acknowledge and seek to rectify the problem as soon as it is discovered. The Inspector's assistant director should be notified, and depending on the scale of the problem, the Director might also need to be advised. Under guidance from the Assistant Director or Director, the Inspector should attempt to rectify the error immediately. Internal discussions and any subsequent actions taken by the Inspector should be documented on the case file.

The personal and professional limitations of Inspectors must be recognised and acknowledged by their assistant director and/or Director. Within FWBC, there should be no reluctance to hand over responsibility for an investigation to a more qualified Inspector.

Inspectors are responsible for seeking guidance and assistance if they are not confident about any aspect of an investigation.

Full and accurate records must be maintained throughout the investigation process. If a quality review officer, independent review panel or court reviews an investigation or its methods, those undertaking the review must be able to determine if the Inspector's decisions and actions were reasonable. Accurate record keeping will provide a key point of reference in the event of any inquiry or review.

3.7.3 Managing the expectations of parties

3.7.3.1 Regular contact with parties

A common source of criticism or complaint about the conduct of an investigation is that an investigator did not give sufficient and ongoing feedback to the complainants.[4] Complainants should be kept up to date and advised, in general terms, of the progress in investigating or dealing with their complaints and the time frames that apply. Inspectors must advise all relevant parties to an investigation of any key developments and provide them with updates particularly where there are unforeseen delays in completing a matter. It is the expectation of FWBC that Inspectors liaise regularly with relevant parties (unless the parties have been notified previously of significant delays). Updates may be written (letter, fax or email) or verbal. However, Inspectors must ensure that all contact is noted on the file and in AIMS. (refer to FWBC Guidance Note 2, section 9.1 for further information)

3.7.3.2 Managing expectations

Inspectors should ensure parties understand that the role of FWBC is to enforce minimum entitlements and that in carrying out this role, Inspectors do not represent or advocate for either party. When dealing with parties to an investigation, Inspectors must not speculate on the likely outcome of an investigation at an early stage. Until all relevant evidence has been gathered and assessed, the Inspector must remain open-minded regarding the potential outcome of the investigation.

An Inspector must be certain that the conduct of their investigation is fair and proper and in accordance with the principles of natural justice. In practice, this means all parties to an allegation are afforded procedural fairness. All parties should be given the opportunity to present their case, and to respond to any allegations made during the course of the investigation. Specifically, the person affected must have the opportunity to:

- show cause why a particular action should not be taken
- put forward arguments supporting their position
- deny any adverse allegations and provide evidence in support
- present alternative explanation for particular matters

[4] NSW Ombudsman, *Investigating Complaints*, 2004, p. 74.

- request that a decision or determination is reviewed

The Inspector must be unbiased, act only on the basis of logically probative evidence, take into account all relevant considerations, fully inform interested parties of the nature of the decision to be made and the basis upon which that determination will be made and allow persons about whom a decision is to be made to be heard on the relevant points.

Inspectors should not imply that there will be a quick resolution, that the recovery of underpayments is guaranteed, or that non-compliance will necessarily result in FWBC litigation action. In relation to complex investigations in particular, Inspectors should ensure that complainants understand that a contravention does not necessarily result in underpayments or compensation for the complainant.

Inspectors must ensure that a complainant's expectations are as realistic as possible. If a complainant develops unrealistically high expectations, they may become dissatisfied with the way in which the complaint is handled, the manner in which an investigation is conducted or the outcome of any investigation.

All information provided to the complainant, whether in writing, by telephone or face-to-face, should be in plain English.[5] Inspectors should avoid complicated technical or legal language. Any verbal advice to a complainant should be promptly and fully documented by the Inspector.

Managing relations with the suspect is equally important. It is important for an Inspector to remain sensitive to the concerns of the suspect and, as when dealing with a complainant, regularly inform the suspect of progress of the investigation. Procedural fairness requires that, at an appropriate stage, the suspect has the opportunity to reply to the substance of an alleged contravention.

Investigations that proceed to litigation require the Inspector to regularly liaise with the people with a legitimate interest in the complaint (e.g. the complainant, suspect, witnesses). Inspectors should keep all parties informed of the progress of any court hearings and outcomes.

When engaging with stakeholders relevant to an investigation, Inspectors are required to ensure that they make contemporaneous file notes. All FWBC employees who have contact to any party in relation to a FWBC investigation are required to make a file note containing details of the event. A file note template has been developed which contains all relevant information which may be required should an Inspector be called to account for the actions or decisions in the future.

3.7.4 Identifying the applicable industrial instrument

To identify the applicable industrial, transitional, or fair work instrument for a particular complaint, Inspectors should:

[5] NSW Ombudsman, *Investigating Complaints*, 2004, p. 74.

- check if an instrument is noted on the complaint form
- check if an instrument is noted on any documents provided by the parties to the complaint
- ask the suspect
- ask the complainant
- search Knowledge Bank to establish whether the suspect is respondent to awards or certified agreements, etc
- search the FWC website for transitional and fair work instruments, etc
- obtain confirmation to determine if an AWA and/or ITEA is in effect.

Initial inquiries do not always identify the relevant industrial, transitional or fair work instrument. The Inspector must then make an assessment of the work actually performed by the complainant during the period of employment being investigated and allocate an instrument of best fit. This involves the Inspector asking the complainant about their duties, comparing those duties with the scope or classification as stated in an applicable industrial, transitional or fair work instrument and allocating a particular instrument as relevant for that complainant.

In most cases, the type of work performed will be covered by an industrial, transitional or fair work instrument. For those employees where there is no such applicable instrument (often called an award/ agreement free employee), the Inspector should seek to ensure the complainant is receiving the minimum entitlements under the FW Act or T&C Act.

The Inspector should not simply rely on any prior determination noted on the file or in AIMS, but should ensure that the appropriate fair work instrument has been identified, in consideration of all of the information and evidence gathered during the investigation. The Inspector should seek the advice of their Assistant Director in making such identification where needed.

3.8 Establishing the facts – Evidence

3.8.1 Introduction

Establishing the facts involves gathering evidence from a range of sources. Evidence is material presented to a court to enable it to make findings on the existence or non existence of the facts that must be proven in order to sustain an allegation.

In the context of FWBC matters, evidence can be any records, statements, testimony or other material which are relevant to prove or disprove an alleged contravention of Commonwealth workplace laws.

The nature and quality of the evidence gathered by an Inspector during an investigation plays an important role in determining whether or not the matter can proceed to FWBC litigation action. Further, the evidence gathered during an investigation will also inform the Inspector's decisions throughout the investigation process, including in regards to:

- issuing contravention letters and/or compliance notices

- recommending enforcement action
- recommending that no further action should be taken.

This section will assist Inspectors in understanding the rules of evidence as they apply to workplace relations investigations. These rules not only affect the admissibility of material gathered during an investigation, but also affect the weight given to particular pieces of evidence by the court. The section outlines the different types of evidence that Inspectors may deal with and explains the relevant burden and standards of proof in FWBC litigation matters.

3.8.2 Rules of evidence

The *Evidence Act 1995* (Cth) (the Evidence Act) provides the legislative framework for evidence law in Australia. This section provides a basic overview of some aspects of evidence law that may be relevant to Inspectors in performing their duties. It is not intended as a comprehensive explanation of evidence law generally.

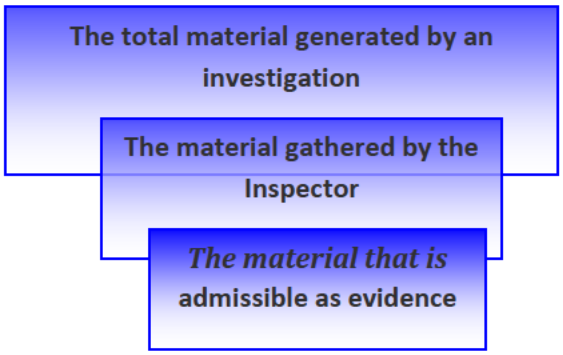
Where material is allowed to be put before the court as evidence, it is said to be admissible. If it is not allowed, the material is said to be inadmissible. Ultimately the court will decide on the admissibility of evidence. However, there are some general rules of evidence that Inspectors should bear in mind when conducting their investigation, so that the evidence gathered will not be excluded in court due to failures to follow the rules of evidence.

Inspectors should aim to gather material that will later be admissible as evidence if the matter proceeds to litigation. Inspectors are advised to gather all legally obtainable material in the first instance. Subsequently, Inspectors can utilise the investigative and evidential evaluation processes to assess the material's evidentiary value, and to decide what material can be used as evidence in court.

Where a matter is recommended for litigation, the evidentiary value of the material and its admissibility in court will be assessed by the Legal Group. Inspectors should always provide the Legal Group with an outline of all of the material that has been gathered to facilitate this assessment.

The following diagram illustrates the narrowing of focus that occurs within an investigation, from the initial gathering of all material available to the more limited volume of material that is admissible as evidence. These concepts are discussed further throughout this chapter.

Figure 3: Hierarchy of material[6]



3.8.2.1 Admissibility and relevance

The general rule of admissibility is:

- evidence that is relevant in a proceeding is admissible in the proceedings, unless excluded by some specific rule
- evidence that is not relevant in the proceedings is inadmissible.

The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings. Evidence may also be relevant if it relates to the credibility of a witness.

Facts in issue are the points of proof in dispute between the parties. Each alleged contravention is comprised of elements, or points of proof that are required to be established in order to demonstrate that there has been a contravention of Commonwealth workplace laws. Usually, the elements of a contravention are spelt out in the provision of the FW Act dealing with the issue in question. Not all points of proof will necessarily be disputed between FWBC and the suspect (e.g. the suspect may not dispute that the complainant was employed during a certain period, or performed certain duties).

When determining whether material is sufficiently relevant, Inspectors should consider whether or not it makes the facts in issue more or less probable, as this is the underlying test applied by the courts when considering relevance.

3.8.2.2 Exclusionary rule - hearsay evidence

The hearsay rule provides that the oral or written statements of a person who is not called as a witness are generally not admissible in evidence, because the person who made them is not on oath and is not subject to cross-examination. Hearsay is not excluded on the ground that it is irrelevant (it may be very relevant), but because it is considered to be untrustworthy.

[6] ACPO; Centrex; National Centre for Policing Excellence (UK), *Practice Advice on Core Investigative Doctrine*, 2005. Figure 2 (p45)

In deciding what is hearsay three questions need to be asked:

- is it a statement made out of court?
- was it made by a person other than the person testifying?
- is it being tendered in order to prove the truth of the statement?

If the answer to all three questions is yes, then the evidence is hearsay. If the answer to any of these questions is no, then it is not hearsay.

If, having considered the above questions, it is not clear whether or not the evidence is hearsay, the evidence could be included, and the court will have the ultimate decision as to whether the evidence is admissible or not.

3.8.2.3 Exceptions to the hearsay rule

Hearsay evidence may be admissible if it falls into one of the categories of exemptions from the hearsay rule. The types of evidence that are exempted from the hearsay rule include:

- evidence relevant for a non-hearsay purpose (e.g. if the purpose of the evidence is to prove what was said to the witness, not the truth of what was said)
- first hand hearsay where the maker of the representation is unavailable or whose appearance as a witness would cause undue expense, delay or impracticality (i.e. representations about something that a now deceased person did, saw or heard and then relayed to the witness)
- admissions (where evidence is given by a witness who saw, heard or otherwise perceived the admission being made)
- business records (including employment records)
- tags and labels
- telecommunications
- contemporaneous statements about a person's health
- evidence given in former proceedings
- statements made in public documents.

Inspectors should avoid relying on hearsay evidence to prove their case. However, the collection of hearsay evidence during an investigation may be beneficial to the investigation as it can provide relevant background information, or may reveal other avenues of inquiry for the Inspector.

3.8.2.4 Exclusionary rule - opinion evidence

The opinion rule provides that a witness's opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed (e.g. "John is a liar" is an opinion and would not be admissible as proof that John is in fact untruthful). Such evidence is excluded on the grounds that opinions and beliefs of ordinary individuals are irrelevant to the facts in issue. It is the function of the court (not the witness) to form opinions.

There are a number of exceptions to the opinion rule, the most notable of which is expert opinions. The opinions of persons considered to be experts are generally admissible when the subject is one in which competence to form an opinion can only be gained by a course of special study or experience (such as science, medicine, trade, technical terms, fingerprint identification). However, the opinions of experts are not admissible when the court is just as capable of forming an

opinion as the expert witness. Owing to their experience, Inspectors may be considered experts on certain aspects of Commonwealth workplace relations law and compliance.

3.8.3 Types of evidence

3.8.3.1 Best evidence

The term best evidence is most often used to describe primary evidence (i.e. evidence that by its nature suggests that better evidence is not available). An example of best evidence would be an original document. In the context of FWBC investigations, it is practice to sight original documentation and keep copies wherever possible.

This is not to say that other forms of evidence (sometimes called secondary evidence) will not be acceptable to the court. Rather it is a question of how much weight will be given to various pieces of evidence. Courts will generally give most weight to primary evidence.

For this reason Inspectors should seek to gather primary evidence wherever possible. Primary evidence includes, but is not limited to, materials such as:

- eyewitness accounts in witness statements ("I did/saw/heard…")
- original time and wages records (copies of the originals are acceptable, but not copies of copies)
- relevant industrial or fair work instruments
- signed correspondence between parties.

As a model litigant[7], FWBC has an obligation to seek all information that is relevant to the alleged contravention and to place before the court all best evidence uncovered, irrespective of which side the material supports.

3.8.3.2 Circumstantial evidence

Circumstantial evidence is evidence of a fact, from which another fact may be inferred. Broadly speaking, circumstantial evidence is considered to lack the strength of best evidence. However circumstantial evidence can have a compelling cumulative effect when viewed together and in conjunction with primary evidence.

Circumstantial evidence will usually be admissible and can be particularly useful:

- where there are no independent witnesses to an incident or situation
- in civil matters where the burden of proof is lower than in criminal matters
- to set the scene for the court in regards to the circumstances surrounding the alleged contravention.

3.8.3.3 Documentary evidence

Documentary evidence is any record of information which, by reference to its contents or existence, tends to prove or disprove a fact in issue.

[7] Commonwealth Attorney General's Department – *Legal Services Directions 2005*

The Evidence Act defines a document very broadly to include any record of information including:

- anything on which there is writing
- anything on which there is marks, figures, symbols or perforations having a meaning for persons qualified to interpret them
- anything from which sounds, images or writings can be reproduced with or without the aid of anything else
- maps, plans, drawings or photographs.

Documentary evidence may be stored in an electronic format, and may include parts of documents and copies, reproductions or duplicates of documents.

In a majority of cases, evidence collected by Inspectors will be documentary in nature. Documentary evidence is often best evidence as a document does not forget or lie. Also a document may have been created by automated systems, parties with no vested interest (i.e. banks, businesses, government departments), or before litigation action is ever considered. Time and wages records are the most common form of documentary evidence obtained, but Inspectors should not limit the investigation by focusing only on this type of material.

3.8.3.4 Testimonial evidence

Testimony usually refers to the evidence given by a person who appears before the court as a witness. In FWBC litigations, testimonial evidence is usually provided by way of an affidavit, rather than orally in the witness box.

Both oral and affidavit testimony is given under oath or affirmation, rendering the witness liable to punishment should they provide evidence they know to be false or misleading.
A witness who gives oral or affidavit testimony is able to be cross-examined concerning that testimony and/or on matters which might go to the witness's credibility.

Affidavit evidence is generally only obtained when a matter proceeds to litigation, as affidavits must meet the requirements of the particular court in which they will be filed and be witnessed by a solicitor or a Justice of the Peace. However, witness statements taken by Inspectors in the course of an investigation are important as they will ordinarily form the basis of the affidavit evidence prepared for court.

3.8.3.5 Physical evidence

Physical evidence is any tangible item which tends to prove or disprove a fact in issue. It is unlikely an Inspector would be required to collect physical evidence in the course of a normal investigation, but Inspectors should not rule out the possibility. An example of relevant physical evidence might be an item produced by a complainant (i.e. a name badge or a uniform) which goes to proving their correct classification.

3.8.4 The evidential burden and standard of proof

As part of FWBC's role as a regulator, FWBC initiates litigation (where appropriate) in relation to non-compliance with Commonwealth workplace laws. As it is FWBC who makes the allegation, it is FWBC who is required to produce evidence in support of the allegation and satisfy the court that it has met the required standard of proof.

The FW Act operates mainly within a civil jurisdiction. The standard of proof in a civil litigation requires FWBC to prove on the balance of probabilities that the allegation is substantiated (i.e. that it is more likely than not that the alleged contravention occurred). It is the Inspector that bears the burden of supplying sufficient evidence to the Legal Group to establish a case against the suspect. The exceptions to this general proposition arise in matters of adverse action and discrimination. In both of these instances, once the Inspector has established, on balance, certain aspects of the contravention the onus shifts to the suspect to establish that the action did not occur for the prohibited reason.

Inspectors should bear in mind the positive onus upon FWBC to prove its case and the relevant standard of proof, when gathering and evaluating evidence.

3.8.5 Obtaining evidence

It may be difficult in the early stages of an investigation for an Inspector to determine what evidence will be required and whether certain material will be relevant to the complaint, and/or admissible under the rules of evidence. As such, Inspectors should gather all legally obtainable,[8] potentially relevant material in the first instance, even where there is doubt as to its value or admissibility. Inspectors may subsequently utilise the investigative and evidential evaluation techniques to eliminate irrelevant or inadmissible material.

Material should be collected as the investigation progresses. This ensures the evidence is as fresh as possible in the memories of those concerned and also minimises the need for Inspectors to backtrack should litigation become necessary.

To facilitate the efficient collection of material, Inspectors should:

- identify the potential contraventions, and the facts that will need to be established to satisfy each element of each contravention
- identify the sources from which material of potential evidentiary value may be gathered (including complainants, witnesses, suspects, third parties, government agencies, the work premises, and suspect and non-suspect databases, such as telephone, banking and credit card records)
- plan for the collection of material (including by use of an investigation plan document and/or evidence matrix, see 21.8 below)
- critically consider the material obtained to determine if it reveals further lines of inquiry.

[8] Refer 21.5.1 of this Guide (below) for further information.

3.8.5.1 Limitations to the power to collect evidence

Inspectors should remain conscious of the limits of their legal power to obtain material under the FW Act Of particular note are the facts that:

- Inspectors can only enter premises "without force" (s 708(1) of the FW Act). This means that Inspectors can be refused entry. To enter when permission has been refused can be considered entry with force. Similarly, if an Inspector is asked to leave, it is inconsistent with their powers to remain on the premises.

Inspectors must ensure that they gather evidence in accordance with the provisions of the FW Act Evidence obtained in contravention of the FW Act may be inadmissible in any FWBC litigation action. This would not only jeopardise the case, but would also breach FWBC's model litigant obligations[9], and may render the Inspector personally liable to legal action.

3.8.6 Best practice in obtaining evidence

FWBC strives to comply with best practice in obtaining evidence. Inspectors must ensure that:

- information gathering powers are used only to obtain information for the lawful purposes provided under the FW Act
- prior to using formal information gathering powers, Inspectors should consider whether the information can be obtained by informal means.

When using a formal request such as a notice to produce, an Inspector should:

- keep accurate records (in the form of file notes) providing the rationale behind the issuing of the formal request
- use FWBC's pro forma document (for notices to produce) that details the legislative authority under which the document is issued, and complies with privacy and other legislative requirements
- consult with their Assistant Director prior to recommending enforcement action for failure to comply with a notice to produce.

In relation to the information, records and documents obtained, the Inspector must:

- ensure that FWBC record management procedures are followed, to maintain the integrity of evidence received in an investigation
- exercise caution when considering inter-agency disclosure of information obtained during an investigation, and only disclose such information in accordance with the FW Act and established memoranda of understanding.

[9] Commonwealth Attorney General's Department – *Legal Services Directions 2005*

3.8.7 Obtaining Call Charge Records and Telephone Subscriber Detail requests

In order to assist the investigation of specific breaches of the FW Act, Inspectors can request that an application be made for Call Charge Records (CCR)s and Telephone Subscriber Details (TSD) from Telstra and other communications carriers. (NB. Optus have advised that reverse CCR records are only kept for 6 to 8 weeks).

To ensure compliance with the *Telecommunications Act 1997* and to ensure proper records are maintained by FWBC, the following procedures will be followed when applying for CCRs and TSDs:

- In the first instance Inspectors should discuss with their Assistant Director the appropriateness of requesting such records. Assistant Directors must be satisfied that the information is reasonably necessary for enforcing provisions of the FW Act. General or non-specific requests will be declined.
- Once satisfied of the proper need for a request, the Assistant Director will ensure 'Statement in Support of CCR Request or TSD Request' is completed in full. Included in this request will be a brief summary of the conduct under investigation and an indication of the relevant suspected breaches of the FW Act.
- Once completed and approved, the Statement in Support will be forwarded to an authorised officer of FWBC (Chief of Operations) through the relevant State Director and Executive Director Operations for authorisation.
- Once approved by the authorised officer, the Statement in Support is to be provided to the Victorian Administrative Assistant who will arrange for the processing of the request.

All correspondence pertaining to requests for CCRs or TSDs will be held on a file which will be maintained by the Victorian Administrative Assistant. Copies should also be included in AIMS.

Inspectors are required to respect the sensitive and personal nature of information contained in CCRs and TSDs, including by:

- making requests strictly for the purpose of enforcing provisions of the BCII Act and/or FW Act;
- using any information obtained only within the investigation as described in the 'Statement in Support of CCR Request or TSD Request'; and
- storing CCRs and TSDs within the relevant investigation file, and ensuring that the information is not accessible on a more general basis.

Company and Director searches
Administrative staff in each State are responsible for seeking paid company and director searches. Approval must be sought from an Assistant Director or State Director prior to requesting such a search.

3.8.8 Obtaining Evidence by s712.

3.8.8.1 Principles for obtaining documentary evidence

Inspectors often require access to documentary evidence when treating or investigating a complaint, or undertaking an audit. Inspectors should consider the best method to obtain the required records or documents.

There are three methods to obtain documentary evidence that may be used:

- informal means (e.g. verbal requests, emails or letters) that do not invoke the powers of a Inspector under the *Fair Work Act 2009* (Cth) (FW Act)
- the requirement under s 709(d) of the FW Act when on premises
- the notice to produce records or documents (NTP) under s 712 of the FW Act.

The initial consideration for the Inspector is whether the use of coercive information-gathering powers under the FW Act is required. Where an exercise of powers under the FW Act is appropriate, the Inspector should consider whether the best power to exercise in the circumstances is the requirement under s 709(d) of the FW Act or the notice to produce under s 712 of the FW Act.

The following table lists some questions that a Inspector might consider in choosing the best method to obtain records or documents, together with responses that compare the features of each listed method.

Question	**Informal request**	**Requirement s 709(d)**	**Notice to produce s 712**
Can the request be verbal and not written?	Yes	Yes	No
What is the minimum amount of time that must be given to comply?	None	None	14 days[10]
Is this an exercise of powers under the FW Act?	No	Yes	Yes
Can the request be made from a FWBC office?	Yes	No	Yes
Is the recipient required to comply?	No	Yes	Yes
Is there a penalty for non-compliance?	No	No	Yes
Is it best practice for a matter in litigation?	No	No	Yes
Is there the option to seize the records or documents?	No	No	No

Inspectors should note that in all cases they have no legal authority to seize records or documents.

3.8.8.2 Original documents and receipts

Regardless of the method used to obtain records or documents, certain principles apply.

[10] For the reckoning of time, refer to s 36 of the *Acts Interpretation Act 1901* (Cth).

It is best practice for the Inspector to obtain original documents where required, although in most cases copies of originals will suffice (where the originals have been sighted). Copies of copies are not sufficient. Ideally copies of documents should be certified at the time they are copied from an original source.

Where original documents or records are provided, the Inspector must properly acknowledge the receipt of these. The Inspector should provide a general evidence receipt to the person who supplied the material.[11] The general evidence receipt confirms that material was received and verifies what specific documents or records were provided.

Where copies are provided, or records are sent electronically, it is not necessary for the Inspector to provide a general evidence receipt.

3.8.8.3 Requesting records through informal methods

Inspectors can request records or documents without relying on the formal powers under the FW Act. Accordingly, it is valid for a Inspector to request records or documents from a person by telephone, in person, or in writing (e.g. by email, fax or letter).

Inspectors should consider the available means to obtain the information sought as an alternative to using the powers under the FW Act.[12] This approach follows a report from the Administrative Review Council[13] containing twenty best practice principles, and a review by the Commonwealth Ombudsman[14] that commented on FWBC's performance against these principles.

In addition, the Inspector should consider the practical advantages of an informal request, which include:

- the request can be made verbally (e.g. over the telephone)
- the time period given can be shorter than the 14 days required for an NTP
- there is scope to simply vary an informal request (e.g. to grant an extension of time)
- an informal request naturally might suit a dispute resolution process that does not otherwise invoke powers under the FW Act
- the impact and cost of compliance for the recipient may be less to respond to an informal request as opposed to a formal request.

An informal request does not need to be made on every occasion. In some cases, a Inspector may determine that due to the nature of the case, a formal exercise of powers to obtain records should be used (even from the outset). Examples would include cases where it has been identified that a person is unlikely to provide the full documents or records sought via an informal request, that a person does not want the Inspector to copy or retain records and documents that were provided informally, or that litigation is a likely outcome.

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[11] In addition, there is a specific evidence receipt relevant only to the s 709(d) requirement (see section 5 of this Guide).
[12] A section on "Information Gathering Principles" will form part of the revised FWBC Operations Guide.
[13] Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies*, Report no. 48, May 2008.
[14] Commonwealth Ombudsman, *Fair Work Ombudsman: Exercise of Coercive Information-Gathering Powers*, Report no. 09-2010, June 2010.

In any case where an informal request does not result in the required records or documents being provided, then Inspectors should look to obtaining records through the formal provisions of s 709(d) or s 712 of the FW Act.

3.8.8.4 Exercising powers to obtain documents and records under the FW Act

If a formal exercise of powers is appropriate, Inspectors must note that compliance powers can only be exercised for one or more of the following compliance purposes:

- determining whether the FW Act or a fair work instrument is being, or has been, complied with
- determining whether a safety net contractual entitlement is being, or has been, contravened by a person (but only if the Inspector reasonably believes that a person has contravened one or more of: a provision of the National Employment Standards, a term of a modern award, a term of an enterprise agreement, a term of a workplace determination, a term of a national minimum wage order, and/or a term of an equal remuneration order)
- the purposes of a provision of the *Fair Work Regulations 2009* (Cth) (FW Regulations) that confers functions or powers on Inspectors
- the purposes of a provision of another Act that confers functions or powers on Inspectors.[15]

There are two different provisions for obtaining documents and records available under the FW Act: the requirement under s 709(d) and the notice to produce (NTP) under s 712.

Where a person is asked under s 709(d) or s 712 to produce records or documents that are kept electronically, the information is to be provided as a writing that reproduces the information in a form capable of being understood by the Inspector.[16]

For either a requirement under s 709(d) or an NTP under s 712, the Inspector has the power to inspect, and make copies of, the record or document.[17] The Inspector can also keep the record or document for such period as is necessary,[18] subject to the provisions of s 714(2) of the FW Act.

However, there are several differences between the two exercises of power, and it is critical that Inspectors understand these differences and the features of each provision.

3.8.8.5 Using the requirement provisions under the FW Act

Under s 709(d) of the FW Act, a Inspector while on premises[19] may require the production of a record or document while the Inspector is on the premises, or within a specified period.[20] Accordingly, this provision is of particular benefit where a return visit to the premises is logistically difficult (such as in remote locations), in circumstances where the Inspector

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[15] FW Act; s 706.
[16] Refer s 25A of the *Acts Interpretation Act 1901* (Cth). FW Regulations, Chapter 3, Part 3-6, Division 3, Subdivision 1, Regulation 3.31 also provides that employers must keep employee records in a legible form in the English language and in a form that is readily accessible to a Inspector.
[17] FW Act; s 714(1)(a).
[18] FW Act; s 714(1)(b).
[19] See FW Act s 12 and s 708 for definition and other considerations regarding premises.
[20] There is no definition for the "specified period" in the FW Act. It can be less than the 14 days required for an NTP under s 712.

believes urgent access to the records or documents is required, or where there are concerns that records or documents may be destroyed if not obtained while on the premises.

The FW Act permits a requirement to produce records or documents under s 709(d) to be verbal. The requirement can be reduced to writing at the Inspector's discretion.[21]

For evidentiary purposes, the Inspector should complete and issue a specific s 709(d) evidence receipt for the records or documents received under the s 709(d) requirement provisions. This particular receipt can be useful even when copies are received, as the specific evidence receipt for s 709(d) requirements captures the details of the requirement together with the details of the documents or records provided.

In addition, the Inspector should make contemporaneous notes detailing the conversation in which the records or documents were required under s 709(d), as well as the documents or records that were received in response.

When exercising powers, the Inspector should consider the benefits and detriments of using the s 709(d) requirement over an NTP. In summary, benefits include:

- the Inspector can require production while on premises, or else within a specified time period (which can be shorter than the 14 days required for a NTP)
- the Inspector has the power to inspect and copy records or documents kept on the premises or accessible from a computer kept on the premises (s 709(e)).

The disadvantages to the s 709(d) requirement as opposed to the NTP are:

- the requirement can only be exercised while on premises (not from another location)
- where a requirement under s 709(d) of the FW Act is not complied with, there is no civil remedy for non-compliance available under the FW Act or FW Regulations.

Where a requirement under s 709(d) of the FW Act is not complied with, the Inspector should look to issue an NTP under s 712 of the FW Act as the next step to obtain the records or documents.

3.8.8.6 Notice to produce (NTP)

A notice to produce (NTP) is a formal request authorised by s 712 of the FW Act. This section of the FW Act enables Inspectors to require any person, not just the suspect, to produce to them any record or document relevant to determining if there has been a contravention of Commonwealth workplace laws. The NTP must be in writing, served on the recipient, and give the person at least 14 days to produce the records or documents.

The potential range of records or documents obtainable using an NTP is broad. However, this does not mean that Inspectors should ask for every record or document that may be available. While it may be open for Inspectors to request all records and documents for all employees, Inspectors should consider what legally obtainable records or documents are relevant to the case at hand, and write the NTP to seek those records or documents as

[21] A written template does exist, but its contents are included in the s 709(d) evidence receipt.

appropriate. In this way, Inspectors will lessen the time and cost implications of compliance with the NTP for the notice recipient.

An NTP must on its face identify the specific purpose for which the notice is issued (i.e. the reason that the records or documents are sought).[22] Where the Inspector is determining compliance with a fair work instrument, the NTP should identify that instrument by name. Where the purpose of seeking the records or documents is to determine compliance with the FW Act or FW Regulations, the NTP should specify the relevant part and division of the FW Act or FW Regulations. For example, if the matter relates to alleged sham contracting, the NTP should seek "records and documents relevant to determining whether Part 3-1, Division 6 of the *Fair Work Act 2009* is being or has been observed."

In general, it may not be necessary to specify the individual sections of the FW Act in identifying the specific purpose for which the NTP is issued. However, the NTP should be obvious on its face that the purpose for which it has been issued is an exercise of power conferred by s 712.[23] It also should be clear from the NTP what contravention is being investigated as otherwise the NTP may not be valid.

A template notice to produce is available to assist Inspectors. In addition, checklists contained in Appendices A and B of this Guide can aid Inspectors in ensuring all elements are considered when producing an NTP.

3.8.8.7 When to serve a notice to produce

A notice to produce should be created and served as soon as it becomes apparent that the Inspector will need to request certain records or documents by such means, and the person who has custody of, or access to the records or documents has been identified. This is relevant particularly in matters where the records or documents required may be held by parties other than the suspect (such as an accountant), or where the required records or documents are not limited to records required to be kept under the FW Regulations. However, Inspectors must ensure that the records or documents are requested only for the purposes permitted under the FW Act (see section 4 of this Guide).

When creating an NTP, Inspectors must ensure the person named in the NTP is the appropriate person. Where the suspect is a company, addressing the NTP to "**The Proper Officer**" will be relevant in most instances, unless the Inspector is specifically aware of the identity of the person directly in control of the required documents. If a specific individual is named in the NTP, Inspectors must ensure that the named person:

- has custody and/or control of the documents sought (e.g. the human resources manager); and
- is capable of accepting service (e.g. they are an officer of the company or an employee with capacity to represent the company, such as a manager).

Further, Inspectors should clearly identify in the NTP the records or documents required and specifically state what they are seeking to inspect.

[22] The guiding case law is *Thorson v Pine* [2004] FCA 1316.
[23] *Thorson v Pine* [2004] FCA 1316.

3.8.8.8 Effective service of a notice to produce

The FW Act (s 712) requires that an NTP must be served, but does not specify a particular method of service (other than to allow that service can be by fax). Accordingly, service of an NTP may be in person, by fax, or by post.[24]

Service in person is allowed under the FW Act. If the Inspector elects to serve in person, the following issues should be taken into consideration:

- personal service can be slower and less practical for Inspectors
- if the business entity is in a remote location, personal service can be difficult to effect.

However, personal service ensures that the Inspector has some certainty as to who within an organisation was served, and when service was effected. If the NTP is served by hand, a receipt of service should be completed by the Inspector and signed by the recipient of the NTP.

If a person refuses to sign a receipt for service, Inspectors should still serve the NTP, complete an affidavit of service as soon as practicable, and note in the affidavit of service that the person refused to sign for the receipt.

If a person refuses to accept service of the document, a Inspector should not seek to "serve" the document by placing it near the person. The Inspector should leave the premises and consider other means of serving the NTP.

Where personal service by the Inspector is impractical, a process server may be utilised to effect "personal" service by FWBC (in this case, Inspectors must obtain a receipt confirming service and an affidavit of service from the process server).

The FW Act specifically allows an NTP to be served by fax. Service by fax is fast and efficient. If the Inspector elects to serve an NTP by fax, as a matter of best practice, the Inspector must retain a copy of fax transmission report and should contact parties shortly after to confirm receipt.

If serving the NTP by post, best practice provides that the NTP is sent by registered post, and that the recipient is required to sign a delivery confirmation that is returned to the Inspector. Although sending the NTP by pre-paid post is acceptable for simple service,[25] using the best practice method detailed above provides the Inspector with evidence that the postal item was sent. It also provides evidence that the item was received by a particular person, or else was unclaimed or refused. Such information will be of relevance for the Inspector in considering the action to be taken if the records or documents sought in the NTP are not provided.[26]

Regardless of the method of service, a Inspector must gather sufficient evidence so that an affidavit of service can be produced that will establish the valid service of the NTP if needed.

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[24] Refer *Acts Interpretation Act 1901* (Cth), s 28A regarding service in person or by post.
[25] *Acts Interpretation Act 1901* (Cth), s 28A.
[26] If urgent service of an NTP by post is required, then express post may be suitable.

3.8.8.9 Guidelines for service on entities

The FW Act authorises Inspectors to serve an NTP on any person who may hold records or documents relevant to compliance purposes. The following service guidelines apply:

Type of entity	Manner of service
Company	Served personally; or by fax, or by post to the company's registered office.[27]
Partnership	Served personally to the person named in the notice (being one of the partners); or by fax to one of the partners in the partnership, or by pre-paid post.[28]
Sole trader	Served personally to the person named in the notice, being the sole trader; or by fax to that person, or by pre-paid post.[29]

When the suspect is a company and the Inspector intends to serve the company by leaving a copy of the NTP at the company's registered address, the Inspector must ask and confirm of the individual served:

"Are you able to accept this document on behalf of the company?"

"What position do you hold within the company?"

Inspectors should then make a contemporaneous note of the responses given to these questions, and complete an affidavit of service where appropriate.

If an NTP is being served on a company that is in administration or liquidation, the NTP should be served on the administrator or liquidator. Service can be effected personally, by fax, or by post. The address for service is the office of the administrator or liquidator as nominated in the most recent notice lodged with the Australian Securities and Investments Commission (ASIC).[30]

When serving an NTP, the Inspector should advise the person served (either verbally or in writing) that a failure to comply with the NTP without "reasonable excuse" may result in civil proceedings (see section 12 of this Guide).

As soon as possible after serving an NTP, Inspectors should make a file note recording:

[27] See *Corporations Act 2001* (Cth), s 109X regarding personal or postal service on a company.
[28] See *Acts Interpretation Act 1901* (Cth), s 28A regarding personal and postal service.
[29] See *Acts Interpretation Act 1901* (Cth), s 28A regarding personal and postal service.
[30] See *Corporations Act 2001* (Cth), s 109X (1)(c) and (d).

- the time and date of service
- the method of service
- the person served
- that person's position within the company served
- the location of the service
- who effected the service
- where relevant, the names of any witnesses to the service.

This note must be in such form as to ensure the integrity and admissibility of any evidence obtained through the NTP. The note should capture the information required to produce an affidavit of service where needed.

3.8.8.10 Time for compliance with a notice to produce

Inspectors must allow the person or entity who is required to comply with the NTP at least 14 clear days to produce the records or documents sought. The 14 clear days should be counted from the time the NTP is served.

If the NTP is sent by fax, the date for production of records and documents should be no less than 14 days after the next day of faxing the notice. For example, if the NTP was faxed on 7 January 2013, the date for production of the records or documents requested under the NTP should be no earlier than 14 days from 8 January 2013, i.e. 22 January 2013.

If the NTP is served by post, Inspectors must consider that service is deemed to take effect at the time at which the letter would be delivered in the ordinary course of post.[31] Therefore, Inspectors should allow at least an additional two days delivery time from the date it is posted (16 days in total) for production of the records or documents requested, and even more time for an NTP that is posted to regional or interstate addresses.

3.8.8.11 Where an extension of time is sought to comply with a notice to produce

Under no circumstances is it appropriate to grant an extension of time for an NTP, and Inspectors should be aware that any attempt to extend the NTP time-frame may invalidate the NTP. Where an extension of time is sought (and such extension appears reasonable in the circumstances), the Inspector should consider issuing a new NTP, and rely upon their discretionary powers not to enforce the original NTP.

3.8.8.12 Reasonable excuse for not complying with a notice to produce

The term "reasonable excuse" for the purposes of s 712(4) of the FW Act is not expressly defined in the legislation. As such, determining what constitutes a "reasonable excuse" will always remain a question of fact given the particular circumstances of each case, and may need to be decided by a court if required. Further, under s 712(4) of the FW Act, it is up to the person required to comply with the NTP and not FWBC to successfully argue on the facts that there was a reasonable excuse for any non-compliance.

Any excuse that would be accepted by a reasonable person as sufficient to justify non-compliance with an NTP may satisfy the reasonable excuse defence.[32] Examples of where

[31] *Acts Interpretation Act 1901* (Cth), s 29.
[32] *Fair Work Ombudsman v Ballina Island Resort Pty Ltd* [2011] FMCA 500 at [73].

a reasonable excuse may be a valid defence for failing to comply with an NTP are situations where:

- documents sought are subject of another confidentiality undertaking given to a court
- there are physical or practical difficulties in producing the documents
- there is debilitating illness or injury of the person (or a close family member of the person) running a one-person or very small business[33]
- a fire, flood or other natural disaster has destroyed the documents required to be produced, or delayed their production[34]
- there has been prior removal by the police or another government agency of the documents requested to be produced under the NTP.[35]

Conversely reasons given for failing to comply with an NTP that do not amount to a reasonable excuse might include where:

- production of documents would involve the contravention of a foreign law and subsequent exposure to criminal prosecution
- failure is due to usual business activities, lack of resources and time pressures associated with managing the business[36]
- compliance with an NTP might expose that person to a civil penalty.[37]

Inspectors should seek the guidance from their assistant director if a person provides an excuse for not complying with an NTP. The advice of Legal Group may be of assistance in determining whether the non-compliance with an NTP should be escalated for litigation.

3.8.8.13 Penalties for non-compliance with a notice to produce

A failure to comply with an NTP should be investigated further by the Inspector who originally issued the NTP.

Where an NTP issued under s 712 of the FW Act is not complied with, there is a civil remedy available under s 712(3) of the FW Act. The maximum penalty for non-compliance with an NTP issued under s 712 of the FW Act is 60 penalty units for an individual and 300 penalty units for a body corporate.

If the Inspector (in consultation with their assistant director) believes that seeking a penalty for failure to comply with an NTP issued under s 712 of the FW Act is appropriate, then the matter should be discussed with Legal Group to determine if it is suitable for litigation in accordance with *FWBC Guidance Note 1 – Litigation Policy*.

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[33] *Riley McKay Pty Ltd v Bannerman* (1977) 31 FLR 129; *Melbourne Home of Ford Pty Ltd & Ors v Trade Practices Commission and Bannerman (No.3)* (1980) 47 FLR 163.
[34] *Riley McKay Pty Ltd v Bannerman* (1977) 31 FLR 129; *Melbourne Home of Ford Pty Ltd & Ors v Trade Practices Commission and Bannerman (No.3)* (1980) 47 FLR 163.
[35] *Riley McKay Pty Ltd v Bannerman* (1977) 31 FLR 129; *Melbourne Home of Ford Pty Ltd & Ors v Trade Practices Commission and Bannerman (No.3)* (1980) 47 FLR 163.
[36] *Fair Work Ombudsman v Ballina Island Resort Pty Ltd* [2011] FMCA 500; *Fair Work Ombudsman v Finetune Holdings Pty Ltd (No.2)* [2012] FMCA 349 at [30].
[37] See FW Act, s 713.

3.8.8.14 Checklist for Notice to Produce – Content

It is important that each NTP issued strictly complies with all technical requirements – both to ensure that the NTP is legally valid and can be enforced; and also to maximise the response received so that the documents or records sought are provided. The advice of Legal Group can be sought before the NTP is served if there is any uncertainty about the wording of an NTP.

A checklist for Notices to Produce can be found in the **Ready Reckoner S712 Notices**

3.8.8.15 How will the NTP be served?

- The NTP must be legally served or else it is invalid and unenforceable – 'near enough' *is not* 'good enough' in this situation.
- Unless the NTP is legally served and all technical requirements are met, a person can not have action taken against them for failing to comply with an NTP.
- Keep a record to prove the time, date, place, method of service, and the person who served it.
- The same NTP can be served in more than one way if it is not certain whether one particular method of service will be effective.

3.8.8.15.1 Service by Fax

- NTPs can be served by fax.
- Check the fax number is correct.
- Retain the fax report/receipt and attach to the NTP on the file.
- Call the recipient and check whether it was received – keep a file note.

3.8.8.15.2 Service by Registered Post

- Ensure address/recipient is correct.
- Ensure the Registered Post receipt evidencing service is received.
- Follow up the person with a telephone call or email to seek confirmation that the NTP was actually received. Make file notes of all conversations.

3.8.8.15.3 Personal Service

- Think of all the places that the person may be able to be personally served, particularly if they may be hard to find.
- Consider use of a process server for difficult personal service. Give the process server as much information as possible to assist them to find the person. Give clear instructions as to how the person is to be served.
- If personally serving an NTP, identify the recipient by name. Ask them to sign a copy of the document in question to acknowledge service if possible.

- Make a file note at the time of service with all the necessary details.
- There are some circumstances where only personal service will be effective e.g. If the relevant business is still registered but no longer operating, the NTP may be served on the company by delivering a copy of the NTP personally to a director of the company who resides in Australia.

Follow up with the recipient to check progress and to encourage them to comply with the NTP – do not let them ignore it.

3.8.9 Obtaining testimonial evidence

The majority of witness testimony in FWBC litigations is provided by affidavit. An affidavit is a written statement containing the witness's evidence relevant to the facts in issue, and sworn before a person authorised to administer an oath that the contents of the affidavit are true to the best of the witness's knowledge (usually a solicitor or Justice of the Peace).
Affidavits are normally only prepared by Inspectors in conjunction with the Legal Group once the matter proceeds to litigation. If an Inspector is required to prepare an affidavit for a court matter they should consult with the Legal Group.

Witness testimony gathered by the Inspector during the investigation, in the form of a witness statement, is significant to the investigation and any subsequent litigation because that testimony:

- will inform the Inspector's decision making in respect of issuing contravention letters and/or compliance notices, and recommending enforcement action
- will inform the legal assessment as to whether there is sufficient evidence to support any proposed litigation
- is likely to provide the best evidence, as it is recorded closer to the events and the witness's recollection is likely to be clear and uncontaminated
- may form the basis of the affidavit evidence prepared for court
- may be later used as a reference to refresh a witness memory, or to attack their credibility
- may, in the event of the death or later unavailability of a witness, become the best evidence available to the court.

Affidavits are often shorter and narrower in their scope than a witness statement, as they will deal only with the matters in dispute between the parties, where as a witness statement should set out all relevant evidence that a witness is able to provide in a matter.

3.8.9.1 Taking witness statements

FWBC expects its Inspectors to exercise their professional judgment in selecting the appropriate method of recording both interviews and conversations. The methods available would include either the taking of a typed or hand written statement or the electronic recording of the interview.

The particular approach taken by the Inspector should, where practicable, be undertaken in consultation with their relevant Assistant Director prior to a decision. A Case decision record (CDR) is not required to record the reason(s) for the decision taken.

The decision to take a statement or electronically record a witness interview may be based on a number of operational factors including (but not limited to) the nature and extent of the non-compliance or contravention being investigated, the wishes and/or availability of the particular witness, the likely compliance outcome, and the assessment by the Fair Work Building Inspector of the best and most relevant means of obtaining the available evidence.

Where an electronically recorded interview of a witness has been obtained, the Inspector will generally not be required to have the interview transcribed. However, where an investigation is to be referred to Legal for consideration of litigation or other compliance action, a transcription will be obtained. The decision to acquire a transcript will be taken in consultation with the relevant Assistant Director. Where no transcript is obtained the relevant Inspector will prepare a summary of the interview for inclusion in the case management system and the TRIM file.

Where a transcript is obtained, the responsible Inspector will proof read the transcript to ensure it is a true and accurate record of the interview. Following consultation with legal and the relevant Assistant Director, the responsible Inspector may be required to prepare a synopsis of the transcript for use by Legal. Consultation between the responsible Inspector, the relevant Assistant Director and legal officer will determine whether it is necessary to seek a witness statement or affidavit from the witness.

Inspectors are to attach copies of the recording, transcripts and/or written witness statement to the brief of evidence along with the synopsis and any other relevant documents.

Wherever practicable, interviews with alleged wrongdoers (ie. records of interview) will be electronically recorded.

A copy of the audio recording and/or transcript should be provided to the witness as soon as practicable after interview.

Witnesses may not have had any prior exposure to regulatory agencies or litigation and may require reassurance and information during the process. Inspectors must recognise the individual needs and concerns of witnesses and appropriately address them. As a minimum, Inspectors should ensure witnesses understand the investigation process, the role of FWBC and how their evidence maybe used.

In identifying and gathering evidence, the Inspector should consider whether any person (including the complainant) has seen, heard, or experienced events relevant to the investigation, and is able to provide information relevant to the alleged contravention. If so, then the Inspector should approach that person to provide a witness statement. It is best practice that a witness statement is obtained as soon as possible after the events to which the investigation relates.

When taking a statement, it is critical to remain focused on the purpose of the statement. These uses may include:

- to assist decision making or whether there is sufficient evidence to support litigation
- guidance of litigators in the event litigation is undertaken as statements may provide the basis upon which to conduct the case
- as a reference at a later date to refresh witness' memory prior to and at court.

Witness statements are ordinarily formulated from evidence obtained from a witness during an interview.

Where a witness requires an interpreter, the Inspector should arrange for a government approved and accredited interpreter through the Translating and Interpreting Service (TIS). Further information can be found in

Inspectors should be sensitive to the cultural background or religion of witnesses before undertaking interviews. Awareness of these differences may prevent inaccurate assumptions being made by the Inspector based on the individual's behavior. For example, silence or a lack or eye contact in some cultures may denote guilt or something to hide, while in other cultures this behavior denotes respect.

Witnesses who are considered **vulnerable** as defined in Section 3.11.17 – *Interviewing vulnerable people* should be offered the opportunity to have a support person or interview friend present when being interviewed and signing their witness statement. In some circumstances vulnerable persons may be incapable of providing a reliable and accurate account of the incident under investigation. Inspectors should consider recording interviews with vulnerable people either by visual, audio or written means.

If the witness is under 16 years of age or otherwise identified as vulnerable, the Inspector **must** seek permission from their parent/guardian to conduct the interview and ensure that the interview is conducted in the presence of a competent adult, in accordance with basic child protection concepts. Where the witness is between the ages of 16 and 18 years, the legal requirements are less stringent, but best practice dictates that Inspectors should seek permission from a parent/guardian and ensure that a third party is present throughout the interview process. Additionally the interview should be conducted in the presence of the parent/guardian except where the parent/guardian is likely to be a witness in the same matter. Despite the absence of a clear legal obligation, it is strongly recommended that Inspectors take these measures as they are in the best interest of both FWBC and the witness.

An Inspector should never conduct witness interviews or discuss a witness statement in the presence of other potential witnesses. If this occurs, the witnesses may be accused of colluding and it may detrimentally affect both witnesses' credibility and significantly diminish the value of their evidence. For this reason, Inspectors should also ask witnesses not to discuss their statement or evidence with other potential witnesses such as co-workers.

3.8.9.2 Form of witness statements

When drafting a witness statement, Inspectors must refer to the standard witness statement template.

This template includes the approved jurat, which complies with the criminal code warning and civil procedure rules. Specifically, the standard template requires the witness acknowledge that they understand:

- the potential consequences of providing false or misleading information in their statement
- the information contained in the statement may be used as evidence in legal proceedings
- they may be required to give evidence under oath or affirmation relating to the contents of the witness statement.

Witness statements should be typed, using double spacing between lines. Headings should be used to assist in structuring the presentation of the evidence. Numbered paragraphs should be used, with a new paragraph for each new subject.

3.8.9.3 Contents of witness statements

A witness statement should contain all the relevant facts from the witness's perspective and should endeavour to present the facts in a way that is logical, persuasive and evidentially admissible. As a general guide, a witness statement should:

- contain all evidence relevant to the matter
- be written in the first person (e.g. "I saw")
- be written in the witness's own speech, even if not proper English (within reason)
- contain evidence of what the witness did, saw, said or heard
- discuss events in a chronological order
- explain relevant events in terms of what happened, when it happened, where it happened and who was there
- recount conversations in the exact words spoken (direct speech) to the best of the witness's recollection (i.e. I said: "I quit.", John said "Ok, just go then.")
- preface conversations with "we had a conversation in words to the following effect"
- avoid hearsay evidence unless an exception to the hearsay rule applies (see 21.2.2.1 above)
- avoid opinion evidence unless the witness is a qualified expert (see 21.2.3 above)
- not contain views as to what someone else thought or understood
- where relevant, include evidence of things that did not occur (i.e. not being given notice, not being given an information statement)
- include detail and nuance that lends credibility to the witness's account
- identify and refer to any documentary or physical evidence that the witness relies upon to back up or support their evidence (i.e. rosters or payslips).

For further assistance in drafting witness statements the Inspector should consult their Assistant Director or the Legal Group.

3.8.9.4 Review and signing of witness statements

A witness statement will generally be drafted based on evidence provided by the witness during an interview with an Inspector.

In all FWBC investigations, it is best practice that a statement be finalised and signed at the time of taking the statement.

When the witness statement is completed, the witness should be asked to sign the bottom of each page of the statement and initial any alterations. The witness should also be asked to sign and date the last page immediately below the last paragraph.

There is no legal obligation for a witness to sign a statement. If the witness declines to sign the statement, the Inspector should note the fact that the request was made on the statement, and any reasons offered by the witness for declining to sign.
It is good practice for the Inspector to also sign or initial each page of the statement. The Inspector's signature block should appear on the last page and should note the date the statement was obtained, where and by whom.

The Inspectors should not provide copies of a statement to a witness until they are signed.

Inspectors may find the following guidance useful in preparing to conduct interviews.

In general, interviewees should be asked to provide information about:

- what they saw;
- what they did;
- what they said or heard; and
- documents they prepared, received or acted upon.

Useful tips for interviewing:

- Use the templates provided on the Inspectors' Resource Page.
- Record who the witness is and the position he or she occupies.
- Define the witness's responsibilities e.g. employing subcontractors, monitoring work activities, controlling entry to a building site.
- Detail the events in chronological order.
- Material should be relevant to the investigation.
- Use open-ended questions when seeking information from a witness.
- It is acceptable to help the witness recall an event or incident by taking his/her mind back to it – it is not acceptable to put thoughts in the witness's mind or words in their mouth.
- Where possible, relevant words spoken should be recorded in the first person in the form of I said "……." and He said "….."
- Use "I" not "we" – the witness cannot speak for what someone else saw or heard – even if they were together at the time.
- Ensure that witnesses do not speak to each other about their evidence.
- Do not interview or take a statement from one witness when another is present.
- Ensure that any documents are properly identified during the interview.

As with any other aspect of an investigation preparation is essential. Take some time before commencing the interview to understand what it is you are seeking from the witness, keeping in mind the elements of the contravention and other evidence available.

Remember:
Conduct an interview as soon as possible. The closer to an incident the interview is conducted and the evidence obtained, the greater weight a court or commission is likely to put on it.

3.8.9.5 Significant witnesses

Where an investigation reveals that there is a person who may have witnessed a significant event or whose account of a particular matter or incident is likely to have considerable bearing on the outcome of an investigation or litigation, the Inspector must treat that person as a significant witness. Inspectors are most likely to deal with significant witnesses in duress or other complex matters.

Inspectors must endeavor to contact any significant witnesses and ask them to participate in an interview and/or provide a witness statement as soon as reasonably practicable. Inspectors should keep records of such contact And any refusal or unavailability on the part of the significant witness.

Failure to lead evidence from a significant witness in court, without a reasonable excuse, may result in the court inferring the reason that a significant witness was not called was because their evidence did not help FWBC's case (known as a 'Jones v Dunkel' inference).[38]

3.8.9.6 Witness competency

A witness must be competent to give evidence in court. Only the court can rule on the competence of a witness. The key considerations in assessing competence are the witness's ability to:

- communicate their evidence
- give a rational reply
- understand the nature of an oath as an obligation to tell the truth.

If a witness is incapable of understanding the nature of an oath (i.e. the witness is a child or a person with an intellectual disability or mental illness) the court may allow them to provide unsworn evidence. Where physical disabilities affect a person's capacity to function as a witness, attempts will be made to accommodate their needs and facilitate the giving of their evidence.

If the Inspector is aware of any potential issues affecting the witness's competency these should be raised with the Legal Group at the earliest opportunity.

[38] *Jones v Dunkel* (1959) HCA 8; (1959) 101 CLR 298

3.8.9.7 Witness credibility

A witness's credibility will, in part, determine the weight that the court gives to the evidence presented by that witness. Issues such as perceived truthfulness, clarity, consistency and reliability will have a bearing on credibility. Cross examination is designed to test the veracity of the witness's evidence and to damage their credibility.

If the Inspector is aware of any matter potentially affecting the credibility of a complainant, witness or the suspect in a (potential) litigation, the Inspector should immediately bring those issues to the attention of the Legal Group so that any credibility concerns can be considered.

3.8.10 Evidence management

When collecting or handling evidence, Inspectors need to ensure they manage the evidence in a way that preserves the integrity and evidential value of the material, and minimizes the chance that material may become lost, damaged or contaminated.

Many FWBC investigations are routine and unlikely to result in litigation, and therefore may not require the rigorous application of evidence management processes. However, Inspectors should be aware of, and in appropriate cases apply, relevant evidence management processes. Cases likely to require a strict application of the processes include complex investigations, large-scale wages and conditions matters, or any investigation that appears likely to end in litigation.

3.8.11 The chain of evidence

Where a matter results in litigation it is important that the Inspector can demonstrate a chain of evidence or continuity. That is, the Inspector must be able to show a continuous chain of possession and storage from the time a piece of evidence came into FWBC's possession until it is presented for admission before a court. Any potential break in the chain of possession may render the piece of evidence suspect to contamination and cause it to be inadmissible.

Continuity of possession is proved by the testimony of each person who has handled the evidence. All records surrounding the collection, storage and disposal of a piece of evidence may be required to be produced in court if there is an allegation of contamination. Therefore, it is vital that records be properly maintained and that persons who have handled the evidence are clearly identified as they may be called to give testimony in regards to that evidence.

If a document passes from the Inspector who collected it to some other person, the Inspector cannot swear that the exhibit has not been altered, tampered with or had its identifying label changed after it left his or her possession. At most, the Inspector can only say that it is similar to the one that was in their possession. It is for this reason that briefs of evidence (see Chapter 15 - Litigation) provided to the Legal Group should not contain original evidence.

The following procedures for documentation, storage and disposal are designed to assist the Inspector to demonstrate continuity and preserve the integrity of the evidence from the time the evidence is obtained, until it is used in court. The Inspector must maintain records

detailing the circumstances in which the evidence was collected and a register of its storage and disposal.

3.8.12 Documenting receipt of evidence

When evidence is collected or received, an evidence receipt is to be provided by the Inspector to the person who supplied the material as a way of confirming that the material was received and verifying what was provided.

The evidence receipt should be signed, dated and timed by the Inspector and must accurately set out:

- the source of the material
- how it was received (post, fax, hand delivered, collected from workplace)
- when it was received (time, date)
- persons present at the time of receipt (especially if collected from the workplace)
- a description of the documents or items received (including dates, titles, model and serial numbers if applicable).

A copy of the evidence receipt should be retained on the case file.

Inspectors should also make a note of the actions taken in the collection of evidence, the nature of any material received, the date of receipt, and the fact an evidence receipt was issued.

In large scale or complex inquiries, a designated exhibits officer may be appointed. The exhibits officer is responsible for maintaining an exhibit register detailing all required information. Exhibits should be placed on the register when received and significant items should be brought to the attention of relevant Inspectors at the earliest opportunity.

3.8.13 Storage of evidence

To ensure the hard copy file can stand alone, Inspectors should print and store all important documents from the AIMS database on the hardcopy file. This ensures the investigation can be easily understood from the start of a complaint to its completion.

The file should be constructed to demonstrate the chronology of an investigation and highlight the tools utilised during the course of the investigation, decisions made and actions taken to achieve compliance with the relevant legislation and/or instrument.
Therefore, Inspectors are encouraged to take working copies of relevant material that may be placed on the case file and examined, marked or highlighted as required.
The original material received should be kept as clean copies and should be:

- secured in a box, within plastic sleeves in a binder, or in some other appropriate way
- labelled (with a brief description of the item, the case name, the source of the material, the time and date it was obtained and the name of the Inspector)
- unmarked (including not paginated or hole punched)

- stored in a physically secure, limited access, storage area (such as a lockable filing cabinet).

Some locations may have a designated secure storage space for collected material and/or exhibits. Inspectors should consult their Assistant Director about the most appropriate storage space available to them.
Specifically, electronic record of interviews and record of conversations should be stored in the following manner: Inspectors should ensure they file discs in a disk register that keeps track of number and AIMS reference, i.e. interview 1/10 – XT000337. Masters should all be stored together in the most appropriate storage space available.
Details of the storage location and any handing over of evidence to another person for any reason must be recorded on the case file and in AIMS.

3.8.14 Disposal of evidence

Where an investigation has been closed and the relevant appeal periods (if any) have expired, consideration should be given to disposing of materials. This is a procedure aimed at effective management of storage space, so materials that have no further purpose are not held unnecessarily.
Prior to issuing any such instruction, the Inspector must ensure that:

- any decision made is not in conflict with any court order (e.g. the courts may order that materials or items be returned immediately or be forfeited and destroyed, depending upon the circumstances)
- all potential owners of the material have been afforded an opportunity to lodge a claim for the item, goods or documents (this is especially important in instances where there are rival claims to ownership).

Details of steps taken to ensure the above, and the information about the date and method of disposal, should be recorded on the case file and in AIMS.

3.9 Establishing the Facts – Interviewing

3.9.1 Introduction

This section guides Inspectors in the conduct of investigative interviewing. The term investigative interviewing is used to describe the general procedure for interviews with complainants, witnesses and suspects.

The knowledge and skills required for successfully interviewing are applicable at any stage of FWBC investigation process, whether conducting initial complainant contact over the telephone or during a formal record of interview with a suspect.

In conducting records of interview with suspects, electronically record all such interactions. Where such interactions are not electronically recorded, the Inspector must record the operational reasons for this in a case decision record.

Template scripts for conducting records of interview and records of conversation are available on the Inspectors' Resource Page. The Record of Interview template script must be used for all interviews where the Inspector believes or is concerned that the interviewee:

- may have contravened state, territory or Australian laws (not limited to Australian workplace laws);
- may be an accessory to a contravention of such laws (such as under s. 550 of the FW Act); or
- may disclose information during the course of the interview which would otherwise require the interview to be conducted under caution.

In general, this will include all interviews involving allegations of sham contracting, industrial action or coercion.

Inspectors must ensure that all participants to records of interview are cautioned in the following terms at the commencement of the interview: "This interview is being conducted on a voluntary basis. Before I commence, I must caution you that you do not have to say or do anything, but anything that you do say or do will be recorded and may be used in evidence. Do you understand that?"

It is essential the interviewee understand the caution and their right not to answer questions. If you are unsure whether the person understands their rights, further questions should be asked to establish the level of understanding and ensure they are fully aware of their rights.

For interviews involving interviewees who do not fall within the above criteria and who are mere witnesses to an incident, the Record of Conversation template script may be used if the decision to electronically record the interview is made. For further guidance on witness interviews see 21.7.1 above. In conducting a record of conversation or taking a statement the Inspector may form the opinion that the person being interviewed was involved in an alleged breach, either as a party or an accessory. In such circumstances, the Inspector must make the witness aware that the nature of the interview has changed. The Inspector must ensure the witness is fully aware of the change in circumstances and administer a caution in the same terms as those set out above.

Where during the conduct of a record of conversation an Inspector administers a caution, as soon as practicable after the interview is complete, the Inspector must complete a case decision record to identify:

- why the interviewee was not cautioned at the commencement of the interview;
- the basis on which the Inspector decided to caution the interviewee during the interview;
- any admissions that may have been made by the interviewee prior to the caution being given; and
- any future action proposed by the Inspector in relation to the interview or interviewee (this should include any legal advice sought or to be sought in relation to the interview).

In all instances, where a copy of the transcript of the interview or conversation is prepared, a copy should be provided to the interviewee as soon as is practicable. There is no requirement, where the Inspector believes that the transcript is accurate, to request that the interviewee verify, sign or initial a copy of the transcript. A standard letter is provided on the Inspectors' Resource Page that must be provided to each interviewee with their copy of the transcript.

3.9.2 Purpose of interviews

An interview is a planned conversation with the purpose of obtaining information and evidence to gain the truth in relation to a matter under investigation. Conducting an interview will involve asking questions and recording the answers given to obtain the relevant information and evidence.

Interviews, either formal or informal, often form part of an Inspector's investigation. In most cases, an Inspector would interview the complainant and/or the suspect. Other witnesses may also be interviewed.

An interview is only part of the evidence collected during an investigation. An interview itself may prove or disprove the alleged complaint. More often, the interview alone is not sufficient to fully resolve a matter. Therefore, the interview will need to be considered along with other evidence (and even other interviews) before the Inspector forms a final view about the result of the investigation.

A person being interviewed must be advised if the interview is being recorded electronically (even if the recording is of a telephone conversation or is only for the purposes of transcription). If a person agrees to be interviewed, but does not agree to having the interview recorded electronically, the Inspector may still conduct the interview without recording it electronically, and make a written or typed record of the interview. In either of the above situations the Inspector must inform the person being interviewed that their attendance and participation is entirely voluntary.

Any person has the right to refuse to be interviewed by an Inspector and a person can not be compelled to either participate in an interview or to answer questions. If a person does not agree to being interviewed, the Inspector can continue the investigation with the other information and evidence at hand. Where an interview is refused, Inspectors should make an appropriate note on the investigation file. If a complainant refuses to be interviewed by an Inspector in relation to their own complaint, it may be appropriate to advise the complainant that the investigation into their complaint cannot proceed any further.

3.9.3 Seven principles of investigative interviewing

These principles provide an authoritative guide to investigative interviewing and are accepted internationally as the best practice model for investigations across a range of jurisdictions. These principles embody a number of important points and apply equally to interviews with complainants, witnesses and suspects across the full range of investigations by Inspectors.

Principle 1*

The role of investigative interviewing is to obtain accurate and reliable information from complainants, employers and witnesses in order to discover the truth about matters under investigation.

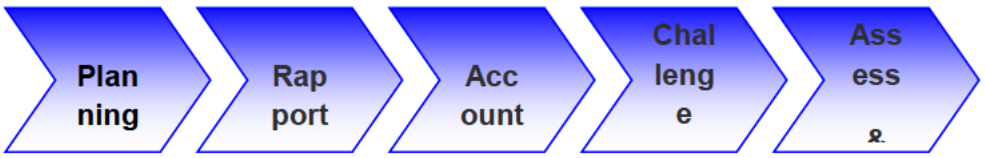
Principle 2*

Investigative interviewing should be approached with an open mind. Information obtained from the person who is being interviewed should always be tested against what the interviewer already knows or what can reasonably be established.

Principle 3*

When questioning anyone, Inspectors must act fairly and in accordance with the principles of procedural fairness (as dictated in each case). In all matters they must remain impartial.

3.9.4 The interview framework



3.9.5 Record of conversation

A record of conversation is the notes of a conversation between an Inspector and a witness in respect of the matter under investigation.

In a record of conversation, there is no requirement to give a formal caution (because the person being interviewed is a witness and not a suspect). However, it is appropriate to advise the witness of their obligation to be truthful and of the possible consequences if the evidence the witness gives is false or misleading (Criminal Code 137.1). In addition, the person must be notified if the conversation is being recorded electronically (even if the recording is of a telephone conversation or is being made for the purposes of transcription). If the person is unwilling to have the conversation recorded electronically, but the person is still willing to participate in the conversation, the Inspector can make a record of the conversation in written or typed form.

A record of conversation is not always used as actual evidence before a court. However, the information gathered in the record of conversation might later form the basis of a witness statement or affidavit which could be used in evidence in a court. It is imperative that notes made in a record of conversation are evidentially admissible to allow later use if required. They should be as legible as possible. Never use liquid paper to correct mistakes.

Many of the principles of interviewing for a record of interview may also be applied in a record of conversation, bearing in mind that the person interviewed is a witness and not a suspect.

3.9.6 Record of interview

A record of interview (ROI) is a formal record of a conversation between an Inspector and a suspect in respect of the matters under investigation.

A record of interview itself may be submitted as evidence by an Inspector in a court. Therefore, it is important that the Inspector follow certain steps in conducting the interview to ensure it is admissible as evidence.

Inspectors should understand and adhere to fundamental practices when interviewing suspects, regardless of the type of investigation being conducted. Inspectors must ensure that they pay particular attention to rules regarding interviews being voluntary, fair, and

reasonable. In particular, when interviewing people of Aboriginal or Torres Strait Islander decent, it is important that Inspectors have regard to the Anunga Rules (outlined at 3.11.18).

At the start of an ROI, Inspectors must clearly caution a suspect of their rights and obligations throughout the process, including their right to remain silent during the interview.

The suspect should be advised of their right to have a friend, legal practitioner or other representative present at the interview as a support person. It is important that all parties understand that the support person is not there to answer the questions and the suspect must speak on their own behalf. If the support person accompanying the suspect is a witness in the same case, the Inspector should advise the interviewee to seek another support person.

Inspectors should be guided by the questions and procedures provided in the ROI plan and interview template.

3.9.7 Planning the interview

Planning an interview will enhance the likelihood of a successful outcome. Issues that should be considered by the Inspector during the planning phase include:

- why do I need to interview this person in relation to the investigation?
- what information and/or evidence do I expect to elicit from the interview?
- how will the interview contribute to the overall investigation?
- does the interviewee have needs which must be addressed?
- is it appropriate to interview this person now, or should I first collect further information or interview other persons?
- do I currently have the required information or evidence necessary for me to conduct an effective interview with this person at this time?
- are the exhibits in a format that will allow me to put them coherently to the person during the interview in order to elicit the response required to further the investigation?
- are there any other factors which are likely to influence the successful conduct of the interview (e.g. language issues, availability of the interviewee)?
- what is this person's previous history (including their compliance history, attitude, and willingness to cooperate or otherwise, etc)
- what legal concerns are involved?
- what are the elements to prove the contravention?
- what practical arrangements are required (such as location of interview, room size, equipment needed, exhibits, etc)?
- is a pre-interview briefing required with a legal representative?

In order to conduct a successful interview concerning an alleged contravention of Commonwealth workplace laws, the Inspector will need to have a thorough knowledge of the relevant legislation Inspector in order to be able to ask questions that should reveal during the interview whether or not the alleged contraventions of the award have occurred.

Thoroughly understanding the complaint allows an Inspector to prioritise at what stage of an investigation any interviews should occur. While it is accepted that an interview with a complainant or witness will be conducted at the earliest opportunity, an interview with a suspect may be better held later in the investigation when more information is available.

Considering all these issues should assist in determining when, where, how and why to approach the person to be interviewed, what questions to ask and what exhibits or other evidence and information to put to the person at interview.

3.9.7.1 Pre-interview

Prior to conducting any interview, the Inspector should establish that the person being interviewed has authority to speak for and on behalf of the entity under investigation. In the case of a company, only someone who has authority or says they have the authority to speak for and on behalf of a company can answer questions that will later be admissible in court against the company. If the Inspector has concerns that the person may not have authority to speak for the company, they should seek formal written confirmation to this effect from a company director or other known authorised representative prior to the interview.

Prior to interviewing a suspect, Inspectors should invite the interviewee to participate in the record of interview in writing using the 'Offer of interview – suspect' letter template.

Before the interview, the Inspector should give an overview of how the interview will be run, including the notion that participating in the proposed interview is voluntary, and obtain the interviewee's acknowledgement. Initial contact with an interviewee is discussed in more detail in the rapport stage of the process (see 22.3.5 below).

3.9.7.2 Interview plan

The Inspector should prepare a specific interview plan ahead of time, wherever possible. If this is not practical, a previous interview plan relating to similar circumstances can be used to assist. The plan should be derived from the evidence matrix and should cover all the matters which the Inspector intends to discuss with the interviewee.

In relation to suspect, the interview plan should set out each of the formal allegations which the Inspector intends to discuss. Each allegation should be clear, unambiguous and as concise as possible. Each allegation should cover the supposed involvement of the suspect in the matter being investigated and should cover the common elements of time, date, place, jurisdiction and identity. These can be read onto the record at the start of the interview.

The interview plan should be set out logically. It should include the elements for each alleged contravention of the law that the Inspector is investigating in respect of the suspect and (in each instance) should be directly related to the evidence the Inspector hopes to obtain from the suspect.

For each of the alleged contraventions, the Inspector should include questions that cover each component of the contravention. The Inspector should consider using a series of questions that start with who, what, when, where, why and how to explore fully the matter.

It is important to recognise that the suspect may not wish to proceed in the direction that the Inspector has planned. This can arise for a number of reasons including confusion, a difference in thinking or a conscious effort on the suspect's part to avoid providing information or answering questions while still appearing to be cooperative. That is why having a sound interview plan is important, as is having a corroborator present to monitor progress of the interview against the objectives of the plan. Ensure that sufficient time to conduct the interview has been allowed.

A record of interview template is available on the intranet.

3.9.7.3 Location of interview

Some interviews may be carried out at a place other than FWBC premises. If this is the case, Inspectors should always consider the appropriateness of the surroundings (including the Inspector's safety) and the possibility of noise and interruptions.

While some interviewees, specifically complainants and witnesses, may prefer the familiarity of their own home or their workplace, the Inspector needs to consider whether the location has enough peace and quiet. Recalling information from memory requires concentration and therefore somewhere quiet. In addition the Inspector should take into account access to any exhibits that may be required for the interview.

The FW Act provides that an Inspector has the power to interview any person at premises[39] where the work was performed or the relevant documents are kept, in investigating certain prescribed matters under the Act. The FW Act further provides Inspectors with the power to ask for certain details, such as the person's name and address[40].

There are times when an Inspector will choose to interview a witness at their workplace. These instances may arise when the Inspector is conducting a field investigation and encounters or identifies a person on site who is a witness to the matter being investigated. If it is more appropriate, the witness may be invited to be interviewed at another location or at another time. However, time constraints may require that the witness is interviewed at the workplace at that time. The Inspector can proceed with the interview but should be sensitive to any concerns that the witness may have in being interviewed at the workplace.

On other occasions, an Inspector may conduct more formal interviews for which there has been considerable preparation. These interviews are discussed in more detail in the rest of this chapter, and are known as a record of conversation (with a witness), and a record of interview (with a suspect).

3.9.8 Conducting the interview

Where practicable, two Inspectors should be present when conducting interviews. One Inspector takes the role of the lead interviewer, while the other acts as corroborator. Their roles in the interview process are detailed below.

[39] FW Act; s709
[40] FW Act; s711

3.9.8.1 The lead interviewer

The lead interviewer's role is to conduct the interview, ask the bulk of the questions, and manage the progress of the interview. The lead interviewer will conduct the planning of the interview, including writing out the allegations to be put to the suspect, completing the interview plan, and ensuring that exhibits to be referred to in the interview are readily available and appropriately marked for identification.

3.9.8.2 The corroborator

The corroborator's role is to:

- take notes during the interview. This provides several benefits, particularly in the case of electronic recording. It may be that a transcript will not be available for some time after the completion of the interview and important information arising from the interview needs to be available in the interim to progress other aspects of the investigation. Furthermore, it may be that there is a need to come back to previously asked questions during the course of the interview and this can be difficult when recording electronically unless the specific question was written down by a corroborator at the time.
- record the start time, finish time and times of all suspensions and resumptions.
- manage all exhibits to be shown to the suspect during the course of the interview, including noting the identifying number and the point in the interview when the exhibit was shown to the suspect.
- monitor the interview questions, considering the elements of the contravention and ensuring any missed questions or rights are brought to the attention of the lead interviewer before the end of the interview.
- make sure that each element of the interview plan has been addressed during the interview.

It is preferable that all questions in the interview are asked by the lead interviewer. This is because one of the roles of the lead interviewer is to build rapport with the suspect. This is more easily accomplished where the suspect only needs to focus on one person. However, it is appropriate that the lead interviewer offer the corroborator an opportunity to ask questions at the end of the interview or at the end of questioning on a particular issue or aspect.

Where a corroborator notes that a question has been overlooked by the lead interviewer or that a matter needs to be further pursued during the course of the interview, the corroborator should make a note of the issue and address it when given the opportunity to ask questions by the lead interviewer. Only if the lead interviewer has missed something significant (such as the caution) or made a major error should the corroborator intervene by passing a note to the lead interviewer, as interruptions by the corroborator cause distraction and can unnerve the interviewee.

3.9.8.3 Building Rapport

Building rapport with an interviewee is essential to facilitate an environment where they will feel comfortable in disclosing information. Rapport is about building a relationship with the interviewee from the first point of contact. Managing first impressions will have a positive or negative impact on how an interviewee responds to questioning. It is an opportunity for the

Inspector to minimise any anxiety felt by the interviewee, regardless of whether they are a complainant, another witness, or a suspect.

An interviewee should be made to feel comfortable in order to speak freely. Therefore creating the right environment from the outset is vitally important. Depending on the nature of the alleged contraventions, and the past history of the suspect, an Inspector will consider how the suspect is best approached to be interviewed (e.g. by phone, by letter, or via a third party such as a solicitor or representative).

If the matter is likely to proceed to litigation, it is appropriate for an Inspector to formally write to the suspect with an invitation to participate in a record of interview in relation to the alleged contraventions being investigated. Inspectors should seek the advice of their Assistant Director in drafting this kind of letter.

3.9.8.4 Explaining the procedure

To support the interviewee and create an environment where they are comfortable in speaking, Inspectors should explain the interview process. The explanation should include the reason the interview is being conducted, what is expected of the person being interviewed (e.g. they will be asked to recall a certain event), and any specific procedures that will be followed during the interview. This will give the interviewee clarity in relation to what is happening, how their information will be used and an understanding of procedure.

Confirm with the person being interviewed that the information is:

- their account
- to be given in their own words
- to be as detailed as they can recall.

3.9.8.5 Account

This stage of an interview is where a detailed account of the matter under investigation is given by the interviewee. This stage can be recorded in writing or on audio or video. Interviewees will recall events best when they are comfortable in their surroundings, understand the process they are engaged in and have an understanding of what is expected of them.

Having thoroughly prepared for the interview and built a rapport with the interviewee, the Inspector comes to the stage of obtaining as much information as the interviewee can or will offer. The next stage may involve setting the scene.

3.9.8.6 Setting the scene

An interviewee may be recalling an event that they experienced days, weeks or months previously and it is often difficult to recall details accurately. If the interviewee is given time to concentrate and is willing to make the effort, more details about the incident may be recalled.

3.9.8.7 Statements that set the scene

Inspectors must allow adequate time for the interviewee to concentrate and focus on their answer. Remember at this point the interviewee may be silent as they work hard to recall

information. The more time and effort the Inspector spends on setting the scene without actually leading the interviewee, the more information the interviewee will give. To set the scene, the Inspector might use sentences such as:

- think about what you were doing
- think about what was happening
- focus on everything you could see
- concentrate on who was with you
- think about what you could hear
- concentrate on what was said
- concentrate on how the weather was at the time
- think about how you were feeling.

Do not rush into the next question just because an interviewee is silent. Give the interviewee time to respond to the question.

3.9.8.8 Obtaining an uninterrupted account

By now the scene is set for the interview to continue. The Inspector should ask the interviewee to give an uninterrupted account of everything they know about the matter being investigated. This is referred to as free recall.

Free recall has the following advantages:

- a version is given without prompting or interrupting
- interviewees can explain their views and feel they have had an opportunity to say what they wish.

As the interviewee gives free recall, the Inspector should listen carefully and note areas where further details are to be sought. Interviewees must be given sufficient time to provide their first uninterrupted account.

On occasions the Inspector may not obtain a full first account in the free recall phase. This may be because an interviewee (even after careful explanation) does not fully understand what is required of them or is keen to impart information and speaks quickly, covering a large amount of information in a short period of time. If this happens the Inspector must consider the aim(s) of the interview as detailed in the written plan, and systematically cover the questions and topics that were identified during the planning stage.

Ensure the interviewee understands what is expected of them and repeat the introductory question, reaffirming the need to include as much detail as possible.

3.9.8.9 Using open questions

The Inspector should use open questions to encourage the interviewee to give a full response. As per the interview plan, questions should begin with:

- Who
- What

- When
- Where
- Why
- How

Starting a sentence with one of these words requires the interviewee to reply with an expanded answer. This is essential for the Inspector to verify known facts without leading the interviewee.

Asking closed questions will provide the interviewee with an opportunity for a one-word response – usually yes or no. The Inspector should try to avoid questions beginning with:

- Did you…
- Have you…
- Is it true…
- Is it correct…
- I put it to you…

These questions will offer the interviewee an opportunity to respond with little or no explanation.

3.9.8.10 Encouraging repeated attempts to recall

During the interview, encourage the interviewee to search their memory. It is unlikely that everything available in their memory will be recalled on the first attempt.

3.9.8.11 Expanding the account

The first account given by an interviewee may be incomplete. In fact, many accounts given can be expanded with probing open questions. Inspectors can assist the interviewee in expanding the account by breaking the first free recall into smaller, more manageable topics and asking the interviewee to refocus on individual segments of their account. Placing the interviewee back into context and setting the scene for each segment allows them an opportunity to concentrate on detail again with the Inspector asking minimal questions.

3.9.8.12 Summarising

The Inspector should summarise what has been said about each aspect of the free recall to check that understanding is accurate, before moving on to the next topic. To maintain the conversational flow, link the summary to the next topic with an open question.

Apart from giving Inspectors the opportunity to check understanding of what has been said, summarising also gives the interviewee the opportunity to add to or alter what they have said. It also helps maintain a professional working relationship by showing the interviewee that the Inspector has listened and understood what they have said and cements the work undertaken in the rapport stage.

This should encourage the interviewee to continue their account and to be increasingly open with the Inspector as the interview progresses. Summaries also have the benefit of affording the interviewee a break as the Inspector contributes their share of the conversation.

Summarising will also provide an opportunity for the interviewer to reinforce their memory. On occasions there will be a lot of information in one topic area. To avoid becoming overloaded with this, the Inspector may need to summarise the interviewee's responses before the end of the topic and later summarise the whole topic before moving on.

3.9.9 Methods of recording the interview with the Suspect

3.9.10 Location and method

Records of interview should be conducted on FWBC premises wherever possible and always should be formally recorded. The best method to record the interview is with an electronic recorder. Ensure that only new media (such as a CD or DVD) are used. In the case of triple decks, ensure that each disk used is new. Ask the Assistant Director for official FWBC CDs and/or DVDs. The Inspector must advise the person being interviewed that the interview is being recorded electronically (even if the recording is of a telephone conversation or is being made for the purposes of transcription).

The Inspector should be prepared with a back-up method of recording the interview (such as typing the interview into a laptop computer which has a charged battery or hand writing the interview into the Inspector's notebook), in case the electronic recorder fails to operate.

Sometimes, the suspect is not prepared to be recorded electronically, but is nonetheless prepared to talk to the Inspector. In such cases, the Inspector should inform the suspect of the intention to record the interview in typed or written form (as for the back-up method above).

Where the interviewee has refused to participate in an electronically recorded interview, document the refusal at the start of the typed or hand-written interview.

The Inspector should inform the suspect that he or she will be given the opportunity to read the record of the interview at the conclusion and to adopt it if they so wish. Adoption usually takes the form of signing each page and initialling any errors, such as misspellings. Where the interview was recorded in the Inspector's notebook, have the suspect read and then sign the notebook as an accurate record of the conversation. This can later be typed up and the signature of that statement referenced as having been recorded in the notebook.

3.9.11 Transcribing & storage of recorded conversations

The following procedures are to be followed when records of interview or conversations have been electronically recorded.

In the first instance, all recorded interviews or conversations should be down-loaded to a compact disc, SD Card or other electronic storage device and secured in a suitable storage medium that has limited access. A register is to be maintained in a secure area.

Approval from an Assistant Director is required before any recordings are sent to a transcribing service. The Assistant Director will determine whether it is necessary for the recordings to be transcribed or whether a summary will suffice. If the latter is sufficient then arrangements can be made to prepare the summary in-house. Matters would normally be transcribed where it is likely that the investigation will proceed to litigation.

If Auscript are used as the transcribing service, they are capable of transcribing all files that have been electronically captured. The recorded conversations can be emailed directly to Auscript avoiding copying and mailing. Auscript have advised that the preferred recording mode should be set on SP (short play) as opposed to LP (long play). This will allow 155 minutes of recorded conversation which should be sufficient in the majority of circumstances.

It will be the responsibility of the Assistant Director to email the relevant material to Auscript and ensure that any invoices for payment are returned for their attention. Once the invoice has been received by the Assistant Director he or she will endorse the invoice to indicate that the services have been received before forwarding to the delegate for approval and on forwarding to the Finance Unit for payment.

Hard copies of all transcripts should be held on the original investigations file according to the procedures outlined in File Management – section 2.22 in FWBC Guide.

3.9.12 Challenging an interviewee

The challenge phase of an interview primarily occurs when interviewing suspects. It is an opportunity to tactically challenge evidential inconsistencies between what the interviewee has said and the evidence known to the interviewer. The challenge questions should be presented to the interviewee in the same way as the rest of the interview questions, in a clear and calm manner that allows the interviewee to understand and respond to these questions. This phase is best conducted once all investigative actions have been completed.

The timing of a challenge is crucial and the potential impact enormous. It is human nature to want to confront an inconsistency or apparent lie as soon as it is identified. However, it is essential that a suspect is not confronted until after they have given a detailed account of their version of events, as doing so makes it very difficult for the interviewee to claim a misinterpretation or misunderstanding.

In an interview, the preferred strategy is to make no immediate judgement and to let the suspect continue with their account. The Inspector may find that the interviewee was not lying but just mistaken. Even if the suspect is being intentionally untruthful, still allow them to continue talking. In this way, the suspect may provide assistance to the investigation if the Inspector is able to disprove the suspect's account and show them to be unreliable or dishonest.

Answers provided during interviews are not considered to be voluntary if any threat, promise or inducement is made that caused the suspect to provide those answers. Evidence (such as a record of interview) may be excluded from court proceedings in circumstances where it has been obtained improperly or where suspects are tricked into making admissions.

3.9.13 Assess and evaluate

Any interview can be evaluated provided that the purposes and consequences of the interview are known. To effectively evaluate an interview, it is essential for the interview to have been clearly planned at the outset, and for the information received during the interview to have been clearly understood.

This process allows Inspectors to determine whether the interview has achieved its objective, and whether inconsistencies are highlighted, hypotheses can be developed from the interview, or other investigative action is necessary. It also allows evaluation of the performance of the interviewers themselves. Professional questioning and interviewing comes with practice. The more interviews an Inspector does the better they should become.

3.9.14 Witnesses

A person becomes a witness when an Inspector determines that the person has seen, heard, or experienced an event and can provide information which is relevant to the matter being investigated.

In most cases, the main witness is the complainant. However, there are occasions when other people may be interviewed. Usually these people would be witnesses to the matters being investigated. For example, a co-worker who was present when a relevant conversation between the complainant and the suspect occurred and who can advise the Inspector what was said, would be a witness.

The interview of a witness should be conducted at the first practicable opportunity to ensure the best recall of events and to avoid contamination of the witness's memory through discussion with other people.

3.9.15 Significant witnesses

A significant witness is a witness whose account of a particular matter or incident may have considerable bearing on the direction or outcome of an investigation. In the majority of investigations, the concept of significant witnesses will not arise. However, as complex investigations may involve numerous witnesses of varying importance, it is important that Inspectors are able to identify those witnesses whose accounts may be of greater value.

Significant witnesses may be seen as a special category of witness for two principle reasons. These are that:

- the witness may have been, or may claim to have been, an eye witness or witness to the immediate event in some other way
- the witness stands in a particular relationship to someone having a central position in the inquiry.

Statements from significant witnesses should be regarded as a high priority and obtained at the earliest opportunity. The review process that applies to the witness statement of a significant witness in a complex investigation should involve the Legal Group.

3.9.16 Introducing exhibits

During the course of the questioning, the Inspector may show exhibits to the interviewee (such as documents that the interviewee has allegedly signed). The Inspector should fully describe the object for the purpose of the recording device, even if the interview is being video recorded, to avoid any ambiguity later. The description of the exhibit should include reference to any identifying numbers and/or exhibit numbers recorded on the object.

3.9.16.1 Disclosure and admissions

Procedural fairness must be given to the suspect before and during the interview. This includes informing the suspect about the nature of the allegation(s) against them and the possible consequences if each allegation is proven. This is not to be confused with full disclosure of the evidence against them. If the interviewee or their representative asks about the existence of any evidence that may not have been disclosed, it is appropriate for the Inspector to explain that the fullest appropriate information has been provided to the interviewee.[41] The Legal Group will guide Inspectors as to the level of disclosure. In addition, Inspectors should have regard to Guidance Note 5 - Document Access Policy and the provisions within the FW Act dealing with disclosure of information, particularly s 718. Consistent with the Policy, any decision to release documents should be done so in conjunction with the appropriate Executive Level 2.

An admission by a suspect may go some way to supporting a subsequent litigation. Evidence should always be sought within the interview that will help validate any admission that is made. Faced with an admission, Inspectors should seek further details to help confirm the accuracy of the account. Further, Inspectors should anticipate later challenges to any admission. Always consider, if the admission was not made, what additional evidence there is to support litigation. Litigation should never be based on an admission alone.

3.9.17 Interviewing vulnerable people

The definition of a vulnerable person as applied within FWBC can be found in Guidance Note 1 - Litigation Policy.

Vulnerable workers include (but are not limited to): young people, trainees, apprentices, people with a physical or mental disability, people with 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 living

[41] See Ord, Brian, Shaw, Gary and Green, Tracey, *Investigative Interviewing Explained (Second Edition)*, Chatswood NSW: LexisNexis Butterworths, 2008 p 85.

in regions with limited employment opportunities and/or with financial and social restraints on their ability to relocate to places where there may be greater job opportunities.

Although the person considered vulnerable is usually the complainant or another witness, there are circumstances where the suspect may also be considered a vulnerable person.

Special considerations for interviewing vulnerable people are detailed below.

3.9.18 Interviewing people of Aboriginal or Torres Strait Islander descent

When interviewing people of Aboriginal or Torres Strait descent, the Inspector should adhere to the Anunga Rules, which are 9 guidelines set down by Justice Forster in the in the Supreme Court of the Northern Territory in the case of *R v Anunga*[42].

The purpose of the Anunga Rules is to address disadvantages faced by Aboriginal and Torres Strait Islander people in situations involving police interviews and investigations. The Rules have been adopted by State legislatures as a best practice to apply generally to protect the rights of an interviewee or an individual in custody. The Anunga Rules are:

- Where necessary, an interpreter should be present
- Where practical, a 'prisoner's friend' should be present
- Care should be taken in administering the caution to ensure there is a proper understanding
- Leading questions should be avoided
- Even after an apparently frank and free confession is obtained, police should continue to investigate the matter to find proof of the commission of offences from other sources
- Police should offer the interviewee a meal, coffee, tea, water and toilet breaks
- Suspects are not interviewed when ill, drunk or tired and that interviews should not last for an unreasonable amount of time
- If the suspect seeks legal advice, reasonable steps should be taken to obtain it and if the suspect states that they do not wish to answer any more questions, the interview should be terminated
- Substitute clothing should be provided where clothing is taken for forensic examination

It is particularly important that Inspectors caution an Indigenous Australian appropriately as a record of interview or statement may be inadmissible as evidence if information was not considered to have been provided voluntarily. Inspectors should ensure that they:

- advise the interviewee that they have the right to remain silent; and
- ensure that the interviewee understands that right.

[42] R v Anunga (1976) 11 ALR 412

As the onus is on the complainant (in the civil proceeding) to prove that the interview or statement was given voluntarily, Inspectors should also attempt to ensure that an independent or support person is present. This should be done prior to the interview taking place.

3.9.19 Interviewing minors

If the witness is under eighteen (18) years of age, the Inspector should ensure that a parent or guardian is present during the interview. The parent/guardian should also co-sign any statement signed by the witness.

In the exceptional case where the parent or guardian is unable to attend, or is a witness in the same matter, another responsible adult (see 22.16.4 – *Support persons or interview friends*) should be present with the junior witness.

3.9.20 Interviewing non-English speaking people

Witnesses who have a limited understanding of English should be offered the services of an accredited interpreter (where available). Avoid using persons known to the witness or connected to the case as an interpreter. Ensure that the interpreter is aware that they must not impede or distort the witness's communication. Recording the actual words spoken by the witness also will allow the interview to be independently interpreted later, if required.

3.9.21 Support persons or interview friends

Where an Inspector determines a witness is vulnerable, the Inspector should consider whether a support person could assist the witness during the interview. If so, the Inspector should offer the witnesses the opportunity to have an interview friend present during the interview and when preparing and signing any witness statement.

The role of an interview friend is to assist in communicating with the witness and to act in the best interests of the witness during the interview. They should not answer questions for or offer opinions on behalf of the witness. The interview friend should not be a person or entity alleged to have contravened Commonwealth workplace laws, the complainant, or another actual or potential witness in the same investigation.

The Inspector should consider that not all persons who fall within the above definition of vulnerable worker will require additional assistance in the interview process. In addition, some persons who do not meet the formal definition of a vulnerable person and are otherwise capable people may be too distressed to give a proper account in an interview situation.

If the vulnerable witness is unable to bring an interview friend or support person for any reason, Inspectors should offer to arrange for an independent person over the age of 18 years to support the witness during the interview process. A local Justice of the Peace (JP) or some local organisations, such as crisis centres or advisory services, can provide support

persons for interviews. The following organisations may be able to provide interview friends subject to availability and resources:

Melbourne: Jobwatch Inc
Phone: 03 9662 1933

Brisbane: Nikki Candy
Principal Industrial Officer
Young Workers Advisory Service
Phone: 07 3211 1447

Perth: The Employment Law Centre of WA
Phone: 08 9227 0100

Adelaide: Melanie Cunningham / Kirsten Sandstrom
Service to Youth Council (SYC)
Phone: 08 8405 8540

Sydney: Contact: Jane Sanders (Principal Solicitor)
The Shopfront Youth Legal Centre
(02) 9322 4808
(Case by case basis – for young and especially disadvantaged people only)

The Inspector should consider in each situation whether a support person should assist, and seek the advice of the Assistant Director as needed.

It is strongly recommended that Inspectors take these measures where appropriate as they are in the best interests of both FWBC and the witness.

3.10 Establishing the Facts - Examination Notices

Note: Section 46 of the FWBI Act contains a 'sunset' provision under which the Director cannot apply for an examination notice after 1 June 2015.

3.10.1 Introduction

Sections 44 to 58 of the FWBI Act provide an ability for an AAT presidential member to issue an examination notice to seek information, documents and evidence from witnesses.

Section 45 of the FWBI Act provides that the Director may apply in writing to a nominated AAT presidential member for the issue of an examination notice. An examination notice must not be issued in relation to more than one person, but may be issued in relation to more than one investigation.

There are three different types of examination notice, specifically:

- an examination notice requiring the production of information.

Paragraph 45(1)(c) of the FWBI Act allows the AAT presidential member to issue an examination notice requiring a person to give information to the Director.
This power will only be used where a person's attendance is not required at an examination. Instead the person will be required to answer a series of written questions put to them in an examination notice. The examination notice must specify the time by which, and the manner and form in which, the information is to be given.

- an examination notice requiring the production of documents
  Paragraph 45(1)(d) of the FWBI Act allows the AAT presidential member to issue an examination notice requiring a person to produce documents to the Director. The examination notice must specify the documents, or kinds of documents, that the person must produce. The Notice must specify the time by which, and the manner in which, the documents are to be produced.
- an examination notice to attend and answer questions
  Paragraph 45(1)(e) of the FWBI Act allows the AAT presidential member to require a person to attend before the Director to answer questions relevant to the investigation. The examination notice must specify the time and place for attendance.

All possible avenues to obtain the evidence voluntarily or via information gathering powers available to Inspectors under Subdivision B of Division 3 of Part 5-2 of the FW Act must be exhausted before the issuing of an Examination Notice will be considered.

The Director will only seek to have an examination notice issued by an AAT presidential member where:

- the Director, or his authorised delegate, has commenced an investigation (refer part 26.2);
- the investigation is not connected with a building project in relation to which a determination by the Independent Assessor is in force;
- there are reasonable grounds to believe that a particular person has information or documents relevant to that investigation;
- it is likely to be important to the progress of the investigation that this information or evidence be obtained;
- other methods of obtaining the information, documents or evidence have been attempted and have been unsuccessful or are not appropriate; and

it is reasonable to require the person's attendance, having regard to the nature and likely seriousness of the suspected contravention, and the likely impact on the person as far as that impact is known of the issue of the examination notice on the person.

Examination notices will not be sought to conduct a 'fishing expedition' for information.

3.10.2 Delegations to Inspectors to undertake investigations

On 1 June 2012, the Director formally delegated his functions under section 10(c) of the FWBI Act, to Inspectors. This delegation is an important step in ensuring the validity of examination notices.

On 13 June 2012, the Director issued a direction to all Inspectors, which requires that they create a record of each instance in which they exercise this delegation. A template

document (Record of Decision to Investigate) is provided on the Inspector Resources page and is to be completed at the commencement of each investigation, the transfer of investigations between FWBC personnel or where the Inspector determine that additional potential contraventions have been identified that were not listed on the original document.

3.10.3 Application of use/derivative use indemnity

A key feature of the use of examination notices is that a witness is not excused from giving information, producing a document or answering a question as required by an examination notice on the basis that to do so might tend to incriminate them or otherwise expose them to a penalty or other liability.

However, subsection 53(2) of the FWBI Act protects witnesses with respect to information, documents or answers that they give. This means that such information or documents is inadmissible in evidence against the person.

Subsection 53(2) does not protect a witness in circumstances where they:

- fail to comply with any of the obligations specified in subsection 52(1)(b) of the FWBI Act (also see paragraph 26.18 below - compliance with an examination notice);
- knowingly give information or evidence or produce a document that is false or misleading (sections 137.1 and 137.2 of the Criminal Code); or
- obstruct, hinder, intimidate or resist a Commonwealth public official in the performance of the official's functions (section 149.1 of the Criminal Code).

In practice, these protections will mean that an examination notice should never be issued to a person who may be a respondent to any resulting enforcement action.

3.10.4 FWBC procedures leading to a decision to seek an examination notice

Where an Inspector believes that there is a need to seek an examination notice, he or she will raise the matter with the relevant Assistant Director and State Director, who will consider whether to also consult with the Legal Group. In considering whether to seek an examination notice, the Inspector must assess whether:

- the investigation (or investigations) involves a contravention, by a building industry participant, of a designated building law (the FW Act, the FW (TPCA) Act, the IC Act, or a Commonwealth industrial instrument such as an award or a workplace agreement), or a safety net contractual entitlement;
- the investigation (or investigations) is ongoing, and proceedings have not yet commenced;
- the investigation (or investigations) is not connected with a building project in relation to which a determination under subsection 39(1) is in force;
- substantial and meaningful steps to acquire the relevant information, documents or evidence voluntarily and via information gathering powers available under Subdivision D of Division 3 of Part 5-2 of the FW Act have been exhausted;
- there are reasonable grounds to believe that the person to be subject to the examination notice has information or documents, or is capable of giving evidence relevant to a building industry investigation, specifying the grounds for that belief,

- the consequences of the use/derivative use indemnity would mitigate against the use of an examination notices;
- there are any possible contempt of court issues; and
- there will be any effect on the person to be issued the examination notice.

Subject to approval by the State Director and Executive Director, the Inspector is to prepare a draft application to the nominated AAT presidential member, including a draft affidavit and examination notice (subject to confirmation of relevant dates, see below).

These draft documents are to be forwarded to the Director for his consideration. If the Director considers that the draft application, affidavit and notice demonstrate an appropriate circumstance for the issue of an examination notice, the Inspector is to:

- prepare a covering letter to accompany the examination notice;
- request that an examination notice number be issued;
- liaise with all relevant parties in order to determine a suitable date for the information or documents to be received, or the date which the witness will be required to attend to answer questions;
- liaise with relevant parties regarding a venue for the examination to be held;
- liaise with relevant parties regarding booking of transcription service to record examination; and
- advise the Director Conformance so that any potential security issues may be addressed.

Once all details of the examination notice have been confirmed, the Inspector will send the application, affidavit, proposed examination notice and cover letter to the Director for consideration and signature.

If the Director is satisfied with the documents, an application can be made to the nominated AAT member for the issue of an examination notice.

3.10.5 The Affidavit to the AAT presidential member

The application must be accompanied by an affidavit by the Director including the following information:

- the name of the person in relation to whom the application relates;
- details of the investigation (or investigations) to which the application relates;
- a statement that the investigation (or investigations) are not connected with a building project in relation to which a determination under subsection 39(1) FWBI Act is in force;
- the grounds on which the Director believes the person has information or documents, or is capable of giving evidence, relevant to the investigation(s);
- details of other methods used to attempt to obtain the information, documents or evidence;
- the number (if any) of previous applications for an examination notice that the Director has made in relation to the person in respect of the investigation(s); and

- information about whether the Director has made, or expects to make, any other applications for an examination notice in relation to the investigation(s) and if so, the persons in relation to whom those applications relate.

The nominated AAT presidential member may request that the Director give the presidential member further information in relation to the application. If a request for further information is made the Director must give the further information in writing as soon as practicable after receiving the request.

3.10.6 Format of examination notices

There are three different templates that may be used for an examination notice, depending on the type of information sought, specifically:
Section 45(1)(c) FWBI Act allows a nominated AAT member to issue an examination notice requiring a person to give information to the Director.

The template for the Notice requiring the production of information is prescribed by Schedule 7.1 of the FWBI Regulations.

Section 45(1)(d) allows a nominated AAT presidential member to issue an examination notice requiring a person to produce documents to the Director.

The examination notice must specify the documents, or kinds of documents, that the person must produce. The Notice must specify the time by which, and the manner in which, the documents are to be produced.

The template for the examination notice requiring the production of documents is prescribed by Schedule 7.2 of the FWBI Regulations.

Section 45(1)(e) allow a nominated AAT member to require a person to attend before the Director to answer questions relevant to the investigation. The examination notice must specify the time and place for attendance.

The template for the examination notice to attend and answer questions is prescribed by Schedule 7.3 of the FWBI Regulations.

3.10.7 Covering letter

All examination notices must be accompanied by a covering letter (available on the Inspector Resources page). The covering letter is designed to help witnesses understand the formal wording of the examination notice.

The covering letter will:

- outline in plain English the recipient's rights and obligations, including that the witness may choose to be represented by a lawyer of the person's choice;

- state that the witness may request a change in the time of the scheduled examination in writing if there are exceptional circumstances that prevent or unreasonably impede attendance at the examination;
- state the potential consequences for non-compliance with the examination notice; and
- offer the details of a Contact Officer if the witness has any outstanding questions.

3.10.8 Issuing of examination notices by AAT presidential member

The nominated AAT presidential member to whom the application for an examination notice has been made must issue the examination notice if the presidential member is satisfied of the following matters:

- that the Director has commenced the investigation (or investigations) to which the application relates;
- that the investigation(s) are not connected with a building project in relation to which a determination under subsection 39(1) is in force;
- that there are reasonable grounds to believe that the person to whom the application relates has information or documents, or is capable of giving evidence relevant to the investigation(s);
- that any other method of obtaining the information, documents or evidence has been attempted and has been unsuccessful, or is not appropriate;
- that the information, documents or evidence would be likely to be of assistance in the investigation(s);
- that the nature and seriousness of the suspected contravention justifies the issue of the examination notice; and
- having regard to all the circumstances it would be appropriate to issue the examination notice, including the likely effect on the person to be examined.

As soon as practicable after an examination notice has been issued by the AAT presidential member, the Director must notify the Commonwealth Ombudsman that the examination notice has been issued. Refer to section 26.24 regarding obligations concerning the Commonwealth Ombudsman.

3.10.9 Service of the Notice

The service of examination notices are governed by section 28A of the *Acts Interpretation Act 1901*.

A notice may be served:

(a) on a natural person:
  (i) by delivering it to the person personally; or
  (ii) by leaving it at, or by sending it by pre-paid post to, the address of the place of residence or business of the person last known to the person serving the document; or

(b) on a body corporate by leaving it at, or sending it by pre-paid post to, the head office, a registered office or a principal office of the body corporate.

Whilst service by Registered Post is permitted, notices will be served personally in most circumstances. Alternatively, FWBC will serve the notice on the addressee's legal adviser where the adviser has instructions from the addressee to accept service on the witness's behalf. In exceptional circumstances, process servers may be used, particularly where there is significant travel involved.

The witness may be served either at work or home during or after business hours. However, a considered decision should be made taking into account any potential repercussions that may result for the witness if they are served at work. If the witness will cooperate, it is best to arrange with the witness as to where is best for them to be served with the notice.

The Inspector will arrange for the personal service of an examination notice and covering letter at least 14 clear days prior to the examination.
An affidavit must be completed as soon as practicable after service has been affected. The affidavit must include all relevant discussion with the witness including whether or not the witness has any relevant documentation in relation to the investigation.

3.10.10 Rescheduling of compliance dates in notices

If a witness requires an extension of time to produce information or documents or requires that the date of their examination be changed due to exceptional circumstances, they must request an extension or change of date in writing. The Director has the discretion to grant an extension of time or change the date of an examination.

3.10.11 Conduct of examinations

The Director will personally preside over all examinations.

3.10.11.1 Evidence given by a witness at an examination is required to be given on oath or by affirmation.

Only FWBC staff members directly involved in the investigation may attend an examination. Who will attend must be considered on a case-by-case basis, but will usually be as follows:

- the Director (for the purpose of presiding over the examination),
- a member of the Legal Group (for the purpose of assisting the Director),
- an Inspector (this will usually be the case officer running the investigation),
- video recorder (for the purpose of video recording and arranging exhibits),
- witness, and
- the legal representative of the witness.

Third parties, with the exception of legal representatives, are excluded from examinations even though they may have a direct interest in the evidence to be given. For example, a suspect whose company is under investigation has no right to attend the examination of an employee. The exclusion of third parties is supported on the basis that examinations are investigative rather than judicial proceedings, so that no right of attendance arises.

Those persons who are in attendance at the examination, in particular, the case officer and lawyer, have a critical role to play. This involves:

- assisting the Director to prepare for the examination;
- assessing the evidence provided by the witness,

- suggesting further lines of questioning for the Director,
- taking notes of answers given by the witness, and
- advising the Director where there is information or evidence in the possession of FWBC that confirms or contradicts the evidence being given.

Examinations must video-recorded and a transcript of the evidence will be hand-delivered to the witness once it becomes available. Accompanying the transcript will be a letter inviting the witness to make any amendments or written comments in relation to the transcript.

Section 65 of the FWBI Act protects the confidentiality of protected information obtained by the Director under sections 44 to 58 of the FWBI Act. It is a serious offence for the Director or FWBC staff to record or disclose information obtained in the course of their official employment if this is not done in a manner permitted by section 65 of the FWBI Act.

3.10.11.2 Documents obtained as a result of an examination notice

Section 55 of the FWBI Act allows the Director to take possession of a document produced under an examination notice and keep it for as long as necessary for the purposes of the relevant legislation.

Section 56 of the FWBI Act allows the Director to make and keep copies of any document produced under an examination notice.

Where the Director has retained any document produced under an examination notice, section 55(2) of the FWBI Act enables the provider of the document to obtain a certified copy of the document.

The certified copy is taken as evidence of the original document in all courts and tribunals. The provider of the document, or a person authorised by the provider, is also entitled to inspect the document held by FWBC and to make copies of the document prior to being given a certificate.

3.10.11.3 Legal representation

All witnesses have the right to legal representation at examinations, and may choose their own legal representation.

Witnesses are given a minimum of 14 days from the date they are served with the notice to the date that they are required to attend an examination. This timeframe allows the witness sufficient time to source a legal representative should they so choose.

A legal representative will be permitted to:

- object to questions as being unclear or irrelevant to the subject matter of the examination;
- re-examine the examinee to clarify any response to an earlier question; and
- make submissions at the completion of the examination.

3.10.12 Compliance with an examination notice

A person who receives an examination notice pursuant to section 50 of the FWBI Act is obligated to comply with that notice. In particular, an addressee of a notice must, where relevant:

- give the required information by the time, and in the manner and form specified in the notice;
- produce the required documents by the time, and in the manner, specified in the notice;
- attend to answer questions at the time and place specified in the notice;
- take an oath or affirmation, when required to do so under subsection 51(4) of the FWBI Act; and/or
- answer questions relevant to the investigation while attending as required by the notice.

A recipient of an examination notice will commit an offence under section 52 of the FWBI Act if they fail to comply with the above obligations.

A recipient of an examination notice is not required to give information, produce a document or answer questions if to do so would disclose information that is the subject of legal professional privilege or would be protected by public interest immunity.

Where a recipient of an examination notice refuses or fails to comply with the examination notice, the Director may write to the person asking them to show cause as to why the matter should not be referred to the Commonwealth Director of Public Prosecutions for prosecution.

In the case of non-compliance at an examination, the Director may ask the examinee to show cause immediately by giving an oral explanation. The witness will be permitted to seek an adjournment of the examination to consult with a legal adviser before answering.

Section 52 of the FWBI Act provides that non-compliance may be a criminal offence carrying a maximum penalty of six months imprisonment. However, subsection 4B(2) of the *Crimes Act 1914* (Cth) provides that the court can, if considered appropriate, instead of, or in addition to imprisonment, impose a maximum $5,100 fine for breaches, and five times that for a body corporate convicted of an offence.

3.10.13 Payment for expenses incurred in attending an examination – Section 58

In accordance with section 58 of the FWBI Act and Division 7.2 of the FWBI Regulations , a person who attends an examination as required by an examination notice is entitled to be paid fees and allowances, fixed by or calculated in accordance with the FWBI Regulations, for reasonable expenses (including legal expenses) incurred by the person in attending the examination.

The person is not entitled to expenses unless the person applies in writing to the Director for payment of the expenses within three months after the examination is completed and provides the Director with sufficient evidence to establish that the person incurred the

expenses. A guide and claim form is located on the Inspector Resources page and should be provided to the witness by the Inspector.

3.10.14 Travelling allowance – Regulation

The witness is entitled to a payment (a travelling allowance) towards meeting the expenses that the witness incurs in travelling between their workplace or residence and the place where the examination takes place.

The amount of the travelling allowance is as follows:

- if it is reasonable for the witness to travel by air—the amount that is payable for economy class air travel;
- if public transport is available—the amount that the witness actually and properly pays for the public transport; and
- if public transport is not available and the witness travels using their private motor vehicle—the amount calculated at the rate of $0.74 per kilometre travelled.

However, the maximum amount payable for the travelling allowance is $2,000.00 (Regulation 7.10).

When deciding whether public transport is or is not available, regard will be had to whether a public transport system is operating by which the witness could conveniently:

- travel to the examination place in a reasonable time before the witness's required attendance; and
- return to the witness's work or residence in a reasonable time after the witness's attendance at the examination place.

3.10.15 Accommodation allowance – Regulation

The witness is entitled to a payment (an accommodation allowance) towards meeting the expenses that the witness incurs for accommodation when the witness is necessarily absent overnight from the witness's residence to attend the examination.

The amount of the accommodation allowance is the amount calculated at the accommodation rate that is payable under the Taxation Office Determination for the lowest salary range.

The amount must be calculated having regard to the:

- time of the latest public transport available by which the witness could conveniently travel to the examination place in a reasonable time before the witness's required attendance; and
- the time by which the witness could conveniently return to the person's work or residence using the earliest public transport available in a reasonable time after the witness' attendance at the examination place.

3.10.16 Attendance allowance – Regulation

The witness is entitled to a payment (an attendance allowance) towards meeting any loss of earnings that the witness incurs when the witness is necessarily absent from the witness' work to attend the examination.

The amount of the attendance allowance is the amount (the usual pay) that the witness would otherwise have been entitled to receive for performing his or her normal duties during the witness' absence from work to attend the examination.

When claiming the attendance allowance, the witness must provide evidence that confirms:

- the witness' usual pay; and
- that the witness did not receive the witness' usual pay for the time when the witness was necessarily absent from the witness' work to attend the examination.

3.10.17 Legal allowance – Regulation 7.3

The witness is entitled to a payment (a legal allowance) towards meeting the legal costs and disbursements that the witness reasonably incurs for a lawyer to represent the witness at the examination.

The amount of the legal allowance is an amount calculated using the costs set out in the *Federal Magistrates Court Rules 2001*.

3.10.18 Commonwealth Ombudsman scrutiny on the use of examination notices

As soon as practicable after an examination notice has been issued, the Director must notify the Commonwealth Ombudsman that an examination notice has been issued, and provide to the Commonwealth Ombudsman a copy of:

- the examination notice;
- the affidavit that accompanied the application for the examination notice; and
- any other information in relation to the examination notice that was given to the nominated AAT presidential member who issued the notice.

As soon as practicable after an examination of a person is completed, the Director must give the Commonwealth Ombudsman:

- a report about the examination;
- a video recording of the examination; and
- a transcript of the examination.

The report must include:

- a copy of the examination notice under which the examination was conducted;
- information, including the:
    - time and place at which the examination was conducted,
    - the name of each person who was present at the examination, and
    - any other information prescribed by the regulation.

The Commonwealth Ombudsman must review the exercise of examination notice powers by the Director, and any person assisting the Director, and may do anything incidental or conductive to the performance of that function.

The Commonwealth Ombudsman's powers under the *Ombudsman Act 1976* (Cth) extend to a review by the Ombudsman under this section as if the review were an investigation by the Ombudsman under that Act. The exercise of those powers in relation to a review by the Ombudsman is taken, for all purposes, to be an exercise of powers under the *Ombudsman Act 1997.*

3.11 Making a Determination

3.11.1 Establishing a contravention

A contravention is established when the Inspector determines that there is sufficient evidence to prove a contravention of Commonwealth workplace laws. It is imperative that this determination is not made by Inspectors until all available evidence has been collated and assessed. A premature determination made without considering all of the evidence may result in the Inspector making an incorrect determination.

To establish whether a contravention has or has not occurred, the Inspector must complete an investigative evaluation of the evidence obtained and assess whether or not that evidence supports each of the points of proof of the alleged contraventions. The determination of a contravention should not occur until the Inspector has collected and considered all available evidence.

Where a complainant fails to provide relevant evidence, the Inspector should formally advise the complainant that if they fail to supply evidence within a specified timeframe, the Inspector must continue with the investigation on the evidence that is available.

Once all available evidence has been collated and assessed, the Inspector must conduct an investigative evaluation of the evidence and determine whether or not a contravention of Commonwealth workplace laws can be supported by the evidence. Investigative evaluation involves the Inspector critically evaluating the material gathered and can also provide intervention and escalation points for Assistant Directors.

Once a contravention is established it must be recorded in AIMS.

3.11.2 Where no contravention is established

Sometimes, after considering the evidence, an Inspector determines that no contravention is established. If the investigation was started in response to a complaint (as is often the case), the Inspector should contact the complainant to explain why no contraventions were detected and give the complainant the opportunity to supply any further evidence which could substantiate their complaint.

If no further evidence is supplied, the alleged contraventions must be entered into AIMS and marked with the outcome not sustained. The outcome of the complaint is also recorded as

not sustained. Completion letters must be sent to both parties, using the letter templates in AIMS.

3.11.3 Case decision records

An Inspector is required to keep a record of significant case decisions that occur during the progress of an investigation.

A Case decision record (CDR), is a documented, transparent record of decisions made throughout the investigative life-cycle. CDRs are, as a matter of best practice, recorded in AIMS.

A CDR is used by Inspectors to preserve evidence of a decision that has been made regarding important elements of a matter. A CDR should show details of the decision made, including the factors considered, and the following action to be taken. The CDR will also detail the decision maker, and any persons required to approve the decision (e.g. the Assistant Director).

The use of CDRs remains an important part of the decision-making and documenting process for Inspectors in FWBC.

Case decision records (CDR) emanate from a range of sources, including:

- specific requirements laid down in FWBC Operations Guide;
- specific requirements that originates in a Direction, other than FWBC Guide or FWBC Operations Guide; and
- general obligation to record decisions of significance, including decisions not to proceed with a particular course of action.

A CDR should not just describe the decision taken but should also explain the factors that were considered when making the decision. CDR's are processed in the following order:

- signed and dated, then scanned and saved in Document Manager (DM);
- scanned DM document linked into relevant AIMS investigation as a file note; and
- original CDR document placed on TRIM file.

In addition, and as a general rule, if a decision has some significance, then the Inspector should prepare and submit a CDR.

If an Inspector is unsure if a CDR should be completed, then it is advisable to raise one rather than not have the case decision recorded. Note: If the CDR is in reference to a decision made in consultation with another person, that person should also sign the CDR.

Below is a table which identifies 22 circumstances that specifically call for the raising of a CDR.

No.	Description	Comment	Requirement source	Requirement Reference	Approval Authority
1	Person to assist FWBC Inspector exercise functions	CDR prepared by Assistant Director Operations	FWBC Guide	Ch 1 - 1.4.3	SD Ops or Exec Dir
3	Assess FWBC jurisdiction	Range of factors include legislative, time limits and court/tribunal involved	FWBC Guide	Ch 3 – 3.5	Immediate Supervisor
4	Decision to Investigate	s.13(4) Direction from FWBC Director to comply with Guidance Note 1, (Note this uses different CDR template).	FWBI Act s.13(4) Direction & FWBC Guidance Note 1	FWBC Director's direction to Inspectors (13 June 2012) Ch 3 - 3.3.3.1 Ch 3 – 3.10.2	Inspector
5	Decision to use s.712 FW Act powers	Formal record of decision to use s.712 powers	FWBC Guide	Ch 3 – 3.8.8	AD Ops
6	Advise of failure to comply with s.712 FW Act notice	Decision to issue a letter stating failure to comply potentially breaching s.149.1 *Commonwealth Criminal Code Act 1995*	FWBC Guide	Ch 3 – 3.8.8.13	AD Ops
7	Request to use s.45 FWBI Act powers	Self-explanatory	FWBC Guide	Ch 3 - 3.10.1	AD Ops, SD Ops & Exec Dir
8	Decisions emanating from Case Conferences	Case conferences include any meeting between FWBC staff where decisions of significance to an investigation are made	FWBC Guide	Ch 3 – 3.12.5	Immediate Supervisor
9	Decision to refer matter to mediation	Self-explanatory	FWBC Guide	Ch 16. TBA	AD Ops
10	Refer matter for litigation	Part of raising a brief of evidence. (Potential Litigation Summary as part of the BOE template).	FWBC Guide	Ch 15 – 15.	AD Ops & SD Ops

11	Request CCR or telephone subscriber details	As required	FWBC Guide	Ch 3 – 3.8.7	AD Ops
12	Decision whether or not to delay an investigation	Person subject to the investigation requests a delay due to illness	FWBC Guide	Ch 4 - 4.10	AD Ops
13	Confidential case assessment	Decision whether the complaint needs to be classified as 'confidential'	FWBC Guide	Ch 3 - 3.6.9	AD Ops
14	Re-phase Investigation	Decision to refer matter to different action than currently being undertaken. e.g. mediation or full investigation	FWBC Guide	Ch 3	AD Ops
15	Targeted Audits	Once an Inspector has determined that a Section 712 Notice needs to be issued, a Record of Decision to Investigate form (RDI) must be completed.	FWBC Guide	Ch 17 – 17.2.1.1	AD Ops
16	ROI with suspect that is not electronically recorded	If the Inspector has conducted an ROI with a suspect and this has not been done electronically, the reasons must be recorded.	FWBC Guide	Ch 3 – 3.9.1	AD Ops
17	Caution given during an ROC	If, during an ROC, an Inspector has cautioned the interviewee.	FWBC Guide	Ch 3 – 3.9.1	AD Ops

Please note, the following issues can be addressed in one CDR :

No.	Description	Comment	Requirement source	Requirement Reference	Approval Authority
18	Evaluation of evidence provided	Assess evidence and decisions taken during the investigation to ensure transparent, accountable, timely and defensible (forms part of the Potential Litigation Summary).	FWBC Guide	Ch 3 -3.8.2	AD Ops & SD Ops
19	Industrial instrument	Considerations involved in decision on what is the appropriate instrument	FWBC Guide	Ch 3-3.74	AD Ops
20	Contravention sustained	Decision whether the contravention/s outlined in the complaint are sustained.	FWBC Guide	Ch 3-3.11	Immediate Supervisor
21	Issuing contravention	Decision to recommend any of the following: • Contravention letter • Penalty Infringement Notice (PIN) • Written undertaking • Letter of Caution • Litigation • Mediation • Referral to Small Claim Tribunal	FWBC Guide	Ch 3-3.14	AD Ops & SD Ops
22	Decision on contravention	Assessment and determination of whether a contravention has occurred.	FWBC Guide	Ch 3.14	AD Ops

3.12 Case Conference

A case conference can occur at any time during the investigation process. A case conference is a meeting to assess the progress and information gathered during a specific investigation and to discuss:

- whether further investigation is warranted
- appropriate enforcement options
- policy or organisational issues which need to be taken into account
- any legal issues or guidance to be sought from FWBC's Legal Group
- whether significant resources will be involved, and if so, are appropriate
- whether considerable cooperation across regions is required.

A case conference is an important tool for Inspectors to use in the investigation process. One of the chief benefits of a case conference is its capacity to resolve problematic aspects of a case. It gives Inspectors and FWBC management the opportunity to discuss the nature of the investigation, to review evidence gathered and to make a determination regarding the progress of the investigation. This will assist in the delivery of fair, efficient and consistent enforcement decisions.

3.12.1 The purpose of a case conference

A case conference is not always a compulsory step within the investigation process and should be undertaken on an 'as needed' basis. The decision to take a matter to a case conference does not impede the taking of any immediate steps by Inspectors (such as attending the workplace, taking statements, gathering evidence or issuing a penalty infringement notice). These steps can occur simultaneously with the progressing of a matter to case conference.

A case conference is an important tool for Inspectors to use in the investigation process. One of the chief benefits of a case conference is its capacity to resolve problematic aspects of a case. It gives Inspectors and FWBC management the opportunity to discuss the nature of the investigation, to review evidence gathered and to make a determination regarding the progress of the investigation. This will assist in the delivery of fair, efficient and consistent enforcement decisions.

3.12.2 Matters to case conference

Inspectors should consider nominating investigations for a case conference when they have some or all of the following characteristics:

- difficult and remain unresolved
- contentious and /or high profile
- novel, requiring a consistent approach or precedent setting

- may require interstate/territory support and coordination
- may need consideration from a FWBC policy perspective
- may require simple or general legal advice
- any other investigation at the discretion of the relevant Director.

In addition, where it appears that the matter involves an overseas worker, a young worker, suspected sham contracting, the matter must be case conferenced. The focus of this case conference is to assess the suitability of the matter for litigation. Particular sections of this FWBC Operations Guide also specify further instances where case conference is a requirement (e.g. in industrial action and discrimination investigations).

3.12.3 Alternatives to case conference

Inspectors, Assistant Directors are required to conduct investigative evaluations throughout the course of their investigations. These evaluations and subsequent discussions with Legal Group, Operations and directors, as required, preclude the need for a formal case conference for many FWBC investigations.

3.12.4 Structure of a case conference

When an investigation is identified as urgent an ad hoc case conference should occur within 48 hours of an initial brief being provided to the Executive. For further information on an ad hoc case conference Inspectors should consult their principal investigator, or director.

The Inspector nominating the investigation for a case conference is required to complete a case conference investigation plan template. This plan and supporting documentation is emailed to their director for approval. The day before the case conference the director or delegate emails the list of investigations and associated plans to all case conference attendees.

Typically, the case conference includes the Inspector and (depending on the case) the Inspector's Assistant Director, the State Director, Legal Officer, Legal State Director and the Executive Director.

The role of the State Director and Executive Director in the case conference is to provide practical guidance and direction on investigative and administrative matters raised at case conference. The role of the Legal officer is to provide advice on matters of a legal nature raised at case conference. For this reason, it is expected that the Inspector in conjunction with their Assistant Director will conduct an assessment as to whether legal advice is required prior to taking the matter to case conference. Legal officers need only be required to attend where legal issues are in question.

3.12.5 Outcome of a case conference

The attendees at a case conference discuss the issues involved in the investigation, what future action should be taken and will make one of the following directions:

- the case requires further investigation
- the case requires further (formal) legal advice to be sought from the Legal Group
- the case requires specific action (including the appropriate enforcement mechanism)
- the case does not require any further investigation
- the case is not appropriate for litigation
- the investigation requires additional resources including support and coordination with other states and/or territories
- the case should be prepared for litigation

The State Director and Executive Director will confirm the determination on the case conference investigation plan drafted by the Inspector. **The Inspector is required to record the determination in a CDR and attach to a file note in AIMS and include on the hard copy Trim file.**

The case conference will determine if investigations are to be referred back to a case conference. The Inspector may also refer an investigation back to case conference if there is an identified need for additional guidance regarding the progress of the investigation.

3.13 Recording information

FWBC staff should read the following information in conjunction with FWBC Records Management Policy and the AIMS User Guide regarding information management and classified and sensitive document handling.

The ability to explain and justify the actions taken and decisions made in the course of an investigation are critical to the accountability and transparency of investigations undertaken by FWBC. Inspectors must maintain contemporaneous, accurate records and be able to explain the rationale of all decisions. For this reason, an auditable record of the reasons for taking a particular investigative action must be kept. In addition to ensuring that the investigation is progressed in accordance with applicable best practice models, accurate and timely record keeping also provides clear support for the integrity of the decision making process should any subsequent review be undertaken.

3.13.1 Record keeping processes.

Record keeping must include records of the decisions made by the Inspector and the reasons for actions taken. In addition, these records will represent a chronological account of the investigation itself by documenting actions, strategies, risk assessments and quality assurance conducted throughout the investigation.

As with material and evidence, investigation records may be stored in a variety of formats, including evidence matrices, running sheets, AIMS entries, field notebooks and so on. The appropriate format for record keeping will largely depend upon the nature and complexity of the contravention being investigated.

When Inspectors are constructing hardcopy files, the file needs to demonstrate the chronology of an investigation and highlight the tools utilised during the course of the investigation, decisions made and actions taken to achieve compliance with the relevant legislation and/or instrument.

The file should be able to stand alone (all important documents should be printed and stored on the hardcopy file to ensure the investigation can be easily understood from the start of a complaint to its completion).

On closure of the investigation, both the Assistant Director and Inspector must sign off on the investigation file. Where an Assistant Director has conducted the investigation the file should be co-signed by the State Director. It is important to note that files in non-capital offices can be signed off by proxy via the Assistant Director.

3.13.1.1 Record Keeping in AIMS Case Management System

Please refer to the AIMS User Guide for instruction on how to record investigations on AIMS

3.13.1.2 Trim Files

- All investigations are to have a separate FWBC file created through TRIM.

- The TRIM file is the primary record of the investigation and, as such, care should be taken to ensure its completeness and integrity. The file should be able to stand alone. the file needs to demonstrate the chronology of an investigation and highlight the tools utilised during the course of the investigation, decisions made and actions taken to achieve compliance with the relevant legislation and/or instrument.

- The action record on file covers should always be endorsed clearly and correctly. Instructions appear on the inside cover of FWBC files as to how actions should be recorded.

- Details should be recorded on the file each time a relevant decision is made. In particular, how the Inspector determined the jurisdiction, employing entity and industrial instrument should be recorded.

- All documents should be attached to the file contemporaneously on the basis of the date the document was either created or received by the Inspector. The oldest document is to be attached first.

- A new file part should be requested when the existing file has reached its reasonable capacity to store documents without damage or loss, often considered to be around 250 folios (pages).

- Care should be taken to ensure that multiple investigations are not contained on the one file. It is preferable to have one file for one investigation, although there may be several breaches being investigated and with multiple complainants involved.

- Running sheets are to be maintained for all investigations on the AIMS system. Copies of running sheets are to be printed from the AIMS System and attached to the file at the conclusion of the investigation or file closure.

- Where contraventions are identified or the complaint is to be closed, the record should contain the decisions and action proposed and agreed to and signed off by the Inspector's Assistant Director.

- Once an investigation has been finalised, a File Closure Checklist is to be completed which should be the last document placed on the file.

3.14 Contravention letters

When an Inspector is satisfied that a person has contravened Commonwealth workplace laws, the Inspector is authorised to issue a contravention letter.

To avoid doubt, contravention letters can be issued in relation to contraventions of the WR Act (or any of the instruments under the WR Act) that occurred prior to 1 July 2009 or contraventions of the FW Act that occurred from 1 July 2009.

A contravention letter is a written notification that:

- informs the suspect of the failure including what provisions have been contravened, how they have been contravened, and the information the Inspector has relied on to make their determination
- requires the suspect to take specified action within a specified period to rectify the failure (if appropriate)
- requires the suspect to inform the Inspector of action taken to rectify the contravention (if appropriate)
- advises the suspect of the potential consequences of failing to comply with the contravention letter.

The contravention letter is authorised by the FW Regulations[43] and forms part of the ongoing process of procedural fairness provided to a suspect by advising the suspect of the contravention and its potential consequences, explaining the evidence that was used in reaching the determination and providing the suspect with the opportunity to respond, including submitting additional evidence.

3.14.1 Issuing a contravention letter

Contravention letters should be addressed to the correct legal entity (not just the business or trading name) and should advise that the writer is an Inspector.

[43] FW Regulations; Chapter 5, Part 5-2, Division 3, Reg 5.05.

Best practice provides that contravention letters are sent by registered post to the suspect's registered office. Additional copies may be sent to directors or contact persons at preferred addresses (including by email or fax).

A contravention letter seeking rectification is used in circumstances where an Inspector has determined that corrective action is required, usually in the form of a back payment to a complainant.

A contravention letter may also be issued in instances where rectification is not possible, e.g. where an Inspector has determined there are only non-monetary contraventions and corrective action is not possible (such as in certain complex cases, or where the suspect has not supplied rosters or issued pay slips). Where rectification is not possible, the contravention letter would also advise the suspect that litigation may be pursued. This type of contravention letter may be followed with a letter of caution, an enforceable undertaking or actual litigation (see Chapter 14 – Non Litigation Outcomes and Chapter 15 -Litigation).

Minor variations to these pro forma contravention letters may be necessary, depending on the circumstances of the individual investigation. The most common example of this is where a suspect has rectified a contravention during the course of an investigation. In this instance the contravention letter does not seek a further rectification, but still serves to formally notify the suspect of the contravention, acknowledge that the contravention has been rectified, and advise that the investigation is completed.

To assist the suspect in understanding the nature of the contravention, the Inspector may enclose relevant educative resources along with the letter.

3.14.2 Responses to a contravention letter

The suspect might respond to the contravention letter with full voluntary compliance, in which case the investigation will usually be completed (see 6.11.2 below).

The suspect may respond to the contravention letter by providing new evidence that disproves some or all of the alleged contraventions. In such cases, the Inspector would consider the new evidence and advise the suspect if the contravention letter stands in full, stands in part, or is withdrawn. The suspect will be advised in writing to comply with any remaining items of the contravention letter.

On occasion, the Inspector may determine that an optional final letter (following the contravention letter) would assist in resolving the investigation. Where appropriate in the circumstances of the case, the Inspector (in consultation with their Assistant Director) might issue a final letter that provides the suspect with a further seven days to rectify the contraventions. The final letter also will detail the consequences of continued non-compliance.

Sometimes, the suspect will not comply in full with the contravention letter in which case the next step is to consider commencement of an appropriate enforcement mechanism (such as compliance notice, letter of caution, recommendation to litigate).

3.14.3 Where no contravention is established

Sometimes, after considering the evidence, an Inspector determines that no contravention is established. If the investigation was started in response to a complaint (as is often the case), the Inspector should contact the complainant to explain why no contraventions were detected and give the complainant the opportunity to supply any further evidence which could substantiate their complaint.
If no further evidence is supplied, the alleged contraventions must be entered into AIMS and marked with the outcome not sustained. The outcome of the complaint is also recorded as not sustained. Completion letters must be sent to both parties, using the letter templates in AIMS.

3.15 Potential outcomes of investigations

3.15.1 Referrals to other agencies

If, during an investigation a complaint is determined to be outside FWBC's jurisdiction, the Inspector should refer the matter to another appropriate agency. The Inspector must record details of all inquiries conducted and any other factors considered during the decision making process on the hard copy file and note the decision in AIMS. The decision to refer a matter to another agency must be made by the Inspector in consultation with their Assistant Director.

3.15.2 Voluntary compliance

3.15.2.1 General principles of voluntary compliance

Voluntary compliance is an unlikely outcome for non W&E matters and would occur in very limited circumstances. Voluntary compliance however, is the most common way in which wages and entitlements complaints are completed following an investigation by field staff.

When it is determined that one or more contraventions have occurred and a contravention letter is issued, an Inspector must give the suspect a reasonable opportunity to voluntarily rectify the matter.

Where a contravention letter stipulates an underpayment amount, the suspect may achieve voluntary compliance in one of three different ways – offer to settle, full provision of all outstanding entitlements, and payment by instalments. In some instances, voluntary compliance may not be achieved at the contravention letter stage, but rather will occur as a result of the Inspector issuing a formal compliance notice.

3.15.2.2 General principles of voluntary compliance

Irrespective of the method of voluntary compliance, Inspectors should obtain a record of payments made to employees form (signed by the suspect) which includes:

- the gross and net amounts paid (including the reason for any deductions)
- details of the electronic transfer or cheque number
- a photocopy of any cheques
- confirmation of receipt from the complainant (where appropriate).

To facilitate the early return of the record of payments made to employees form, it may be sent to the suspect with the contravention letter.

Inspectors must also remain aware that in some circumstances, Litigation will also be considered a necessary response to the contravention and/or the most appropriate means of dealing with the suspects and deterring others from contravening Commonwealth workplace laws. This may occur even if there has been voluntary compliance.

3.15.3 Offers to settle

An offer to settle is an amount proposed (often by the suspect) in settlement of any underpayment resulting from the complaint. In general terms, it is acceptable for a complaint to be resolved via the acceptance of an offer to settle.

An offer to settle can be made by either party at any stage of the investigation process. The Inspector is responsible for ensuring that the integrity and progress of the investigation is not undermined or unduly delayed by any offers to settle.

The Inspector should be open to parties resolving a matter on suitable terms, considering that a settlement may be an appropriate solution to a complaint. For example, a settlement may be fitting where a suspect has made an honest mistake or it is difficult to determine the exact amount owed. A complainant may also prefer to accept an immediate payment that is less than the full entitlements owed instead of waiting for the completion of a protracted investigation or receiving the complete amount under an instalment arrangement.

The Inspector should discuss the suitability of any party's offer to settle with their Assistant Director. The Inspector should refer all offers made by the suspect to the complainant (and vice versa). In so doing, the Inspector (in conjunction with the Assistant Director) should take care to ensure the other party (typically the complainant) understands the nature of the offer and their entitlements, and that no undue influence has been placed on a party to settle. During an offer process, the Inspector must maintain impartiality and a facilitative role. The Inspector should provide all parties with information as to the appropriate obligations and entitlements, in order that an informed decision can be made by the parties. The Inspector should disclose to the parties whether the amount of an offer is more or less than is estimated to be owed by FWBC (if known). The Inspector should also recommend that the parties seek their own legal advice as to whether it is in their interests to accept an offer to settle. The Inspector must make notes of all involvement in an offer to settle.

Where an offer to settle has been accepted by the complainant, the Inspector should obtain written confirmation from the complainant of their acceptance of the offer to settle. Where

possible, this confirmation should include the terms of settlement and the actual amount (gross and net) to be paid to the complainant.

In practice, settlement may result in resolution of the complaint, but not necessarily full compliance with the FW Act. Should this situation occur, the Inspector must seek authorisation from their Assistant Director of the action to be taken by FWBC. If any contraventions are evident, regardless of the settlement, the suspect should be advised of the contraventions in writing, and these should be recorded in AIMS.

A settlement by the parties will not prevent FWBC from pursuing further action (including audit activity, more investigation, enforcement or litigation) if such action is appropriate. For example, it is appropriate for an Inspector to consider further action with respect of the suspect where:

- the suspect has a previous complaint history
- the suspect's engagement with the current complaint, including whether the suspect understands or acknowledges their obligations, was poor.

Where further action is intended, it is important that all parties are made aware of such an intention by the Inspector.

However, in most cases, where the complainant has accepted an offer to settle and has been provided with the full settlement as agreed between the parties, FWBC's investigation will have been completed.

3.15.4 Full provision of all outstanding entitlements

Full provision of all outstanding entitlements is the payment in full by the suspect of all amounts owing to the complainant, as determined by the Inspector in the contravention letter. Record of the payment being made (gross and net) should be provided to the Inspector by the suspect and confirmed with the complainant. The details must be entered in a AIMS note and a hard copy attached to the file.

3.15.5 Payment by instalments

Rather than embark on a course of action that jeopardises the viability of the business and the livelihood of both suspects and employees, Inspectors are to exercise a flexible and common sense approach to recovering these monies. This includes payment arrangements, whereby a suspect enters into an arrangement to pay the outstanding amount over a specified period of time. A payment arrangement can be proposed by either party or by the Inspector, although the request to pay by instalments is usually made by the suspect.
The proposal needs to be approved by a Assistant Director who will take into consideration:

- the reason for payment by instalments
- whether immediate payment would jeopardise the suspect's ability to carry on its business
- the amount to be paid and the period the suspect proposes to take for full provision of all outstanding entitlements

- the suspect's history
- the complainant's views.

If the instalments are approved, a detailed instalment plan needs to be signed by the suspect. Confirmation of approval of the instalment plan must be sent to both parties. The suspect should be advised that any default on an instalment payment may be followed by further action from FWBC, including action to recover the remaining amount owing.

The complainant should be advised that following the first instalment (which will be confirmed by the Inspector), the complainant will have to monitor the remaining instalments and advise the Inspector if a payment is not received. Importantly, the complainant should also be advised to confirm with the Inspector when the full payment of all amounts has been received.

After the first instalment has been made, the investigation should be closed in AIMS. The Inspector should informally monitor the progress payments until all payments are made, by keeping periodic contact with the payee. Once the final payment is made, the Inspector should create a file note stating that the matter is now finalised.

Where a complainant refuses to accept a payment schedule that appears reasonable (in all the circumstances) Inspectors should seek the advice of their Assistant Director. It is also appropriate for the Inspector to advise a complainant who is owed outstanding entitlements of their rights of recovery under the FW Act, including under the small claims procedures where the amount of the complainant's outstanding underpayment is $20,000 or less.

Chapter 4 – Investigations B.

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4.1 When FWBC cannot investigate

There are occasions where FWBC does not or is unable to investigate a complaint. Common instances include where:

- the FWBC does not have jurisdiction
- the complaint is outside the time limits[1] under the FW Act
- a court, commission or other agency is already investigating the complaint .

In such cases, the Inspector must inform the complainant of the reasons FWBC is unable to investigate their complaint. Wherever possible, the Inspector should escalate the matter to their Assistant Director, rather than referring people through to external agencies.

On occasion, Inspectors may find that a complainant is being advised or assisted by a representative (such as a solicitor or union delegate) but the complainant is not taking formal court action in relation to the complaint. In these cases the Inspector should continue to investigate the complaint. However, if the complainant's representative is actively making submissions to the suspect (such as sending letters of demand, or seeking payment of additional amounts as calculated by the representative), the Inspector should discuss the matter with their Assistant Director. Where the representative is advocating for the complainant to the suspect it may be appropriate for FWBC to cease its investigation.

4.2 Allegations of criminal activity

During an investigation allegations may be raised about either the complainant or the suspect being involved in criminal activity. If an Inspector receives such an allegation they should discuss this with their Assistant Director and manager to determine the appropriate course of action including the relevant options that may be available in accordance with Chapter 23 – Enforcement and Chapter 24 – Litigation.

In some cases the complainant may be the subject of legal proceedings brought by the suspect, who seeks to delay FWBC's investigation pending the outcome of these proceedings. As noted above (4.5.2), where a court matter involves a different issue to the FWBC complaint, the Inspector is able to continue with the investigation of the complaint. However, the distinction may not be clear, if the alleged suspect's proceedings relate to the complainant's activities during their employment. Again, the Inspector should discuss this situation with their Assistant Director and manager (and at case conference if relevant) to determine the appropriate course of action for FWBC.

4.3 Allegations of an employee withholding property

Where a suspect claims that the employee making the complaint is withholding property belonging to the suspect, the Inspector must advise the suspect that this is a separate issue

[1] FW Act; ss 544 and 545(5)

which they need to pursue through their own action as FWBC is only able to enforce Commonwealth workplace laws.

4.4 Allegations of fraud

If a complainant or suspect makes allegations of fraud (e.g. in relation to taxation or social security), the Inspector is to explain that FWBC does not have powers to investigate fraud and should refer them to the relevant agency or the police.

4.5 Alleged cash in hand payments

A suspect may claim that an employee was given cash in hand payments in addition to the wages shown in the employment records. As with all allegations, the investigation should proceed only on the basis of the evidence provided. If the suspect cannot present evidence to confirm these allegations then they cannot be taken into consideration in calculating the amounts paid to the complainant.

4.6 Additional entitlements not claimed

When a complaint is lodged, the complainant is required to detail the disputed entitlements. Investigations may reveal that a complainant is owed additional entitlements not specified on the complaint form (e.g. they have claimed annual leave entitlements, but the Inspector discovers that the complainant was underpaid their hourly rate of pay). FWBC is obliged to investigate all contraventions of Commonwealth workplace laws, irrespective of whether the contraventions are stipulated on a complaint form. Inspectors should ensure that both the complainant and suspect are informed of the additional contraventions found. Inspectors should seek to achieve compliance in all respects.

4.7 Contraventions affecting other employees

Records provided by the suspect may show that other employees have also been adversely affected by one or more contraventions (e.g. records may show that the suspect underpaid all employees). Inspectors should ensure that the suspect is informed of the additional persons affected by the contraventions, and should seek compliance in all respects.

4.8 Complaints from public sector employees

When a complaint is received from a Commonwealth public sector employee, FWBC strongly encourages the complainant to raise the matter with their agency and to use their internal dispute resolution process where possible.

If this internal process fails (or cannot be used in the circumstances), FWBC will investigate the complaint. At the completion of the investigation, the Inspector will inform the employee and public sector agency of the outcome of the investigation. It is then a matter for the employee and the agency to seek to reach a resolution. However, if the investigated complaint remains unresolved, the matter will be referred for case conference to consider

the available options for FWBC. The complainant should be advised that FWBC may not litigate public sector agencies for contraventions of Commonwealth workplace laws, and that the decision will be made in accordance with Guidance Note 1 - Litigation Policy.

4.9 No contact with parties

Where an Inspector has made reasonable attempts to contact a complainant without success, a 7 day letter should be sent to the complainant advising that the Inspector has attempted to contact them.

Prior to sending a 7 day letter an Inspector should have exhausted all reasonable attempts in contacting the complainant. This includes attempting to contact the complainant via telephone, email, text message, and/or fax and providing them with a reasonable amount of time to respond.

If no contact is received from the complainant within 7 days, the Inspector should consult with their Assistant Director about whether to continue some or all aspects of the complaint or close the matter. This will involve an evaluation of the evidence available and whether it is possible or appropriate to continue the investigation.

FWBC Inspectors should make all reasonable attempts to contact the suspect, which may include a site visit. After exhausting reasonable attempts to contact the suspect, Inspectors should discuss the specific investigation with their Assistant Directors, and together decide how the matter should be progressed.

Depending on the circumstances it may appropriate to expedite the matter through the complaint process based on the available evidence or to send the 7 day letter to the suspect.

4.10 Persons seeking to delay investigations due to illness

Although uncommon, there are occasions where a person seeks to delay FWBC's investigation on medical grounds (e.g. in the case of a suspect suffering a long term illness). The Inspector should use their discretion, and if a party is unable to reasonably manage their business due to illness, a short delay might be granted (and the other parties to the investigation will be advised of this). However, the investigation cannot be postponed indefinitely, and the person who is unwell will be asked to provide the details of the person who is or will be managing their business or employment matters during their period of illness. The investigation can continue with this authorised person as the ill person's representative. If such details cannot be obtained, the matter should be referred for case conference to consider the further options that are available to FWBC.

4.11 Complainants who are officeholders or family members

In some cases the complainant appears to have a formal involvement as part of the employing entity against which they have complained. This may include cases where the complainant is an officeholder (or former officeholder) of a company or a direct member of the suspect's family (such as a parent, spouse, child or sibling).

In these cases the Inspector will need to critically examine whether a contract of employment exists between a suspect and employee. Often there will be a need to obtain evidence that a legitimate employment relationship was in place. Relevant evidence would include the suspect's employment records, instructions or directions issued to the complainant, records of conversation with the complainant, records of interview with the suspect, witness statements from employees and other records or documents detailing payments made to the complainant by the suspect.

4.12 Requests for information

As an Australian Government agency FWBC has a legal obligation to comply with the Freedom of Information Act 1982 (Cth) (FOI Act) which provides every person with the right to request access to information held by a Commonwealth agency

In some circumstances where a request for documents is made to FWBC, the documents can be made available without an application being made under the FOI Act.

The FWBC Director's authority to release documents is found in section 64 of the FWBI Act which authorises the Director to disclose information in certain circumstances.

Granting access in this way is at the sole discretion of FWBC. FWBC retains the right to refuse access to documents and require that a formal FOI application is made. Documents disclosed in accordance with the FW Act generally are exempt from the operation of privacy laws.[2] Section 65 FWBI Act outlines protection of confidentially of information obtained under an examination notice.

The following is a general overview on FOI, however inspectors should refer to FWBC Guidance Note 5 - Document Access Policy for further information.

4.12.1 General policy in relation to access to documents

Where a request for documents is made to FWBC, consideration should be given to whether the documents can be made available without requiring an application under the *Freedom of Information Act 1982*(FOI Act).

In particular, FWBC will consider whether the documents can be disclosed under the powers conferred by sections 64 FWBI Act (subject to section 65 FWBI Act), and delegated to Inspectors in accordance with a Delegation of Powers and Functions signed by the Director. Generally speaking, documents disclosed in accordance with the FWBI Act are exempt from the operation of privacy laws.

The purpose of the policy is to promote efficient and timely access to certain documents held by FWBC. In particular, the policy is designed to assist parties to an investigation (e.g. complainants or suspects responding to a claim) in seeking access to relevant documents on file which relate to their matter.

[2] FWBC Guidance Note 2 - Document Access Policy

The granting of access to documents under this policy is at the sole discretion of FWBC. FWBC reserves the right to refuse access to documents requested under this policy. Where this occurs a person seeking documents may choose to make a formal FOI application whereupon a decision on access to the documents will be made in accordance with the terms of the FOI Act.

4.12.2 Documents which are publicly available

Where a request relates to a publicly available document, FWBC will not require an application be made under the FOI Act. FWBC provides access to many publicly available documents, such as blank claim forms, fact sheets, guidance notes and media releases on our website.

4.12.2.1 Making a request to access documents

The request should be made to the Inspector responsible for the investigation. In considering whether to provide a party to the investigation with access to the documents, the Inspector will determine whether they can be released under sections 64 and 65 FWBI Act.

Generally speaking, it will be considered appropriate for an Inspector to disclose certain documents to parties to the investigation. Note: FWBC will delete personal information relating to others prior to releasing documents (such as names, addresses, phone numbers and email addresses). Documents which may be appropriate for release include:

- copies of documents provided to FWBC by the requesting party;
- copies of any evidence provided by the other party to the investigation (such as time sheets, payslips, emails, diary records and statutory declarations or formal statements which relate to the requesting party);
- copies of telephone discussions or interviews between the requesting party and FWBC staff (where a record of conversation is made);
- copies of correspondence between FWBC and other parties to the investigation relating to issues in dispute in the investigation;
- copies of documents containing the personal information of the requesting party;
- copies of any tribunal or court decision or authority relied upon in making a decision.

Certain documents will not be released by FWBC under section 64 of FWBI Act. These include:

- legal advice provided by FWBC's internal lawyers or by external legal providers in relation to the matter;
- personal information relating to others;
- internal working documents such as recommendations on the file or internal conference notes relating to the matter;
- commercially sensitive information.

In determining whether to grant such a request, in accordance with section 64(2)(a) of the FW Act FWBC will have regard to whether the disclosure of information is necessary and/or appropriate. The decision will be made by the Inspector responsible for the investigation in conjunction with the Inspector's EL2.

Where the Inspector has any doubts about releasing documents, the Inspector may consult with FWBC's Legal Group about whether they should release the document. The Inspector will provide the person requesting documents with a letter approving the request (in full or part) or rejecting the request, together with reasons for the decision. The Inspector may also provide a schedule of the documents relating to the request.

4.12.3 Disclosure of information to parties to an investigation

Where a party to an investigation provides FWBC with information in the course of an investigation, this information may be disclosed to the other parties to the investigation, especially if it is necessary in the interests of affording natural justice to those other parties. Generally speaking, FWBC will only provide information to another party where that party has requested information relating to the investigation and where disclosure is permitted, or not restricted, under sections 64 or 65 of the FWBI Act.

If a person has provided documents to FWBC "in confidence", then it may be that the investigation is impeded. However, FWBC will not release those documents under section 64 of the FWBI Act without the permission of the person who supplied the document. If the permission to release the documents is not given, FWBC will inform the party requesting access to the documents that they may make an application under the FOI Act. Such an application will then be subject to the FOI Act and disclosure may be made if it is required under the FOI Act.

4.12.4 Protected information

Section 65 of the FWBI Act restricts what a person may do with protected information. Protected information includes information that was disclosed or obtained under an examination notice.

Disclosing or making a record of protected information by an entrusted person is an **offence** under section 65(2) of the FWBI Act, with a maximum penalty of 12 months imprisonment.

Pending approval of the Document Access Policy Guidance Note, all requests for information and/or documents should be confirmed with the FWBC FOI Information Officer.

4.13 Matters requiring legal advice

In the course of their investigations Inspectors sometimes encounter complex factual and legal issues. In the first instance the Inspector should consult their Assistant Director. If the Inspector, together with their Assistant Director, decides that legal advice is required the Inspector should make a request for advice in accordance with the procedures outlined below.

4.13.1 Procedure for requesting legal advice

The following procedures have been developed to ensure that the legal advice provided to Fair Work Inspectors is accurate, complete and timely. When requesting legal advice the Fair Work Inspector should:

- complete the request for legal advice form. The request should clearly outline the question being asked, briefly provide the background to the request and attach all documentation relevant to the request (e.g. if the question relates to an AWA, attach the AWA). The request for legal advice form also contains a section where the Inspector, Assistant Director and Director, are invited to share their view of the answer to the question being asked. As a general rule the Legal Group does not require the whole investigation file to provide advice;
- send the request to the relevant director for approval.

If the director approves the request it will then be forward to the State Legal Director, from which it is registered and allocated to a legal officer. The legal officer will then contact the Inspector to clarify the requests and discuss a timeframe for delivering the advice.

Alternatively, for simple requests, Inspectors may obtain ad hoc legal advice at a case conference or, after consulting with their team leader, by contacting and making an appointment with their region's relevant lawyer. If the issues raised with the lawyer are of a complex nature, the lawyer will request the Inspector follow the formal procedure outlined above.

4.13.2 Using legal advices

4.13.2.1 Legal professional privilege

Legal advice provided by the Legal Group to Inspectors is covered by legal professional privilege. This means that the advice is confidential and FWBC is entitled to refuse to disclose that advice to other parties.

Inspectors must be very careful not to waive (lose) privilege. Privilege is waived by disclosing the substance of or the conclusions drawn in the advice to persons outside FWBC. The courts have stated that even revealing the gist of legal advice is sufficient to waive privilege [3].

[3] Rich v Harrington [2007] FCA 1987

Where an inspector has used the legal advice to make a decision it is important that they do not refer to or call on that advice to justify their decision to persons outside the FWBC (i.e. complainants, the suspect or other parties). Statements such as "I've checked with our internal lawyers and they agree that…" or "On the basis of legal advice I have decided…" are likely to waive privilege.

It is sound practice that the Inspector confidently state the decision which has been reached and explain why, without saying that legal advice has been obtained.

4.14 Unclaimed money

Under the FW Act (s559), a suspect may make payment to the Commonwealth of the amounts owing to an employee, in specified circumstances. Inspectors should be aware that all unclaimed monies are managed by FWBC on behalf of FWBC.

Unclaimed monies can only be accepted by FWBC in very limited circumstances.
The FW Act specifies [4] that a suspect may make payment to the Commonwealth where:

- an employee has left the employment of a suspect without having been paid an amount to which the employee was entitled to receive under the FW Act or a fair work instrument; and
- the suspect is unable to pay the amount to the former employee because the suspect does not know the former employee's whereabouts.[5]

Every attempt must be made by the suspect to find the contact/payment details for the employee, however…

Where the suspect exercises such option, the Commonwealth holds the amount in consolidated revenue (refer 11.11.3.1 below). Payment of the amount to the Commonwealth is a sufficient discharge to the suspect, as against the former employee, for the amount paid.

The employee may subsequently make a claim for the amount paid to the Commonwealth by the suspect. Such claim is made to FWBC (on behalf of the Commonwealth) in accordance with the provisions of both the FW Act [6] and the FW Regulations (refer 11.11.3.2 below).

4.14.1 Additional considerations when receiving unclaimed money

When receiving public money (including unclaimed money), the following principles apply:

- only officials authorised under the *Financial Management and Accountability Act 1997* (Cth) (FMA Act) may receive and bank public monies

[4] FW Act; s 559
[5] Similar provisions were contained in the *Workplace Relations Act 1996*, s 726.
[6] FW Act; s559(3)

- FWBC will bank public monies by the end of the working week (the Friday) in which the funds were received by the banking officer, unless the amount is $100,000 or more, in which case the funds will be banked within 24 hours
- a person designated as a 'Collector of Public Monies' (CPM) may collect and receipt public monies
- in some circumstances it may be necessary for an official in FWBC other than a CPM to receive public monies; where this occurs, the public monies should be handed to a CPM as soon as practicable, no later than one working day from the day of receipt
- any arrangement for the receipt and custody of public monies by persons external to FWBC requires specific authorisation.[7]

The duties and responsibilities designated to the CPM, include:

- issuing receipts, upon request
- ensuring all cheques are crossed as "not negotiable"
- maintaining appropriate records of collections
- reconciling total receipts issued with total amount of public monies received and investigate and resolve discrepancies immediately
- ensuring public monies is not mixed with private money
- ensuring adequate security of all public monies under their care and custody
- handing the public money and supporting documentation to a designated "Banking Officer" on a daily basis.

4.14.2 Best practice and administrative procedures

Where an employee is deemed untraceable, in such cases the following steps should be taken:

4.14.2.1 Deposits of money from suspects

Inspector is required to send the Employer Letter explaining the process, in conjunction with the Certificate.

The suspect completes the Deposit certificate - unclaimed monies and provides the certificate and a cheque for the net amount of the unclaimed money to the Inspector. The cheque must be made payable to the "Collector of Public Monies."

Payments from suspects by instalment can only be accepted if a schedule of payments is submitted and authorisation is granted by the Chief Financial Officer, Group Manager, Corporate Services or Executive Director, Human Services (as per section 34(1)(c) of the FMA Act 1997.

The Inspector records the AIMS number on the Certificate. The suspect is required to complete a Deposit Certificate for each employee for whom unclaimed monies are to be deposited, unless prior arrangements have been made with the Finance and Reporting Group for situations involving large numbers of employees.

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[7] Refer FMA Act; s12

The employer should make all attempts to locate the whereabouts of the former employees before FWBC will accept unclaimed monies.

The Inspector should forward the certificate, checklist, documentation and cheque immediately to the **FWO** State Office Administration Officer. Within 24 hours of receipt the State Office Administration Officer will forward the cheque, with the completed form(s) and documentation, to the Finance and Reporting Group at the National Office. The Finance and Reporting Group will then ensure the cheque is receipted and deposited into the Fair Work Ombudsman Other Trust Moneys Account.

4.14.2.2 Payments of money to employees

When the employee's whereabouts are subsequently traced and their identity verified, the former employee may claim from **FWO** the money that was due to them which the suspect has paid to the Commonwealth.

To make such a claim, the Inspector must provide the employee with the Form of Claim for Unclaimed Monies ("Form of Claim") to complete. The Inspector should advise the employee that the information will need to be verified and certain financial procedures must be followed before payment can be made. Once the Inspector receives the completed Form of Claim, they must verify the accuracy of the information.

In most circumstances the Inspector is required to verify the accuracy of the identity of the employee by the following methods:

- sighting at least two pieces of identification, one of which is photographic identification
- where an Inspector is unable to physically sight the two original pieces of identification, photocopies are sufficient, provided they have been certified by a Justice of the Peace as being true and correct copies of the original documents
- in circumstances where an employee is no longer living in Australia, the employee is still required to provide photocopies of two pieces of identification, one of which is photographic identification. In these instances, the photocopies are required to be certified by a Commissioner for Declarations or the equivalent in that country
- in circumstances where an Inspector is able to sight the relevant pieces of identification but is unable to make photocopies of those documents, the Inspector is required to sign a statement explaining why the documents were unable to be copied, what the documents were, and the date on which the sighting of the documents occurred
- in the instance where an employee is incarcerated, the Inspector is required to take a statement from the employee to verify their identification, and complete the Form of Claim and obtain copies of the relevant pieces of identification where possible. In these circumstances it is also necessary to obtain information as to the employee's preference for payment to be made, whether into a bank account or into a prison account. In the instance of the latter, appropriate details of how such payment is to be made is to be obtained by the Inspector from the relevant prison officials.

Once the Inspector has verified the accuracy of the information provided by the employee, the Inspector then needs to complete the Unclaimed Monies Form. The Inspector must ensure that there is sufficient information to enable Finance and Reporting Group to confirm that:

- the amount claimed by the employee has been paid to the Commonwealth
- the employee has made a claim for the amount in accordance with the FW Act and the FW Regulations
- the employee is entitled to the amount being held.

The Inspector will forward both forms (and the photocopies of identification or statements) to FWO State Administration Officer who will forward to the **FWO** Finance and Reporting Group for verification that funds are available for the payment.

Chapter 5 Industrial Activities

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5.1 Introduction

This chapter deals with industrial activities in a number of forms. Industrial activities encompass matters under the FW Act where industrial organisations may play a significant role, including (but not limited to) freedom of association (FOA), industrial action (IA), and right of entry (ROE). Industrial organisations are an influential participant in the workplace relations arena, and it is important that Inspectors gain an understanding of the various protections contained within the FW Act. This chapter is not intended to provide detailed, step-by-step instructions for conducting investigations relating to industrial activities, but rather to provide an understanding of the main provisions of the FW Act relating to industrial activities.

Matters relating to industrial activities may arise during the course of an investigation, whether they were raised by a complainant or not. FWC has an obligation under the FW Regulations to provide certain information to FWBC on a regular basis, enabling FWBC to fulfil its functions with respect to industrial activities.

5.1.1 Industrial activities protections

Industrial activities protections are governed by Part 3-1, Division 4 of the FW Act and a definition of what actions are considered to be engagement in industrial activity is contained in s347. In essence, these protections seek to ensure that persons are free to determine whether or not they wish to be associated with industrial organisations. The provisions also provide relief where their right has been contravened.

The FW Act provides a number of protections for a person to exercise their right to participate in industrial activities. Under Part 3 of the FW Act, it is unlawful to take adverse action against a person on the basis of a prohibited reason, including their engagement in industrial activity.[1] Furthermore, s772 of the FW Act provides prohibited reasons for termination of employment. This section provides protection from termination of employment on several grounds, including membership or non-membership of a trade union, participation in trade union activities outside working hours (or within working hours with the suspect's permission), or seeking office as a representative of employees.

Where Inspectors form the opinion that industrial activities contraventions may be involved in an investigation, they should consult with their Assistant Director.

5.1.2 General prohibitions in respect of industrial activities

Divisions 4 and 5 of Part 3-1 of the FW Act prohibit certain types of conduct by any industrial party, including the following:

[1] FW Act; s346.

5.1.2.1 Coercion

The FW Act (s348) provides that a person must not organise or take, or threaten to organise or take, any action against another person with the intent to coerce the other person, or a third person, to engage in industrial activity.

5.1.2.2 Misrepresentations

The FW Act (s349) prohibits a person from knowingly or recklessly making a false or misleading representation about another person's obligation to engage in industrial activity, or another person's obligation to disclose whether they or a third person is or is not, or was or was not, an officer or member of an industrial association, or engaging in industrial activity.

5.1.2.3 Inducements

Under s350, a suspect, or principal, must not induce an employee, or independent contractor, to become, not become, remain or cease to be an officer or member of an industrial association.

5.1.2.4 Bargaining service fees

The FW Act (s353) prohibits a person from taking any action which has the effect of demanding or purporting to have the effect of demanding payment of a bargaining services fee.

5.1.2.5 Coverage by particular instruments

Under s354, a person must not discriminate against a suspect due to the type of workplace instruments that cover or do not cover, or purport to cover or not cover, the employees of the suspect.

5.1.2.6 Allocation of duties

Under s355, a person must not organise or take (or threaten to organise or take) any action against another person with the intention to coerce the other person, or a third person, to do any of the following:

- employ, or not employ, a particular person
- engage, or not engage, a particular independent contractor
- allocate, or not allocate, particular duties or responsibilities to a particular employee or independent contractor
- designate a particular employee or independent contractor as having, or not having, particular duties or responsibilities.

5.1.3 Role of the Inspector in stand down disputes

In limited circumstances, suspects may stand down their employee(s) without pay.[2] Under the FW Act Inspectors may make application to FWC to formally deal with a dispute about stand down.[3]

Inspectors may also find in the course of wages and conditions investigations that suspects have stood down employees without pay for various circumstances. If the reason for the

[2] FW Act; s524
[3] FW Act; s526

stand down is not authorised by the FW Act or by the applicable enterprise agreement or contract of employment, then the suspect would not be entitled to stand down employees without pay, and the employees would be entitled to payment for the period of the unlawful "stand down".

5.2 Freedom of association (FOA)

Inspectors should bear in mind that FOA matters may arise in the context of other complaints and investigations, such as wages and conditions matters and coercion complaints in relation to industrial activity matters. For this reason, and due to the potential sensitivity of FOA matters, Inspectors are expected to consider the possibility for contravention of the FOA provisions in all investigations.

In summary FWBC takes allegations of contraventions of the FOA provisions of the FW Act seriously. Wherever a complaint is received that relates to FOA, the matter will be prioritised as a potential complex case investigation and an initial assessment as to the likelihood of contravention will be made as a matter of urgency. It should be noted that FOA provisions apply not just to the employment relationship, but to independent contracting arrangements as well.

5.2.1 Definition of FOA under the WR Act

Part 16 of the WR Act dealt with FOA. The intention of this part of the WR Act (as detailed in s778) was to:

- ensure that suspects, employees and independent contractors are free to become, or not become, members of industrial associations
- prevent discrimination or victimisation on the basis of membership or non membership of an industrial association and
- provide relief, remedies and penalties where a party has breached the relevant provisions of the WR Act.

These provisions still have relevance for investigations involving alleged contraventions prior to 1 July 2009, but it should be noted that the provisions of the FW Act (while preserving these general principles) do differ in several respects.

5.2.2 Definition of FOA under the FW Act

FOA is dealt with in Chapter 3 of the FW Act which covers the general protection of workplace rights. In particular, s346 prohibits a person from taking "adverse action"[4] against another person because the person is or is not a member or officer of an industrial association; because the person engages, or has at any time engaged or proposed to engage in industrial activity; or because the person does not engage, or has at any time proposed not to engage in industrial activity. In addition to these protections, all employees are provided protections from unlawful termination due to membership or participation in a trade union or employee representative under s772 of the FW Act.

[4] FW Act; s342. Also refer Chapter 14 – General protections and adverse action of this Manual.

The term freedom of association (or FOA) is not explicitly used in describing the protections of industrial activities under Part 3-1, Division 4, of the FW Act. However the term is used in other sections of the FW Act to describe these protections.[5] In essence, the FW Act seeks to ensure that persons have the right to choose to become, or not to become, members of industrial associations,[6] to be represented by that industrial association, and to make these elections without any discrimination, pressure or coercion being applied.

The former FOA provisions of the WR Act have not been preserved as a distinct section of the FW Act However, several of these former provisions are encompassed by FW Act divisions relating to general protections, such as workplace rights and adverse action (refer Chapter 7 – Workplace rights and adverse action), and by provisions relating to industrial action (refer 5.3 below).

5.2.3 Operational guidance

Where an Inspector encounters what they believe may constitute a FOA matter they should consult their Assistant Director as the investigation will require more highly developed investigative techniques.

As with other adverse action matters, there is a reversal of the onus of proof in FOA matters (refer Chapter 7 - Workplace rights and adverse action). Under the FW Act an Inspector can initiate litigation for enforcement of the FOA provisions of the FW Act (refer Chapter 14 – Non Litigation Outcomes and Chapter 15 – Litigation).

5.3 Industrial action 18.3

5.3.1 Definition of industrial action 18.3.1

The FW Act defines industrial action as any of the following:

- the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work
- a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee
- a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work
- the lockout of employees from their employment by the suspect of the employees (with a lockout being defined as a suspect preventing the employees from performing work under their contracts of employment without terminating those contracts).

The Inspector should be aware that industrial action does not include:

- action by employees that is authorised or agreed to by the suspect of the employees

[5] e.g. FW Act; ss 334 and 336.
[6] For a definition of industrial association, see FW Act; s12.

- action by an suspect that is authorised or agreed to by, or on behalf of, employees of the suspect
- action taken by an employee if:
  - the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and
  - the employee did not unreasonably fail to comply with a direction of his or her suspect to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.[7]

Industrial action can take several forms including strikes and work bans, and it may be taken by unions or employees in pursuit of a new enterprise agreement. Suspects can also engage in response action under the FW Act.

5.3.2 Definition of protected industrial action 18.3.2

Industrial action under the FW Act can be protected or unprotected. Industrial action is protected under Chapter 3, Part 3-3, Division 2 of the FW Act only if:

- it is action taken by employees (or their bargaining representatives) to support or advance claims in relation to an enterprise agreement (claim action); or
- it is action taken by suspects or employees in response to industrial action taken by the other party (response action); and
- the action meets the common and additional requirements for protection.[8]

The common and additional requirements for protection include:

- not taking action in relation to a proposed enterprise agreement that is a greenfields agreement or multi-enterprise agreement
- not taking action before the nominal expiry date of an existing enterprise agreement or workplace determination
- genuinely trying to reach agreement
- observing the notice requirements
- complying with any orders or declarations
- not taking action in relation to a demarcation dispute
- not taking action in relation to unlawful terms or as part of pattern bargaining (claim action only)
- authorisation by ballot (claim action only).[9]

If industrial action does not meet the definition of protected industrial action as above, it is considered to be unprotected industrial action. However, not all unprotected industrial action contravenes a civil remedy provision under the FW Act. For example, industrial action taken in contravention of FWC orders made under ss 424-426 of the FW Act is not a civil remedy provision.

[7] FW Act; s19
[8] FW Act; ss 409-411
[9] FW Act; ss 409-414

It is only where unprotected industrial action contravenes a civil remedy provision of the FW Act (and can therefore be enforced by FWBC) that an Inspector would ordinarily investigate the matter further, as an investigation of unlawful industrial action. These unlawful industrial action matters include industrial action prior to the nominal expiry date of an enterprise agreement or workplace determination, industrial action that contravenes an FWC order, and the unlawful payment or acceptance of wages for the period of industrial action (refer 18.3.3 and 18.3.4 below).

FWBC investigates and enforces compliance with the FW Act in relation to unlawful industrial action. FWBC takes allegations of unlawful industrial action seriously and Inspectors are expected to treat these types of investigations as operational priorities (particularly those involving contravention of FWC orders).

Inspectors should remain aware that the FW Act contains provisions relating to industrial action taken by employee and suspect associations as well as by individuals. These actions are largely within the jurisdiction of FWC, but they may arise as peripheral issues in FWBC investigations.

Industrial action investigations are conducted using the same principles and practices outlined in the relevant chapters of the FWBC Operations Manual. In addition, certain strategies and considerations specific to IA investigations are detailed later in this chapter.

5.3.3 Specific contraventions of the legislation which the FWBC can enforce

Inspectors have the power to investigate and take enforcement action in respect of contraventions of the civil remedy provisions, as contained within the table in s539 of the FW Act.

5.3.3.1 Industrial action before the nominal expiry date of an enterprise agreement or workplace determination

Under s417 of the FW Act industrial action cannot be taken prior to the nominal expiry date of an approved enterprise agreement or workplace determination. From the day an enterprise agreement or workplace determination comes into effect until the nominal expiry date has passed, neither an employee nor a suspect can lawfully organise or engage in industrial action.

In order to pursue a contravention of s417, the Inspector would need to establish:

- that there is or was a valid enterprise agreement or workplace determination that had not reached its nominal expiry date prior to the industrial action
- that the prospective suspect, employee or employee organisation engaged in (or is engaging in) industrial action
- that there are witnesses who have (or will) provide a statement detailing the manner of and participants in the industrial action.

5.3.3.2 Industrial action that contravenes an FWA order

FWC can issue orders to stop or prevent industrial action under ss 418-420. FWC can make an order of its own volition or on the application of a party to the industrial dispute (usually the suspect), and s421 provides that a person to whom an order applies under ss 418-420 must not contravene the order.

In order to establish a contravention of s421, it will be necessary for the Inspector to gather sufficient evidence to prove the following:

- there is an order that was made by FWC
- the order binds the suspect, employee or employee organisation
- the order was served on the suspect, employee or employee organisation effectively and/or that the suspect, employee or employee organisation is aware of the order, its terms and effect
- the suspect, employee or employee organisation contravened the order.

5.3.3.3 Payments relating to periods of industrial action

Sections 470-475 deal with the issue of payment for periods of industrial action. In general, s470 specifies that it is unlawful for a suspect to make payment to an employee in relation to protected industrial action, and s473 details that employees (and employee organisations) must not seek or accept such payment.

Provisions relating to payments for partial work bans under protected industrial action are addressed in s471, and the relevant orders that FWC may make concerning partial work bans are covered by s472. It should be noted that ss 471 and 472 are not civil remedy provisions.

In relation to unprotected industrial action, s474 specifies that it is unlawful for a suspect to make payment to an employee in relation to unprotected industrial action. In the case where the unprotected industrial action is for less than four (4) hours on a day, the suspect must withhold a minimum of four (4) hours payment from the employee. Further, s475 prohibits an employee (or employee organisation) from asking for or accepting a payment from a suspect, for the period of unprotected industrial action.
In order to establish such a contravention of s470, the Inspector must gather sufficient evidence to establish:

- there was protected industrial action
- the protected action was not a partial work ban
- whether the protected action was (or included) an overtime ban or not, including all relevant details relating to any request, refusal and/or requirement to work overtime
- the suspect made a payment in relation to the protected industrial action.

In order to establish such a contravention of s473 by an employee, the Inspector must gather sufficient evidence to establish:

- there was protected industrial action
- the employee asked the suspect for or accepted payment from the suspect for the period of industrial action

- the actual payments made to employees
- whether any payment that was made came from the suspect.

In order to establish such a contravention of s473 by an employee organisation (or its officers or members), the Inspector must gather sufficient evidence to establish:

- there was protected industrial action
- the employee organisation (or its officers or members) asked the suspect for payment for the period of industrial action
- in addition, it should be confirmed whether any payments were made to employees, and whether such payments came from the suspect.

In order to establish such a contravention of s474, the Inspector must gather sufficient evidence to establish:

- there was unprotected industrial action
- the duration of the unprotected industrial action each day
- whether the unprotected action was (or included) an overtime ban, including all relevant details relating to any request, refusal and/or requirement to work overtime
- the suspect made a payment in relation to the unprotected industrial action.

In order to establish such a contravention of s475 by an employee, the Inspector must gather sufficient evidence to establish:

- there was unprotected industrial action
- the employee asked the suspect for or accepted payment from the suspect for the period of industrial action
- the actual payments made to employees
- whether any payment that was made came from the suspect.

In order to establish such a contravention of s475 by an employee organisation (or its officers or members), the Inspector must gather sufficient evidence to establish:

- there was unprotected industrial action
- the employee organisation (or its officers or members) asked the suspect for payment for the period of industrial action
- in addition, it should be confirmed whether any payments were made to employees, and whether any payments made came from the suspect.

5.3.3.4 Contraventions regarding coercion

In addition to the provisions detailed above, ss 473 and 475 effectively prohibit coercion in respect of an employee (or employee organisation) accepting or asking for payments in relation to industrial action. Such actions may also contravene ss 348 or 349 of the FW Act (refer Chapter 6 – Undue influence or pressure, duress and coercion investigations).

5.3.4 Other provisions

Other civil remedy provisions related to industrial action, for which Inspectors can take action, include:

- s346(b) which prohibits a person from taking adverse action against another person because the other person engages, or has at any time engaged or proposed to engage, in industrial activity
- s346(c) which prohibits a person from taking adverse action against another person because the other person does not engage, or has at any time not engaged or proposed to not engage, in industrial action
- s434 which relates to failing to comply with a ministerial direction in respect of industrial activity
- s458(2) which relates to reporting requirements for a protected action ballot
- s463 which provides that a person must comply with an order or direction of FWC in respect of a protected action ballot.

5.3.5 Conducting an industrial action investigation

There is no legislative requirement to report instances of unlawful industrial action, and therefore not all instances may come to the attention of FWBC. Usually FWBC acts on its own volition to investigate such alleged instances, after having sourced or received information from parliament, members of the public, employees or suspects. The media is monitored daily by the Inspector – Industrial Action (FWI-IA) to identify any industrial action matters. The FWI-IA also monitors the FWC website daily for applications and orders regarding industrial action.

Where there are applications to or orders issued by FWC, the FWI-IA obtains background information and prepares a case assessment report, which is forwarded to the relevant director.

On occasion, an Inspector in the course of their work may also become aware of industrial action that has or is likely to occur (without having been advised of the matter by their director or via the FWI-IA monitoring process). In such cases the Inspector should advise their director of the matter, providing as much information as possible. The director (in consultation with the FWI-IA) will decide the appropriate action that is to be taken, including whether an Inspector is required to commence an IA investigation.

5.3.6 Attendance at industrial rallies and meetings

Rallies and meetings where industrial action is discussed may provide important indicators as to who is behind a motion to engage in unlawful industrial action. Those people or organisations may be respondents in subsequent court action, and/or may be of interest to FWBC in an IA investigation.

Notwithstanding the opportunity to gather information and evidence at a rally or meeting, Inspectors have an obligation to act fairly and openly in the execution of their duties.

Accordingly, the attendance of Inspectors at such gatherings should only occur in the following circumstances:

- the meeting or rally is in a public place
- members of the general public are invited, or would reasonably be expected to be in attendance (e.g. in a park)
- attendance at the meeting or rally poses no risk or threat to the Inspector.

Inspectors should not attend meetings that have been promoted as being for members, or are being held in venues that are closed to the general public (or that you could reasonably expect to be closed to the general public), unless permission has been sought from the meeting organiser or a person authorised to act on the meeting organiser's behalf.

In seeking permission, Inspectors should make it known to the meeting organiser they are attending in an official capacity as a Inspector from FWBC. Such permission ordinarily should be sought prior to any such event occurring, although in practicality such circumstances and the granting of permission are likely to be rare.

Additionally, Inspectors always should be mindful not to place themselves at risk by being in attendance at such events. Crowd mentality and dynamics can cause people to act very differently than how they might otherwise act as an individual or in a small group. Inspectors need to be cognisant of this and always be ready to withdraw from situations where it appears crowds are getting agitated or aggressive, even if those events are open to the general public and are in public places. FWBC's Client Aggression Guide provides further guidance to Inspectors in regard to these considerations.

Any Inspector who is unsure as to whether or not they should attend a meeting or rally, or are unsure of whether the meeting or rally meets the above criteria, should consult directly with their manager.

5.3.7 Case conference

All industrial action investigations must be case conferenced in accordance with FWBC case conference process as required. At the first available case conference, the Inspector will provide an initial update as to the progress of the investigation. The Inspector assigned to an industrial action investigation will be required to provide regular updates at the case conference throughout the course of the investigation. Where appropriate, the Inspector could seek advice or assistance at the case conference in drafting relevant correspondence to parties in relation to IA matters.

An important consideration to be discussed at case conference is whether there are any contraventions of civil remedy provisions, and the appropriate compliance options (as detailed in 18.3.8 below). The decision whether to recommend litigation (or some other enforcement activity) rests with the Inspector and their director, as outlined in Guidance Note 1 - Litigation Policy.

5.3.8 Compliance options

If the Inspector identifies a contravention of a civil remedy provision under the FW Act there are a range of compliance tools available. In particular, the following should be considered:

- a letter of caution
- a contravention letter
- an enforceable undertaking
- injunctions
- litigation
- media.

General correspondence (or an "educative letter") is not considered an appropriate response to a contravention of a civil remedy provision.

A letter of caution may be issued where the Inspector determines that the contravention of the civil remedy provision is inadvertent or relatively minor.

A recommendation for enforceable undertaking (including via the litigation summary minute) may be made where the Inspector views that it is in the public interest for FWBC to accept an enforceable undertaking in lieu of litigation.

The FW Act also allows that an Inspector (and other parties) can seek an injunction in relation to various matters relating to industrial action, including:

- under s417(3), an Inspector can apply to the Federal Court or Federal Magistrates Court for an injunction or other order in relation to industrial action taken in contravention of s417(1)
- under ss 421(1) and (3), an Inspector can apply to the Federal Court or Federal Circuit Court for an injunction or other order in relation to the contravention of orders made under ss 422, 419 or 420.

Litigation itself will be recommended by the Inspector (via the litigation summary minute) where appropriate in consideration of the public interest, the characteristics of the suspect, employee or employee organisation and Guidance Note 1 - Litigation Policy.

The following factors are relevant to the test of public interest:

- the potential impact on the financial circumstances of a company, third party companies, the community or national economy
- the risk of future unlawful industrial action and destabilisation
- whether the action is ongoing
- the behaviour of the parties
- the deterrence message (specific or general) that either 'action or 'non action' by FWBC would send to the broader workplace relations community
- whether there is a history of industrial action by the relevant parties at the particular workplace
- whether a letter of caution has been issued to the relevant party

- whether an enforceable undertaking involving the relevant parties is in place
- whether FWBC has previously investigated allegations of unlawful industrial action at the particular workplace and/or
- the wilfulness or otherwise of any breaches of an FWC order.

For further information on letters of caution, enforceable undertakings, injunctions and litigation, refer Chapter 14 Non Litigation Outcomes and Chapter 15 – Litigation.

5.3.9 Where no further action is taken

As with any FWBC investigation, where there have been no contraventions of Commonwealth workplace relations laws, there is no further action to be taken. On other occasions it may be found that further action is not appropriate where there is insufficient admissible evidence of contraventions, or it is not in the public interest to proceed with the compliance options shown in 18.3.8 above.

Where the Inspector forms the view that no further action should be taken in an industrial action investigation, this should be discussed at case conference, in order to confirm that (in consideration of the evidence and procedures as detailed in this manual) the investigation should be closed.

5.4 Right of entry (ROE)

5.4.1 Permit holders and right of entry

A union official who holds a right of entry permit is known as a 'permit holder' (under the FW Act and has the right to enter building sites or premises to hold discussions with employees, or to investigate suspected breaches of the FW Act or a term of a Fair Work Instrument.

Part 3-4, FW Act also contains provisions dealing with the requirements to be met by permit holders seeking to exercise rights to enter premises under relevant State or Territory workplace health and safety laws.

5.4.2 Right of Entry Notice Requirements

A permit holder seeking entry to investigate suspected contraventions must provide an entry notice during working hours to the occupier of the premises and any affected employers under Part 3-4, Division 2, FW Act.

A permit holder seeking entry to hold discussions with employees must provide an entry notice during working hours to the occupier of the premises.

The entry notice must be served at least 24 hours, but no more than 14 days, before the entry (s487(3)). In the case where the permit holder has an exemption certificate issued by FWC which waives the notice period for the entry, this is to be given to the occupier of the premises and any affected employer before or as soon as practicable after entering the premises (s487(4)).

In all cases, the entry notice must include:

- the site or premises to be entered
- the day of entry
- the name of the permit holders union
- the section of the FW Act that authorises entry.

Additionally, for notices that relate to entry to investigate a suspected contravention, the entry notice must also include details of:

- the provision of the union's rules that entitles the union to represent the employee
- a declaration that they (i.e. the permit holder) are entitled to represent the industrial interests of an employee who performs work on the site
- the suspected breach.

When the entry is to hold discussions with employees the notice must also include:

- the provision of the union's rules that entitles the union to represent the employee
- a declaration that they (i.e. the permit holder) are entitled to represent the industrial interests of an employee who performs work on the site.

5.4.3 Purpose of entry

In the building industry a permit holder is able to enter sites during working hours to investigate suspected contraventions under the FW Act or instrument, or relevant state or territory OHS laws, or to hold discussion with employees.

5.4.3.1 Entry for the purpose of investigating suspected contraventions

Under section 481 FW Act a permit holder has the right to enter building sites and other premises to investigate if they have reasonable grounds to believe the FW Act or a term of a Fair Work instrument has been, or is being, broken.
A permit holder can only exercise these rights on a specific site if all the following conditions are met:

- the suspected breach affects at least one member of the permit holder's union
- the union is entitled to represent the industrial interests of that member
- the member works on that site; and
- the union official reasonably suspects that a breach has occurred, or is occurring.

A permit holder must*:*

- produce the permit holder's authority documents (i.e. permit and entry notice) for inspection when requested to do so by an affected employer or by the occupier of the premises (in the case of entry to investigate suspected contraventions) (s489); and
- comply with any reasonable request of the occupier to comply with an OHS requirement that applies to the premises (s491).

When on site a permit holder has the right to:

- inspect any work, process or object relevant to a suspected breach (s482)

- interview any person about a suspected breach:
  - who agrees to be interviewed; and
  - who the union is entitled to represent
- inspect and make copies of records that are directly relevant to the suspected breach:
  - the records must be kept on the site or be accessible on a computer kept on the site
- serve a notice on an employer to produce records at a later date
- inspect, or request production of, non-member records, if the non-member has consented in writing; or seek an order from the FWC to access non-member records.

When exercising powers to inspect, copy or request production of documents, the permit holder must produce their authority documents. Note this is a separate requirement to produce authority documents. In this instance the permit holder is required to produce their documents before exercising this power.

A permit holder must not:

- enter any part of premises of the employer that is used for mainly residential purposes (s493)
- use or disclose any information or document obtained when investigating a suspected breach for unrelated purposes unless authorised to do so by the FW Act (s504)
- misrepresent the authority granted to the union official under the FW Act (s503); or
- intentionally hinder or obstruct any person or act in an improper manner in exercising, or seeking to exercise, their rights (s500).

Permit holders who do not meet these responsibilities can be asked to leave the site and may face penalties for their actions (refer to Item 25 in s 539(2) for list of civil remedy provisions).

5.4.3.2 Entry for the purpose of holding discussions with employees

Under section 484 FW Act, a permit holder has the right to enter building sites and other premises to hold discussions with employees, including current and potential members of their union. This right may only be exercised on the day specified in the entry notice and during working hours, meal times or other breaks (section 490 FW Act).

A permit holder can hold discussions with employees who:

- work on that site
- are entitled to be represented by the permit holder's union; and
- wish to participate in discussions.

A permit holder must:

- comply with an occupier's reasonable request to conduct interviews or hold discussions in a particular room or area or to take a particular route to reach that room or area (s492).

When on site a permit holder has the right to:

- request a room in which to hold discussions or interviews:
  - where possible, the employer should provide a room that is suitable; and
- exercise these rights without being hindered or obstructed.

A permit holder must not:

- hold discussions with employees other than at meal times or other breaks
- misrepresent the authority granted to the union official under the FW Act; or
- intentionally hinder or obstruct any person or act in an improper manner in exercising, or seeking to exercise, their rights (s500).

5.4.4 Entry for OHS purposes

Under section 494 FW Act, a registered union official may have the right to enter under state or territory OHS legislation; in some states now known as Work Health and Safety (WHS) legislation.

On request the permit holder must still show their federal permit to the occupier of the site and/or the affected employer, and ensure they meet certain requirements under:

- the relevant state or territory OHS legislation; and
- the *Fair Work Act 2009*.

Different provisions apply in the case of right of entry for OHS purposes. Where a union official has a right to enter under a prescribed OHS law and a constitutional connection exists, the union official must not exercise the right unless he/she:

- holds a permit under the FW Act; and
- exercises the right during working hours.

There are a number of ways that a constitutional connection may exist, and are defined in s494(2).

To exercise a State or Territory OHS right to inspect or access an employee record, the permit holder must give written notice to the occupier of the premises or any affected employer, setting out the reasons for entry and be delivered at least 24 hours prior to exercising this right.

The entry notice must name:

- the site or premises to be entered
- the day of entry; and
- which union the permit holder belongs to.

A permit holder:

- may only exercise a state or territory OHS right during working hours; and
- must not exercise a state or territory OHS right unless he or she complies with any reasonable request by the occupier to observe on-site specific OHS practices.

Fair Work Building Industry Inspectors will need to consult the FW Regulations in order to determine whether a law is prescribed as a state or territory OHS law (s494(3)). This list is reproduced at the end of this ready reckoner.

5.4.5 Responsibilities of Site Occupiers and Affected Employers

An employer, site occupier, or other person must not:

- refuse or unduly delay entry to a permit holder entitled to enter the site (s501)
- refuse or fail to comply with a permit holder's request to produce or provide access to records or documents (s482(3), s483(4))
- intentionally hinder or obstruct a permit holder who is exercising their right of entry powers (s502)
- misrepresent themselves by intentionally or recklessly giving the impression they are authorised to do things they are not authorised to do (s503); or
- disclose or use information or a document obtained in the investigation of a suspected contravention for an unauthorised purpose (s504).

5.4.6 Investigating Right of Entry Contraventions

When investigating an alleged misuse of the right of entry provisions, a Fair Work Building Industry Inspector should determine:

- if the person holds a current valid permit which has not been revoked, suspended or had conditions imposed (this may be done by accessing the FWC website)

- if the permit holder was exercising his or her right of entry powers (If not, any action is unlikely to constitute a contravention)

- the basis for the entry (i.e. to investigate suspected contraventions, hold discussions with employees or for OHS purposes) as should be set out in the entry notice or exemption certificate

- if entering for OHS purposes, determine if the union official is a permit holder under the relevant OHS law

- if the permit holder was asked to produce the permit by the occupier or affected employer. If so, determine whether consent was given for the permit holder to enter or whether the entry was disputed in any way by the occupier or employer

- whether the permit holder has met the requirements of the relevant entry provision (e.g. if entry is for the purpose of investigating a suspected contravention of the FW Act or a Fair Work instrument, check whether the permit holder has reasonable grounds for suspecting that a contravention of the FW Act or Fair Work instrument has occurred or is occurring; and whether work is being carried out by, and affected one or more employees who are a member of the permit holder's organisation and work on the premises)

- if relevant, whether the permit holder has complied with requests of the occupier/ employer. (The reasonableness of the request is a matter for FWC); and

- whether the permit holder has acted in accordance with any permit conditions.

On obtaining all available evidence, determine whether the permit holder, employer or other person has contravened sections of the FW Act.

The FW Act provides that an application to impose conditions, suspend or revoke an entry permit can be made by a Fair Work Inspector or a person prescribed by the regulations (s 507).

Contraventions of state OHS legislation can be referred to the relevant state agency which regulates that legislation.

5.4.7 Powers of FWC in regard to Right of Entry

In brief, FWC has power to:

- deal with disputes about the operation of ROE provisions (including whether a request is reasonable)
- FWC is empowered to deal with disputes and make orders in relation to right of entry (ss 505-509).
- on application, take action against a permit holder, including to impose conditions on, suspend or revoke an entry permit
- restrict rights of officials and organisations where ROE rights have been misused; or
- make orders in relation to the provisions above.

5.4.8 FW Act Amendments 2013 – New Right of Entry Laws (commencing 1 January 2014)

On 27 June 2013 the Federal Senate passed the *Fair Work Amendment Act 2013,* which includes changes to the existing ROE provisions. The following ROE amendments will commence on 1 January 2014.

5.4.8.1 Meetings in lunchrooms

Under the new provisions, a union official exercising right of entry can automatically use the employee's lunch room for any entry discussions or interviews. The only limits on this right are:

- the lunchroom must be provided by the "occupier" of the premises for the purpose of taking breaks
- at least one of the people being interviewed or met with must ordinarily take their breaks in the room being entered; and
- the official must still comply with the other limitations of their right of entry.

5.4.8.2 Remote areas – transport and accommodation

The new amendments expressly provide that employers in "remote areas" assist officials with both transport and accommodation when exercising right of entry.

The obligation to provide transport only arises where the premises are "not reasonably accessible". In that case, the "occupier" and the union (or the union official) must agree on a

“transport arrangement” in which the official is given assistance in reaching the site. The occupier can charge the union or the official a fee for transport and/or accommodation, but the fee cannot be more than is necessary to cover costs.

The union’s rights to transport and accommodation are subject to a number of limitations, which include:

- the right only exists if providing accommodation or transport would not cause the occupier undue inconvenience
- the request must be made a reasonable time before the entry; and
- the official must comply with their normal right of entry obligations (such as the obligation to not hinder or obstruct others) while using the accommodation or transport.

FWC has the express power of being able to settle any disputes over whether premises are “reasonably accessible”, whether accommodation is “reasonably available”, and whether providing transport and/or accommodation would cause “undue inconvenience”.

5.4.8.3 FWC and Right of Entry Disputes – excessive entries

Section 505A provides that FWC may deal with disputes about the frequency with which a permit holder enters premises. FWC may issue orders against a union official, or an entire union, if FWC is satisfied that the official, or representatives of the official’s union, enter so frequently that it requires “an unreasonable diversion of the occupier’s critical resources”.

It is unlikely that a permit holder is able to exercise these expanded rights if the purported reason for the entry is for an OHS purpose regulated by state legislation and no such equivalent state provision applies.

Chapter 6 Coercion and Undue influence or Pressure Investigations

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The aim of this chapter is to alert Inspectors to some of the common indicators that may assist them in recognising potential allegations of undue influence or pressure, and coercion.

6.1 Coercion

Where the investigation involves coercion, Inspectors must have regard to the relevant provisions of the FW Act. Coercion in this context is dealt with in Part 3-1 of the FW Act.

Specifically, s343 makes it unlawful to for a person to take any action with the intent to coerce another person (or third party) to exercise or refuse to exercise (or propose to exercise or refuse to exercise) a workplace right in a particular way.

Section 348 makes it unlawful for a person to organise or take, or threaten to organise or take action with the intent to coerce another person (or third party) to engage in industrial activity.

Further s355 makes it unlawful for a person to coerce another person into:

- making decisions regarding employing particular people
- engaging a particular contractor
- allocating particular duties or responsibilities.

Coercion is not defined in the FW Act. However, the term has been considered in a number of cases and, in the context of Commonwealth workplace laws, coercion has a generally accepted meaning. Coercion is defined at common law in that both involve the application of "illegitimate pressure". Coercion requires an intention to use this pressure to overbear the

will of a person, and it requires more than just an inducement to comply. Coercion requires a wrongful or illegal action or the negation of choice, and connotes the threat of harm to the interests of the other party. Of course, where collective agreements are involved, this "illegitimate pressure" is likely to manifest in a different way than with individual agreements (such as the former AWAs and ITEAs). The most useful approach is for the Inspector to assess a set of circumstances with respect to the complaint:

- what is the alleged coercive behaviour?
- on what basis was the threat or conduct unlawful?
- did the conduct effectively result in the negation of choice of the other party?

As a rule, when considering the question of coercion Inspectors must determine whether or not suspects have participated in behaviour intended to coerce parties to act in a certain way.

6.1.1 Illegitimate pressure

Determining the existence of coercion involves characterisation of the behaviour of the parties in order to determine whether "illegitimate pressure"[1] has been applied. Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct, but the categories are not closed.

If the Inspector forms the view that illegitimate pressure has been applied the Inspector should consult with their Assistant Director and raise a Case Decision Record.

6.2 Exceptions relating to coercion

Participating in industrial action which is "protected action" as defined in s435 of s408 of the FW Act does not amount to coercion, but the industrial action must meet the criteria of "protected action" in order to be exempt from these provisions.

For more information on industrial action, refer Chapter 5– Industrial activities.

6.3 Undue influence or pressure under the FW Act

Where alleged or apparent undue influence or pressure has occurred, Inspectors must investigate with regard to the relevant provisions of the FW Act. Undue influence or pressure in this context is dealt with in Part 3-1 of the FW Act. Specifically, s344 makes it unlawful for an employer to exert undue influence or pressure on an employee in relation to an employee's decision to:

- make, or not make, an agreement or arrangement under the NES

[1] *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40

- make, or not make, an agreement or arrangement under a term of a modern award or enterprise agreement (where the term is permitted to be included in the award or agreement)
- agree to, or terminate, an individual flexibility agreement
- accept a guarantee of annual earnings
- agree, or not agree, to a deduction from amounts payable to the employee in relation to the performance of work.

It should be noted that undue influence or pressure (while not defined in the FW Act) in its common law usage involves a person seeking to take advantage of the position of power they have over another person. There is not a requirement (as there is coercion) for the Inspector to establish that threats or force have been used. As such, there is a lower legal threshold for undue influence or pressure than for coercion. Paragraph 1396 of the Explanatory Memorandum to the Fair Work Bill 2008 (which later became the FW Act)explains this lower threshold recognises that there should be higher obligations on employers who seek to modify employees' safety net conditions of employment.

6.4 FWBC practices for investigating undue influence, pressure or coercion matters

Initially, an Inspector should take the following steps:

- Identify the alleged "illegitimate pressure"
- Determine whether there is any actual or threatened conduct that is "unlawful"
- Determine whether the alleged pressure resulted in the employee being prevented from making a "free" decision

6.4.1.1 Proofs 16.6.2.1

Generally, Inspectors should firstly confirm that the employer is subject to the FW Act (as a "national system employer").

Where the alleged undue influence or pressure relates to agreement making or the use of bargaining agents, Inspectors should obtain:

- any relevant correspondence between the employer and the employee, including any bargaining agent of the parties
- witness statements from relevant parties (those who may have been party to, or witnessed the interactions between employer/employee/industrial organisation – where applicable)
- statements from employee/employer/industrial organisation representative (where applicable).

6.4.1.2 Conclusions

If the alleged illegitimate pressure involves unlawful threats or amounts to unconscionable conduct designed to negate any freedom in a decision, it may support an allegation of coercion.

Irrespective of the finding, the Inspector should consider whether the contravention gives rise to any other contraventions (such as false and/or misleading statements – refer 6.5.1.4).

6.4.1.3 Misrepresentations

Sections 345 and/or 349 of the FW Act prohibit a person from recklessly making false or misleading representation with regard to workplace rights (s345) and industrial activity (s349).

Inspectors should take care when considering these types of contraventions as there are specific elements that may present difficulty, including that the conduct must be reckless; and the conduct must cause the other person to act or not act

Chapter 7
Workplace rights and adverse action

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7.1 Introduction

The FW Act provides certain "general protections" for employees and prospective employees in Part 3-1.[1] This chapter focuses on the protection of workplace rights as provided for in the Division 3 of Part 3-1 of the FW Act.

After reading this chapter, Inspectors should be able to:

- understand the types of workplace rights inquiries and complaints dealt with by FWBC
- identify issues concerning workplace rights in their day-to-day investigations that may warrant escalation.

7.2 Protections under the Fair Work Act

The FW Act provides that adverse action must not be taken against a person because the person:

- has a workplace right
- has, or has not, exercised a workplace right
- proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right.

The protection extends to prohibiting action taken to prevent the exercise of a person's workplace right, and to prohibiting action taken against a person relating to certain actions taken by another party for that person's benefit.[2]

For example, a workplace has an enterprise agreement in place that provides for the appointment of a safety officer. An employee performing this role is protected against adverse action in relation to carrying out that role on the basis that it is a workplace right. In this example the person is protected because the role or responsibility is provided for in the workplace instrument.[3]

7.3 Workplace rights

7.3.1 Definition of workplace rights

Workplace rights are detailed in s341 of the FW Act. In summary, a workplace right, for the purposes of the FW Act, exists where a person (or in some instances a body):

- is entitled to the benefit of, or has the role or responsibility under a workplace law, workplace instrument or order made by an industrial body; or
- is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or
- has the capacity under a workplace law to make a complaint:
    - to seek compliance with that workplace law or instrument; or
    - in relation to their employment.

[1] FW Act; Part 3-1
[2] FW Act; s 340
[3] FW Act; s341(1)(a)

In addition, workplace rights are extended not only to employees (and employers), but also to prospective employees as well as independent contractors and those who engage them.

7.3.2 Workplace law and workplace instruments

As workplace rights relate to entitlements under workplace law or workplace instruments, it is important to consider how these terms are defined for the purposes of Part 3-1, Division 3 of the FW Act. This is of particular significance as the definitions of workplace law and workplace instrument in the FW Act extend beyond traditional interpretations.

The definition of workplace law (as applicable to the "general protections") includes not only the FW Act, but also Schedule 1 to the *Workplace Relations Act 1996*, the *Independent Contractors Act 2006*, and:

> "any other law of the Commonwealth, a State or a Territory that regulates the relationship between employers and employees (including by dealing with occupational health and safety matters)"[4]

A workplace instrument is defined in the FW Act as being an instrument made under (or recognised by) a workplace law, provided that the instrument concerns the relationships between employers and employees.[5]

Accordingly, a person may have a workplace right or ability to exercise a workplace right under the FW Act in relation to their entitlements as well as under various state and Commonwealth laws and instruments.

In practice, this does not mean that Inspectors will be expected to investigate contraventions of state or territory laws as such. Rather Inspectors will seek to establish whether a person has exercised (or attempted to exercise) a workplace right that results from the relevant state or territory law, and has suffered some form of adverse action as a consequence. In other words, the issue at hand for the Inspector will not necessarily be the actual contravention of the state or territory law, but, for example, the consequence to the employee of highlighting the contravention.

7.4 Adverse action

7.4.1 Definition of adverse action

In relation to an employee, adverse action is defined in the FW Act to include circumstances where an employer dismisses an employee, injures an employee in their employment, alters the position of an employee to the employee's prejudice, or discriminates between an employee and other employees of the employer.[6] Coverage extends to a prospective employer refusing to employ a prospective employee or discriminating in the terms and conditions offered to a prospective employee.[7]

Under the FW Act adverse action is not limited to actions taken by employers and employees but also, in some circumstances, extends to action taken by or against independent contractors. Therefore, adverse action may occur where a person refuses to engage, make use of services, or supply goods and services to an independent contractor.

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[4] FW Act; s12
[5] FW Act; s12
[6] FW Act; s 342(1) item 1
[7] FW Act; s 342(1) item 2

The following table (from s342 of the FW Act) sets out circumstances in which a person takes **adverse action** against another person.

Meaning of *adverse action*		
Item	**Column 1** ***Adverse action* is taken by ...**	**Column 2** **if ...**
1	an employer against an employee	the employer: (a) dismisses the employee; or (b) injures the employee in his or her employment; or (c) alters the position of the employee to the employee's prejudice; or (d) discriminates between the employee and other employees of the employer.
2	a prospective employer against a prospective employee	the prospective employer: (a) refuses to employ the prospective employee; or (b) discriminates against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee.
3	a person (the ***principal***) who has entered into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor	the principal: (a) terminates the contract; or (b) injures the independent contractor in relation to the terms and conditions of the contract; or (c) alters the position of the independent contractor to the independent contractor's prejudice; or (d) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (e) refuses to supply, or agree to supply, goods or services to the independent contractor.
4	a person (the ***principal***) proposing to enter into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor	the principal: (a) refuses to engage the independent contractor; or (b) discriminates against the independent contractor in the terms or conditions on which the principal offers to engage the independent contractor; or (c) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (d) refuses to supply, or agree to supply, goods or services to the independent contractor.
5	an employee against his or her employer	the employee: (a) ceases work in the service of the employer; or (b) takes industrial action against the employer.
6	an independent contractor against a person who has entered into a contract for services with the independent contractor	the independent contractor: (a) ceases work under the contract; or (b) takes industrial action against the person.
7	an industrial association, or an officer or member of an industrial association, against a person	the industrial association, or the officer or member of the industrial association: (a) organises or takes industrial action against the person; or (b) takes action that has the effect, directly or indirectly, of prejudicing the person in the person's employment or prospective employment; or

Meaning of *adverse action*		
Item	**Column 1** ***Adverse action* is taken by ...**	**Column 2** **if ...**
		(c) if the person is an independent contractor—takes action that has the effect, directly or indirectly, of prejudicing the independent contractor in relation to a contract for services; or (d) if the person is a member of the association—imposes a penalty, forfeiture or disability of any kind on the member (other than in relation to money legally owed to the association by the member).

From the table above, it can be seen that adverse action includes:

- threatening to take action covered by the table in subsection (1); and
- organising such action.

Adverse action does not include action that is authorised by or under:

- the FW Act, or any other law of the Commonwealth; or
- a law of a state or territory prescribed by the regulations.

Adverse action does not include an employer standing down an employee who is:

- engaged in protected industrial action; and
- employed under a contract of employment that provides for the employer to stand down the employee in the circumstances.

7.5 Investigation, causation and proof

When considering a workplace rights complaint, Inspectors should investigate whether:

- the complainant has or had a workplace right (which may or may not have been exercised); and
- the employer took adverse action against the complainant; and
- the adverse action was taken because of the workplace right (i.e. causation).

In order to sustain a complaint, it will be necessary to establish all three of these "elements".

In adverse action (and discrimination) matters, there is a reversal of the onus of proof. This means that where the first two elements are established (i.e. that the complainant has or had the workplace right and that adverse action occurred) the Inspector is not required to prove the causation aspect. Rather, upon the Inspector having satisfactorily established the existence of the workplace right and the adverse action, the burden of proving that the action was not taken because of the workplace right falls upon the employer.

7.6 Process for matters involving dismissal

The FW Act provides different processes for contravention of general protections provisions that involve a dismissal of an employee, and those that do not.

In the case of a contravention involving a dismissal, the person dismissed (or their industrial association) can apply to FWC to deal with the general protections dispute. Such application

should be made **within 21 days** after the dismissal took effect**.** Applications may be lodged after this time only if FWC is satisfied there are exceptional circumstances. **When providing information about remedies involving dismissal, Inspectors should advise the person of this 21 day time limit, in addition to the time limits relating to unfair dismissal applications.**

If the application is rejected by FWC because it is outside of the time limit, the complainant may still be able to seek another remedy, such as at common law through the courts. As an alternative, the complainant may instead seek to lodge a complaint regarding any alleged breaches of the FW Act with FWBC.

7.7 Process for matters not involving dismissal

In the case of a contravention not involving a dismissal, the person alleging the contravention can apply to FWC to deal with the dispute. However, FWC must only conduct a conference if the parties to the dispute agree to this. Applications must be lodged within the six-year limitation period provided by the FW Act.

7.8 FWBC position on complaints regarding alleged contraventions

Where the complaint relates to an alleged contravention of the general protections provisions involving a dismissal, the complainant should be referred to FWC in the first instance unless the complaint specifically alleges unlawful discrimination (refer Chapter 11 – Discrimination). Where the statutory 21 day period for lodgement with FWC has expired, the complainant should be advised of the timeframe and encouraged to seek urgent independent advice as to whether they should make an application to FWC outside of this timeframe. Inspectors cannot provide advice as to whether an "out of time" application to FWC will be accepted.

In certain circumstances, the complainant might also ask an Inspector if there are remedies available under other provisions of the FW Act, relating to unfair dismissal or unlawful termination. It should be noted that the FW Act specifies that a person must not make an unlawful termination application where they are entitled to make a general protections application in relation to conduct.[8] Inspectors should not provide advice to potential complainants regarding which type of application to lodge with FWC. Rather complainants who are uncertain of the appropriate application to lodge should be referred to FWC and encouraged to seek urgent independent advice.

Where the complaint relates to an alleged contravention not involving a dismissal, the complainant should also be advised of their rights to pursue the matter through FWC in the first instance. In addition, where the complaint is of alleged discrimination (whether involving dismissal or not), FWBC will consider the complaint according to the procedures outlined in Chapter 11 – Discrimination of this Manual.

7.9 Where FWC is not dealing with the complaint

If the complainant is not pursuing a remedy through FWC (e.g. because the application to FWC has been rejected because of time limits), other remedies may be available to the complainant. In particular:

[8] FW Act; s 723.

- the complainant may seek a remedy at common law through the courts or another tribunal of competent jurisdiction; or
- the complainant may ask FWBC to investigate the complaint.

Where the complaint is not being dealt with (or has not been dealt with) by FWC, the courts, a tribunal or another body, then FWBC is able to investigate any alleged contraventions of the FW Act, in accordance with the relevant sections of this FWBC Operations Manual.

In addition, FWBC may seek to investigate any instances where it appears or it is alleged that the complainant's employment has been adversely affected (including terminated) because they have made an inquiry or complaint with FWBC.[9] In these cases, FWBC may investigate the circumstances surrounding the adverse action in order to establish whether there has been a contravention of the FW Act, even if the complainant seeks formal remedy for the adverse action itself through another body.

Key Messages

- The FW Act provides that adverse action must not be taken against a person who has a workplace right, has or has not proposed to exercise that right or has or has not exercised that right
- Workplace rights extend to prospective employees and independent contractors and those who engage them
- Inspectors should concentrate on establishing whether the complainant has a workplace right, the employer took adverse action against the complainant, and the action was taken because of the workplace right

[9] FW Act; s 341(1)(c). Also see the Explanatory Memorandum to the FW Act (paragraph 1369).

Chapter 8
Wages and Entitlements Investigations

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8.1 The National Employment Standards (NES)

The NES are designed to underpin the modern awards and enterprise agreements by providing minimum entitlements for all national system employees (and those employees to which the NES may apply by virtue of state referral of powers). Modern awards (refer 13.6 below) and enterprise agreements (refer 13.7 below) can also provide entitlements to employees that are of greater benefit than the NES. However the NES cannot be excluded by a term of a modern award or enterprise agreement. The NES commenced on 1 January 2010.

8.1.1 Defining the NES

There are 10 standards that constitute the NES, which are the minimum standards of employment conditions for national system employees. These are defined in Part 2-2 of the FW Act. A summary of the subject areas is listed below:

- maximum hours of work (s62)
- rights to request flexible working arrangements (s65)
- parental leave and related entitlements (s67)
- annual leave (s87)
- personal/carer's leave and compassionate leave (ss 95, 102, 104)
- community service leave (s108)
- long service leave (s113)
- public holidays (s114)
- notice of termination and redundancy pay (s117)
- provision of a Fair Work Information Statement (s124).

As noted above, the NES apply specifically to national system employers and national system employees. However (as noted above) the standards with respect to parental leave and notice of termination extend to all employers and employees.[1]

When assisting parties to an investigation in understanding their entitlements or obligations under the NES, Inspectors may make reference to the range of fact sheets which are available with each entitlement in the NES.

8.1.2 The New entitlements in the NES

Six standards in the NES did not form part of the AFPCS under the WR Act. A brief summary of these six standards is given below, but Inspectors should refer to the FW Act for the full entitlements provided for by each standard.

- **Requests for flexible working arrangements**

[1] FW Act; s59 and divisions 2 and 3 of Part 6-3

Under this entitlement employees with at least 12 months service, who are parents or have carer's responsibilities for children under school age or under 18 and have a disability, will be able to request in writing flexible arrangements to assist them in caring for these children.

The FW Act provides that employers may only refuse such requests on reasonable business grounds, although the term "reasonable business grounds" is not defined. They must do so by written response within 21 days (also refer 13.5.1.3 below).[2]

- **Community service leave**
  The entitlement provides for unpaid leave for absences associated with voluntary emergency management activities and "***an activity***" as described in the FW Regulations. There is no cap on the amount of community service leave to be provided (if it is reasonable). The sanctioned absence is limited to the time that the employee is engaged in the activity, including reasonable travelling time associated with the activity and reasonable rest time immediately following the activity.

  Community service leave also includes jury service. Under the FW Act employees, (who are not casual employees), are entitled to be paid for up to ten days absence on jury service. This does not mean that the community service obligation of jury service is limited to ten days or to non-casuals; it merely means that the employer is only obliged to pay the base rate of pay to non-casual employees for the first ten days of the jury service period. The reasonableness requirement which applies to other forms of community service does not apply to jury service due to its compulsory nature.

- **Long service leave**
  This entitlement is a transitional entitlement pending the development of a uniform national long service leave standard. Under this entitlement employees are entitled to long service leave in accordance with the terms of the applicable modern award, unless the employee's employment is subject to a transitional instrument.

  Where an employee does not have applicable award-derived long service leave entitlements, any entitlement to long service leave will be derived from state or territory legislation.

- **Public holidays**
  The NES provide that employees are entitled to be absent from work on a public holiday. However an employer may request an employee to work on a public holiday where this is reasonable. An employee is entitled to refuse the request if the request is not reasonable or the refusal is reasonable. The FW Act under s114(4) provides Inspectors with a non-exhaustive list of the factors to be taken into account when considering whether a request or refusal is "reasonable". In these circumstances a

[2] Requests for flexible working arrangements under the NES are distinct from (and should not be confused with) individual flexibility arrangements under a modern award or enterprise agreement (see Chapter 12 – Investigation of individually negotiated entitlements of this Manual).

substituted public holiday may be considered if there is a provision in a modern award or enterprise agreement stating an agreed substitute public holiday.

- **Notice of termination and redundancy**
  The NES also provide minimum notice to be given by employers. These are similar to the previous provisions under s661 of the WR Act, but Inspectors can enforce notice provisions as a NES entitlement (whereas under the WR Act, Workplace Inspectors could not).

  The FW Act further legislates a general entitlement to redundancy pay for national system employees. A State reference employee may continue to be entitled to redundancy pay under the NES for a period of 12 months from the Division 2B referral commencement even if his or her employer is a small business employer.

- **Fair Work Information Statement**
  A Fair Work Information Statement (FWIS) will be provided by employers to new employees as soon as practicable after the commencement of employment. The FWIS will include information relating to:
  - the NES
  - modern awards
  - agreement–making under the FW Act
  - the right to freedom of association
  - the role of FWC and FWBC
  - other matters as prescribed by regulation.

8.1.3 NES entitlements that were modified from the AFPCS

Four of the NES standards were modified from the existing AFPCS. A brief summary follows for each, but again Inspectors should refer to the FW Act for the full provisions of each standard.

Also, it should be noted that one AFPCS (regarding minimum rates of pay) was not preserved in the NES, as the provisions relating to minimum rates of pay have been incorporated in other transitional provisions of the FW Act (see 13.3.3 above).

- **Maximum weekly hours of work**
  An employee's ordinary hours of work should not be more than 38 per week. An employer may require an employee to work reasonable additional hours. While the NES itself does not provide for averaging, it is possible for employers and employees to do so through a written agreement. The NES provides that averaging arrangements for hours of work for award/agreement-free employees must not be over a period of more than 26 weeks. This is a significant limitation when compared to the maximum time frame allowable for averaging under the WR Act (12 months).

  Modern awards (refer 13.6 below) and enterprise agreements (refer 13.7 below) may provide for averaging of hours of work over any period.

- **Parental leave**
  Parental leave remains similar to the AFPCS entitlements. Under the NES an employee with at least 12 months continuous service who gives birth to, or adopts a child, or whose spouse or de facto who gives birth to, or adopts a child, is entitled to take up to 12 months unpaid parental leave. There is a limited entitlement for spouses to take leave concurrently.

  Further, an eligible employee can ask for an additional 12 months unpaid parental leave and an employer may only refuse this request on reasonable business grounds, although (as with requests for flexible working arrangements) the term "reasonable business grounds" is not defined (also refer 13.5.1.3 below).

- **Annual leave**
  Under the NES annual leave entitlements for employees (other than casual employees) accrue 'progressively during a year of service', rather than accruing on each completed 4 week period. The specific rules regarding the crediting and accrual of annual leave under the WR Act have not been retained in the NES.

  Modern awards (refer 13.6 below) and enterprise agreements (refer 13.7 below) may include cashing out terms provided the employee's remaining entitlement is not less than 4 weeks. Employers and award/agreement-free employees may also agree to such a cashing out arrangement.

- **Personal/carer's leave and compassionate leave**
  The NES retains much of the existing provisions from the AFPCS, with some differences such as including terms regarding the effect of other forms of leave on personal/carer's leave and adding a provision that casuals are entitled to take up to two days unpaid compassionate leave per occasion. Modern awards and enterprise agreements may include terms relating to the cashing out of personal leave provided an employee maintains a minimum balance of 15 days.

  Modern awards and enterprise agreements cannot be detrimental to an employee when compared to the NES.

8.1.4 Enforcement of the NES

A contravention of the NES is a civil penalty provision, although it should be noted that penalty orders cannot be made in some instances. In particular, orders cannot be made for a contravention of the "reasonable business grounds" component of the requests for flexible working arrangements and the parental leave standards and therefore, on a practical level, the provisions cannot be enforced by FWBC. The role of FWBC in these cases would be limited to seeking compliance with the procedural requirements surrounding the request, such as requiring an employer to provide a written response to the employee's request, in accordance with the standard.

8.1.5 Considerations regarding terminations that span the WR Act and the FW Act

Inspectors may investigate complaints where the actions relating to the termination of employment appear to span the WR Act and the FW Act. In these circumstances, the T&C Act details the applicable provisions.

The FW Act (ss 117-118) provides for notice of termination to be given under the NES and has operated from 1 January 2010. Accordingly, these NES notice provisions apply only if the notice of termination was given on or after 1 January 2010. If notice was given prior to that date, then the relevant continuing provisions (such as under s661 of the WR Act) would specify the notice of termination to be given.[3]

Regarding redundancy pay, the NES redundancy pay provisions only apply to terminations that occur on or after 1 January 2010, even if notice of the termination was given before that date.

8.1.6 Interaction between the NES and transitional instruments (from 1 January 2010)

The T&C Act provides to the extent that a term of a transitional instrument is detrimental to an employee in any respect, when compared to the employee's entitlement under the NES, that term of the transitional instrument has no effect.[4] This provision is called the "no net detriment rule" and will be an important rule for Inspectors to consider when determining the entitlements of an employee to whom a transitional instrument applies after the commencement of the NES (1 January 2010). There are some exceptions to the no net detriment rule, namely where the term is permitted by the NES or T&C Act.[5] It should be noted that the no net detriment rule is to be applied on a "line by line" basis, which may result in the terms of a transitional instrument continuing to operate, but subject to more favourable provisions in the NES.[6] Of course, where a provision of an applicable transitional instrument is more favourable than the relevant NES provision, the more beneficial entitlement under the transitional instrument would continue to operate.

On application by a person covered by a transitional instrument, FWC (but not FWBC) may vary a transitional instrument to resolve difficulties arising from the interaction of the transitional instrument with the NES or to make the transitional instrument operate effectively with the NES.[7]

8.2 Modern awards

[3] T&C Act; Schedule 4, Part 3, item 9 (also refer 13.3.2 of this Manual chapter).
[4] T&C Act; Schedule 3, Part 5, Division 1, item 23. Note 3 to this section explains that the NES in this respect is taken to include the extended parental leave and notice of termination provisions under ss 746 and 761 of the FW Act.
[5] T&C Act; Schedule 3, Part 5, Division 1, items 23(2) and 24
[6] See the Explanatory Memorandum to the T&C Act, paragraph 83.
[7] T&C Act; Schedule 3, Part 5, Division 1, item 26

8.2.1 Introduction

The stated objectives of the award modernisation project are to provide a fair and relevant safety net. Modern awards commenced on 1 January 2010 and cover most businesses in the national workplace relations system. Many modern awards contain transitional provisions which allow wages and penalty rates that are higher or lower than pre-existing conditions to be progressively introduced in annual instalments from dates as defined in the modern award (often beginning 1 July 2010, but some awards have transitional provisions that commenced on 1 January 2010). However, a few modern awards (non-phased modern awards) contain no transitional provisions at all. Where there are no transitional provisions, the full terms of the modern award apply from 1 January 2010. Inspectors should check the relevant modern award to confirm the applicable transitional provisions (if any), and their dates of effect.

The award modernisation process was originally undertaken by the Australian Industrial Relations Commission (AIRC). Finalisation of this project transitioned to Fair Work Australia on 1 July 2009. The development of modern awards is an extensive process. Priority had been placed upon producing a number of modern awards across various industries such as hospitality, retail, metal and associated industries, due to the relatively high number of workers employed in these industries.

Modern awards are designed to provide industry relevant details about second tier entitlements which complement the NES. The FW Act (s55) details that a modern award must not exclude the NES or any provisions of the NES. A term of a modern award has no effect to the extent that it contravenes s55 of the FW Act.

Where employees and employers have entered into an enterprise agreement (refer 13.7 below) the modern award does not apply. Modern awards also do not apply to those employees with guaranteed annual earnings in excess of the high income threshold (however, the NES still applies to those employees).

Inspectors may refer parties to an investigation to the 'Modern Awards' fact sheet or one of the industry pages on FWBC's website for industry-specific information regarding modern awards.

8.2.2 Terms that may be included in a modern award

Modern awards cover the following matters (s139):

- minimum wages (s139(1)(a))
- type of employment (e.g. full-time, part-time, casual, regular part time, shift) (s139(1)(b))
- arrangements when work is performed (e.g. hours of work, rostering, notice periods, other variations to working hours) (s139(1)(c))
- overtime rates, shifts, working weekends and public holidays, irregular or unpredictable hours (s139(1)(d)-(e))
- annualised wage or salary arrangements (s139(1)(f))
- allowances (s139(1)(g))

- leave, leave loading and arrangements for taking leave (s139(1)(h))
- superannuation (s139(1)(i))
- procedures for consultation, representation and dispute settlement (s139(1)(j)).

8.2.3 Mandatory terms

There are a number of terms that must be included in any modern award. These are:

- Coverage terms: this means that the award must clearly identify persons and/or entities that are covered by the award (s143)
- Flexibility terms: this term provides for the ability of both the employee and employer to enter into an arrangement whereby the award can be modified by mutual consent (s144)
- Dispute settlement terms: this means that there must be a dispute settlement term in the award outlining the procedures for the resolution of any dispute (s146)
- Terms specifying ordinary hours of work: This term provides that the modern award must specify the hours of work for each classification of employee under the award (s147)
- Pieceworker[8] terms: if the modern award covers those defined as pieceworkers, details of the base and full rates of pay must be included as these details will determine the employee's entitlements under the NES (s148)
- Terms detailing the automatic variation of allowances: where FWC considers that certain allowances should be varied when the wage rate changes, a term covering automatic variation must be included (s149).

8.2.4 Terms that must not be included in a modern award

The FW Act provides that a modern award must not include an objectionable term.[9] An objectionable term is defined as a term that requires or permits or implies the same of a contravention of the general protections listed (part 3-1) or the payment of a bargaining fee.[10]

Other terms that must not be included in a modern award are:

- terms that refer to deductions or payments made for the benefit of the employer (s151)
- terms about right of entry. A modern award must not include terms that require or authorise an official of an organisation to enter premises (s152)
- terms that are discriminatory (s153). A term is not discriminatory merely because it provides minimum wages for juniors, employees with a disability or employees to whom training arrangements apply
- terms that contain state based differences in general must not be included. The exceptions are when they were included in the modernisation process with a five

[8] For a definition of pieceworker, see FW Act; s21.
[9] FW Act; s150
[10] FW Act; s12

year limit or when FWC makes or varies another modern award that will cover some or all classes of employees who were originally covered. FWC cannot extend the coverage for those not originally covered (ss 154 (1), 154(2))
- terms dealing with long service leave (s155).

8.2.5 Review of modern awards

FWC is responsible for conducting the reviews of modern awards at least every 4 years (s156) during which FWC may vary, revoke or make a new award.

To vary the 'minimum wage' of a modern award FWC must be satisfied that the variation is justified by '*work value reasons'.* The reasons justifying the amount that employees should be paid for doing a particular type of work, being reasons related to any of the following:

- nature of the work
- level of skill required and/or the responsibility involved in carrying out the work
- the conditions under which the work is done.

8.2.6 Interaction between modern awards and transitional instruments

The T&C Act details that a transitional APCS ceases to cover an employee when a modern award that covers the employee comes into operation.[11] The T&C Act also details the specific interaction between modern awards and transitional instruments.

Several operational rules apply, as detailed below:

8.2.6.1 *Agreement-based transitional instruments*

Where an agreement-based transitional instrument applies to an employee, or to an employer or other person in relation to an employee, the following rules are relevant:

- where the agreement-based transitional instrument that applies is a workplace agreement, a workplace determination, a preserved state agreement, an AWA or a pre-reform AWA, the modern award does not apply (but the modern award can continue to cover the employee while the agreement-based transitional instrument continues to apply)
- where the agreement-based transitional instrument that applies is a pre-reform certified agreement, an old IR agreement, or a section 170MX award, and a modern award also applies, then both the agreement-based transitional instrument and the modern award apply, but the agreement-based transitional instrument applies over the modern award to the extent of any inconsistency.[12]

However, the Inspector should also consider that the above rules are subject to the requirement that the base rate of pay under an agreement-based transitional instrument must not be less than the relevant modern award rate (also refer 13.4.3 above).[13]

[11] T&C Act; Schedule 9, Part 3, Division 2, item 11.
[12] T&C Act; Schedule 3, Part 5, Division 2, item 28.
[13] T&C Act; Schedule 9, Part 4, item 13.

8.2.6.2 *Award-based transitional instruments*

If a modern award (other than the miscellaneous modern award) that covers an employee or an employer or other person in relation to an employee, comes into operation, then an award-based transitional instrument ceases to cover the employee, or the employer or other person in relation to an employee. However, in the case of the miscellaneous modern award the reverse is in effect true. The miscellaneous modern award will not cover an employee, or an employer or other person in relation to an employee, while they are covered by an award-based transitional instrument.[14]

The provisions above also apply in relation to outworker terms in awards.

8.3 Enterprise agreements

8.3.1 Introduction

The FW Act provides for national system employers and national system employees (and their bargaining agents) to make enterprise agreements that provide terms and conditions for those national system employees to whom the agreement applies. An enterprise agreement can have terms that are ancillary or supplementary to the NES.[15]

Enterprise agreements are negotiated by the parties through collective bargaining in good faith, primarily at the enterprise level.[16] In this regard enterprise agreements have similarity to the collective agreements that were available under the WR Act.

There are two types of enterprise agreements, a single-enterprise agreement and a multi-enterprise agreement. Both types have greenfields provisions, allowing an employer with a new enterprise who has not yet employed persons who would be covered by the agreement to make the enterprise agreement with one or more relevant employee organisations.[17]

Inspectors should note that the FW Act does not have provision for employers to make new workplace agreements with individual employees, as was allowed under the WR Act's AWAs and ITEAs (although existing individual agreements that are in operation under the WR Act continue under transitional provisions, as detailed elsewhere in this chapter).

8.3.2 Bargaining and representation during the bargaining process

The terms of the FW Act impose obligations upon the parties involved in enterprise negotiations to bargain in good faith. Failure to do so may result in FWC making certain orders (refer 13.8 below).

[14] T&C Act; Schedule 3, Part 5, Division 2, item 29.
[15] FW Act; ss 55 and 169
[16] FW Act; s171
[17] FW Act; s172

8.3.3 The approval of enterprise agreements

In order to attain legal force under the FW Act enterprise agreements must be approved by FWC. In order to approve an enterprise agreement FWC must be satisfied that:[18]

- the agreement has been genuinely agreed to by the employees covered by the agreement (excepting greenfields agreements)[19]
- in the case of a multi-enterprise agreement, the agreement has been genuinely agreed to by each employer covered by the agreement, and no person coerced or threatened to coerce any of the employers to make the agreement
- the terms of the agreement do not contravene the provisions in s55 of the FW Act regarding the interaction between enterprise agreements and the NES
- the agreement passes the BOOT[20]
- the group of employees covered by the agreement was fairly chosen (if not all employees are covered, FWC must take into account whether the group is geographically, operationally or organisationally distinct)
- the agreement must not contain unlawful terms[21] or designated outworker terms
- the agreement must include a dispute settlement term[22]
- the agreement must contain a specified nominal expiry date of not more than 4 years from the date of approval[23]
- in the case of a greenfields agreement, the relevant employee organisations are (taken as a group) entitled to represent the industrial interests of the majority of employees covered in relation to work performed under the agreement, and it is in the public interest to approve the agreement.

There is also a requirement that enterprise agreements contain certain mandatory terms, including terms relating to individual flexibility arrangements[24] and consultation of matters about major workplace change that is likely to have significant effect on employees.[25]

There are some limited exceptions to these criteria. For example, FWC can approve an enterprise agreement that does not pass the BOOT if it is not contrary to the public interest.[26] FWC can also approve an enterprise agreement with undertakings.[27]

There are specific approval requirements for particular employee groups[28] including shift workers, pieceworkers, school based apprentices and trainees, and outworkers.

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[18] FW Act; ss 186-187
[19] FW Act; s188
[20] FW Act ;s193. The BOOT applies from 1 January 2010. During the bridging period, the No Disadvantage Test still applied (T&C Act; Schedule 7, Part 2, Division 1,item 2).
[21] FW Act; s194
[22] FW Act; s186
[23] FW Act; s186
[24] FW Act; s202
[25] FW Act; s205
[26] FW Act; s189
[27] FW Act; s190
[28] FW Act; ss 196-200

8.3.4 Operation of enterprise agreements

For an Inspector who is investigating whether an enterprise agreement has force of law as a fair work instrument under the FW Act, the key consideration is whether the agreement (having passed through FWC approval procedures) is in operation.

Once approved by FWC, an enterprise agreement comes into operation from:

- 7 days after the agreement is approved; or
- if a later day is specified in the agreement, that later day.[29]

The FW Act also details the circumstances under which an enterprise agreement ceases to operate, or ceases to apply to an employee.[30] Once an enterprise agreement has ceased to operate that particular enterprise agreement can never operate again.[31]

8.3.5 The content of enterprise agreements

Enterprise agreements may be made about permitted matters as defined in the FW Act.[32] In summary, permitted matters are limited to:

- matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement
- matters pertaining to the relationship between the employer(s) and the employee organisation(s) that will be covered by the agreement
- deductions from wages for any purpose authorised by an employee who will be covered by the agreement
- how the agreement will operate.

The FW Act details that a term of an enterprise agreement that purports to deal with something other than a permitted term does not have any effect.[33]

Further, the base rate of pay under an enterprise agreement must not be less than the modern award rate or the national minimum order rate.[34]

8.3.6 Interaction between enterprise agreements and the NES

The FW Act (s55) details that an enterprise agreement must not exclude the NES or any provisions of the NES, with some specified qualifications.

[29] FW Act; s54(1)
[30] FW Act; ss 54(2) and 58
[31] FW Act; s54(3)
[32] FW Act; s172
[33] FW Act ss 55 and 253
[34] FW Act; s206

8.3.7 Interaction between enterprise agreements and modern awards

As noted above, the FW Act (s57) provides that when an enterprise agreement applies to an employee, then a modern award does not apply. The FW Act also provides that only one enterprise agreement can apply to an employee at one time, and specifies the rules for application in the case of ambiguity (s58).

8.3.7.1 *Relationship between transitional AFPCS and an enterprise agreement*

The T&C Act provides that the term of an enterprise agreement has no effect to the extent to which it purports to exclude the AFPCS during the bridging period.[35]

8.3.7.2 *Terms of an enterprise agreement that have no effect*

If a term of an enterprise agreement is not about a permitted matter, is unlawful, or is a designated outworker term, it has no effect.[36] Inspectors should note that the ineffectiveness of a particular term of an enterprise agreement does not prevent the agreement from operating as an enterprise agreement.

8.4 Good faith bargaining

8.4.1 Introduction

Part 2-4 of the FW Act introduces a largely new requirement in Commonwealth workplace law with respect to good faith bargaining in the negotiation of enterprise agreements, with a particular emphasis on the bargaining representatives and their conduct in the process.

A bargaining representative includes the employer and/or the person appointed by the employer as bargaining representative, as well as the employee organisation or other person appointed by the employee as the bargaining representative.[37]

There is a significant onus on the employer to both recognise and bargain with another bargaining representative.

8.4.2 Definition of good faith bargaining

Good faith bargaining itself is not directly defined in the FW Act. As this is a new provision in Commonwealth workplace law, there is not a body of relevant case law from which a definition can be gleaned.

However, the FW Act does detail good faith bargaining requirements that a bargaining representative for a proposed enterprise agreement must meet.[38] These requirements are:

[35] T&C Act; Schedule 7, Part 6. item 27(7).
[36] FW Act; s253
[37] FW Act; s176
[38] FW Act; s228(1)

- attending and participating in meetings at reasonable times
- disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner
- responding to proposals of other bargaining representatives in a timely manner
- giving genuine consideration to the proposals of other bargaining representatives and providing reasons for responses to those proposals
- refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining
- recognising and bargaining with the other bargaining representatives.

Good faith bargaining does not require a bargaining representative to make concessions during the bargaining for the agreement or for the bargaining representative to reach agreement on terms that are to be included in the agreement.[39]

An employer can initiate bargaining, agree to another party's request to bargain, or be compelled by FWC to negotiate a new enterprise agreement. Regardless of the circumstances, the employer must notify the relevant employees of their rights to be represented by a bargaining representative.[40] An employer can only be compelled to participate in negotiations where a bargaining representative for an employee applies to the FWC for a majority support determination. In so doing the FWC must be satisfied that a majority of employees at an enterprise want to bargain.[41]

Unions are often the bargaining representative for employees, but employees can choose another party as bargaining representative. An employer must not refuse to recognise or bargain with another bargaining representative once this choice has been made.

8.4.3 Bargaining orders

Where there is a breakdown in the bargaining process, if it involves a bargaining representative not acting in good faith or multiple bargaining representatives causing the process to be inefficient or unfair, a bargaining representative may apply to FWC for a 'bargaining order'.[42]

If FWC makes a bargaining order, a person to whom the bargaining order applies must abide by it, and the contravention of a term of a bargaining order is a breach of the FW Act.[43] Where there is contravention of a bargaining order, a bargaining representative may make an application to FWC for a serious breach declaration.[44] If the serious breach declaration is made and the matters at issue are not resolved by the end of the post-declaration negotiation period, then FWC will make a bargaining related workplace determination. [45]

[39] FW Act; s228(2)
[40] FW Act; s173
[41] FW Act; ss236 and 237
[42] FW Act; s230(2)(d)
[43] FW Act; s233
[44] FW Act; ss 234 and 235
[45] FW Act; s269

Other remedies available to bargaining representatives in relating to agreement making under the FW Act include seeking a majority support determination or a scope order, or applying to FWC to deal with a dispute.[46]

8.4.4 The role of the Inspector

The Inspector may, during the course of their investigation(s) be able to bring action against employers, employees and/or their representatives if they refuse to recognise or bargain with another bargaining representative. Further an Inspector can also take action against a bargaining representative for breaches of any bargaining orders issued by FWC.

The Inspector should remain vigilant in this area noting any indication of coercion and/or contravention of the freedom of association protections, which may have some influence in the investigation overall.

8.5 Wages and Entitlements Investigations

This chapter provides details about industrial instruments, NES, wages and conditions investigations, the actions expected of Inspectors in conducting these investigations and the possible outcomes.

Below are some examples of scenarios that may arise in wages and conditions investigations:

- A complainant alleges that their employment was terminated without notice and is seeking pay in lieu of notice. The employer denies this and asserts the complainant abandoned their employment
- A complainant alleges the duties they are performing correspond to a higher classification level than they are being paid at. The employer maintains that the employee is classified correctly. There are no other persons who were a witness to the work performed by the complainant
- A complainant alleges that they have not been paid in accordance with the Australian Fair Pay and Conditions Standard (AFPCS) or the applicable modern award. The 'employer' maintains that the complainant is an independent contractor
- A complainant alleges that they are owed pay for time worked. The employer argues that the employee has falsified their timesheet
- A complainant alleges that they have not been paid for working overtime. The employer states that the overtime worked was not authorised.

[46] FW Act; ss 236 – 240

8.5.1 An employer's obligation to keep records under the Fair Work Act

An Inspector must be familiar with the requirements regarding employment records under the FW Act and FW Regulations.

Under Commonwealth workplace laws employers are required to keep accurate and complete records relating to employees and to issue pay slips.

The maintenance of records and provision of information to an employee is designed to ensure that each employee receives their correct wages and entitlements. It also assists an Inspector to investigate whether an employee has received the full wages and entitlements owing under Commonwealth workplace laws.

Where clients require information related to the record keeping Inspectors can refer them to the fact sheet 'Employee records and pay slips'. Employers can also be referred to the templates 'Weekly time and wages records', 'Employment records – details' and 'Employment records – leave'.

In accordance with the requirements of the legislation,[47] employers must make (and keep for 7 years) employee records in relation to each of its employees. The FW Act details that the contents, kind and form of the employee records to be made and kept are as prescribed by the FW Regulations.

The FW Act also provides that an employer must give a pay slip to each of its employees within one working day[48] of making a payment to the employee in relation to work performed. The FW Act details that the form and contents of pay slips is to be as prescribed by the FW Regulations.

8.5.2 Employer obligations under the Fair Work Regulations

Chapter 3, Part 3-6, Division 3 of the FW Regulations deals with records relating to employees and pay slips.

The keeping of accurate records by all employers is a key requirement under the FW Regulations. Employers are obliged to provide employment records to Inspectors, employees and former employees upon request.

8.5.3 Records requirements

Under the FW Regulations:

- employers must make (or cause to be made) a record relating to an employee containing the prescribed details[49]

[47] FW Act; s 535
[48] FW Act; s 536
[49] FW Regulations; Chapter 3, Division 3, Subdivision 1,Reg 3.32

- employers must keep (or cause to be kept) all records for each employee for a minimum of seven years[50]
- records should be in a legible form in the English language and in a form that is readily accessible to an Inspector[51]
- records must not be altered unless for the purposes of correcting an error[52]
- records must not be false or misleading.[53]

8.5.3.1 *General contents*

Under Regulation 3.32 of Chapter 3, records relating to an employee must show:

- the employee's name
- the employer's name
- the date on which the employee's employment commenced
- whether the employment is full time or part time
- whether the employment is permanent, temporary or casual
- Australian Business Number (if any) of the employer (from 1 January 2010).

8.5.3.2 *Records concerning hours worked*

The FW Regulations do not specify that employers are required to record an employee's start and finish times or the number of ordinary hours worked. However, if an employee works overtime hours and they are entitled to an overtime penalty or loading, the employer must record the number of overtime hours worked by the employee[54]. In addition, if the employee is a casual or irregular part-time worker who is guaranteed a basic periodic rate of pay, a record of the hours worked by the employee must be kept.

The Australian Fair Pay and Conditions Standard (the Standard or AFPCS) and the National Employment Standard (NES) provides for a maximum of 38 ordinary hours each week plus reasonable additional hours. The FW Act (ss 63 and 64) allows some scope for employers and employees to agree to an averaging of the weekly hours worked over a specified period. If the employer and employee agree in writing to an averaging of the employee's hours of work, the employer must keep a copy of that agreement[55].

8.5.3.3 *Pay records*

Employers are required to keep records of payments made to employees.[56] Under Regulation 3.33 of Chapter 3, the records must include:

- the rate of remuneration paid to the employee
- the gross and net amounts paid to the employee
- any deductions made from the gross amount paid to the employee

[50] FW Regulations; Chapter 3, Division 3, Subdivision 1, Reg 3.32
[51] FW Regulations, Chapter 3, Division 3, Subdivision 1, Reg 3.31
[52] FW Regulations; Chapter 3, Division 3, Subdivision 1, Reg 3.44(4)
[53] FW Regulations; Chapter 3, Division 3, Subdivision 1, Reg 3.44(1)
[54] FW Regulations; Chapter 3, Division 3, note to Subdivision 1
[55] FW Regulations; Chapter 3, Division 3, Subdivision 1, Reg 3.35
[56] FW Act; s535

- the details of any incentive-based payment, bonus, loading, penalty rate, or other monetary allowance or separately identifiable entitlement paid to the employee.

8.5.3.4 *Leave records*

If an employee is entitled to leave, the record relating to the employee must contain the following details:

- any leave taken by the employee
- the balance of the employee's entitlement to that leave from time to time.

If an employer and employee have agreed to cash out an entitlement to take an amount of leave under Regulation 3.36 the employer must keep:

- a copy of the agreement to cash out the amount of leave; and
- a record of the rate of payment for the amount of leave cashed out and when the payment was made.

8.5.3.5 *Superannuation records*

Under Regulation 3.37 if the employer is required to make superannuation contributions for the benefit of the employee, the record relating to the employee must show details of each superannuation contributions made by the employer including:

- the amount of the contributions made
- the dates on which the contributions were made
- the period over which the contributions were made
- the name of any fund to which the contributions were made
- the basis on which the employer became liable to make the contributions
- a record of any election and date on which it was made where the employee has elected to have their superannuation contributions paid into a particular fund.

8.5.3.6 *Individual flexibility arrangement records*

Regulation 3.38 requires that if an employer and employee agree in writing on an individual flexibility arrangement in relation to a modern award or enterprise agreement (under ss144 or 202 of the FW Act) a record must be made and kept by the employer including:

- a copy of the agreement; and (where applicable)
- a copy of a notice or agreement that terminates the flexibility arrangement.

8.5.3.7 *Guarantee of annual earnings*

Regulation 3.39 requires that if an employer gives a guarantee of annual earnings under s330 of the FW Act the employer must make and keep a record including:

- the guarantee; and (where applicable)
- the date of any revocation.

8.5.3.8 *Termination records*

Where the employment has been terminated records must be made and kept which shows the details of an employee's termination,[57] including:

- whether the employment was terminated by consent, by notice, summarily or in some other manner (specifying that manner); and
- the name of the person who acted to terminate the employment.

While the regulations do not specifically state that the date of termination is to be recorded, in order to determine an employee's entitlements (such as accrued leave owing on termination), a record of the termination date will be required.

8.5.3.9 *Transmission and transfer of business*

Where a transmission of business has occurred under the WR Act (i.e. prior to 1 July 2009), the old employer is required by the WR Regulations (Regulation 19.15) to give the new employer all records in relation to any transferring employees.

Where there has been a transfer of business under Part 2-8 of the FW Act (from 1 July 2009), the old employer is required by the FW Regulations to transfer to the new employer each employee record concerning a transferring employee.[58] If the transferring employee becomes an employee of the new employer after the transfer, the new employer must ask the old employer to provide the employee's records, and the old employer must give the records to the new employer.

8.5.4 Pay slips

The employer must issue a written pay slip to each employee within one working day of the payment for work to which the pay slip relates.[59]

Pay slips must contain details of the payments, deductions and superannuation contributions for that pay period. Pay slips may be either in hard copy or electronic form.[60]
Pay slips must show:[61]

- the employer's and the employee's name
- the date that the payment was made
- the pay period to which that pay slip relates
- the gross and net amount of payment
- any loadings, monetary allowances, bonuses, incentive-based payments, penalty rates or other separately identifiable entitlement
- the Australian Business Number (if any) of the employer (after 1 January 2010)
- for employees paid at an hourly rate, the ordinary hourly rate of pay, the number of hours worked at that rate and the amount of payment at that rate

[57] FW Regulations; Chapter 3, Division 3, Reg 3.40
[58] FW Regulations; Chapter 3, Division 3, Reg 3.41
[59] FW Act; s536(1)
[60] FW Regulations; Chapter 3, Division 3, Subdivision 2, Reg 3.45
[61] FW Regulations, Chapter 3, Division 3, Subdivision 2, Reg 3.46

- for employees paid at an annual rate of pay, that rate as at the last day in the payment period
- details of any deductions made including the name of any fund or account into which the deduction was paid
- where superannuation is payable, the amount of each superannuation contribution the employer has made or is liable to make for that pay period, and the name of the fund into which the payment is made or will be made.

Where an employee is paid at an hourly rate of pay the pay slip must show the number of ordinary hours worked by the employee that were paid at an ordinary hourly rate of pay[62], as noted above. Given that the employer may not be required to record this information in their employment records and that the employer is not required to keep copies of pay slips issued to employees, the pay slips kept by employees may be important evidence. In investigating a complaint an Inspector should make enquiries with the complainant as to whether they have kept any of their pay slips.

8.5.5 Absence of records

Where Inspectors are unable to obtain employment records, the complaint under investigation will not necessarily be defeated. Inspectors should seek alternative sources of information including, but not limited to, pay slips, witness statements, diary records, rosters and bank statements.

In addition, the Inspector would give consideration to the enforcement options available where an employer has not kept or provided records, or where the records provided are inaccurate or not in the prescribed form. Such options include the issuing of a penalty infringement notice (PIN)[63] or recommendation to proceed to FWBC litigation (refer Chapter 14 Non Litigation Outcomes and Chapter 15 – Litigation).

8.5.6 The collection of records

The collection of employment records occurs in the majority of FWBC investigations. When Inspectors receive employment records they must ensure that these records are managed in accordance with FWBC's evidence management procedures. This includes, but is not limited to, ensuring that the integrity of the records is maintained, issuing evidence receipts and storing the records appropriately. In general, FWBC practice is to retain copies of employment records and return the originals to the employer wherever practical.

8.5.7 The identification of record keeping and pay slip contraventions

Where the only contraventions identified in the Inspector's investigation are of record keeping or pay slip requirements, Inspectors have a discretionary ability to undertake educative action (see 8.5.8) or enforcement action (8.5.9).

[62] FW Regulations; Division 3, Subdivision 2, Reg 3.46(3)
[63] FW Act; s558; FW Regulations, Chapter 4, Part 4-1, Reg 4.04

However, where the Inspector's investigation identifies underpayments to employees or contraventions of other provisions of the FW Act and FW Regulations, the appropriate action will be taken, as detailed in the relevant section of this manual.

8.5.8 Educative action

Where only technical[64] record keeping or pay slip deficiencies are identified or the employer is a first time offender, Inspectors may issue a contravention letter and provide relevant fact sheets to the employer in relation to the alleged record keeping or pay slip contravention. In such cases it would be appropriate for the Inspector to follow up with the employer at a later date to ensure that the deficiencies have been remedied.

Educative action is an alternative to enforcement action. Educative action should not be considered a compulsory precursor to enforcement action.

8.5.9 Enforcement action

Where contraventions of the record keeping or pay slip provisions of the FW Act and FW Regulations require further action to be taken (irrespective of whether the employer is a first time offender or not), enforcement action is available, including the issuing of a PIN[65] or the progression to FWBC litigation.

In brief, a PIN may be issued wherever an Inspector reasonably believes the employer has contravened particular civil penalty provisions of the FW Act.[66] Specifically, an Inspector may issue a PIN in respect of contraventions of ss535(1), 535(2), 536(1) and 536(2), namely where the employer has contravened record keeping or pay slip requirements, and a fine of up to 10% of the maximum penalty allowable for that particular contravention under s539(2) of the FW Act [67] (refer Chapter 14 -Non litigation Outcomes for more information).

FWBC litigation will be considered where there are serious, repeated or wilful contraventions of the record keeping or pay slip requirements under the FW Act and FW Regulations. An employer may be liable for a civil penalty (refer Guidance Note 1 - Litigation Policy, Chapter 14 -Non litigation Outcomes and Chapter 15 – Litigation).

8.6 Deductions from wages and entitlements

Inspectors will find in the course of investigating complaints (and wages and conditions complaints in particular) that an employer may seek to deduct amounts from the monies that are payable to an employee under Commonwealth workplace laws.

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[64] An example of a "technical contravention" would be a contravention that did not cause any disadvantage to the employee or hinder the investigation, such as an employer's failure to record the full name of an employee when the identity of the employee is not in dispute.
[65] As authorised by FW Act s558 and FW Regulations, Chapter 4, Part 4-1, Reg 4.04
[66] FW Regulations, Chapter 4, Part 4-1, Reg 4.03
[67] FW Act; s558(2) and the note to FW Regulations, Chapter 4, Part 4-1, Reg 4.05

The Inspector needs to ascertain whether such a deduction was authorised by the employee and/or whether the employer is able to make such a deduction.

"Deductions" as used in this chapter refers to monies that are deducted from the wages or other entitlements paid to an employee. Deductions should not be confused with "offsetting" which is where an employer has paid an employee above the minimum for some entitlements or pay periods and below the minimum for others and seeks to have the "above minimum" amounts offset against the underpayments (refer 7.11 below).

8.6.1 FWBC practice regarding deductions

An Inspector needs to understand when deductions are authorised and legal, particularly with respect to Commonwealth workplace laws, and when they are unauthorised and may require further investigation by an Inspector. The provisions relating to deductions have changed over time and are detailed below. The Inspector will need to consider when the deduction(s) occurred in order to determine the provision(s) applicable at the time.

8.6.1.1 *For the period prior to 27 March 2006*

Prior to the amendments to the WR Act that took effect from 27 March 2006, deductions were allowed provided that all of the following three conditions were met:

- there was a clear agreement between the employer and the employee for the deduction to occur
- the deduction was for the benefit of the employee
- in all circumstances the deduction was fair.

These continue to form the underlying conditions of the WR Act.

8.6.1.2 *For the period from 27 March 2006 to 22 September 2006*

8.6.1.2.1 Under Commonwealth workplace relations law

The WR Act itself does not have specific provisions relating to deductions. Prior to 23 September 2006, the WR Regulations 2006 also did not make provisions for deductions. Accordingly, following the amendments to the WR Act effective 27 March 2006, until the introduction of the new WR Regulations effective 23 September 2006:

- there were no provisions in the WR Act that would allow a deduction that resulted in an employee receiving below their minimum entitlements under the Standard, irrespective of whether the deduction was agreed to, fair, or for the benefit of the employee.

8.6.1.2.2 Application of state workplace relations laws

The matter of "deductions from wages or salaries" is a "non-excluded matter" under s16(3) of the WR Act. Therefore, relevant state laws regarding "deductions from wages or salaries"

are not automatically prevented from applying to parties in the Commonwealth workplace relations system.[68]
Each state has legislation that regulates the payment of wages, for example:

- NSW – Industrial Relations Act 1996 (ss 117-121)
- Victoria – Victorian Workers' Wages Protection Act 2007
- Queensland – Industrial Relations Act 1999 (ss 391-394)
- South Australia – Fair Work Act 1994 (ss 67-68)
- Western Australia – Minimum Conditions of Employment Act 1993 – Pt 3A
- Tasmania – Industrial Relations Act 1984 (ss 47, 51).[69]

The state legislation in general provides that deductions from wages cannot be made unless they are specifically authorised by an industrial instrument or statute or by the employee. However, Inspectors do not enforce provisions of state laws. Advice should be sought from a Assistant Director regarding these provisions if required.

8.6.1.3 *For the period from 23 September 2006 to 30 June 2009*

The WR Regulations were amended (with a date of effect of 23 September 2006) to permit deductions in limited circumstances. The relevant regulation is 7.1(5A) of Chapter 2, Part 7.
The Regulations provided that a workplace agreement or contract of employment is unenforceable to the extent that it allows a penalty to be imposed that reduces an employee's wages below the minimum amount guaranteed under the Australian Pay and Conditions Standard ("the Standard") (see Regulation 7.1(5) and (5A) of Chapter 2, Part 7).
A "penalty" for this purpose means a pay deduction, a reduction in employee entitlements or a requirement to make a payment to the employer. However, it does not include anything that is done for the benefit of the employee, by authority of law or because the employee received an entitlement to which they were not entitled (see Regulation 7.1 (18) of Chapter 2, Part 7).

The regulation does not specifically limit the employer's ability to make any deductions where such deductions do not result in the employee receiving below their minimum legislated entitlements. Should an employer attempt to recover any overpayments of entitlements, such recovery action would not be a matter considered by FWBC.

The state legislation dealing with deductions set out in 8.6.1.3 would also apply.
It is noted that employers are required to itemise all deductions from wages on pay slips provided to the employee(s), pursuant to Regulation 19.21 of the FW Regulations. For more information on pay slips, refer 8.5.4 above.

8.6.1.3.1 Provisions of industrial instruments (up to 30 June 2009)

A further matter to be considered for the period up to 30 June 2009 is that industrial instruments under the WR Act may also contain provisions that permit deductions in specified circumstances. For example, some awards allow employers to withhold pay,

[68] *Stewart, Andrew, Stewart's Guide to Employment Law, The Federation Press, December 2007, p.190*
[69] *Stewart, Andrew, Stewart's Guide to Employment Law, The Federation Press, December 2007, p.190*

wages or monies in circumstances where employees have not provided the appropriate notice of termination. Where the deduction has occurred prior to 1 July 2009, it is important for the Inspector to review the relevant provisions of the applicable industrial instrument to determine whether deductions are permitted.

The Inspector should also note that awards under the WR Act may have their own provisions on payment of wages (often including deductions), but it would appear these provisions are not enforceable,[70] since deductions from award entitlements are not listed as an allowable matter (WR Act s 513) nor a preserved award term (WR Act s 527). Further, it appears that a pay scale under the WR Act cannot deal with the specific issue of deductions either.

8.6.1.4 *From 1 July 2009 onwards*

Changes to the deductions provisions in Commonwealth workplace laws took effect from 1 July 2009 and act to replace all the earlier provisions.

Deductions are no longer a "non-excluded matter" under the FW Act and the FW Act makes specific provisions in relation to deductions. In particular, s324 of the FW Act which states that an employer may deduct an amount from an amount payable to an employee if:

- the deduction is authorised in writing by the employee and is principally for the employee's benefit; or
- the deduction is authorised by the employee in accordance with an enterprise agreement; or
- the deduction is authorised by or under a modern award or a FWC order; or
- the deduction is authorised by or under a law of the Commonwealth, a state or territory or an order of the court.

Terms in a modern award, enterprise agreement or employment contract may have no effect if the term effectively permits a deduction or requires a payment be made by an employee to an employer.[71]

Some of these points are expanded below.

8.6.2 Deductions for the benefit of the employee

Deductions which are principally for the benefit of the employee are allowable in some instances.

Deductions which are not required by law and not for the benefit of the employee are generally unallowable. The matter often arises in the cases of overseas workers (refer Chapter 10 - Overseas workers investigations).

[70] For the period 27 March 2006 to 30 June 2009 only
[71] S326(1) of the FW Act

Examples of deductions which are generally not considered to be for the principal benefit of an employee include:

- legal and agent expenses incurred by an employer
- non-market value rents (which is applicable to all employees)
- deductions for mobile phone bills for work related use
- deductions for shortages in cash tills
- costs of damages to the employer's property
- costs of breakages or loss of the employer's assets.

8.6.2.1 *Deductions authorised by the employee*

On occasion, an employee may authorise an employer to make deductions from their wages. Such deductions may include personal superannuation contributions, salary sacrifice arrangements and deductions for private medical fees. It is important to note that evidence may be required to prove that any deductions were authorised by the employee in the case of a dispute between parties.

A deduction from the entitlements of an employee who is under 18 years of age must be authorised in writing by their parent or guardian.[72]

8.6.3 Deductions authorised by other laws

Deductions which are commonly authorised by other laws include income tax or amounts in garnishee orders from a court. Specific Commonwealth agencies (such as the Child Support Agency and Centrelink) may also have the authority to deduct or garnishee monies from an employee's wages.

8.6.3.1 *Minimum entitlements*

The T&C Act and FW Act provide for guaranteed minimum wages.[73] The obligation on employers to provide the minimum wage to employees restricts the deductions from wages that can be made. Therefore, a monetary contravention would occur if a deduction was made and such deduction took the employee's wages below the minimum wage under the amount required by the relevant provisions or instruments under the T&C Act or FW Act.

In addition, certain statutory entitlements owing on termination can not be withheld under the provisions of the T&C Act and FW Act. A common issue faced by Inspectors involves complaints regarding employers withholding annual leave entitlements because of an employee's alleged failure to comply with notice of termination provisions. As annual leave is

[72] See FW Act s326(1)(d)

[73] Transitional minimum wage provisions operate from 1 July 2009 under the T&C Act. Certain other provisions (such as modern awards) take effect from 1 January 2010 under the FW Act (refer Chapter 13 – National employment framework of this Manual).

a statutory entitlement contained within the T&C Act and FW Act,[74] employers in general cannot deduct or withhold any portion of the entitlement, which is required to be paid in full upon termination. However, complications can arise where a transitional or Fair Work instrument applies that allows entitlements to be withheld where an employee has failed to give the specified notice of termination.

8.6.3.2 *Role of the Inspector regarding deductions*

The role of the Inspector is to seek compliance with the Commonwealth workplace laws.
For a contravention to occur the deduction must take the employee's entitlements below the amount that they should have received in accordance with the relevant industrial or fair work instrument or provision of the FW Act.

Accordingly, if unauthorised deductions are made from the entitlements due to an employee (including wages and entitlements owed on termination) and such deductions have the effect of reducing the amount paid to less than the minimum required by law, then there is a contravention and the employee must have the full amounts due paid by the employer.

It is noted that the contravention would be both of s324 of the FW Act and of the relevant legislative provision that provides for the full payment of the entitlement. For example, an employee was due to be paid $500 for a week's work under the applicable modern award and the employer unlawfully deducted $100 from this amount, paying only $400. The contravention would relate to both the unauthorised deduction of monies and the failure to pay the full wages owing to the employee. The remedy sought to achieve voluntary compliance would be that the employer pays the full wages owing, in this case by reimbursing the unlawful deduction of $100 to the employee.

If an employer had exerted undue influence or pressure on an employee in relation to deductions, the Inspector would also consider whether there were contraventions of s344 of the FW Act (refer Chapter 6 – Undue influence or pressure, duress and coercion investigations).

In considering whether a deduction is permitted under the FW Act, Inspectors should discuss the details of the individual complaint with their Assistant Director and give consideration to whether the deduction is:

- authorised in the ways provided for in 7.6.6 above; and
- for the benefit of the employee; and
- reasonable in the circumstances.[75]

Deductions should be considered on a case-by-case basis with legal advice sought where appropriate.

8.7 Making a determination

[74] In this example, annual leave would be provided by the transitional AFPCS from 1 July 2009, and then by the NES from 1 January 2010 (refer Chapter 13 – National employment framework).
[75] See FW Act s326 and FW Regulations Reg 2.12

8.7.1 Determining whether there has been a contravention

Determination of a contravention is discussed in detail in Chapter 3 – Investigations. In summary, once all available evidence has been collated and assessed the Inspector must critically and objectively evaluate the evidence gathered in order to determine whether or not a contravention of Commonwealth workplace laws is supported.

A record should be included on the file when this determination has been made. The record should contain the decisions and action proposed by the Inspector.

8.7.2 Issuing a contravention letter

Where an Inspector is satisfied that a person has contravened a Commonwealth workplace relations law, the Inspector should issue a contravention letter.[76]

To avoid doubt, contravention letters can be issued in relation to contraventions of the WR Act (or any of the instruments under the WR Act that occurred prior to 1 July 2009 or contraventions of the FW Act that occurred from 1 July 2009.
A contravention letter is a written notification that:

- informs the employer of the contravention
- requires the employer to take specified action within a specified period to rectify the failure (if appropriate)
- requires the employer to inform the Inspector of action taken to rectify the contravention
- advises the employer of the consequences of failing to comply with the contravention letter.

In the context of wages and conditions investigations, contravention letters most commonly seek rectification of contraventions in relation to entitlements owed to employees (usually including payment of outstanding monies to the complainant).

Where the contravention is unable to be rectified (e.g. rosters have not been supplied or pay slips have not been issued), a different form of contravention letter is used. This contravention letter also advises the employer that litigation action might be pursued and may be followed with a letter of caution, an undertaking or actual litigation (refer Chapter 14 – Non Litigation Outcomes and Chapter 15 – Litigation).

8.7.3 Calculation of entitlements

It is the responsibility of all employers to pay every employee in accordance with the relevant legislation. Therefore, wherever possible the onus should be put on employers to calculate the actual amounts owed to a complainant. When dealing with large organisations with

[76] Inspectors are authorised to issue such letters under regulation 5.05 of Chapter 5 of the FW Regulations.

payroll staff and automated payroll systems this may be straightforward. However, in cases where it is evident that an employer does not have the expertise to perform calculations or is unable to undertake the task in a reasonable timeframe, it may be more efficient for the Inspector to perform the calculations.

Inspectors need to use their judgement to decide whether to utilise their time to perform calculations. Calculating entitlements can be a time consuming task, particularly when dealing with various penalty rates, allowances or overtime. However, an Inspector should consider performing calculations if it is likely to produce a more accurate and timely result. Inspectors also can provide calculations of amounts owed upon request of an employer, if this assists in obtaining an outcome to the complaint. Providing a copy of calculations to the employer and answering their questions is another way in which Inspectors can educate employers on their responsibilities under the FW Act.

If the employer disputes the calculations sent by an Inspector, the employer should be asked to provide evidence in support of their position and/or calculations of their own made in accordance with Commonwealth workplace laws.

Although it is not necessary to quantify the amount of an underpayment in order to issue a contravention letter, an Inspector should have at least a rough idea of how much is outstanding to assist in resolving the complaint (where possible).

In some cases it may be useful to ask the complainant how much they believe they are owed and the reasons why (depending on whether all the alleged contraventions have been proven and the complainant's own ability to successfully determine their own entitlements). Where the complainant has provided their own calculations with their complaint, these may assist in resolving the matter, especially at the early stages of the investigation. Having this information can also assist an Inspector in managing the complainant's expectations (where the complainant's calculations appear to be well above the amounts owed under the legislation).

If a matter proceeds to litigation, detailed and accurate calculations will need to be constructed by the Inspector in a format suitable for presentation to the court.

8.8 Voluntary compliance

Voluntary compliance is explained in detail in Chapter 3 – Investigations. In summary, voluntary compliance is the most common way in which complaints are completed following an investigation by field staff.

Prior to completing an investigation by voluntary compliance, Inspectors should obtain a record of payments made to employees form signed by the employer that includes:

- the gross and net amounts paid (including the reason for any deductions)
- details of the electronic transfer or cheque number
- a photocopy of any cheques
- confirmation of receipt from the complainant (where appropriate).

To facilitate the early return of the record of payments made to employees form, it might be sent to the employer with the contravention letter.

8.9 Deeds of arrangement or deeds of release

A deed of arrangement or deed of release is a document often created by the employer (or their representative) and given to the complainant for signing prior to a payment being made. The deed will usually state that the complainant accepts the payment as full and final settlement of the debt owed to them. Employers may seek to make signing the deed a condition of their providing payment to a complainant. The deed is a legally binding document when signed and will restrict the complainant from taking any further action in relation to any shortfall in the payment.

Inspectors should not provide advice or an opinion if asked whether a complainant should sign a deed. Inspectors should not provide pro forma or template deeds to employers, complainants or other parties.

Where the Inspector has determined that minimum entitlements are owed, the obligation on the employer to rectify the contraventions exists regardless of whether or not the complainant agrees to sign any deed of arrangement. Likewise any deed signed by the complainant will not prevent FWBC from pursuing litigation if such action is appropriate. However in most cases, where the parties abide by the agreed terms of the deed, FWBC's investigation will have been completed.

Where the deed has resulted from a case before FWC, a court or other tribunal, also refer to Chapter 20 – External Agencies.

8.10 Where voluntary compliance is not achieved

Circumstances may arise where the employer will not voluntarily comply with the items listed in the contravention letter. An employer may comply in part (e.g. agreeing to back pay wages but not overtime), state that they will comply but in a timeframe that is not acceptable to the complainant, or be unwilling to comply at all as they do not agree with the determination made by the Inspector in the contravention letter.

If the employer does not comply in full with all items of the contravention letter, then voluntary compliance has not been achieved. In such cases the Inspector must consider the evidence and assess the enforcement options available. These are discussed in detail in Chapter 14 – Non Litigation Outcomes and Chapter 15 – Litigation. However in general these may include:

- issuing a penalty infringement notice (for certain records contraventions)
- issuing a letter of caution
- referring the complainant to small claims procedures
- referring the matter for case conference
- recommending a matter for an enforceable undertaking
- the issuing of a compliance notice (after case conference)
- recommending a matter for FWBC litigation.

This decision is made in consultation with the Inspector's Assistant Director or at case conference during a formal investigative evaluation.

8.11 Offsetting

Sometimes an investigation will show that an employer has underpaid a complainant on some entitlements (e.g. allowances, overtime) but paid above the minimum on others (e.g. the base rate of pay). Employers often wish to "offset" the above minimum payments (or overpayments) against the underpayments.

When considering any offsetting arrangement, Inspectors must adopt a three stage process (see figure 5). This process consists of:

- **Stage 1**: considering the possible underpayments
- **Stage 2**: considering the arrangements in place to offset any underpayments (including statutory or common law offsetting arrangements)
- **Stage 3**: establishing contraventions and choosing the appropriate enforcement option.

For the purpose of description, the three stage process is explained as a linear, step by step process. However, in practice Inspectors may find that each step partly informs another. Inspectors may also find they need to go back a step and reconsider evidence, before proceeding with the next stage.

It is important to note that, while FWBC does exercise discretion during this process (particularly during the enforcement stage), this discretion is not intended to allow employers to subvert their obligations under Commonwealth workplace laws. Rather, FWBC intends to identify contraventions, educate regarding obligations and enforce the legislation where arrangements have resulted in a detrimental financial impact on a complainant.

8.11.1 Stage One: Considering the possible underpayments

During stage one Inspectors should focus on establishing whether an underpayment of wages or entitlements has occurred. Inspectors must determine the correct Fair Work instrument and consider how the instrument specifies the payment of entitlements. Considerations regarding offsetting should only be addressed after an underpayment has been identified.

At this first stage Inspectors need only consider whether there has been an underpayment. Considering whether there has been compliance with other obligations under Commonwealth workplace laws comes later (in stage three). Once possible underpayments have been considered, Inspectors can then move to stage two - considering the arrangements in place.

8.11.2 Stage Two: Considering the arrangements in place

If an employer is seeking to offset payments Inspectors must assess whether there are any legitimate arrangements in place which specify how this may occur. There are two categories of relevant arrangements: statutory arrangements and common law arrangements.

8.11.2.1 *Statutory arrangements*

Statutory arrangements refer to any arrangements under Commonwealth workplace law which may alter the payment of wages or entitlements to an employee.

8.11.2.1.1 Individually negotiated entitlements

Under the FW Act, employers and employees have the ability to enter into legislated arrangements which vary the way certain entitlements apply to employees. In all instances, where an Inspector encounters an arrangement where an employer has underpaid a complainant on some entitlements (e.g. allowances, overtime), but paid above the minimum on others (e.g. the base rate of pay), they should clarify whether one of these statutory arrangements exists. Such arrangements may include a guarantee of annual earnings, a safety net contractual entitlement (SNCE) or an individual flexibility arrangement (IFA) (refer to Chapter 12 – Investigation of individually negotiated entitlements for more details on these arrangements).

When dealing with an offsetting matter where SNCEs are effective, Inspectors should enforce the complainant's statutory entitlements and any enforceable SNCEs as the complainant's minimum entitlements. For further information refer to Chapter 12 – Investigation of individually negotiated entitlements.

8.11.2.1.2 Fair work instruments

Inspectors should always refer to the applicable Fair Work instrument and consider any terms that are provided for by the instrument which may alter the way entitlements can be applied to employees. In some instances Fair Work instruments contain provisions for the averaging of ordinary hours of work, annualised salary arrangements or enterprise flexibility provisions which will inform whether a contravention occurred.

For example, some awards provide that the ordinary hours of work for an employee can be averaged over a four week period. If an employee's minimum entitlements have been met over the specified period in accordance with the award provisions, no contravention has occurred and no further action is required.

8.11.2.1.3 Modern awards and transitional arrangements

There are transitional arrangements in most modern awards that Inspectors must consider; in particular, the model transitional provisions which are included in most modern awards. A small number of modern awards contain different transitional arrangements (such as the preservation of an entitlement for a limited period of time). Some modern awards include industry specific arrangements.

It is important to check the modern award to determine what, if any, transitional arrangements apply to relevant employees.

8.11.2.1.4 NES

Inspectors should also consider that the NES provide arrangements for the averaging of ordinary hours of work for award or agreement-free employees. Award or agreement-free employees can agree to an averaging arrangement under which hours of work (maximum 38 hours per week) are averaged over a specified period of not more than 26 weeks.

8.11.2.2 *Common law offsetting arrangements*

Once allowable statutory offsetting arrangements have been considered, and if an Inspector still finds an underpayment has occurred, then the next step is to consider whether the arrangement in place is allowable under common law. In order to do so Inspectors must compare the arrangement in place with the types of arrangements that are permitted at common law.

Importantly, Inspectors must remember whilst in stages one and two, they are working towards establishing an underpayment contravention. Therefore, while the common law offsetting principles determine the underpayment contravention, there are other factors that must be considered before an Inspector chooses any enforcement options. Inspectors must refer to stage 3 before proceeding with any action on an offsetting matter.

8.11.2.2.1 Common law offsetting principles

When considering common law offsetting arrangements there are two binding principles which an Inspector needs to consider.

Firstly, offsetting should only be applied over individual pay periods and not over the entire period of employment. That is, an above minimum payment for one pay period cannot be used to offset an underpayment in another pay period (Poletti v Ecob [1989]). At this point in the investigation, the contravention is determined by referring to the underpayment in each pay period in isolation, not over the period of the complaint/audit period.

Secondly, over-award payments can only satisfy entitlements to which the payment is designated (Textile, Clothing and Footwear Union of Australia v Givoni Pty Ltd [2002]). This means, for example, that paying a higher wage rate than the award minimum does not offset penalties or loadings in the award unless:

- it is clear that the parties intended to do so via a formal arrangement (i.e. an employer has properly entered into an offsetting arrangement that makes it clear that over-award payments are in satisfaction of all penalties, wages etc due under the award); and
- the amount satisfies the entitlements that would otherwise be payable to the employee.

8.11.2.2.2 Proper offsetting arrangements

Any agreement to offset over-award payments must be clear and expressed (usually in writing).[77] The type of evidence Inspectors should seek to obtain could include the written evidence which details the arrangement. This may include a written contract of employment or associated documents; for example a letter of offer (if accepted) or a document or agreement stating an employee's wage rate. The agreement must demonstrate the clear intention that payments above the minimum are in satisfaction of other entitlements and all parties must demonstrate agreement with the arrangement.

However, the offsetting arrangement does not have to be in writing to exist. If, for example, there was express designation of above minimum payments and both parties articulated a clear and consistent understanding of the offsetting arrangement that was in place, this would be an indication of the existence of a proper offsetting arrangement. Where there is no written agreement in place and the parties dispute the terms (or the existence of) an offsetting arrangement, it is up to the employer to provide evidence that the arrangement is in place (and the terms of the arrangement) if they seek to rely on it.

In short, it is not enough for an employer to have accidently or unintentionally entered into an offsetting arrangement without proper reference to the entitlements due to an employee under the employee's Fair Work instrument or the FW Act. Therefore, paying an entitlement in excess of the award minimum does not offset another entitlement in the award unless it is clear that the parties intended to do so.

Consequently, when determining if a contravention has occurred, above minimum payments can only be offset against other entitlements where the above minimum payment was designated for that purpose at the time of payment.

8.11.2.2.3 Scope of advice regarding common law offsetting arrangements

Inspectors may be asked how an employer can enter into a common law offsetting arrangement. Inspectors should not give advice regarding whether a party should, or should not, enter into an offsetting arrangement with another party.

Inspectors should advise an employer that they must ensure that at all times they are meeting an employee's minimum conditions of employment according to the applicable Fair Work instrument or the FW Act.

[77] Poletti v Ecob and the Textile, Clothing and Footwear Union of Australia v Givoni.

Inspectors may also advise parties that if they choose to enter into a common law offsetting arrangement they should ensure:

- it is clear that the parties intended to do so via a formal arrangement in writing (i.e. an employer has properly entered into an offsetting arrangement that makes it clear that over-award payments are in satisfaction of all penalties, wages etc due under the award); and
- the amount satisfies the entitlements that would otherwise be payable to the employee.

Parties should also be encouraged to seek independent legal advice prior to entering into any such arrangements.

8.11.3 Stage Three: Establishing contraventions and choosing the appropriate enforcement option.

8.11.3.1 *Issuing a contravention letter*

The way FWBC ultimately determines contraventions in cases involving offsetting and whether enforcement is necessary is dependent on any arrangements which are in place between the complainant and the employer (if any).

In all cases where an underpayment of entitlements as prescribed by a Fair Work instrument is identified (refer: Figure 1 – Enforcement Outcomes), the employer must be notified in writing using a contravention letter. However, FWBC will exercise its discretion when it comes to enforcing these contraventions. FWBC will only seek rectification of underpayments where the complainant has suffered an overall financial disadvantage over the period of the complaint/audit period.

In the case that a complainant has not suffered financial disadvantage over the period of the complaint/audit period, it is important to note that FWBC is not discharging the employer of any wrongdoing regarding the contraventions. Rather, FWBC will identify the contraventions and exercise its discretion to not pursue payment based on the fact that the complainant was not financially disadvantaged. This does not preclude the complainant seeking their entitlements through other means, for example, a small claims procedure. However, such other means would not be initiated or supported by FWBC.

Importantly, when issuing a contravention letter Inspectors should ensure the contravention letter identifies the contraventions under the FW Act and/or the applicable instrument. The contravention letter should specify each contravention (e.g. non-payment of overtime for a specified period) in accordance with the relevant sections of the FW Act and instrument.

Where financial disadvantage has been identified, the amount that an Inspector should seek to recover represents the difference between what the complainant received over the period of the complaint/audit period, compared to what the complainant should have received under the relevant Fair Work instrument for that period.

If there is no financial disadvantage over the period of the complaint/audit period (i.e. if the complainant received more than they otherwise would have under the applicable Fair Work instrument), then an Inspector should still issue a contravention letter identifying the contraventions. However, the contravention letter should identify that on this occasion, FWBC has decided not to pursue any underpayments based on the fact that the complainant was not financially disadvantaged.

Inspectors should ensure that the employer is adequately informed to ensure that they are able to comply in the future and are aware that future non-compliance may result in enforcement action.

In stage three it is also important that Inspectors consider the broader contraventions beyond underpayments. This involves considering whether there has been compliance with other obligations under Commonwealth workplace laws (such as matters not directly related to payment); for example, payslips and record keeping.

8.11.3.2 ***Enforcement options***

In choosing an appropriate enforcement option, an Inspector must consider whether there has been financial disadvantage and any relevant public interest factors (see Guidance Note 1 – Litigation Policy, paragraph 12). [78]

The key factor to consider is whether the complainant suffered financial disadvantage over the period of the complaint/audit period (i.e. globally). In contrast to the approach used in stage one to determine a contravention, in stage three Inspectors consider underpayments not on a pay period by pay period basis but rather by reference to the whole period of the complaint/audit period, regardless of any offsetting arrangement an employer may or may not have in place. Therefore, in stage three, to determine the dollar figure to enforce, Inspectors must offset the above minimum payments (or overpayments) against the underpayments.

This does not necessarily mean that Inspectors are required to perform onerous calculations. Inspectors can request that an employer provide evidence that the complainant has not been financially disadvantaged by the arrangements in place.

Where a complainant has suffered financial disadvantage, FWBC will seek that the underpayments be rectified. This amount will represent the difference between what the complainant received over the period of the complaint/audit period, and what they should have received over the period of the complaint/audit period.

Importantly, there are certain entitlements that **cannot** be offset. **Entitlements that form part of the National Employment Standards (NES) cannot be offset.** These are protected entitlements under the Fair Work Act and should be paid as prescribed by the FW Act.

[78] The public interest factors are taken from Guidance Note 1 – Litigation Policy.

For example, an employer cannot seek to offset an overpayment of wages against accrued annual leave payable on termination under the FW Act.

There are various enforcement options depending on the characteristics and outcomes of an investigation.

The following paragraphs set out the enforcement outcomes available depending on the financial disadvantage the complainant suffers and whether or not there was a legitimate offsetting arrangement in place.

8.11.3.3 *Offsetting arrangement in place*

8.11.3.3.1 Financial disadvantage

If an employer has a legitimate offsetting arrangement in place but the employee has been financially disadvantaged over the period of the complaint/audit period, the employer should be formally notified of the contraventions of the relevant Fair Work instrument via a contravention letter. The contravention letter would require the employer to back pay any underpayments over the period of the complaint/audit period.

Where voluntary compliance fails or is not possible, choosing an appropriate enforcement option is the next step. The Inspector must consider which enforcement option is appropriate considering the circumstances. Possible enforcement options include issuing a compliance notice or a referral to a small claims procedure.

8.11.3.3.2 No financial disadvantage

If an employer has correctly applied the offsetting principles and the employee was not financially disadvantaged over the period of the complaint/audit period, then the complaint can be completed as not sustained. A completion letter is issued to both parties.

8.11.3.4 *No offsetting arrangement in place*

8.11.3.4.1 Financial disadvantage

If an employer has not correctly applied the offsetting principles and the employee has been financially disadvantaged over the period of the complaint/audit period, the employer should be formally notified of the contraventions of the relevant Fair Work instrument via a contravention letter. The contravention letter would require the employer to back pay any underpayments over the period of the complaint/audit period.

Where voluntary compliance fails or is not possible, choosing an appropriate enforcement option is the next step. The Inspector must consider which enforcement option is appropriate considering the circumstances. Possible enforcement options include issuing a compliance notice or a referral to a small claims procedure.

8.11.3.4.2 No financial disadvantage

If an employer has not correctly applied the offsetting principles and the employee has not been financially disadvantaged over the period of the complaint/audit period, as a minimum the employer should be formally notified of the contraventions of the relevant Fair Work instrument via a contravention letter. For example, contraventions may include frequency of payment, wages, overtime and penalty provisions. In this case, as the complainant has suffered no financial disadvantage, no back payment of outstanding entitlements will be sought by FWBC. This does not negate the contraventions, nor does it affect the complainant's rights to pursue back payment or other remedies through their own action.

Where the contravention letter has been issued and voluntary compliance fails or is not possible, choosing an appropriate follow up enforcement option is the next step. Accordingly, the Inspector may consider issuing a letter of caution as the best enforcement option. The enforcement option should always be considered in the context of the employer's response to the contravention letter. For example, if an employer had failed to respond to the contravention letter, another enforcement option may be more suitable.

If such low impact contraventions continue to occur Inspectors should consider case conferencing the matter. Possible outcomes may include referring the complainant to small claims.

Furthermore, an Inspector could consider, in consultation with their Assistant Director, whether or not the repeat contraventions warrant the possibility of seeking rectification of the full underpayments from the employer. When determining appropriate enforcement, Inspectors, in consultation with their Assistant Director, should consider Guidance Note 1 - Litigation Policy.

8.11.3.5 *Other considerations*

Inspectors should also refer to Chapter 14 - Non Litigation Outcomes and Guidance Note 1 – Litigation Policy when considering appropriate enforcement.

Table: Enforcement outcomes

	Allowable offsetting arrangement in place	**No allowable offsetting arrangement in place**
Complainant suffers financial disadvantage	• Contravention has occurred – notify employer • Enforce underpayment over the period of the complaint/audit period	• Contravention has occurred – notify employer • Enforce underpayment over the period of the complaint/audit period
Complainant suffers no	• No contravention	• Contravention has

financial disadvantage	has occurred • Complete the Investigation	occurred – notify employer • FWBC exercises discretion to not enforce any underpayments

8.11.4 Types of payments that can be offset: illustrative examples

8.11.4.1 *No legitimate offsetting arrangement in place and no financial disadvantage*

Illustrative example

Rob is a full time shop assistant employed under an award in Colonel's Chicken Shop. The award provides that Rob is entitled to receive $20 per hour for ordinary hours (38 hours per week). However, Rob's employer, Kylie, is paying above the award rate, at $25 per hour. However, some weeks Rob works in excess of his ordinary hours and other weeks he works a standard 38 hours. Regardless of Rob's working pattern, Kylie pays him the flat rate of $25 per hour. When Rob works overtime he does not receive the $30 per hour prescribed by the award for overtime hours. Rob has lodged a complaint with FWBC alleging that he has not received his overtime entitlements. Rob claims he was not aware that the $25 was intended to be in satisfaction of his award entitlements. There is no formal offsetting arrangement. When the complaint is presented to Rob's employer she contends that while Rob does not receive $30 per hour for the overtime hours he works, he does receive $25 per hour which is higher than Rob's $20 ordinary hours' entitlement.

The Inspector must consider what rectification is appropriate considering the circumstances. The facts of the matter are as follows:

- a contravention of the award regarding overtime has occurred
- no legitimate offsetting arrangement is in place
- Rob suffered no financial disadvantage over the period of the complaint/audit period
- there are no other public interest factors to consider.

As a minimum Rob's employer should be formally notified of the contravention via a contravention letter. In this case, as Rob has suffered no financial disadvantage, an Inspector may determine that due to the low impact of the contravention no back payment of outstanding entitlements will be sought.

Where the contravention letter has been issued and voluntary compliance fails or is not possible, choosing an appropriate follow up enforcement option is the next step. Accordingly, the Inspector may consider issuing a letter of caution as the best enforcement option. The enforcement option should always be considered in the context of the employer's response to the contravention letter. For example, if an employer had failed to respond to the contravention letter, another enforcement option may be more suitable.

8.11.4.2 ***No legitimate offsetting arrangement in place and financial disadvantage***

Illustrative example

Helen works 46 hours each week and her employer, Jessica, pays her a flat rate of $900 gross per week. Helen's minimum base rate of pay according to the applicable Fair Work instrument is $20 per hour for 38 hours, with any overtime hours to be paid at time and one half.

Jessica has not specified to Helen that the weekly rate of $900 per week is intended to satisfy her award overtime entitlements.

Helen submits a complaint claiming that she should be paid at time and a half for the 8 hours of overtime she works each week. Helen's minimum weekly entitlement is $20 per hour for 38 ordinary hours plus $30 per hour for 8 hours overtime; i.e. a total of $1000 gross per week.

The underpayment contravention is established - Helen is actually being paid $100 gross per week below her minimum entitlements.

The Inspector must consider what rectification is appropriate considering the circumstances. The facts of the matter are as follows:

- an underpayment contravention has occurred
- no legitimate offsetting arrangement is in place
- Helen has suffered financial disadvantage over the period of the complaint/audit period
- there are no other public interest factors to consider.

Helen's employer should be formally notified of the contravention(s) of the applicable fair work instrument and the rectification sought via a contravention letter. In this case the Inspector would seek to enforce the quantum of the underpayment over the period of the complaint/audit period.

Where voluntary compliance fails or is not possible, choosing an appropriate enforcement option is the next step. The Inspector must consider which enforcement option is appropriate considering the circumstances of the matter. In this case the Inspector may consider, for example, the issuing of a compliance notice or a referral to small claims procedures. In this situation the employer and complainant would also need to be informed that the complainant is able to seek remedy for the underpayments at common law.

8.11.4.3 ***Legitimate offsetting arrangement in place and no financial disadvantage***

Illustrative example

John and his employer Beverly agree to an offsetting arrangement in writing, where payments are correctly designated. John works 40 hours each week and his employer Beverly pays him a flat rate of $22 per hour for all hours worked (i.e. he is paid $880 gross per week). John's minimum base rate of pay according to the applicable Fair Work instrument is $20 per hour and any overtime hours are paid at time and one half.

John submits a complaint claiming that he should be paid at time and a half for the two hours of overtime he works each week. FWBC is only able to pursue John's minimum entitlements under the relevant Fair Work instrument. John's minimum weekly entitlement is $20 per hour for 38 ordinary hours plus $30 per hour for 2 hours overtime, i.e. a total of $820 gross per week.

In this case, if the $2 per hour John is paid above the minimum is offset against the underpayment of his overtime entitlements, he is being paid $60 gross per week above his minimum entitlements.

As an above minimum payment was designated and the complainant was not financially disadvantaged over the period of the complaint/audit period, the complaint may be completed with no further action necessary. In the event that there are no other factors influencing the choice of enforcement option, a completion letter could be issued to both parties.

8.11.4.4 ***Legitimate offsetting arrangement in place and financial disadvantage***

Illustrative example

Julia and her employer Georgia agree to an arrangement in writing, where a 10% commission payment will be made each week to substitute Julia's relevant award overtime entitlements. On average, Julia receives $200 commission each week. However, Julia works significant overtime and the $200 is often less than the award entitlement for overtime. In some pay periods she receives more than the award entitlement and in other pay periods there are underpayments ranging from $50 to $100 per week, depending on the amount of overtime she works.

The Inspector must consider what rectification is appropriate considering the circumstances. The facts of the matter are as follows:

- an underpayment contravention has occurred
- there is a legitimate offsetting arrangement is in place
- Julia has suffered financial disadvantage over the period of the complaint/audit period
- there are no other public interest factors to consider.

Georgia should be formally notified of the contraventions of the relevant award via a contravention letter. The contravention letter would seek to enforce the quantum of the underpayment over the period of the complaint/audit period.

To assist the parties in understanding their rights and responsibilities in future, the Inspector may enclose relevant educative material along with the completion letter. Refer to the 'Educative Tools and Resources Spreadsheet' for details of the resources available.

Where voluntary compliance fails or is not possible, choosing an appropriate enforcement option is the next step. The Inspector must consider which enforcement option is appropriate considering the circumstances. In this circumstance the Inspector may consider the relevant options, including issuing a compliance notice or a referral to small claims procedures.

8.12 Insolvent Employers

Legislation that is outside FWBC's jurisdiction can affect the status of a party to an investigation and impact on FWBC's capacity to investigate a complaint. This chapter provides a background on some considerations that Inspectors should regard when investigating a complaint, particularly in relation to FWBC's role when an employer becomes insolvent.

This chapter is not intended to provide complete information about the insolvency legislation administered by other agencies. The focus is on providing a basic overview of the relevant concepts and guidance on the actions that are available and appropriate for the Inspector. Some additional situations that can affect the timely resolution of an investigation are also considered at the end of the chapter.

8.12.1 Insolvency

Insolvency is a situation when a person or corporation is unable to pay all of their debts when they fall due for payment. Insolvency can apply to an individual or sole trader (a personal insolvency) or to a company (a corporate insolvency).

A partnership itself would not become insolvent, although one or more of the partners may become insolvent. The insolvency of a partner does not prohibit the other partner(s) from trading.

If an employer who is the subject of a complaint is insolvent (or becomes insolvent during the course of the investigation), it may limit the practical actions that the Inspector can take during the investigation. In certain circumstances the insolvency of the employer may result in the investigation being closed.

Where this is the case, an Inspector should use one of the following completion letters:

- Full investigation (trustee/liquidator) – This letter is to the trustee/insolvency practitioner where an investigation by field staff has commenced and contraventions have been established. It notifies them of the outcome of the investigation.
- Full investigation (complainant – standard) – This letter is to the complainant when completing the complaint for a bankrupt sole trader or liquidated company. The letter informs the complainant of the outcome of the investigation but advises that any

outstanding entitlements are required to be sought from the company's appointed trustee or liquidator.

- Full investigation (complainant – optional) – This letters contains specific paragraphs for Inspectors who need to complete complaints where the company has entered into a deed of arrangement, the company has been deregistered or where the Inspector is unable to locate office holders.

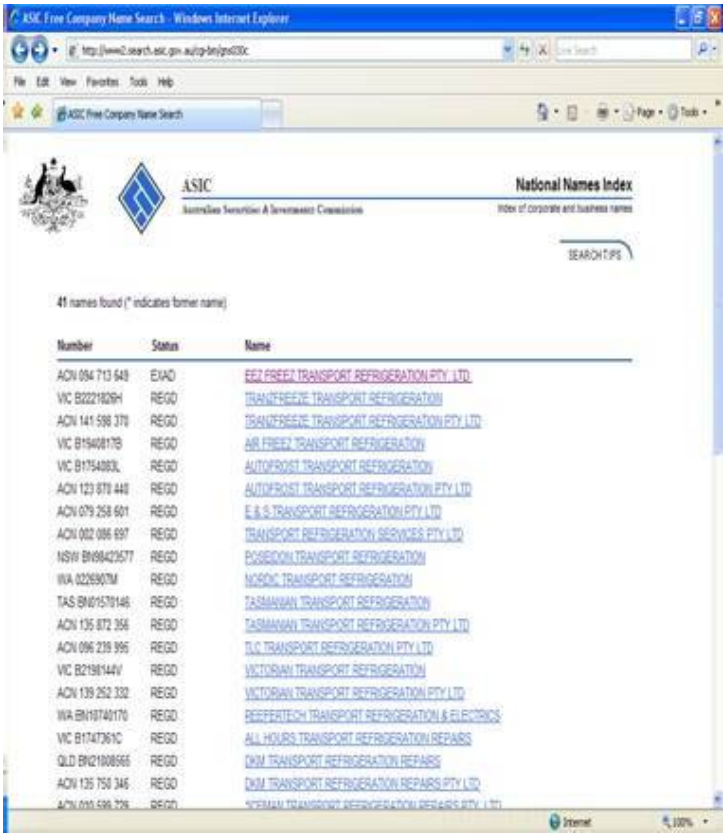
8.12.2 Confirming the status

It is important for an Inspector to identify when an employer is insolvent as this will dictate the action (if any) that the Inspector can take in relation to the investigation.

Accessing the employer's details via the free searches on the ABN and ASIC sites will indicate the status of the employer. In the case of a person registered for ABN purposes who is bankrupt, the name as displayed in the ABN search can indicate that the person is bankrupt. In the case of a company, the status of 'registered' (REGD) indicates that the company is operating and not insolvent (see Figure 1 below). Other status codes can indicate that a company is insolvent (e.g. EXAD indicates that a company is under external administration, as in Figure 2 below).

Figure 1: Example of registered company

Figure 2: Example of company under external administration



Where the free search indicates that the employer is insolvent, an Inspector will be required to conduct a paid search through Australian Business Research Pty Ltd (ABR) to gain further information. This paid search should be printed and placed on file. This search will provide the details of the person (e.g. administrator or liquidator) that is managing the affairs of the insolvent person or company.

In some circumstances FWBC will no longer be able to pursue a complaint due to an employer's insolvency. In such cases the complainant will become an unsecured creditor, and will have to attempt to recover any outstanding entitlements themselves. Where appropriate these complainants should be referred to the General Employee Entitlements and Redundancy Scheme (GEERS), as detailed below.

However, in many cases, insolvency, or a change in the company's status, will not discontinue an FWBC investigation.

8.12.3 Personal insolvency

The Insolvency and Trustee Service Australia (ITSA) is the body responsible for the administration and regulation of personal insolvency in Australia. The *Bankruptcy Act 1966* (Cth) is the legislation that covers personal insolvency.

In summary, persons with unmanageable debt (or debtors) have three main options available to them under the *Bankruptcy Act 1966*:

- debt agreements
- personal insolvency agreements
- bankruptcy.

8.12.3.1 ***Debt agreements and personal insolvency agreements***

Instead of being declared bankrupt, a person may enter into either a debt agreement or personal insolvency agreement. These agreements enable the debts of creditors to be met in an agreed manner in order to avoid bankruptcy.

A debt agreement (pursuant to Part IX of the Bankruptcy Act 1966) provides for a legally binding agreement to be made between a debtor and their creditors as an alternative to bankruptcy. The debt agreement creates some additional protections and consequences for a debtor that an informal arrangement would not provide.

A personal insolvency agreement (under Part X of the *Bankruptcy Act 1966*) is another way for an insolvent debtor to settle debts by agreement with their creditors without becoming bankrupt.

In the case where an employer has entered into a debt agreement or personal insolvency agreement under the *Bankruptcy Act 1966* with creditors, the Inspector can still continue to investigate a complaint as per the processes detailed in this Chapter of this manual. This would include seeking that the employer pay any outstanding entitlements to employees.

8.12.3.2 ***Bankruptcy***

8.12.3.2.1 The bankruptcy process

Bankruptcy is a formal process that can apply in a case where a person is unable to pay their debts and cannot make suitable repayment arrangements with their creditors. A person may become bankrupt by making a voluntary petition or the person's creditors can apply to the court to make a person bankrupt.

In the case of bankruptcy a trustee is appointed to manage the assets and financial affairs of a bankrupt in accordance with the relevant legislation. The trustee may be a registered trustee or ITSA may be appointed as the trustee. The trustee will pay dividends to creditors if sufficient funds are recovered.

There are limitations imposed on the business activities of a bankrupt, including that a bankrupt person cannot continue in any business partnership and cannot be a director of a

company or be involved in a company's management without permission of the court. A bankrupt may be able to continue to operate a business while bankrupt, but if the person trades under an assumed name or business name, the person must disclose that they are a bankrupt to everyone that they deal with.

Where a person is a bankrupt, the person's creditors (such as an employee owed outstanding entitlements) can no longer recover money from the person in relation to a debt that incurred prior to the bankruptcy. Any such approaches should be made to the trustee of the bankrupt person.

8.12.3.2.2 FWBC's role regarding bankruptcy

In investigating a complaint against a bankrupt, the Inspector should ask the bankrupt person for the name and contact details of the registered trustee who is managing the person's financial affairs (these details can also be gathered via an ABR search). The Inspector should then contact the registered trustee and/or ITSA to confirm that they are the trustee for the bankrupt and that the contact details given are correct.

Having established the identity of the trustee, the Inspector should confirm with the trustee how employees of the bankrupt can make a claim to the trustee for their outstanding entitlements.

If the Inspector has not yet identified a contravention or is unable to complete calculations based on the available records and documents, then the complainant should be advised to seek information from the trustee regarding the amount of outstanding entitlements.

If the complaint is in the early stage of the investigation, it should be finalised and the complainant should be notified that the employer is bankrupt and that the entitlements will need to be pursued through the trustee or GEERS. However, if the complaint is at FWBC investigation stage and an Inspector has sufficient evidence to identify that a contravention exists (such as employment records), the Inspector should advise the trustee of the contraventions. This information may assist the trustee in their considerations. The Inspector should also complete calculations of the entitlements owed and provide these to the complainant who is owed the entitlements and to the trustee. This will assist the complainant in proving their debt. Any such calculations should be clearly marked as being an estimate of the complainant's entitlements based on the records and documents available to the Inspector.

The Inspector should confirm whether there are complex matters that may require further investigation and whether litigation is appropriate. Provided that there are no such considerations, and with confirmation of the Assistant Director, the case can be completed. The Inspector will need to write to the complainant with a completion letter containing the following information:

- the employer is bankrupt
- the trustee's contact details
- the complainant should make a claim to the trustee urgently
- calculations of outstanding entitlements (where possible)

- the contact details of GEERS
- the complainant may be eligible to lodge a claim with GEERS
- FWBC's investigation is now completed.

8.12.4 Corporate insolvency

There are several insolvency procedures that can apply in relation to a company under the *Corporations Act 2001* (Cth). These processes are administered by the Australian Securities and Investments Commission (ASIC) and are discussed in some detail below.

8.12.4.1 *Voluntary administration*

Voluntary administration is an insolvency procedure where either the company directors or a secured creditor appoints an external administrator (called a voluntary administrator). This action is taken in a situation where it appears that the company is, or is likely to become insolvent. The voluntary administrator is usually appointed for a limited period of time (often 28 days). As administration is for an interim period and results in one of three specified courses of action (as detailed below) FWBC will not cease to investigate a complaint merely because an administrator is appointed.

During the time of their appointment the voluntary administrator investigates the company's affairs and reports to the creditors on options for the company's future. Outstanding employee entitlements that arose prior to the appointment of an administrator are treated as debts of the company and the employees with outstanding entitlements are considered creditors. Appointment of a voluntary administrator does not automatically terminate the employment of the company's employees.

If the administrator determines that the company is viable, the administrator may continue to trade the company during the period of the administration. In this case, the administrator is required to pay, out of the assets available to them, all of the company debts that occur after the date of their appointment, including employee wages and other entitlements arising during the period of administration. However, it is only in the case where the voluntary administrator adopts the employment contracts or enters into new contracts of employment with employees, that the administrator is personally liable for employee entitlements that arise during the period of administration.

Where a complaint relates to entitlements for an employee of a company under administration the Inspector should contact the administrator in the first instance.

In any case, if an administrator is controlling the company at the time of a FWBC investigation, the administrator can be contacted regarding a complaint and issued a notice to produce records or documents and contravention letters on behalf of the company where appropriate.

The outcome of voluntary administration can be that the company is returned to directors (in rare instances). Where this occurs, the directors are responsible for ensuring the company

pays any outstanding entitlements as they fall due and the Inspector would investigate the complaint as per the processes detailed in Chapter 3 – Investigations A.

More commonly the administration will result in the creditors deciding to accept a deed of company arrangement or the creditors determining that the company should be wound up through the liquidation process (as detailed below).

8.12.4.2 *Deed of company arrangement*

Where the administration results in a deed of company arrangement being approved by creditors, the company will continue to operate in an attempt to secure the best outcome for creditors and avoid liquidation. The deed of company arrangement will bind all creditors, including employees, and will determine the priority in which employee entitlements are paid. These entitlements are grouped into three classes and paid in order:

- outstanding wages and superannuation
- outstanding leave
- redundancy or severance pay.

Each class is paid in full to all employees prior to moving to the next, until payments are exhausted. A deed administrator may be appointed to oversee a deed of company arrangement.

Where a deed of company arrangement is in effect during a FWBC investigation, Inspectors should seek confirmation of the terms of the deed from the administrator and verify whether the complainant's full entitlements have been considered in the making of the deed. If this is the case, then the deed of company arrangement should provide for some payment of the complainant's entitlements (in accordance with the terms of the deed). Complainants with enquiries relating to the terms of the deed of company arrangement should be referred to the administrator in these cases.

On other occasions, such as where the complainant's full entitlements do not appear to have been considered in the making of the deed of company arrangement, it will be appropriate for the Inspector to investigate the complaint. In such cases the Inspector should investigate the complaint as per the processes detailed in Chapter 6 - Investigations and Chapter 7 – Wages and conditions investigations of this manual. If no resolution to the investigation is reached the matter should progress to case conference, where the available options to progress the matter can be decided. Ultimately the existence and terms of a deed of company arrangement will become a consideration when deciding whether FWBC will litigate or not.

8.12.4.3 *Liquidation*

8.12.4.3.1 The liquidation process

Liquidation refers to the orderly winding up of a company's affairs. The company's assets are sold in order to address any debts among creditors (including employees).

The liquidation may be initiated through creditor's voluntary liquidation (after administration) or by an order of a court. A liquidator is appointed and the liquidator's role includes collecting, protecting and selling company assets, and distributing the proceeds of the asset sale. If there are no assets to cover the liquidator's costs, the liquidator may not do any work (beside the lodgement of certain documents as required by ASIC). Distribution to employees in the case of liquidation follows both the payment of the costs of liquidation and the distribution to priority creditors. The appointed liquidator of a company can be determined by conducting a paid ABR search or can often be supplied by one of the parties to the investigation.

In most cases liquidation also results in the termination of the employment of all employees. However, the liquidator may trade the business for a short period to help in the winding up. In these instances the employee entitlements that arise during this period are paid out of the company assets as a cost of the winding up and before other employee entitlements.

Employees have the right, if there are funds from the sale of company assets left over after payment of the costs of the liquidator and distribution to priority creditors, to be paid their outstanding entitlements in priority to other unsecured creditors. Priority employee entitlements are grouped into classes and paid in the following order:

- outstanding wages and superannuation
- outstanding leave of absence (including annual leave and sick leave [where applicable] and long service leave)
- redundancy pay.

8.12.4.3.2 FWBC's role regarding liquidation

Where a company has a liquidator appointed or has been liquidated, then FWBC cannot take any further action and the Inspector should confirm with the liquidator how employees of the company can make a claim to the liquidator for their outstanding entitlements.

If the Inspector has not yet identified a contravention, or is unable to complete calculations based on the available records and documents, then the complainant should be advised to seek information from the liquidator regarding the amount of outstanding entitlements.

If the complaint is in the early stages of the investigation, it should be finalised and the complainant should be notified that the employer is bankrupt and that the entitlements will need to be pursued through the liquidator or GEERS.

If the complaint is at FWBC investigation stage and an Inspector has sufficient evidence to identify that a contravention exists (such as employment records), the Inspector should advise the liquidator of the contraventions. This information may assist the liquidator in their considerations. The Inspector should complete calculations of the entitlements owed and provide these to the complainant who is owed the entitlements and to the liquidator. This will assist the complainant to prove their debt. Any such calculations should be clearly marked as being an estimate of the complainant's entitlements based on the records and documents available to the Inspector.

The Inspector should confirm whether there are complex matters that may require further investigation and whether litigation is appropriate. Provided that there are no such considerations, and with confirmation of the Assistant Director, the case can be completed. The Inspector will need to write to the complainant with a completion letter containing the following information:

- the employer is in liquidation
- the liquidator's contact details
- the complainant should make a claim to the liquidator urgently
- calculations of outstanding entitlements (where possible)
- the contact details of GEERS
- the complainant may be eligible to lodge a claim with GEERS
- FWBC's investigation is now completed.

It is important that the complainant contacts the liquidator as soon as possible, as there is a limited time for the complainant to appeal to the court if dissatisfied with a liquidator's decision. In addition, at the conclusion of the liquidation the company is usually deregistered, which also limits an employee's options to recover monies.

8.12.4.4 ***Receivership***

A company may go into receivership when a receiver is appointed by a secured creditor or a court, to take control of some or all of a company's assets. This situation occurs when a secured creditor has an outstanding debt with the company.

The title "receiver" is used to describe an external administrator who is appointed by the secured creditor or court in relation to the secured creditor's debt. The phrase "receiver and manager" is used further to describe a receiver who has the power to manage the company's affairs under the terms of their appointment. The title "controller" is also used generally to describe both a receiver or receiver and manager.

Receivership differs from general voluntary administration in several key aspects. The receiver only acts on behalf of the secured creditor (not other creditors, such as complainants). The receiver's powers only cover the secured property and the receiver's power to terminate contracts of employment will depend upon the formal terms under which the receiver was appointed.

The receiver has no obligation to report to unsecured creditors, e.g. employees, about the receivership. The receiver's obligation is primarily to the secured creditor who appointed them as receiver. Appointment of a receiver does not automatically terminate the employment of the company's employees.

If the receiver continues to trade the business they must pay ongoing employee wages out of the company's assets. It is only in the case where the receiver adopts the employment contracts or enters into new contracts of employment with employees, that the receiver is personally liable for employee entitlements that arise during the period of receivership.

The receiver may be able to sell assets, including the business itself, in order to obtain funds to pay the secured creditor. Where this occurs, there may be a transfer of business or a termination of employment. FWBC can continue to pursue a company that has been placed into receivership until such time as a decision has been made to wind up (liquidate) the company.

Receivership will usually end when the receiver has obtained enough assets to meet the debt of the secured creditor, complete any receivership duties and pay any receivership liabilities. Unless the company goes into administration (voluntary or court appointed), then control of the company and remaining assets will return to the directors at the end of the receivership.

As such, where a company enters into receivership it does not preclude FWBC from investigating alleged contraventions of Commonwealth workplace laws.

If a receiver and manager is controlling the company at the time of a FWBC investigation, the receiver and manager can be contacted regarding a complaint and issued a notice to produce records or documents and contravention letters on behalf of the company, where appropriate. The receiver may advise that under the terms of their appointment the directors still control the company, in which case the investigation should continue as normal.

8.12.5 The role of FWBC regarding the actions of trustees or administrators

On occasion, complainants contact FWBC to express their dissatisfaction with the actions being taken by the trustee of a bankrupt or the administrator, liquidator or receiver of a company. Most commonly the complaint is that they are a creditor but are not being accepted as such and/or not receiving dividends. In these cases Inspectors must advise the complainant that FWBC does not have the power to direct trustees, administrators, liquidators or receivers to recognise people as creditors or to pay dividends, and that they should raise their complaints with the relevant agency (i.e. ITSA or ASIC).

Complainants may also take their own action in cases where they are not being recognised as a creditor. In the matter of AFG Pty Limited (Receivers and Managers appointed (in liq) v Davey [79], it was determined that employees were employed by a company which had gone into receivership and therefore considered priority creditors, and not employed by a different entity which had been established for payroll purposes. The Federal Court found that employment contracts and payslips were not sufficient on their own in determining the employing entity responsible for paying any outstanding entitlements and that further evidence and testimony should be taken into consideration.

The Inspector may however, be able to provide correspondence to the complainant that details the amount of underpayment FWBC believes was owing to the complainant based on the evidence available during the investigation. This is FWBC's practice in the case of employers in bankruptcy and liquidation (as detailed above) and can be used in the case of administration, deed of company arrangement, receivership or deregistration where

[79] [2010] FCA 1163 (28 October 2010)

appropriate. The complainant could then use this correspondence in support of their claim to be considered as a creditor.

In addition, complainants sometimes seek the assistance of FWBC to take action in order to bring about the insolvency of a person or company. In these cases the complainant should be advised that as a creditor, the complainant is free to exercise their own legal options in this regard. It is not the role of FWBC to seek the insolvency of a person or company. However, on some occasions FWBC has made submissions to the court where insolvency proceedings were already on foot.[80] If the Inspector believes the further involvement of FWBC in relation to the insolvency of a person or company is warranted, they should discuss the matter with their Assistant Director in the first instance. If the further involvement is agreed to by the Assistant Director and the relevant director, the matter will need to be referred to FWBC's Legal Group for consideration.

8.12.6 Background information on GEERS

The General Employee Entitlements and Redundancy Scheme (GEERS) is a basic payment scheme designed to assist employees in cases where:

- their employment was terminated due to the bankruptcy or liquidation of their employer; and
- there were not sufficient funds from the bankruptcy or liquidation to pay all of their outstanding entitlements.

Employees who are eligible should lodge an application to General Employee Entitlements and Redundancy Scheme (GEERS). Employees have 12 months from the date of termination to lodge an application with GEERS.

Employees may be eligible to receive outstanding payment for certain entitlements which are provided for under legislation, an award, a statutory agreement, a written contract of employment or otherwise evidenced in writing. The entitlements which eligible for recovery through GEERS include the following:

- unpaid and underpaid wages in the three-month period prior to the appointment of the insolvency practitioner (including amounts deducted from wages, such as superannuation)
- all unpaid annual leave
- all unpaid long service leave
- unpaid pay in lieu of notice up to a maximum of five weeks pay
- unpaid redundancy pay up to a maximum of:
    - 4 weeks pay per completed year of service where the employer become insolvent **on or after 1 January 2011**.

[80] The first such case was the FWBC's involvement as an interested party in the matter between CIFG (Australia) Pty Ltd and Jaido Pty Ltd (trading as Scallywags Socks) on 25 May 2010. This was a matter before the Supreme Court of Victoria (SC12010 010506),

- 16 weeks pay where the employer become insolvent **prior to 1 January 2011**.

Where an employee's annual wage exceeds the high income threshold (as indexed each year), any outstanding entitlements will be calculated as if the employee was earning the high income threshold as at the date their employment was terminated.

As noted above, in cases of bankruptcy or liquidation, the Inspector's completion letter should advise the complainant of the GEERS scheme and of their possible entitlement to make a claim under the scheme. On receiving an employee claim the GEERS staff will determine whether or not the employee is eligible.

8.12.7 Deregistered companies

In the case of companies, a further consideration is that they may be undergoing strike-off action or have ceased to exist as a legal entity due to their actual deregistration.

8.12.7.1 *Strike-off action*

An ASIC search may reveal that a company is being struck off the register of companies. This is the process immediately prior to deregistration. If the company is in the process of being struck off, Inspectors should check whether de-registration is voluntary or as a result of liquidation.

If an Inspector encounters a company in which strike-off action is in progress, FWBC can write to ASIC to request that deregistration is deferred pending the outcome of FWBC's investigation. Inspectors should seek advice from their Assistant Director to determine if this is appropriate, bearing in mind that it is easier to defer the strike-off than to seek re-registration of a company later.

8.12.7.2 *Deregistration*

FWBC can only pursue a registered company. When a company is deregistered it ceases to exist as a legal entity and all of its outstanding property interests are vested in or dealt with by ASIC.[81] Accordingly, where an Inspector discovers that a company has been deregistered, the Inspector normally will complete and close the complaint. The complainant would be advised to contact ASIC's Property Law Group if they maintain they have some claim on the company's assets.

In limited circumstances (such as where litigation is being considered), the Inspector can apply to ASIC to request that the company deregistration is overturned. If a company has been deregistered the Inspector should consult with their Assistant Director to determine if the matter is of sufficient merit to apply to ASIC to seek the re-registration of the company.

[81] In the case of property held by the company on trust, the property interests are vested in the Commonwealth, and ASIC acts on behalf of the Commonwealth to deal with that property.

It should be noted that ASIC does not always comply with FWBC's requests regarding the deferral of a strike-off or the re-registration of a company.

8.12.7.3 *Deregistered business names*

On occasion the Inspector may find that a business name of an employer has been deregistered. This does not mean that the employing entity itself (e.g. the company) is deregistered. If a business name is deregistered or otherwise inactive, the Inspector should search via the ABN and ASIC sites to determine the relevant sole trader, partnership or company that traded under the business name. Further enquiries can then be made about the status of the underlying person or company (including confirmation whether they are themselves insolvent or deregistered).

8.12.8 Other situations that impact an investigation

In addition to the formal circumstances as described above, there are other situations regarding an employer that impact the Inspector's ability to practically investigate a complaint. These include:

- where the employer is deceased
- where the complainant is deceased
- where a company has no officeholders
- where the officeholders cannot be located.

8.12.8.1 *Deceased estates (employer)*

At times an Inspector may investigate a complaint where the employer is deceased. Where the deceased person is a sole trader or the sole officeholder of a company, there may not be another person readily available who can continue with the operation of the employer's business.

Inspectors should exercise discretion when dealing with these matters and be aware of the emotions of those involved. If the employer has died shortly before or during the course of the investigation it may be appropriate for the Inspector to delay or suspend the investigation for a short period in consideration of the deceased's family and to allow for an executor or representative to be appointed. The complainant would also be advised of the reason for the delay. However, the Inspector should not discontinue the investigation entirely and will seek to resume the investigation after an appropriate time.

Obviously, if a complaint goes to the direct actions of the deceased person, (such as an adverse action complaint) it may not be practical to resume the matter, but complaints regarding underpayments of entitlements can be continued against the deceased person's estate as a person's death does not automatically extinguish their debts.

Upon resuming the investigation, the Inspector will continue the investigation. The Inspector should make contact with the person's appointed executor and/or representing solicitor and advise them that the investigation will continue. The executor or representative will be able

to act for the deceased person's estate and advise of any other relevant considerations (such as the appointment of a new company director).

8.12.8.2 *Deceased estates (complainant)*

At times an Inspector may also be required to investigate a complaint where the complainant is deceased or passes away during the course of an investigation. In this instance, an Inspector should discuss the complaint with their Assistant Director and together, decide on the appropriate action to progress the matter.

An Inspector should consider whether there is sufficient evidence available to prove or disprove a contravention. If there is insufficient evidence, it is unlikely that FWBC will be able to make any determinations about the complaint.

If an Inspector determines that there are outstanding monies owed to the deceased complainant, it is possible for the monies to be paid to an appointed representative or executor of the deceased estate. Inspectors may need to obtain written confirmation that the representative of the deceased complainant is authorised to receive any outstanding monies on the complainant's behalf before releasing monies. Inspectors should discuss the issue with their Assistant Director and may need to consult with the Legal & Advice Branch to decide on the best course of action or the type of confirmation needed.

If the employer fails to rectify the contravention, FWBC is able to proceed the matter to litigation as any legal action brought against the employer by FWBC is done on behalf of the Commonwealth, not the complainant. However, in these circumstances it may be problematic obtaining sufficient evidence to litigate a matter. In determining whether a matter is suitable for litigation Inspectors will need to consider the standard of the evidence gathered, and the public interest factors outlined in Guidance Note 1 - Litigation Policy. Inspectors should discuss the circumstances of the investigation with their Assistant Director and the Legal & Advice Branch to determine if the matter is suitable for litigation.

8.12.8.3 *Companies with no officeholders*

In rare circumstances an Inspector may find that a company's officeholders have all resigned but have not been replaced. Therefore the employing entity still exists, but effectively lacks a person in control of it. In such cases the Inspector should make thorough enquiries to determine the reasons for the resignation of the officeholders and the person(s) who may be effectively in control of the employing entity. The matter should progress to case conference and consideration should be given as to whether action is appropriate in relation to former officeholders.

If the matter is not suitable for litigation and there are no persons identified who can act for the employing entity, it is difficult in a practical sense for an Inspector to take further action. Except in cases where the Inspector is aware that appointment of a new officeholder is imminent, it would be appropriate for the case to be completed and for the complainant to be advised of the reasons for the completion. The complainant should also be advised to seek the advice of ASIC as to their options in a case where they are a creditor of a company with no officeholders. With confirmation of the Assistant Director, the case will be closed.

8.12.8.4 *Where the officeholders cannot be located*

As in the circumstance where a company has no officeholders, it is difficult for an Inspector to take practical action unless a person with authority can be located. The Inspector should take all reasonable steps to locate company officeholders; but in the case where they cannot be located (and there are no other persons with authority to act for the company), it is appropriate for the Inspector to complete the case and advise the complainant of the reasons for completion. With confirmation of the Assistant Director, the case will be closed.

8.12.9 Phoenix Activity

Phoenix activity is the deliberate and systematic liquidation of a corporate trading entity which occurs with the fraudulent or illegal intention to:

- avoid debts, including tax and other liabilities, such as employee entitlements
- continue the operation and profit taking of the business through another trading entity.

The key distinction between fraudulent phoenix activity and the honest resurrection of a company is the intent with which the liquidation is undertaken. Fraudulent phoenix activity involves the liquidation of a company in order to avoid debts with the full intention of continuing the business after the liquidation.

Phoenix activity has a negative impact on FWBC because it hinders the agency's ability to recover employee entitlements.

8.12.9.1 *Arrangements with other government agencies*

FWBC is unable to enforce or litigate matters in respect to phoenix activities as it is outside the scope of matters investigated by Inspectors under the FW Act. As FWBC has no power to actually investigate phoenix activity, Inspectors must not use their compliance powers for this purpose (e.g. NTPs cannot be issued in relation to phoenix activity). However, other regulatory bodies have specific responsibility to monitor and enforce compliance regarding phoenix activities.

FWBC is engaged in a whole of government approach to combat phoenix activity and has arrangements to refer matters of phoenix activity to the Australian Securities and Investments Commission (ASIC) and the Australian Taxation Office (ATO) for their investigation.

Under the *Corporations Act 2001*, ASIC has the power to disqualify a person from managing corporations for up to five years if they have been the director of two or more failed corporations within seven years. ASIC may also deem a person to be a director if they appear to be acting as one.

The ATO also pursues directors engaged in phoenix activity for unpaid taxation and superannuation guarantee obligations. The ATO is often the largest unpaid creditor of a failing corporation.

8.12.9.2 *Indicators of possible phoenix activity*

Inspectors may identify matters possibly relating to phoenix activity during the investigation of a wages and conditions complaint. Below are indicators that a complaint may contain phoenix activity:

- the company fails to lodge tax returns and/or Business Activity Statements
- the business records and/or taxation records significantly understate or overstate the operations of the business, including debts owed
- withheld payments such as PAYG, superannuation and child support payments are kept by the business
- employees are pressured to take leave
- employees have their employment status changed from permanent to casual
- employees are underpaid
- equipment, machinery and uniforms are not replaced as needed.

8.12.9.3 *Indicators that phoenix activity may have already occurred:*

- the employer goes into administration or liquidation during an investigation and then the business continues to operate via another company with the same director(s) and/or shareholders
- an investigation involves a company that has a similar name to one that has been previously investigated and involves the same director(s) and/or shareholders
- the directors of the new entity are family members of the director of the former entity or are close associates, such as managers of the former entity
- a similar trading name is used by the new entity
- the same business premises and telephone number (particularly mobile number) are used by the new entity
- a complainant reports that there has been a change to the name or ABN of their employer on their pay slips
- a complainant reports that their colleagues are employed by different companies (particularly if they're within the same business group)
- the principal place of business of a company changes to the location of another company owned by the same director(s).

If an Inspector receives a complaint which contains potential phoenix activity they should discuss the matter with their Assistant Director in the first instance. If there is evidence to demonstrate that a complaint contains potential phoenix activity, the Inspector should, in consultation with their Assistant Director and Director refer the matter following the ATO referral process.

What Inspectors should look out for practically:

- who appears to control the day-to-day activities of the company

- whether employees were given a proof of debt form when the company went into administration/liquidation
- what happened to other employees when the company was wound up
- how employees were paid; i.e. cash/cheque/direct deposit and how often
- whether employees lodged a Tax File Number Declaration with the employer on commencement and whether on termination they were provided with a Payment Summary Form (in order to lodge an income tax return)
- whether superannuation guarantee payments were correctly paid to the employee
- whether the business is being conducted within an industry known to have high phoenix participation rates; e.g. building and construction, computing, transport, security, employment agencies, textile, clothing and footwear and hospitality.

8.13 Transfer of Business

Transfer of business under the FW Act (and transmission of business under the WR Act) is a complicated area of investigation. This chapter provides Inspectors with guidance on the concepts of "transfer" and "transmission" as well as key issues that may arise in these matters.

This chapter gives attention to the determination of whether a transfer or transmission of business has occurred. However, it is important to bear in mind that the reason for this inquiry is usually to determine the terms and conditions of employment of the employees and employers affected. Consideration of the FW Act, the WR Act and the relevant industrial instrument will need to occur in each case to determine what the consequences of a transfer are, or are not.

It is worth noting that the FW Act (s309 (a) and (b)) states in relation to the transfer of business from one employer to another that the objective is to achieve a balance between the protection of employees' terms and conditions of employment under enterprise agreements, certain modern awards and certain other instruments; and the interests of employers in running their enterprises efficiently.

Determining whether a transfer of business has occurred can be a complex legal issue (as well as a complex investigatory environment). Consequently, investigation of a matter involving a potential transfer of business requires an understanding of the law in this area, a detailed examination of the substance of the complaint and an awareness of the commercial dealings occurring within the business under investigation.

8.13.1 Timing

Under the FW Act, the focus in determining the transfer of a business is on whether there has been a transfer of work between the two employers and the rationale behind the transfer - in other words the connection between the employers. This is in stark contrast to the transmission of business rules under the WR Act which focuses on a succession (i.e. where some tangible or intangible assets move from the old to new employer). The first question an

Inspector must ask is "when did the alleged transfer take place?" Where the transfer took place after 1 July 2009, the Inspector should refer to Section 19.3 of this manual.

Where a complaint involves a transfer/transmission of business that occurs during on or near 1 July 2009, Inspectors should take particular care. The T&C Act provides for situations where the sale or transfer of a business and consequential transfer of employees occur in close proximity to 1 July 2009. It is clear from these provisions that the critical date in these circumstances is the date at which the sale or transfer of ownership was complete; which may not necessarily be the same as the date upon which the employees transferred from the old employer to the new employer.

Inspectors must be aware that under the FW Act there is no longer a 12 month limit on the operation of transferred instruments (as was the case under the WR Act). This means that all entitlements of transferring employees are ongoing and not lapsing as is the case under the WR Act. In either case, employers and transferring employees are able to negotiate a new agreement at any time post transfer.

In the initial phases of an investigation it is critical to isolate "who is the employer", irrespective of when the transfer or transmission took place. When considering these matters the Inspector must also consider whether or not duress has been applied in connection with an AWA (pre 27 March 2008) or ITEA (post 27 March 2008) (refer Chapter 6 – Undue influence or pressure, duress and coercion investigations). Inspectors are encouraged to consider these issues as early as is practicable within the investigation and seek guidance from their Assistant Director and the Legal Group.

8.13.1.1 *Illustrative examples*

Scenario 1:

On 25 June 2009, Whizz Bang Apparel Limited (WBA) acquires all of the business of Jocks 'n' Socks Pty Ltd (JnS). WBA is bound by a collective agreement that covers all of its employees. The sale is a transmission of business under Part 11 of the WR Act and 25 June 2009 is the time of transmission under subsection 580(3) of that Act. WBA does not engage any of JnS's employees at the time of transmission because it is still ascertaining whether it requires any of JnS's employees to work in the acquired business.

WR Act repeal day occurs on 1 July 2009. On 6 July 2009, WBA offers employment to Sam, who was marketing manager of JnS before the sale; he accepts the job. The effect of item 2, Part 2, Schedule 11 of the T&C Act is that Part 11 of the WR Act (as modified) continues to apply because the time of transmission occurred prior to the WR Act repeal day. Sam would therefore become a transferring employee (see section 581 of the WR Act) and the collective agreement would bind WBA (see subsection 585(1) of the WR Act).

Scenario 2:

In May 2009, Geraldton Electric Pty Ltd (Geraldton) enters into an arrangement with Ingham Business Machines (Ingham) under which Ingham will buy Geraldton's business. The arrangement provides that Geraldton's employees will be offered employment by Ingham

effective 27 June 2009. However, because the sale cannot complete until certain leasehold consents are obtained, completion will not occur until 15 July 2009. On completion, the ownership of Geraldton's business assets will transfer to Ingham. Item 7, Schedule 11, Part 3 of the T&C Act has the effect that the transfer of business provisions of Part 2-8 of the FW Act will apply to this transaction because there is a transfer of business as described in subclause 311(1) of the FW Act and the connection between Geraldton and Ingham occurs after the WR Act repeal day. Item 7 applies regardless of the fact that the termination of the transferring employees' employment and their subsequent employment with Ingham occurred before the WR Act repeal day.

8.13.2 Post 1 July 2009 transfer of business

The provisions of the legislation about transfer of employment and transfer of business have a bearing on determining which instrument applies, as well as where the liability for any outstanding entitlements lie in the circumstance where an employee has worked across several businesses and/or the business has changed hands.

8.13.2.1 *Transfer of employment and service*

In certain circumstances where an employee transfers from one employer to another, the employee may continue to have the benefit of their industrial instrument and/or have their service with the first employer recognised as service with the second employer. The FW Act provides the circumstances when this may be the case for transfers of employees between national system employers.

Service with one employer counts as service with another employer and service is deemed to be continuous where there is a transfer of employment, as defined by the FW Act. The FW Act provides that a transfer of employment has occurred:

- where the two employers are associated entities – if there is less than a 3 month gap between employment with each employer (under the FW Act associated entity has the meaning given by section 50AAA of the Corporations Act 2001)
- where the employers are not associated entities – if the employee is a transferring employee in a transfer of business. [82]

Note though, that in the second situation where the employers are not associated, the employer may decide not to recognise service for the purpose of annual leave and redundancy entitlements under the NES. [83]

If the employee has had the benefit of an entitlement relating to a period of service with the first employer, that period of service is not counted again when calculating entitlements as an employee of the second employer.[84] For example, if the employee receives notice of termination or payment in lieu in relation to a period of service with the first employer, that

[82] FW Act; s 22 (7)
[83] FW Act; s 22 (5) (b)
[84] FW Act; s 22 (6)

period of service is not counted again in calculating the amount of notice of termination or pay in lieu with the second employer.

Depending on whether the transferring parties are associated entities or not will determine who carries the burden of employee entitlements. Employees transferring to an associated entity have an automatic right to have the second employer recognise the period of continuous service the employees have accrued with the first employer, carrying over any accrued annual leave, personal leave or long service leave entitlements.

However, non-associated entities are given more flexibility whereby the second employer is offered the choice of recognising transferring employees' continuous service. In the event the second employer decides not to recognise the period of continuous service, the first employer is obliged to terminate the transferring employee and make payment of any redundancy or accrued annual leave entitlement which would otherwise have been transferred. [85]

8.13.2.2 *Definition of transfer of business*

Under the FW Act (Part 2-8, ss 307-320) a transfer of business has deemed to have occurred when there has been a transfer of work between two national system employers, if each of the following is satisfied:

- the employee's employment with the old employer was terminated
- the employee of the old employer is employed by the new employer within 3 months after the termination
- the work performed is substantially the same
- there is a connection between the old and the new employer.

The FW Act considers that there is a connection between the old and new employer if:

- an arrangement exists to transfer assets (e.g. sale of business) relating to the work in question; or
- the work from the old employer is outsourced to the new employer; or
- work previously outsourced is in-sourced; or
- the new and old employers are associated entities.

Where appropriate, Inspectors may refer parties to an investigation to the 'Transfer of business' fact sheet or information on FWBC's website about transfers of business, including details of arrangements before and after 1 January 2010.

8.13.2.3 *Illustrative examples*

Walsh's Excellent Building Supplies (Walsh) enters into an arrangement with Carbone DIY Construction (Carbone) under which Carbone agrees to buy part of Walsh's construction

[85] FW Act;ss 91 and 122

business. Carbone employs some of the employees of Walsh who work in the construction business through its subsidiary, Carbone MYOB (Staffing) Construction (Carbone Staffing). Carbone Staffing would be, under subclause 311(3) of the FW Act, the 'new employer'. There would be a transfer of business, even though the arrangement is between Walsh, the old employer and Carbone Staffing – because Carbone is an associated entity of the new employer.

Kambo & Partners (Kambo) is a human resources consultancy firm in Victoria. Kambo employs four security guards who staff its reception desk and keep the business premises secure. Kambo decides that it no longer wishes to employ security guards itself, and enters into a contract (an outsourcing arrangement) with Elvis Security Pty Ltd (Elvis Security) under which Elvis Security will provide security services to Kambo's premises. Elvis Security offers employment to the four security guards and they accept the offers. The guards perform substantially the same work for Elvis Security as they performed for Kambo. This would be a transfer of business.

8.13.2.4 *Obligations of employers*

The transfer of business rules are relevant in determining:

- whether a transfer of employment has occurred between two non-associated entities
- whether the enterprise agreement, certain modern awards and certain other instruments that covered employees of the old employer continue to cover those employees who are offered and accept employment with the new employer.

Where there is a transfer of business, any transferable instrument that covered an old employer and a transferring employee immediately prior to termination will cover the new employer and transferring employee in relation to the transferring work.

The instruments subject to the transfer of business rules are:

- enterprise agreements approved by FWC
- workplace determinations
- named employer awards (a modern award that is expressed to cover one or more named employers) [86]
- award and agreement based transitional instruments. [87]

It is not necessary for modern awards that are not named awards to transfer because they will normally operate by way of common rule to new employers and employees in the same class, e.g. employees of retail shops. The transferable instrument will bind the new employer until it is replaced by another instrument that can cover the transferring employees.

[86] FW Act; s 312
[87] T&C Act; Schedule 11, Part 3, division 1, item 8

8.13.2.5 *Transferring transitional pay scales*

If the transferring employee is covered by a transitional pay scale then the transferring employee's employment with the new employer remains covered by the transitional pay scale until whichever of the following occurs first:

- the transitional pay scale is terminated; or
- the transitional pay scale otherwise ceases to cover the transferring employee.[88]

8.13.2.6 *Individual flexibility arrangements and guarantees of annual earnings*

Any individual flexibility arrangements that applied to the transferring employee under the old employer will continue with the new employer. [89] The transfer of business provisions under the FW Act also apply to employees who have a guarantee of annual earnings agreement with the old employer. See s316 of the FW Act for the specific requirements surrounding this.

8.13.2.7 *Non-transferring employees*

A new employee of the second employer (not a transferring employee) can also be covered by the transferable instrument if the new employee performs the transferring work and the new employer has no other instrument capable of covering that type of work. [90]

8.13.2.8 *Notifying transferring employees and record keeping*

Generally there are no notice requirements under the FW Act regarding the transfer of instruments in transfers of business that occurred on or after 1 July 2009.[91] For employers' requirements regarding employment records of transferring employees, see the FW Regulations; Chapter 3, Part 3-6, Division 3, Reg 3.41.

8.13.2.9 *Powers of FWC*

FWC is permitted to make certain orders including orders relating to:

- instruments covering the new employer and transferring employees[92]
- instruments covering the new employer and non-transferring employees[93]
- variation of transferrable instruments.[94]

In relation to instruments covering a new employer and transferring employees, FWC can only make an order if the application for the order is made by the following:

- the new or likely new employer

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[88] T&C Act; Schedule 11, Part 2, item 3, (3)
[89] FW Act; s 313 (2)
[90] FW Act; s 314
[91] Except for agreements which have not yet been assessed against the NDT, see Schedule 8, Part 2, Division 8, item 26 of the T&C Act and notice of preserved redundancy provisions – bridging period only, see Schedule 11, Part 3, T&C Act.
[92] FW Act; s318
[93] FW Act; s319
[94] FW Act; s320

- a transferring employee or the likely transferring employee
- if the application relates to an enterprise agreement: an employee organisation is, or is likely to be covered by the agreement.

FWBC and Inspectors are unable to make applications in respect of these orders.

8.13.2.10 *Broader definition of transfer of business*

From 1 July 2009, transfer of business matters will potentially arise in a wider range of investigations due to the somewhat broader definition under the FW Act. It may well be easier to identify that certain corporate restructures result in transfer of business. Under Part 2-8 of the FW Act there are no civil remedy provisions for Inspectors to enforce. However, a transfer of business investigation may give rise to underpayments or other contraventions of the FW Act (e.g. where entitlements are not recognised by new employers contrary to their obligations).

8.13.3 Pre 1 July 2009 transmission of business

Having determined the transmission event occurred prior to 1 July 2009, the Inspector must apply those workplace laws pertaining to the WR Act (subject to some transitional arrangements). [95]

8.13.3.1 *Definition of transmission of business*

A transmission of business occurs wherever a business "changes hands" (or more accurately, where a "new employer" becomes the successor, transmittee or assignee of the whole, or a part, of a business of another person [the "old employer"]). This kind of activity in relation to employment matters is regulated primarily by Part 11 of the WR Act.

8.13.3.2 *Obligations of employers*

Where there is a transmission of business, the WR Act imposes specific obligations upon the "new employer" with respect to the transfer of employees. These obligations include not only notifying employees of the instrument that will apply to them in their employment with the new employer but obligations in relation to parental leave entitlements and, depending on the terms of the transmission of business, to recognise continuity of service in respect of employee entitlements generally or specific employee entitlements (or to assume liability for them).

Where the "new employer" is not obliged to recognise the continuity of service of transferring employees in respect of general or specific entitlements (or assume liability for them), then the old employer may be under an obligation to pay employees their accrued entitlements and/or provide them with notice or redundancy. Inspectors should consider the applicable industrial instrument and the terms of the legislation in determining the obligations of employers.

[95] See T&C Act; Schedule 11, Part 2 regarding employer obligations for transmissions of business that occur before 1 July 2009.

8.13.3.3 *Transmitted transitional instruments*

Where the actual day of the transmission occurs prior to 1 July 2009, a new employer remains covered by a "transmitted transitional instrument" after 1 July 2009 until whichever of the following occurs first:

- the instrument is terminated
- the transmission period ends (12 months after the time of 'transmission of business')
- the instrument otherwise ceases to cover the new employer in relation to the transferring employee. [96]

8.13.3.4 *Determining whether a transmission has occurred*

According to the WR Act, the rules applying to employers are enlivened if

"… a person (the new employer) becomes the successor, transmittee or assignee of the whole or a part of a business of another person (the old employer)."

The terms successor, transmittee and assignee are not defined in the legislation. However, the meaning of these terms has been considered by the High Court in a number of cases, including in the decision of Health Services Union of Australia & Anor v Gribbles Radiology Pty Ltd.

8.13.3.4.1 Private businesses

A starting point for establishing if there has been a transmission of business is to analyse the business activities of both the old and new employer and then compare the two.

A new employer may be a successor, transmittee or assignee of another person's business if it has use of some of the assets previously used by the other person in pursuit of its business. Obviously, whether a transmission of business has occurred will depend on an examination of whether what the new employer has can be described as a part of the other person's business. It's a question of degree.

Assets can be tangible assets such as plant and equipment or intangible assets such as goodwill associated with a particular business. Employees are not assets.

In *Gribbles*, the High Court was at pains to point out that a transmission of business will not occur simply because a new employer pursues the same kind of business activity previously pursued by another person.

8.13.3.4.2 Government

Special considerations apply when one government agency succeeds to the activities of another.

[96] T&C Act, Schedule 11, Part 2, item 3

In that situation, it is sufficient to ascertain whether or not the activities of the former are substantially identical to the activities or some part of the activities previously undertaken by the latter.

Similarly, special considerations may apply where a government contracts with a non-government body for the performance of functions previously carried out by a government authority.

The relevant test is contained within *PP Consultants Pty Ltd v Finance Sector Union of Australia.*

Note: It is not enough that the new employer simply employs some or all of the old employer's employees, nor that the two businesses happen to be involved in similar activities.

8.13.4 Escalation of a transmission of business matter

As some investigations of matters involving a transmission of business may be unusually complex, it is recommended that Inspectors seek advice from the Legal Group.

8.13.5 Guidance points

The courts continue to rely on distinctions between government and non-government employers and that there is material differences in the activities of employers.

Where one or both of the employers is a government agency, it may be sufficient to show that the activities of the new employer are "substantially identical"[97] to those of the old employer. The word "business" takes on a special meaning in the context of government employers because government organisations cannot (by their nature) meet the usual commercial criterion of "carrying on a business" (i.e. profit motivated). Hence it is the "activity" of the employers that must be assessed, rather than the "business" nature.

Activities that form part of the business are distinct from activities that may "facilitate" the business. As an example, an employer who "outsources" services which are ancillary to the business to a new employer organisation will most likely not effect a transmission of business.[98]

Further advice as to characterisation of specific investigations should be sought from your Assistant Director.

[97] *PP Consultants Pty Limited v Finance Sector Union of Australia* (2000) 176 ALR 205
[98] *Stellar Call Centres Pty Ltd v CPSU & Another* [2001] FCA 106 (21 February 2001)

Chapter 9 Sham Contracting

Please also refer to FWBC Guidance Note 7- Sham Contracting for further information.

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9.1 Confirming the employment or contractor status

Defining the status under which an individual (usually the complainant) is engaged needs to be considered by the Fair Work Building Industry Inspector. Confirming whether a complainant is an employee or a contractor provides FWBC with the means to determine whether or not any contraventions have occurred under the relevant legislation.

While it is true that only a court is able to conclusively determine the status of a person's employment, as a matter of practical necessity the Fair Work Building Industry Inspector will likely form a view early in the investigation as to whether the relationship is one of employment or contracting.

9.1.1 Employees

Broadly, employees are engaged under an employment contract also known as a 'contract *of* service' are generally subject to a high degree of control by their employer. Their tenure is usually regular and ongoing, and their employers are obliged to comply with employment laws providing for entitlements such as wages, leave and superannuation.

The FW Act makes many references to employees, and distinguishes between the term "employee with its ordinary meaning" and a "national system employee." Under the FW Act certain provisions apply to all employees (i.e. an employee with its ordinary meaning), while others only apply to national system employees.

An "employee with its ordinary meaning" is defined in s15 of the FW Act which states that:

> "A reference in this Act to an employee with its ordinary meaning:
>
> (a) includes a reference to a person who is usually such an employee
>
> (b) does not include a person on a vocational placement."

A national system employee is defined in s13 of the FW Act as:

> "an individual so far as he or she is employed, or usually employed, as described in the definition of national system employer in section 14, by a national system employer, except on vocational placement."

The FW Act (in s12) further provides that:

> "employee is defined in the first Division of each Part (other than Part 1-1) in which the term appears."

Accordingly, a Fair Work Building Industry Inspector will need to confirm during the investigation:

- whether the complainant is an employee with its ordinary meaning (refer s15 of the FW Act
- whether the complainant is a national system employee (refer ss 13 and 14 of the FW Act

- whether the entitlement claimed by the complainant is provided to all employees, or only to national system employees, under the relevant part of the FW Act.

9.1.2 Contractors

An independent contractor is engaged under a 'contract *for* services'. A contract for services is a commercial contract with working arrangements which differ from those of an employee in a variety of ways. Contractors are generally said to run their own business and may operate their own company, and they are not usually subject to direction or control. The contractual arrangement is entered into between the principal and the independent contractor.

The FW Act does not provide a definition of an independent contractor, other than to note that the term "independent contractor is not confined to an individual" (s12). There is also no definition of contractor provided in the *Independent Contractors Act 2006* (Cth) (IC Act).

9.1.3 Indicators for determining employment status

In assessing whether a worker is an employee or a contractor, the Fair Work Building Industry Inspector should be guided by the various factors commonly considered by the courts in previous cases, referred to as the multi factor test. This test can assist the Fair Work Building Industry Inspector to form a view based on the information available, so that the matter can be actioned. In assessing the particular status of a worker the Fair Work Building Industry Inspector will need to consider each case on its own merits.

The following factors have been taken into account by the courts in determining whether a person is an employee or an independent contractor.

- control
- terms of the contract
- method of remuneration
- provision of equipment
- obligation to work
- hours of work and leave
- deduction of income tax
- ability to delegate work
- ability to perform work for others
- risk.

9.1.4 Background to the multi factor test

The multi factor test operates by looking at the total relationship between the parties. Fair Work Building Industry Inspectors should note that ***no single issue*** concerning control, economic independence or the description of the relationship in a contract will be determinative. For instance, if a complainant is found to have an ABN, this is not sufficient enough to make a determination that the complainant is a contractor. Courts will, however,

place greater weight on some matters, in particular, on the right to control the manner in which the work is performed.

Previously, the High Court decision of Stevens v Brodribb Sawmilling Company Pty Ltd (1986) 160 CLR 16 was often cited when courts considered such matters. More recently, the High Court in Hollis v Vabu Pty Ltd (2001) 207 CLR 21 emphasised the need to look at the totality of the relationship between the parties and be primarily guided by whether, in a practical sense, the worker can be said to be ”running their own business or enterprise”.

The Fair Work Building Industry Inspector will no doubt find several cases published each year that address this issue, and that reach distinct conclusions, based on the evidence placed before the courts.

However, the Fair Work Building Industry Inspector is not expected to be proficient in case law, and should seek the advice of their Assistant Director, principal investigator, or Legal Group as needed (see also 7.4.8 below).

9.1.5 Where the relationship is defined in the written contract

Fair Work Building Industry Inspectors will investigate cases where a written contract between the parties stipulates that the relationship is one of a “contractor.” However, one of the parties to the contract (usually the complainant) may dispute this description and allege that in actuality the relationship is one of employer and employee, despite the wording of the contract. Fair Work Building Industry Inspectors should remain alert to the potential that the matter may involve issues of “sham contracting” as well as the alleged underpayment.

Again, in such cases the Fair Work Building Industry Inspector will need to consider that the written contract is only ***one*** factor to be considered. In assessing whether a worker is an independent contractor or an employee a Fair Work Building Industry Inspector should look not only at the contractual agreement between the parties but at the practical realities of the arrangements, to determine the factual relationship that exists between the parties.

If there are clear indications that the actual relationship is different to that specified in the contract (i.e. that the complainant is an employee), then the Fair Work Building Industry Inspector should proceed with the investigation on that basis.

9.1.6 Where state or other laws deem the person to be a contractor or employee

An individual may be called a “contractor” according to certain laws (e.g. they may be described as a contractor for taxation purposes). However, this does not automatically exempt them from employee provisions of the FW Act or make them a contractor under the IC Act. Under the multi factor test (see 7.4.3 above), it may be found that the person is in fact an employee.

Similarly, some state laws may treat or deem contractors to be employees for certain purposes, such as workers’ compensation. This does not necessarily make them an employee under the FW Act or exempt them from coverage under the IC Act. The multi

factor test must be used by the Fair Work Building Industry Inspector to ascertain the true nature of the relationship.

9.1.7 Making an assessment

As noted above, early in the investigation, the Fair Work Building Industry Inspector will need to assess whether there is an employment relationship or contracting arrangement in place, using the multi factor test (see 7.4.3 above). When questioning the complainant, Fair Work Building Industry Inspectors should use the Compliance Tool Notional Employee/Contractor. When questioning the employer Fair Work Building Industry Inspectors should use the Compliance Tool Notional Employer/Principal.

In some cases, the evidence does not clearly indicate the nature of the arrangement. In the first instance, a Fair Work Building Industry Inspector should review the case with their Assistant Director, manager or principal investigator to decide whether an assessment can be made, whether further evidence can be acquired, or if legal advice is required.

It is critical that any assessment made in relation to status of employment is fully documented, including the evidence upon which it was based. If the matter is litigated and the employer disputes the Fair Work Building Industry Inspector's assessment regarding the status of employment, the court will be required to look at all the factors and determine whether the person is an employee or a contractor.

9.1.8 Assistance from Legal Group

Where the determination is difficult, the Fair Work Building Industry Inspector should contact Legal Group for advice and assistance in making an assessment. Legal Group will provide advice as to the likely determination a court may make regarding the complainant's status of employment. To assist Legal Group the Fair Work Building Industry Inspector must provide the allocated lawyer all available information relevant to the multi factor test.

9.1.9 Where the Fair Work Building Industry Inspector assesses that the complainant is an employee

Where the Fair Work Building Industry Inspector, having applied the multi factor test, finds that the complainant is an employee, but has been treated like a contractor, the Fair Work Building Industry Inspector will need to investigate to determine whether the complainant has received their correct entitlements as an employee. (Consideration would also need to be given as to whether this was a sham contracting arrangement, as detailed in Chapter 20 – Termination and contractors).

9.1.10 Where the Fair Work Building Industry Inspector assesses that the complainant is a contractor

In some circumstances, the Fair Work Building Industry Inspector (having applied the above tests) will find that the complainant is an independent contractor and not an employee. If the complaint related to alleged underpayment of employee entitlements under the FW Act, the Fair Work Building Industry Inspector must advise the complainant that as they are not an employee, the entitlements sought under the FW Act do not apply.

FWBC does not have jurisdiction to investigate complaints made by independent contractors who allege that they have not been provided with the payments or conditions due under their contract for service, or who believe their contract is unfair or harsh. Such complainants will need to pursue their own action through the courts in this regard. Complainants seeking further advice may be referred to the Independent Contractors Hotline on 1300 667 850.

However, there may still be matters for FWBC to investigate in relation to a contractor (e.g. if there are apparent or alleged freedom of association matters under the FW Act or prohibited conduct under the IC Act). In such cases, the Fair Work Building Industry Inspector should further investigate these matters in accordance with their powers under the relevant legislation (refer Chapter 1 - Introduction ,section 1.3))

Where parties to an investigation require information related to the difference between employees and independent contractors, Fair Work Building Industry Inspectors can refer them to the fact sheet 'Independent contractors and employees'.

9.1.11 Sham contracting

A 'sham contract' is an arrangement where an employer attempts to disguise an employment relationship as an independent contracting arrangement, usually for the purposes of avoiding responsibility for employee entitlements.

Part 3-1, Division 2 of the FW Act[1] provides that it is a contravention to:

- misrepresent an employment relationship or a proposed employment relationship as an independent contracting arrangement
- dismiss or threaten to dismiss an individual for the purpose of engaging them as an independent contractor to perform the same role, or a role which is substantially the same work
- knowingly make a false statement to persuade or influence a person to enter into a contract for services in certain circumstances.

Fair Work Building Industry Inspectors can seek the imposition of penalties for contraventions of the FW Act in relation to sham contracts. Fair Work Building Industry

[1] FW Act; ss357-359. These provisions were introduced by the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* and first took effect in the *Workplace Relations Act 1996* (ss 900 to 904) from 11 December 2006.

Inspectors may also apply to the court to grant an injunction in a situation where an employer dismisses or threatens to dismiss an employee for the purpose of re-engaging the employee as an independent contractor (refer Chapter 23 – Enforcement, section 23.7 - Injunctions).

9.1.12 Investigating alleged sham contracts

9.1.12.1 *Is the worker an employee?*

When investigating allegations of sham contracting, Fair Work Building Industry Inspectors will generally be required to obtain evidence of both the 'sham arrangement' proposed or in place, and the legitimate employment relationship that was actually proposed or existed. Such evidence should be obtained from a variety of sources which may include (but are not limited to):

- record of conversations with the complainant(s)
- record of interview with the employer/princpal
- witness statements from employees
- invoices issued by the complainant(s)
- correspondence between the parties
- timesheets, rosters, details of leave taken
- employer policies
- documents detailing payments made to the complainant(s) by the employer/principal
- offers, quotes or contracts entered into between the parties
- documents detailing payment arrangements between the parties
- induction or training forms
- ABN details for the complainant(s)
- Tax File Number Declaration forms
- job advertisements, sub-contractor tender notices
- certificates of currency of Workers Compensation insurance
- directions or instructions on work or performance
- legal advices and activities relevant to the defence
- ASIC company searches
- business name searches
- letter of termination; final payslip

This evidence is necessary to establish that the worker, who is being treated as an independent contractor, should properly be treated as an employee. Fair Work Building Industry Inspectors will need to make use of the multi factor test questionnaire to establish whether an employment relationship or contracting arrangement exists (refer to Chapter 7 – Wages and conditions investigations, section 7.4 – Confirming the employment or contractor status).

It is important to note that Fair Work Building Industry Inspectors will also need to determine whether the complainant has received their correct entitlements as an employee. Where appropriate, Fair Work Building Industry Inspectors may refer parties to an investigation to 'Independent contractors and employees' fact sheet or the FWO's website, which includes some information specific to the cleaning, contact centre and hair and beauty industries.

9.1.12.2 *Assistance from Legal Group*

In some cases, the evidence does not clearly indicate the nature of the arrangement. In the first instance, a Fair Work Building Industry Inspector should review the case with their Assistant Director, manager or principal investigator to decide whether an assessment can be made, whether further evidence can be acquired, or if legal advice is required.

It is critical that any assessment made in relation to status of employment is fully documented, including the evidence upon which it was based. If the matter is litigated and the employer/principal disputes the Fair Work Building Industry Inspector's assessment regarding the status of employment, the court will be required to look at all the factors and determine whether the person is an employee or a contractor.

9.1.12.3 *Where the Fair Work Building Industry Inspector assesses the complainant is a contractor*

In some circumstances, the Fair Work Building Industry Inspector (having applied the above tests) will find that the complainant is an independent contractor and not an employee. If the complaint related to alleged underpayment of employee entitlements under the FW Act, the Fair Work Building Industry Inspector must advise the complainant that as they are not an employee, the entitlements sought under the FW Act do not apply.

FWBC does not have jurisdiction to investigate complaints made by independent contractors who allege that they have not been provided with the payments or conditions due under their contract for service, or who believe their contract is unfair or harsh. Such complainants will need to pursue their own action through the courts in this regard. Complainants seeking further advice may be referred to the Independent Contractors Hotline on 1300 667 850.

However, there may still be matters for FWBC to investigate in relation to a contractor (e.g. if there are apparent or alleged freedom of association matters under the FW Act or prohibited conduct under the IC Act). In such cases, the Fair Work Building Industry Inspector should further investigate these matters in accordance with their powers under the relevant legislation (refer Chapter 1 - Introduction ,section 1.3))

9.1.12.4 *Where the Fair Work Building Industry Inspector finds the employee is being treated as an independent contractor*

Where the Fair Work Building Industry Inspector, having analysed all the evidence and applied the multi factor test, finds that the complainant is an employee, but has been treated like a contractor; section 357(1) of the FW Act[2] has been established. Having found that, the employer contravened section 357(1) it is appropriate to consider whether the defence provided for in section 357(2) is likely to be available to the employer.

[2] A person that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.

9.1.13 Statutory defence to alleged sham contracting

A statutory defence exists in relation to the FW Act (misrepresenting an actual or proposed employment relationship).[3] The FW Act provides an employer will not have contravened these provisions if the employer proves that, at the time the alleged misrepresentation occurred, the employer did not know and was not reckless as to whether the contract would be a contract *of* employment rather than a contract *for* services (i.e. an independent contract arrangement).[4]

Accordingly, the Fair Work Building Industry Inspector should attempt to investigate the employer's "actual belief" as to the nature of its relationship with the worker(s) and the circumstances of implementing the arrangements (i.e. whether legal advice was sought), so as to ascertain whether the misrepresentation was made knowingly or recklessly. Where the employer has received legal advice, Fair Work Building Industry Inspectors can request this legal advice with an NTP.

Where possible, Fair Work Building Industry Inspectors should interview company directors, managers and/or persons who have control of the employer entity. In this instance, any legal advice the employer was acting on may be relevant. As such, the employer may wish to waive legal professional privilege.

9.2 Enforcement methods

9.2.1.1 *Sham Contracting*

Where a Fair Work Building Industry Inspector determines that the defence has not been made out, or is not considered a statutory defence in accordance with s357(2) of the FW Act, and thus the employer has engaged in sham contracting, the Fair Work Building Industry Inspector should discuss the matter with their Assistant Director and consider a relevant compliance mechanism, such as a contravention letter, enforceable undertaking or litigation. For further information on suitable enforcement methods, please refer to Chapter 23 – Enforcement.

9.2.1.2 *Illegitimate contracting*

If a Fair Work Building Industry Inspector determines that the employer did not know; and was not reckless as to whether; the contract was one of employment (s357(2) of the FW Act), this does not mean the form of engagement is legitimate, rather the form of engagement can be described as ""illegitimate contracting". The Fair Work Building Industry Inspector is to issue a special letter of caution to bring about voluntary compliance. Importantly, the educative nature of this formal caution means the defence in section 357(2) of the FW Act will not be available to the employer in the future.

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[3] FW Act; s 357(1)
[4] FW Act; s 357(2)

Fair Work Building Industry Inspectors should note that in addition to issuing the letter of caution, the matter may need to be referred to the ATO, as there may be issues regarding tax and non payment of superannuation contributions. Fair Work Building Industry Inspectors should discuss this with their Assistant Director before referring matters.

9.2.2 Prohibited conduct regarding contractors

The role of FWBC in regard to compliance under the IC Act[5] is very limited. It focuses on allegations relating to coercion against an independent contractor or their principal.

Under certain state and territory laws parties to a services contract may be deemed to be in an employment relationship for certain workplace relations matters. There are also laws that provide employee like entitlements to independent contractors.

The IC Act, which took effect from 11 December 2006, sought to override these state and territory laws – meaning that independent contractors would no longer receive employee like treatment under these laws, and that the principal would no longer be obliged to comply with these laws**.**

In order to allow time for this adjustment to occur the IC Act (s35) provides a **three year** transitional period during which the state or territory laws continue to apply to an independent contractor and their principal. The IC Act also provides that an independent contractor and their principal can make an agreement in writing with which states that they no longer wish for the state or territory laws (which provide employee like entitlements) to apply to them. This agreement is referred to as a '**reform opt-in agreement'**.

The IC Act provides protections for parties in making the choice to sign a reform opt-in agreement. That is that a person must not**:**

- take (or threaten to take) any action with the intent to coerce another person into signing a reform opt-in agreement
- refrain from taking, or threaten to refrain from taking, any action with the intent to coerce another person into signing, or not signing a reform opt-in agreement
- make knowingly false statements with the intent to persuade or influence another person to enter into or not to enter into a reform opt-in agreement.

This protects both the contractor and the principal from being coerced into signing the agreement. If a person is found to have contravened these provisions of the IC Act, FWBC may take action seeking that a penalty be imposed by the court.

FWBC also investigates freedom of association issues relating to independent contractors (refer Chapter 18 – Industrial activities).

[5] IC Act; ss 33-34

Chapter 10

Overseas Workers Investigations

The FWBC currently has investigation and/or enforcement powers concerning the payment of the MSR. Refer to the MOU between DIAC and FWBC and Ministerial Direction #58.

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10.1 Introduction

This chapter gives Inspectors an understanding of the investigation process as it applies to overseas workers and provides guidance on dealing with specific issues that may arise in an overseas worker investigation.

After reading this chapter, Inspectors should:

- recognise the relevant visas
- know the referral protocols between FWBC and the Department of Immigration and Citizenship (DIAC)
- understand the role of FWBC in overseas workers investigations.

10.2 What is an overseas worker investigation?

An overseas worker (as used in this chapter) is a person from another country who is working in Australia as an employee under the terms of a visa.

FWBC's jurisdiction includes overseas workers employed in Australia, provided that such employment is covered by the provisions of the FW Act, as with any other matter or complaint being investigated by FWBC.

Overseas workers are non-Australian citizens that hold a valid visa with work rights. These workers may include people who are Temporary Business (Long Stay) visa holders (under a 457 visa), Occupational Trainees (442 visa), Working Holiday Makers (417 or 462 visa), International Students (573 visa) or Domestic workers (subclass 426 visa).

As the bulk of the matters investigated by FWBC relate to workers on 457 visas, this is the visa generally referred to in this chapter.

10.3 Terms and conditions of a visa

10.3.1 Visas

A visa is a document issued through DIAC that gives a citizen of another country permission to enter and lawfully work in Australia.

The 457 visa allows approved employers to sponsor overseas workers on a temporary basis for up to four years. Sponsored workers must have recognized qualifications and skills to fill particular occupations required in Australia. The 457 visa is designed to allow employers to

quickly recruit skilled workers for vacancies that cannot be filled locally and is the visa most commonly used by employers to sponsor overseas workers.

The sponsor is usually the employer of the overseas worker, although there are some exceptions (see section 9.6.5 below).

457 visas are generally available under arrangements for standard business sponsorship and labour agreements. These are not explained in detail here, but information can be found on DIAC's website.

The subclass 426 visas allow the temporary stay of domestic workers who are employed exclusively in the household of an eligible diplomatic or consular officer in Australia.

In instances where FWBC establishes serious or wilful contraventions against a diplomat or consular officer, FWBC may need to liaise with the Department of Foreign Affairs and Trade (DFAT) to determine if diplomatic options are available (see section 9.3.3.2 below).

10.3.2 Entitlements for 457 visa workers

457 visa workers have entitlements under both the *Migration Act 1958* (Cth) concerning the minimum salary level (MSL) and the FW Act. Following amendments to immigration legislation that took effect from 14 September 2009, salary arrangements for 457 visa workers will change and they will derive entitlements from a market salary rate (in place of the MSL) and the FW Act.

10.3.2.1

The minimum salary level (MSL)

The minimum salary level (MSL) is an annual salary, the amount of which is set by DIAC. For periods of employment prior to the market salary rate taking effect, the MSL must be paid to overseas workers with a 457 visa (the 457 visa worker) as a regular periodic payment (i.e. weekly, fortnightly or monthly).

The amount of MSL to be paid in a given period:

- includes the person's base salary before tax and is separate from any allowances, bonuses, salary packaged items and the like
- excludes any deductions from that amount except Pay As You Go (PAYG) tax withholding amounts and amounts that are 100 per cent tax deductible or otherwise exempt from Fringe Benefits Tax (FBT).

10.3.2.2

Relationship of the MSL to the entitlements under the FW Act

There are two important points that Inspectors must be aware of in regard to entitlements due to 457 visa workers. They are:

- in accordance with the sponsor's undertakings, the sponsoring employer must pay a 457 visa worker either the MSL or the minimum entitlements due under Commonwealth workplace laws, whichever is the higher
- the FWBC currently has investigation and/or enforcement powers concerning the payment of the MSL. Refer to the MOU between DIAC and FWBC and Ministerial Direction #58.

If there appears to be an underpayment of entitlements due to an overseas worker under Commonwealth workplace laws, then the Inspector will proceed to investigate the matter. However, FWBC can only enforce the Commonwealth workplace laws, and not the MSL nor other sponsor undertakings.

Where appropriate the Inspector will make a referral to DIAC if there appears to be contraventions of immigration law (see 9.5.2 for more information).

Introduction of the market salary rate (from 14 September 2009)

10 From 14 September 2009, a system of market salary rates for 457 visa workers was introduced. This market salary rate replaces the MSL. Accordingly all sponsors of 457 visa workers need to pay market salary rates to their 457 visa workers, for all 457 visas granted on or after 14 September 2009.

However, for current sponsors and existing visa workers as at that date, there are transitional arrangements that provide for the MSL to continue until 1 January 2010, when the market salary rates take full effect to replace the MSL.

Details of these new sponsorship obligations are contained in amendments to the *Migrations Regulations 1994* (which commenced from 14 September 2009). As noted earlier in this chapter, for periods of employment prior to the date that these provisions take effect, the MSL still has application.

10.3.2.4

Relationship of the market salary rate to the entitlements under the FW Act

From the date that the market salary rate takes effect:

- the sponsoring employer must pay a 457 visa worker either the market salary rate or the minimum entitlements due under Commonwealth workplace laws, whichever is the higher
- FWBC currently has no investigation and/or enforcement powers concerning the payment of the market salary rate. This remains the responsibility of DIAC.

As with the previous MSL provisions, if there appears to be an underpayment of entitlements due to an overseas worker under Commonwealth workplace laws, then the Inspector will proceed to investigate the matter. However, FWBC can only enforce the Commonwealth workplace laws and not the market salary rate nor other requirements provided by immigration legislation.

Additional powers for DIAC officers (from 14 September 2009)

Inspectors should note that the *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth) was passed by the Parliament in December 2008. Amendments (which also commenced on 14 September 2009) made by this legislation to the *Migration Act 1958* provide DIAC officers with powers (similar to those held by Inspectors) to monitor workplaces and conduct site visits to determine whether employers are complying with their new sponsorship obligations. Further, under the amended arrangements, employers who fail to satisfy a sponsorship obligation may face sanctions and/or penalties of up to $33,000 (to be enforced by DIAC officers).

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10.3.3 Entitlements for 426 visa workers

Subclass 426 visas allows the temporary stay of domestic workers who intend to be employed full time and exclusively in the household of a Diplomatic visa (subclass 995) holder, who is an accredited diplomat or consular officer in Australia.

Diplomatic officers are heads of diplomatic missions and other members of the diplomatic staff (always located in the ACT). Consular officers are career heads of consular posts and consular offices, most often based in commercial centres to provide services to tourists, nationals or migrants.

Employees in the national workplace relations system, including 426 visa workers, are entitled to minimum working conditions established by the FW Act. These include the right to a minimum wage rate, the National Employment Standards and other entitlements contained in Awards or registered agreements.

10.3.3.1

Application of FW Act

The employer of a 426 visa holder is not excluded from the coverage of the FW Act. Diplomatic missions and consular officials fall within the coverage of the FW Act and could be considered national system employers (excepting consular officials in Western Australia). Inspectors should seek legal advice if they are unsure as to whether the employer is a national system employer.

10.3.3.1.1 Immunities 9.3.3.2

Diplomatic officers and consular officers may be able to claim immunity under the *Diplomatic Privileges and Immunities Act 1967* (DPI Act) or the *Consular Privileges and Immunities Act 1972* (CPI Act). As a result, their actions may not be considered contraventions of the FW Act, or alternatively, no action can be taken against them under Australian employment laws due to these immunities. There are different types of immunities that apply to Diplomatic Officers and Consular Officers.

The DPI Act ensures that diplomatic officers are immune from criminal and/or civil action, which also includes actions in relation to possible contraventions of the FW Act.

Under the CPI Act, consular officers have a lower level of immunity from criminal and civil action as compared with diplomatic officers. Therefore, in some cases, it may be possible for FWBC to take action against consular officials under the FW Act.

Other visas 9.3.4

10.3.3.2 In addition to the standard 457 visa, there are also regional 457 visas, which are available to all Australian based sponsoring employers, except businesses operating in the metropolitan areas including Brisbane, Gold Coast, Newcastle, Sydney, Wollongong, Melbourne or Perth.

There are also separate classes of visas other than the 457 visa, including visas for:

- Occupational Trainees (442 visa)
- Working Holiday Makers (417 and 462 visa)
- International Students (573 visa).

These are not detailed in this chapter. For further information visit DIAC's website.

Additional information on the more common visas international workers can be employed under in Australia and the implications specific visa arrangements have on international workers' entitlements can be found here.

10.3.4 The role of the Department of Immigration and Citizenship (DIAC) in 457 visas

10.3.4.1

DIAC's role

As noted above, DIAC enforces compliance with Commonwealth immigration laws including the Migration Act 1958 (Cth) and the Migration Regulations 1994.

DIAC undertakes assessments of applications of potential employers and employees to determine their eligibility under the 457 visa program. On approval as a standard business 10.3.4.2 sponsor, DIAC imposes conditions on employers of 457 visa workers through sponsor undertakings.

DIAC's legislative powers

Until the amendments (discussed above in 9.3.2.3) took effect, there was no legislative basis for DIAC to investigate or enforce sponsor's undertakings under the 457 visa program, other than the employment of illegal workers (see 9.5.3 below). As detailed above, from 14 September 2009 DIAC officers do have certain enforcement powers.

In addition, DIAC can impose some sanctions relating to the employer, but these are not matters for FWBC.

10.3.5 Referral of investigations between FWBC and DIAC

Background

A memorandum of understanding (MOU) exists between DIAC and FWBC to formally clarify and confirm each agency's responsibilities, as well as to provide formal referral and reporting protocols, in relation to the enforcement of Commonwealth workplace laws and immigration laws for 457 visa workers. However, an MOU has not been finalised. FWBC has adopted the following procedures in order to ensure best practice is followed.

10.3.5.1

Referral of investigations from DIAC to the FWBC

10.3.5.2 If DIAC identify a prima facie contravention of Commonwealth workplace laws, the relevant DIAC state or territory manager or their nominated delegate (the DIAC manager) will refer the matter to the relevant FWBC director or their nominated delegate (FWBC contact officer) for investigation. These referrals are made by the DIAC manager sending a completed DIAC referral template to FWBC contact officer by email and hard copy.

The referral template is to include the following information:

- date of referral and approval by the relevant DIAC manager
- reasons for referral to FWBC and allegations or issues of concern
- details of the sponsoring employer, migration agent or other third parties (if applicable) and affected 457 visa workers
- evidence supplied to FWBC (e.g. pay slips, time sheets, relevant contracts, DIAC forms completed by the employer).

The relevant FWBC contact officer will acknowledge receipt within five (5) business days, by email to the relevant DIAC manager.

The relevant FWBC contact officer also will refer the matter for investigation to the appropriate FWBC office within five (5) business days from the date of acceptance of the referral.

10.3.5.3

Referral of investigations from FWBC to DIAC

If an Inspector identifies a prima facie contravention of immigration laws (normally underpayment of MSL or market salary rate) when investigating a complaint, the Inspector should firstly consult with their Assistant Director or manager and then the relevant FWBC contact officer.

If it is decided the matter is to be referred to DIAC, the FWBC Referral Template to DIAC is to be completed by the Inspector and forwarded to the relevant FWBC contact officer. The

FWBC contact officer will ensure the template is completed and then refer the matter by email (and hard copy) to the relevant DIAC manager, for their investigation.

The referral template is to include the following information:

- date of referral and approval by the relevant FWBC contact officer
- reasons for referral to DIAC and allegations or issues of concern
- details of the employer, migration agent or other third parties (if applicable) and affected 457 visa holder(s)
- evidence supplied to DIAC (e.g. pay slips, time records, etc.).

The employment of illegal workers is another potential reason for a referral to DIAC. Workers may be illegal if their visa has expired or they are working in contravention of their visa conditions. More serious concerns are where an illegal worker is being exploited through slavery, forced labour or sexual servitude. If any such issues arise in a FWBC investigation, the Inspector should immediately raise them with their Assistant Director or manager with a view to referring the matters to DIAC.

Where matters are referred from FWBC to DIAC, the Inspector should discuss with their Assistant Director or manager whether FWBC should continue to investigate alleged contraventions of Commonwealth workplace laws.

10.3.6 Matters particular to investigations relating to overseas workers

The allegations raised in referrals or complaints concerning the employment conditions of overseas workers usually relate to wages and conditions matters, such as alleged underpayment or non-payment of wages, allowances and overtime, or an employer's apparent failure to keep time and wages records or issue pay slips to employees.

However, there are some considerations that arise in these investigations concerning overseas workers in particular, as detailed below.

10.3.6.1

Investigation

Subclass 457 visa workers and subclass 426 visa workers are considered vulnerable workers by FWBC due to the language and cultural barriers they often face in the workplace.

10.3.6.2

In addition, the alleged underpayment of such workers may attract the attention of the media, unions or employer associations or members of parliament.

Access to workers

FWBC cannot control or influence when 457 visa workers are required to return to their country of origin. This can occur within 28 days of the worker ceasing employment, unless they obtain an extension from DIAC.

Therefore, the Inspector should seek to collect evidence in these cases as a matter of priority while the workers are in Australia. If the worker has returned overseas, further access to the worker could be costly and complex and may require liaison with relevant embassies and the Department of Foreign Affairs and Trade. It will also be difficult for the workers to be involved in subsequent legal proceedings that may be initiated by FWBC.

Cultural issues

10.3.6.3 Witnesses may be reluctant to assist in the investigation because of cultural issues, including being shamed by their family or associates if they return home early or if they upset their sponsoring employer (who may have links to the employee's community in their home country). There may be a general mistrust of government officials as well as the ultimate threat or fear of being deported.

Access to interpreters and translators

10.3.6.4 Inspectors need to ensure that any records of interview, witness statements or other documents are available in the person's first language and/or translated from the person's first language into English. Please refer to Chapter 3 section 3.9.11 for information on the use of interpreters.

Identifying the employer

10.3.6.5 The employer is required to provide proof to DIAC that they are to be the direct employer (or a company related to the direct employer) of a 457 visa worker. However, it has been the experience of FWBC that the 457 visa worker may have been employed by someone other than the sponsoring employer. There is uncertainty in cases when labour hire firms have applied to be the sponsoring employer, but the 457 visa worker has been placed with a host employer and it is unclear which employer has the contract of employment with the 457 visa worker.

10.3.6.6

Complexity of contracts

457 visa workers are often recruited through overseas migration agents or employment agents. These agents may seek to bind the employee into arrangements that are unlawful in Australia (e.g. they may contain a prohibition on union membership). To investigate all the relevant issues arising in a particular matter, Inspectors may need to examine and analyse contracts between:

- the agent and the employer
- the agent and the employee
- the employer and the employee.

These contracts are often not in English and the parties' right to take action for breach of contract may be affected by the fact they were signed in a foreign country.

Deductions from wages

10.3.6.7 As with any employment relationship, deductions from an overseas worker's wages cannot be made unless specifically authorised by a provision of the legislation, a transitional or Fair Work instrument, a statute or by the employee. Under the FW Act,[1] it is possible for employers and employees to agree upon deductions, provided that the deduction is authorised in writing by the employee and the deduction is primarily for the benefit of the employee; or the deduction is authorised by the employee in accordance with an enterprise agreement. In addition, where the deduction is specifically authorised by or under a modern award, FWA order, or under a law of the Commonwealth or state or territory, the deduction is unlikely to be unlawful.

A contravention may occur where an unlawful deduction is made from the 457 visa worker's wages that takes the wage below that guaranteed under FW Act or is made in contravention of the relevant legislation (such as s324 of the FW Act). Such deductions that the employer may have made include recruitment fees, migration costs, health insurance, airfares and accommodation expenses.

For further assistance on deductions, see Chapter 8 Wages and conditions investigations – section 8.6 Deductions.

10.3.7 Overseas workers investigation process for 457 visa workers

10.3.7.1

Receiving DIAC referrals

The Inspector's investigation will often begin on receiving a DIAC referral from the FWBC contact officer and Assistant Director.

On receiving a DIAC referral Inspectors should ensure that the matter is registered in AIMS as a DIAC referral.

10.3.7.2 The Inspector should retain a file with the relevant hard copies including the DIAC referral and any other correspondence with DIAC.

Dealing with confidential matters

In any DIAC referral, the Inspector must consider whether the affected 457 visa holders have agreed that their identity can be revealed to the employer (the employer). DIAC referrals are likely to be the result of a site monitoring visit to the employer and the visa holders are likely

[1] FW Act; s324

to be currently employed. Inspectors must assume that these matters are to be treated as confidential.

However, if the referral contains evidence that the affected visa holder(s) have advised DIAC that they agree to their identity being revealed to the employer, the Inspector will need to contact the visa holder(s) and arrange for the completion of an authority to disclose identity form. In these cases, a letter should be sent to the visa holder(s) requesting that the form be completed and advising that FWBC will investigate the matter.

Use of interpreters

10.3.7.3 The DIAC referral should indicate if either the employer and/or the visa holder(s) need an interpreter and, if so, the required language. If there is a need for an interpreter, the Inspector should follow the procedures detailed in [insert new reference]

Review and initial assessment

10.3.7.4 If the Inspector identifies a need for any further clarification and information from DIAC, this request should initially be made to the relevant FWBC contact officer. The relevant FWBC contact officer will then follow up these issues with the relevant DIAC manager.

In assessing the referral, the Inspector should consider whether the employing entity is covered under the Commonwealth workplace laws, and therefore within FWBC's jurisdiction.

10.3.7.5 *Interviewing the employer*

In the case of a DIAC referral, the Inspector should advise the employer that the visit is a result of a referral from DIAC of alleged contraventions of Commonwealth workplace laws, unless it is clear that this is not prudent (i.e. visa workers have requested confidentiality or there are only a small number of employees).

The interview with the employer will be conducted as per a standard investigation (see Chapter 3 – Investigations) but with due consideration for any language difficulties the employer may have with English.

The Inspector should prepare a notice to produce as appropriate (in accordance with FWBC procedures as detailed in Chapter x – Evidence). In an overseas workers investigation, the Inspector might consider seeking a broader range of documents than is usual (e.g. letters or contracts between the employer/employee/migration agent and records of sponsorship for 457 visa workers). The Inspector will need to ensure that the records requested are able to be sought under the powers of inspectors and are sought for a purpose as specified in the 10.3.7.6 FW Act.

Investigation findings

Detailed information regarding making investigation findings and issuing contravention letters to the employer can be found in Chapter 3 – Investigation A. Any request for an update of an investigation from DIAC is to be made through the relevant.

Enforcement and litigation

Detailed information regarding the consideration of enforcement options concerning an investigation can be found in Chapter 14 – Non Litigation Outcomes and Chapter 15–Litigation. FWBC's protocol is that when FWBC is taking litigation action against the employer, FWBC will notify DIAC (Refer to MOU for current procedure).

10.3.7

10.4 Overseas workers investigation process for 426 visa workers

10.4.1 Receiving complaints

Workplace complaints from subclass 426 visa holders may come directly to FWBC from the complainant or through a referral from DIAC.

The Inspector should retain a hard copy file with the relevant hard copy documents including the DIAC referral and any other correspondence with DIAC.

10.4.1.1

Commencing an investigation 9.8.2

Inspectors should encourage parties, wherever possible, to voluntarily and amicably resolve their dispute and facilitate a voluntary resolution. Inspectors will need to manage the expectations of 426 visa holders with respect to the possible outcomes of their complaint. Inspectors should consult regularly with their Assistant Directors, and consult with Legal & Advice Branch and the Parliamentary and Government Policy team throughout the investigation.

The Inspector should investigate the complaint as far as practicable, noting that due to certain immunities, there will also be significant restrictions on the ability of an Inspector to conduct an effective workplace investigation.

The Inspector should advise the employer that FWBC has received a complaint. The Inspector should also advise the employer of the allegations and seek a response. Inspectors should note that diplomatic and consular documents in some instances may be inviolable (that is, they may be immune from search, requisition or examination) - refer to section 9.8.3 – Issuing a Notice to Produce for further information. Any information or evidence received from the employer should be considered in the same way as it would for a standard investigation.

10.4.1.2

Issuing a Notice to Produce 9.8.3

The issuing of an NTP should generally only occur in exceptional circumstances. Before serving a NTP to a diplomatic or consular officer, Inspectors should discuss the issuing of a NTP with their Assistant Director, Director, Legal & Advice Branch and the Parliamentary and Government Policy team.

Under the DPI Act and the incorporated *Vienna Convention on Diplomatic Relations (VCDR)*, an agent of the receiving State (ie: Australia) may not enter the private residence of a diplomatic officer except with the consent of the head of the mission. An Inspector is considered an 'agent' by the definition of the receiving State under the DPI Act.

An Inspector would not be able to personally serve a NTP on a diplomatic officer's private residence, but a NTP can be served by post or fax. It should be noted however, that even though the NTP can be served by post or fax, the papers and correspondence of the diplomatic officer are also inviolable. As such, this may prevent a NTP from having any force.

Under the CPI Act and the incorporated *Vienna Convention on Consular Relations* (VCCR), consular premises and consular documents are inviolable, but this is not extended to the private premises of a consular officer. Therefore, documents held at the private premises,relating to the employment of a domestic worker, are unlikely to be considered consular documents. As such, it is likely that a NTP could be effectively served at the private residence of the consular officer.

10.4.1.3 *Completing an Investigation 9.8.4*

Following thorough consideration of all evidence, the Inspector must decide whether the evidence gathered is enough to determine a contravention. At the conclusion of the investigation, the Inspector should inform the parties of the outcome.

In instances where a serious or wilful contravention has been established, FWBC should liaise with DFAT to determine if diplomatic options are available (for example, application for waiver of immunity). The Parliamentary and Government Policy team will facilitate this liaison.

However, for consular officer employers, if the complaint has not been resolved, advice from Legal Branch must be sought as to what options are available to FWBC and the matter should be referred to case conference. The complainant should be advised that the decision will be made in accordance with FWBC Litigation Policy. Both DIAC and DFAT should also be notified of any intention to litigate a consular officer.

It is important to note however, that even in such cases where immunity from action does not apply, the commencement of proceedings against a consular officer may have ramifications for Australia's relations with the relevant foreign State.

Key Messages

- FWBC investigates alleged contraventions of Commonwealth workplace relations laws from all workers employed in Australia including overseas workers
- The main type of investigations regarding overseas workers relates to the subclass 457 visa
- There is a process for referral of overseas workers investigations between FWBC and DIAC
- Overseas workers investigations have certain differences and complexities that Inspectors must consider

Chapter 11 Discrimination Investigations

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11.1 Introduction

All Inspectors need to be aware of the discrimination provisions of the FW Act as they may arise in any investigation, and are relevant for FWBC educational activities.

After reading this chapter, Inspectors should be able to:

- identify potential discrimination matters
- understand the process adopted by the FWBC in the investigation of discrimination matters.

11.2 Discrimination provisions under the FW Act

Protection from discrimination for employees and prospective employees is provided for by the FW Act.[1] The provisions in s351 prohibit employers taking adverse action on discriminatory grounds, subject to some limited exceptions[2] (adverse action generally is discussed in Chapter 7 – Workplace rights and adverse action).

In relation to discrimination, the terms employer and employee have their ordinary meaning and the provisions apply to national system employers and employees.

Unlawful discrimination may occur in various aspects of the employment relationship (or prospective employment relationship), including, but not limited to:

- recruitment and selection
- determining or altering an employee's classification, pay rate, benefits or job design
- rostering, including access to overtime and penalty shifts
- access to resources, training and development
- comparative workload and work complexity issues
- transfer, demotion and promotion
- termination of employment, including dismissal, resignation/constructive dismissal, retrenchment/redundancy, and retirement.

In practice, whether particular actions or conduct constitute potential discrimination under s351 of the FW Act may require an intricate assessment.

11.2.1 Elements of an alleged contravention of discrimination provisions

To identify potential discrimination under s351 of the FW Act, there are two key elements of which need to be present:

1. an 'employer' has taken adverse action against an 'employee' or 'prospective employee'; and
2. the adverse action needs to be because of a defined personal attribute.

[1] FW Act; s351
[2] FW Act; s351(2)

Adverse action

For employees or prospective employees to be discriminated against under the FW Act, adverse action needs to have been taken, or threatened to be taken, against them under Item 1 or 2 of s342(1) of the FW Act. The adverse action must have occurred, or continue to be occurring, on or after 1 July 2009 (or 1 January 2010 for employees of state reference employers). Examples of an employer taking adverse action against an employee or prospective employee include the following:

11.2.1.1

In relation to an **employee,** the employer:

(a) Dismisses the employee. For example:

- Termination
- Retrenchment / redundancy
- Resignation that amounts to constructive dismissal
- Forced retirement

(b) Injures the employee in his / her employment. For example:

- Offering, or not offering, promotion opportunities
- Reducing / removing employee benefits
- Rostering – preventing access to overtime shifts

(c) Alters the position of the employee to the employee's prejudice. For example:

- Demotion
- Changing classifications

(d) Discriminates between the employee and other employees of the employer. For example:

- Comparative workload

Item 1, s342(1)

In relation to a **prospective employee,** the employer:

(a) Refuses to employ the prospective employee;

(b) Discriminates against the prospective employee in the terms and conditions of the offer of employment.

Item 2, s342(1)

Refer to Chapter 14 – Workplace rights and adverse action for further information regarding adverse action.

Adverse action is taken because of an attribute

To be unlawful discrimination, the adverse action must be taken **because of**, or partly because of[3], one or more of the protected personal attributes defined in s351(1) of the FW Act. It is important that there is a link between the adverse action and one or more of the following defined attributes:

11.2.1.2

- Race
- Colour
- Sex
- Sexual preference
- Age
- Pregnancy
- Religion
- Political opinion
- Family or carer's responsibilities
- Physical or mental disability
- Marital status
- Social origin
- National extraction

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11.2.2 Examples of discrimination

Discrimination is a complex area of law and the FW Act does not provide an exhaustive definition of discrimination. Discrimination generally occurs when a person, or a group of people, are treated less favourably than another person or group.

Discrimination may be direct and obvious or it may be more indirect and subtle in nature. Most federal and state anti-discrimination legislation provides definitions for 'direct' and 'indirect' discrimination. It should be noted that the FW Act provisions are broad and make no distinction between direct or indirect discrimination; rather, unlawful discrimination is considered to occur when adverse action is taken because of certain personal attributes.

Both direct and indirect discrimination may be systemic in nature. That is, an employer's policies, practices and attitudes may have the effect of causing discrimination on an ongoing basis.

While the FW Act does not define direct or indirect discrimination, Inspectors should be familiar with the distinct concepts to identify both forms of discrimination when they arise in practice.

11.2.2.1

Direct discrimination

Direct discrimination is treating one person or group of people less favourably than another because of a particular ground or grounds such as race, sex, disability and age. In

[3] FW Act; s360

establishing discrimination has occurred, it is not enough to show the less favourable treatment or the existence of the protected ground. It must be shown that the less favourable treatment occurred because of a discriminatory ground. Examples of direct discrimination include:

- Susan is a primary school teacher and was not offered a promotion for the principal position. Susan is 5 months pregnant. Susan was told she was not offered the promotion because she is pregnant.

- Sandeep applied for a telecommunications role and was not offered the position. Sandeep was born in India and only recently arrived in Australia. Sandeep was told he was not offered the position because he is not Australian.

Indirect discrimination

11.2.2.2

Indirect discrimination is a method for examining the impact of policies and practices which appear to operate in a non-discriminatory manner but which have disproportionate detrimental impact on persons of the status of the complainant and which are unreasonable.[4]

Indirect discrimination will occur where a person imposes, or proposes to impose, a requirement, condition or practice that has, or is likely to have, the effect of disadvantaging people with a protected attribute, and that is not reasonable.[5]

Indirect discrimination may occur when an employer implements an unreasonable requirement, condition or practice that does not appear to be discriminatory, but has the effect of disadvantaging more people with a protected attribute than people without that particular attribute. Examples of indirect discrimination include:

- Sandro works in a factory stacking boxes. The company has recently written a policy requiring all employees to read and write English fluently, even though it is not needed for all jobs within the company, including the job Sandro is employed to do. Sandro is of a non-English speaking background. Sandro was told that he had to pass an English competency examination otherwise he would be dismissed. Sandro lodged a complaint with FWBC because he believed that his employer's threat of dismissal was indirectly because of his race.

- Christina works part time as a medical receptionist. Christina was dismissed because she was unable to attend regular training courses held by the clinic only on weekends and evenings. Christina has to care for her children on weekends and evenings. Christina lodged a complaint with the FWBC because she believed she was dismissed because of her family / carer's responsibilities.

[4] C Ronalds, *Discrimination Law and Practice*, The Federation Press, Leichardt, 2008, 3rd edition, p.32
[5] www.humanrightscommission.vic.gov.au

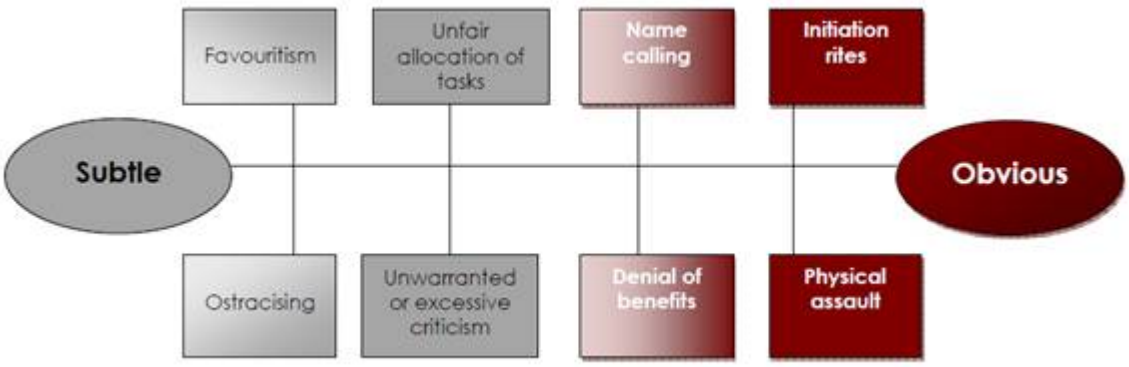
11.2.3 Exceptions

Section 351(2) of the FW Act contains certain exceptions, and provides that action will not constitute unlawful discrimination under the FW Act if that action is any of the following:

- not unlawful under any state, territory or Commonwealth anti-discrimination law[6] in force in the place where the action is taken
- taken because of the inherent requirements of the particular position concerned
- if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings or a particular religion or creed – taken:
    - in good faith and
    - to avoid injury to the religious susceptibilities of adherents of that religion or creed.

11.2.4 Bullying is not always discrimination
(Under development - requires updating with new FWC powers)

Workplace bullying is generally considered to be repeated, unreasonable behaviour that, considering the circumstances, a reasonable person, would expect to humiliate, undermine or threaten the person affected by the behaviour. As illustrated by the diagram below, bullying may encompass a wide spectrum of behaviours from subtle forms, such as ostracism, to the most blatant, such as physical assault.



General bullying or harassment does not constitute discrimination under the FW Act, unless the behaviour can be shown to be adverse action linked to an attribute listed under s351(1). If Inspectors become aware that a complainant is being bullied or harassed, the complainant should be referred to their local OH&S body for assistance. If it is unclear whether a complainant is affected by general bullying or harassment, or if there may be a case of unlawful discrimination, Inspectors should speak with their Assistant Director in the first instance.

[6] Section 351(3) provides that each of the following is an anti-discrimination law: the *Age Discrimination Act 2004*; the *Disability Discrimination Act 1992*; the *Racial Discrimination Act 1975*; the *Sex Discrimination Act 1984*; the *Anti-Discrimination Act 1977* (NSW); the *Equal Opportunity Act 1995* (Vic); the *Anti-Discrimination Act 1991* (Qld); *the Equal Opportunity Act 1984* (WA); the *Equal Opportunity Act 1984* (SA); the *Anti-Discrimination Act 1998* (Tas); the *Discrimination Act 1991* (ACT); the *Anti-Discrimination Act* (NT).

It is important to note that, under the FW Act, a person must not take adverse action against another person because they exercised a workplace right, such as a right to make a complaint about bullying (s340 of the FW Act). For further information regarding investigations involving a workplace rights contravention, refer to Chapter 7 – Workplace rights and adverse action.

11.2.5 Multiple actions in relation to discrimination

The FW Act prevents a **complainant** from taking multiple actions in relation to allegations of discrimination that do not relate to dismissal.[7] A person cannot lodge a general protections court application if an application or complaint has been made by the person or on their behalf to another anti-discrimination body (and the application or complaint has not been withdrawn or failed on jurisdictional grounds). Conversely, a person is not able to lodge a complaint with another anti-discrimination body if a general protections application has been lodged by the person or on behalf of the person.

It is important to note that s734 of the FW Act does not prevent FWBC from taking its own action in relation to discriminatory conduct in situations where a complaint or application has been made to another body. The FW Act only prevents 'a person' (i.e. the employee or potential employee), and not FWBC from commencing a general protections court application if an application or complaint has been made to another body. However, FWBC is concerned to ensure that employers are not put to the cost and inconvenience of having to defend matters in multiple fora. If a complaint has been made to another anti-discrimination body, FWBC will cease to deal with it while it is being addressed by the other body. If the matter is resolved within that alternative forum FWBC will not further consider the matter. However, FWBC may further consider a matter if it has not been resolved by an alternate body once that body's processes are completed.

There are circumstances where a person may lodge a complaint with FWBC regarding adverse action based on a protected attribute, while other proceedings associated with the alleged discriminatory conduct progress concurrently. For example, the FW Act does not prevent a complainant from making a general protections complaint to FWBC, while also making an application to FWC in relation to unfair dismissal.

It is important to note, that in certain circumstances, FWBC may determine it is in the public interest to investigate alleged adverse action and commence legal proceedings against an employer, without that action being taken on behalf of an individual complainant. For example, if FWBC has concerns regarding potential systemic discrimination, it may consider proceeding with an investigation at the same time that a complainant is taking a matter through another body. These matters will be considered by the Director – Discrimination.

Whether an employee or potential employee can lodge a complaint with FWBC regarding a contravention of s351 is complex and requires consideration of a number of factors. If

[7] FW Act; s 734

Inspectors become aware that a complaint in relation to discriminatory conduct has been made with another body, they should speak with their Assistant Director in the first instance.

11.2.6 Further considerations reverse onus of proof

In discrimination matters, there is a reversal of the onus of proof (also refer Chapter 7 – Workplace rights and adverse action). Accordingly, if the Inspector has established that an employee or prospective employee has suffered adverse action because of a protected attribute listed under s351 of the FW Act, the burden of proving that the adverse action was not taken because of the attribute falls upon the employer.

There is some potential overlap between the discrimination and unlawful termination protections available. The reason for the existence of the unlawful termination provisions is that they extend the protections to non-national system employees who are not entitled to make an application under the general protections provisions in relation to the termination.[8] The FW Act states that a person must not make an unlawful termination application where they are entitled to make a general protections application in relation to the same conduct.[9] For further information related to dismissal and termination, please refer to Chapter 13 – Termination and contractors.

11.3 Identifying possible discrimination contraventions throughout an investigation

An Inspector may identify matters possibly relating to discrimination during the investigation of a wages and conditions complaint (or other investigation activity). When this occurs, the Inspector should advise their Assistant Director, and together they should further consider whether the matter may involve adverse action because of a protected attribute.

11.4 Overview of anti-discrimination legislation and bodies in Australia

The FW Act does not grant FWBC exclusive jurisdiction over discrimination complaints. In addition to the provisions of the FW Act, there are various state, territory and Commonwealth laws dealing with discrimination. These laws prohibit discrimination in certain circumstances and provide specific grounds upon which a complaint can be made. The main grounds are race, sex, disability and age. These anti-discrimination laws prohibit discrimination only in certain areas of activity, such as employment, education, accommodation, and the provision of goods or services. FWBC only has the ability to investigate alleged unlawful discrimination as it relates to employment or prospective employment.

Inspectors should be aware that other bodies may have the ability to deal with the specific complaint they are investigating. For further information about these bodies, refer to the discrimination page on the FWBC website. The national anti-discrimination information gateway (www.antidiscrimination.gov.au) provides a single point of contact for these agencies. For further information, Inspectors should speak with their Assistant Director in the first instance.

[8] *Fair Work Bill 2008 Explanatory Memorandum*, item 2702.

Further information to assist in determining if a matter is suitable for investigation by FWBC, as well as other Australian anti-discrimination organisations and jurisdictions can be found here.

11.5 Referral of complaints

Once the Inspector, in conjunction with their Assistant Director, has made a preliminary assessment regarding whether the complaint relates to a possible contravention involving discrimination, the Inspector will decide:

- whether the complaint will be referred to another agency because FWBC lacks jurisdiction (refer 15.6.1 below)
- whether the complaint will be referred to FWC (refer 15.6.2 below)
- whether no further action will be taken (refer 15.6.3 below)
- whether the matter will be investigated further by FWBC (refer 15.7 below).

11.5.1 Referral of complaints to an external agency where FWBC lacks jurisdiction

Some complaints alleging discrimination will fall outside of the discrimination jurisdiction of FWBC, but may be able to be investigated by other agencies. These would generally include alleged discrimination matters that:

- occurred prior to 1 July 2009 (or 1 January 2010 in relation to employees of state reference employers)
- occurred outside of the employment relationship
- are not covered by the protected attributes defined in s 351 of the FW Act
- do not relate to national system employers and employees (refer 15.2 above).

If discrimination matters are outside the jurisdiction of FWBC, FWBC will write to the complainant to:

- explain the role of FWBC
- advise the complainant to contact another agency as a priority
- provide the complainant with the appropriate contact details for the other agency.

Where a single receiving agency cannot be identified for FWBC's referral (e.g. the matter might lie within the jurisdiction of more than one external agency), the complainant may be advised in writing of each of the relevant agencies and their contact details, and encouraged to contact each agency as a priority to determine which would best assist with the complaint. Inspectors may also take into consideration the complainant's desired outcome(s) and whether their interests are best addressed by possible outcomes offered through other federal or state discrimination bodies.

11.5.2 Referral of complainants to FWC

Where a complainant alleging termination because of discriminatory reasons is an employee of a national system employer, the complainant can also make an unlawful termination or general protections dismissal application to FWC to deal with the dispute. If the complaint is within the relevant timeframe (refer Chapter 7 – Workplace rights and adverse action), the complainant will be referred to FWC. FWBC will monitor the matter and at the conclusion of the FWC process will decide what action (if any) will be taken by FWBC. In the case where FWC proceedings have resulted in the completion of the matter, FWBC will not take any further action.

Where a complainant is not eligible to make a discrimination complaint under s351 and s342 of the FW Act, such as complainants who are not national system employees, they may be able to seek a remedy under the unlawful termination provisions of the FW Act (refer Chapter 13 – Termination and contractors). If the complaint is within the relevant timeframe (refer section 13.6 of that chapter), the complainant will be referred to FWC. However, FWBC will not monitor the matter further, as FWBC does not investigate unlawful termination complaints in general.

11.5.3 Where no further action will be taken

In certain circumstances, there i
S and an enterprs an assessment that no further action will be taken. Such circumstances may include:

- where there has been a delay in lodging the complaint (FWBC will be unlikely to investigate complaints received more than a year after the alleged conduct occurred, unless there are reasonable grounds for the delay)
- where the complaint is currently being addressed by, or has already been resolved by, a Commonwealth or state anti-discrimination body
- where the complaint is, or has been, subject to proceedings before a court or other tribunal of competent jurisdiction (refer 4.5.3)
- where it is determined that there has been no adverse action because of a protected attribute (discrimination).

In these cases, the complainant will be advised that FWBC is unable to investigate the matter further, and the relevant reason.

Before making an assessment that a file should be closed on the basis that the alleged discrimination occurred more than 12 months prior, the Inspector should ask the complainant why there was a delay in lodging the complaint. The Inspector should then discuss the reasonableness of the delay with their Assistant Director before deciding whether FWBC will investigate the matter further.

11.6 Where the matter will be investigated by FWBC

Not all matters will require an investigation of a discrimination contravention. It may be identified that a complaint:

- involves an alleged discrimination contravention (adverse action based on a protected attribute)

- does not involve alleged discrimination, but does involve another complex matter requiring further investigation, such as an alleged workplace rights contravention
- only involves an alleged contravention of a wages and conditions matter
- may be suitable for FWBC mediation.

11.7 FWBC investigation of discrimination complaints

11.7.1 Initial contact is with the complainant only

All discrimination complaints are treated as confidential until permission is given by the complainant to contact the employer and witness. (see Confidential Complaints 3.9.9).

11.7.2 Planning the investigation

The Inspector will conduct a record of conversation with the complainant. With confirmation of complainant's permission to contact parties, including the employer, the Inspector will create a comprehensive investigation plan which clearly identifies the points of proof that must be developed, and the evidence that may be required to substantiate them. A notice to produce records or documents (NTP) should not be limited to time and wage records, but rather should seek evidence that may substantiate the complaint. This evidence could include job advertisements, position descriptions, letters of appointment, employment policies, contact details of other employees, financial statements, and performance reports (refer Chapter 3 - Investigations).

11.7.3 Case conference

A case conference will be conducted on a regular basis to specifically discuss discrimination complaints. Matters will proceed to case conference following a decision during regular file reviews with the Director and Assistant Director.

11.7.4 Enforcement action

The discrimination provision under s351 of the FW Act is a civil remedy provision. In discrimination cases there may not be an underpayment or contravention of a Fair Work instrument. Accordingly, the Inspector will often need to consider other matters such as the loss of income suffered by the person or persons who were subject to the alleged discrimination.

There are a range of enforcement options available to Inspectors who determine that an unlawful discrimination contravention has occurred, such as letters of caution or enforceable undertakings (refer to Chapter 14 – Non Litigation Outcomes for further information). FWBC may commence litigation where there is sufficient evidence of the contravention and it is in the public interest to do so (refer to Chapter 15 – Litigation). If the matter proceeds to court, remedies under the FW Act include an injunction or interim injunction, compensation for loss

suffered, or reinstatement of a person. There is no cap on the compensation which can be sought under the FW Act. As with all FWBC litigation, the matter must meet the requirements of Guidance Note 1 - Litigation Policy and undergo both prospects and public interest assessment prior to proceeding to litigation.

11.7.5 Considering FWBC mediation of the complaint

FWBC mediation will only be considered on a case-by-case basis. Should an Inspector believe that FWBC mediation may be suitable, they should discuss with their manager and the Assistant Director – Discrimination or the Assistant Director who will consider, in collaboration with the Assistant Director - Mediation, whether it is a matter that FWBC can mediate.

Chapter 12 Investigation of Individually Negotiated Entitlements

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12.1 Introduction

Employers and employees can make arrangements to provide for terms and conditions in addition to those prescribed by the relevant Fair Work instrument or legislative standards. Two of these types of arrangements are detailed in this chapter.

Individual flexibility arrangements (or IFAs) can be made by employers and employees under the FW Act to vary the effect of a modern award or enterprise agreement. It is important that Inspectors understand the relevant provisions of the FW Act in relation to IFAs, including the role of FWBC in the case of any matters regarding IFAs.

Certain entitlements in common law contracts of employment are considered to be safety net contractual entitlements (SNCEs) under the FW Act. This chapter will also give Inspectors an understanding of the SNCE provisions under the FW Act, the investigation process as it applies to SNCE investigations, and guidance on dealing with specific issues that may arise in a SNCE investigation.

Inspectors should be mindful that IFAs and SNCEs are distinct from a guarantee of annual earnings.

12.2 Individual flexibility arrangements (IFAs) and flexibility terms

An individual flexibility arrangement (or IFA) can be made between an employee and employer under a modern award or enterprise agreement. The IFA will vary the effect of the modern award or enterprise agreement in relation to the employee and employer, in order to meet the genuine needs of the employee and employer.

An IFA is distinct from, and should not be confused with, an employee's right to request flexible working arrangements. Under the NES, employees who meet certain requirements are able to request flexible working arrangements to assist them in caring for children. The FW Act prescribes that a flexibility term must be included in modern awards and enterprise agreements. The flexibility term is the provision that enables an employee and employer to agree to an IFA. Flexibility terms are discussed in detail below.

12.2.1 Modern awards and flexibility terms

The FW Act prescribes that the flexibility term of a modern award must:

- identify the terms of the modern award whose effect may be varied by an IFA
- require that the employee and employer genuinely agree to any IFA
- require the employer to ensure that any IFA must result in the employee being better off overall than the employee would have been if no IFA were agreed to
- set out how any IFA may be terminated by the employee or employer
- require the employer to ensure that any IFA must be signed by the employer and employee (and the employee's parent or guardian if the employee is under 18)

- require the employer to ensure a copy of the IFA is given to the employee.[1]

In addition, the flexibility term must not require that the IFA agreed to by an employee and employer be approved, or consented to, by another person (except for the parent or guardian of an employee under 18).[2]

Importantly, the Inspector also needs to review the flexibility terms of the modern award, as some modern award flexibility terms have additional requirements.

12.2.2 Enterprise agreements and flexibility terms

Similar provisions to those regarding modern awards apply to the flexibility terms of an enterprise agreement, with the additional requirement that the IFA agreed to under the flexibility term of an enterprise agreement:

- must be about matters that would be permitted matters if the IFA were an enterprise agreement
- must not include a term that would be an unlawful term if the IFA were an enterprise agreement.[3]

For enterprise agreements, the FW Act also specifies that a copy of the IFA must be given to the employee within 14 days after it is agreed to.[4] Further, if an enterprise agreement does not include a flexibility term, the model flexibility term is taken to be a term of the enterprise agreement.

12.2.3 Modern awards and IFAs

The FW Act prescribes that if an employee and employer agree to an IFA under a flexibility term in a modern award:

- the modern award has effect in relation to the employee and the employer as if it were varied by the IFA and
- the IFA is taken to be a term of the modern award for the purposes of the FW Act.[5]

In turn, this means that failure to comply with such an IFA is a contravention of a term of a modern award, which is a civil remedy provision. Accordingly, where an Inspector identifies a contravention of an IFA under a flexibility term in a modern award, many of the investigative procedures described throughout this manual that apply to contraventions of modern awards also apply to the entitlements arising from IFAs made under modern awards.

[1] FW Act; s144(4).
[2] FW Act; s144(5).
[3] FW Act; s203(2)(b).
[4] FW Act; s203(7)(b).
[5] FW Act; s144(2).

Importantly, as an individual arrangement, an IFA only relates to the individual employee and the employer. It does not change the effect that the modern award has on the employer and any other employee.

Where an arrangement that purports to be an IFA does not meet a requirement set out in s144 of the FW Act, the arrangement still has effect as if it were an IFA.

IFAs in relation to modern awards can have effect from 1 January 2010, being the date that modern awards and their flexibility terms can have effect.

12.2.4 Enterprise agreements and IFAs

In relation to an enterprise agreement, if an employee and employer agree to an IFA under a flexibility term in an enterprise agreement:

- the enterprise agreement has effect in relation to the employer and employee as if it were varied by the IFA; and
- the IFA is taken to be a term of the enterprise agreement.

This means that failure to comply with such an IFA is a contravention of a term of an enterprise agreement, which is a civil remedy provision. The FW Act further prescribes that the IFA does not have any effect other than as a term of the enterprise agreement. Therefore, an IFA made under an enterprise agreement would not be considered a contract in its own right or a variation to the employee's contract of employment.

Where an Inspector identifies a contravention of an IFA under a flexibility term in an enterprise agreement, many of the investigative procedures described throughout this manual that apply to contraventions of enterprise agreements also extend to the entitlements arising from IFAs made under enterprise agreements.

Importantly, as an individual arrangement, an IFA only relates to the individual employee and the employer. It does not change the effect that the enterprise agreement has to the employer and any other employee.

Where an arrangement that purports to be an IFA does not meet a requirement set out in s203 of the FW Act, the arrangement still has effect as if it were an IFA. This ensures that an employee retains any benefits they are receiving under the arrangement.

IFAs in relation to enterprise agreements can have effect from 1 July 2009, being the date that enterprise agreements and their flexibility terms can have effect.

12.2.5 Transferring instruments

Inspectors should also note that the FW Act makes explicit that where an enterprise agreement is transferred, the transferring enterprise agreement (known as a transferable

instrument) includes any IFA that had effect as a term of the transferable instrument.[6] This provision is subject to any order of FWA.

12.2.6 Investigating IFA matters

As noted previously in this chapter, if the complaint or area of enquiry relates to an employer's alleged failure to comply with the undisputed terms of an IFA, the matter would be investigated as a failure to comply with a term of the modern award or enterprise agreement (see Chapter 8 Wages and Entitlements).

An Inspector may become aware of an IFA whilst conducting an audit of an employer's records. If this occurs, Inspectors should be guided by the IFA targeted audit checklist in determining whether further investigation is necessary.

On other occasions, there may be disputes about whether there was genuine agreement in making the IFA, whether the employer has ensured the employee is better off overall under the IFA, and whether an arrangement is an IFA or not.

It is expected that there may be certain areas of concern to employees regarding the operation of an IFA that may be brought to FWBC's attention. In particular, there may be complaints or enquiries concerning:

- whether there has been genuine agreement to the IFA
- whether an IFA leaves an employee better off overall
- whether an arrangement is an IFA or not.

Some of the key points for Inspectors in relation to these items are detailed below. Where appropriate, Inspectors may refer parties to an investigation to the 'Use of individual flexibility arrangements' Best Practice Guide for information about implementing IFAs in the workplace.

12.2.7 Genuine agreement

It is a requirement of the FW Act that an IFA made under a modern award or enterprise agreement must be "genuinely agreed to by the employer and employee." The FW Act itself does not define "genuine agreement" and it is a phrase which bears its ordinary meaning.

There is no case law regarding genuine agreement in relation to IFAs under the FW Act in particular, but there are cases where the notion of "genuine agreement" in other contexts has been considered. For example, in one case it was suggested that the term "genuinely agree" implied that the consent of the employees was informed and that there was an absence of coercion.

[6] FW Act; s313(2).

In cases where one or both parties to the IFA dispute that there was genuine agreement to the terms of the IFA, the Inspector has several considerations. The main focus will be to investigate any potential contraventions of the FW Act and the flexibility term of the modern award or enterprise agreement in relation to genuine agreement.

12.2.7.1 Potential contraventions regarding lack of genuine agreement

There are certain circumstances where it would appear there was not genuine agreement. These would include where an employer applied coercion, or where the employer applied undue influence or undue pressure. An example of undue influence or pressure in this regard would include an employer telling an employee that if the employee does not agree to a particular IFA, the employee cannot be guaranteed a minimum number of hours of work each week. In cases where it appears that coercion, undue influence or undue pressure may have formed part of the process of making the IFA, Inspectors will investigate the matter according to the principles and practices as detailed in Chapter 6 – Undue influence or pressure, duress and coercion investigations of this manual.

The FW Act also defines the process of "making or terminating an IFA under a modern award or enterprise agreement" as a workplace right, and that a person must not have action taken against them because of their workplace right. This has the effect of also preventing a prospective employer from making an offer of employment conditional on the prospective employee entering an IFA. In cases where it appears that the process of making or terminating an IFA or offering employment has contravened these general protections provisions, Inspectors will investigate the matter according to the principles and practices as detailed in Chapter 7 - Workplace rights and adverse action.

As noted above, the concept of genuine agreement also implies the informed consent of the employee. Therefore, some additional indicators that there was not genuine agreement might include:

- the employee lacking access to the underlying modern award or enterprise agreement during the IFA making process
- the employee not understanding the implications of making the IFA.

Further, it should be remembered that the flexibility term of the modern award or enterprise agreement will require there to be genuine agreement in making an IFA.

Therefore, failure to have genuine agreement is also failure to comply with a term of the modern award or enterprise agreement, which is itself a civil remedy provision.

As the investigative processes regarding the alleged failure to have genuine agreement are covered by other chapters of this manual, they are not repeated here. However, it remains that contraventions of the provisions of the FW Act and the flexibility term of the modern award or enterprise agreement regarding genuine agreement are matters that require complex investigation, and that these matters may result in litigation.

12.2.8 IFAs made fraudulently

One extreme example of there being no genuine agreement would be where it is clear that the IFA has been made fraudulently. This would include situations where an employee's signature has been forged, where the employee agreed to an IFA that was subsequently altered by the employer, or where the employee was not shown the IFA at all. In these cases, it is unlikely that such an arrangement could operate as an IFA. Therefore, in relation to the employee entitlements component of the investigation, an Inspector would proceed as if the IFA did not exist and enforce the modern award or enterprise agreement.

12.2.9 Better off overall

12.2.9.1 The better off overall requirement for IFAs

Under the FW Act and the flexibility term of the modern award or enterprise agreement, the onus is on the employer to ensure that the employee is better off overall under the terms of an IFA.[7] Although similar in name, this employer guarantee is distinct from the better off overall test (or BOOT) that FWC apply to an enterprise agreement when it is lodged. In fact, when applying the BOOT to an enterprise agreement, the FWC does not consider the effects of an IFA.

There is no requirement under the FW Act itself for the employer to quantify how or why the employee is better off overall. However, the model flexibility term for an enterprise agreement does require that an IFA must include details of "how the employee will be better off overall in relation to the terms and conditions of his or her employment as a result of" the IFA.[8] Similar requirements may be found in the flexibility terms of modern awards or of enterprise agreements that do not rely on the model flexibility term.

Although it is not made explicit in the FW Act, the Australian Industrial Relations Commission (AIRC) has indicated that the better off overall requirement would be applied by the employer as at the time the IFA commences to operate, and not continuously applied over the life of the IFA.

12.2.9.2 The approach to the investigation

In the case where an employee disputes that they are better off overall, the Inspector would adopt the following approach:

The Inspector would advise the employer that the relevant flexibility term requires that the employer ensures the employee is better off overall under the IFA. Where applicable, the Inspector would also advise the employer that the flexibility term of the modern award or

[7] FW Act; s144(4)(c) and s203(4).
[8] FW Regulations, Schedule 2.2, item 3(d)(iii).

enterprise agreement further requires that the employer details how the employee will be better off overall.

The Inspector would review the IFA to seek information regarding how the IFA specifies that the employee will be better off overall. The Inspector also may seek evidence from the employer regarding the actions the employer took to comply with the relevant flexibility term in relation to the employer guarantee, including any method used by the employer to ensure that the employee was better off overall. The Inspector would review this evidence, in order to determine whether the employer has met the required obligations to ensure that the employee is better off overall under the IFA.

As the onus is on the employer to ensure that an IFA results in the employee being better off overall, an employer who has not met this requirement is in contravention of the relevant flexibility term. The Inspector will advise the employer of this contravention (such as via a contravention letter). Since the failure relates to the guarantee, an appropriate response from the employer in relation to this contravention where an IFA is still in operation may be to ensure that the employee is better off overall under the terms of the IFA.

Importantly, the Inspector does not have the role of quantifying the effects of any failure by any employer to ensure an employee is better off overall. The contravention relates to whether the employer has met the requirements of the FW Act and/or relevant flexibility term, and is not to be reduced to an amount of underpayment or compensation by the Inspector.

12.2.9.3 Actions to ensure an employee is better off overall

Even where an employer (as an employer) has contravened the relevant flexibility term or the FW Act, an Inspector has no power to create or terminate an IFA. However, the Inspector would advise the employer that they have failed in their obligation to meet the better off overall requirement in making the IFA, and that compensation could be sought through the courts for any loss the employee has suffered (or continues to suffer while the IFA remains in place) as a result of this failure.

Where the employee is still employed, there are options regarding the IFA that the parties may consider. Either party could seek to terminate the IFA (as per the provisions of the relevant flexibility term and the FW Act). Termination of an IFA may be by mutual written agreement between the employer and employee at any time. Either party also may cancel the IFA without agreement by providing the notice as required by the relevant flexibility term or the FW Act. If an employee or employer indicates to the Inspector that they are looking to terminate an IFA, the Inspector might advise the party to consider the full effects of this decision, as the termination of an IFA may result in all benefits provided by the IFA being withdrawn.

In addition, the parties may seek to enter into a new IFA under which the employee is better off overall. However, as the IFA is an agreement between the employer and employee, any

such creation of a new IFA could only be made with the genuine agreement of both the employee and employer. Further, the employer would be obliged to ensure the employee is better off overall again at the time of making of any new IFA between the parties.
As discussed above, the FW Act also defines the process of "making or terminating an IFA under a modern award or enterprise agreement" as a workplace right,[9] and that a person must not have action taken against them because of their workplace right. Inspectors should ensure that complainants are advised of this provision and that complaints of this nature will be investigated.

12.2.9.4 Payments to an employee who was not better off overall

In addition to any termination of the IFA, the employer may propose that they make payments to the employee to compensate for the employer's failure to ensure that the IFA met the better off overall requirement. It should be noted that the FW Act does not state that failure of the employer to ensure an employee is better off overall results in a specific underpayment to an employee. Accordingly, the role of the Inspector in this regard is not to give any advice to either party as to the appropriate amount of any alleged shortfall or compensation, but to seek the employer's response to the contravention letter.

As the IFA itself is treated as a term of the modern award or enterprise agreement, the options available to an employee seeking a remedy will include seeking a court order awarding compensation for the loss suffered because of the contravention.[10]
An employee could not use small claims procedures for an IFA matter under the FW Act, as there is no underpayment of amounts under s548(1A) of the FW Act.

12.2.9.5 IFAs and other arrangements

The FW Act does not provide a standard format for an IFA, although the requirement for the parties to sign an IFA and for an employee to be provided with a copy of an IFA makes it clear that an IFA must be reduced to writing. There may be circumstances where it is disputed by parties or not clear on the face of it whether an arrangement is an IFA or another type of arrangement.

It appears from the wording of the FW Act that not all arrangements that seek to vary the terms of employment are an IFA. In particular, Inspectors should consider:

- an IFA can only be made in relation to a modern award or enterprise agreement
- an IFA must be able to be made under the flexibility terms of the modern award or enterprise agreement
- an IFA is treated as a term of the modern award or enterprise agreement.

[9] FW Act; s341(2)(g).
[10] FW Act; s545(2)(b). Such order would need to be sought through the Federal Court or Federal Circuit Court. In the case of a FWBC litigation, a Inspector has standing to seek such an order (see Chapter 24 – Litigation).

Certain principles follow from these key provisions:

- Firstly, an arrangement made under another instrument (apart from a modern award or enterprise agreement) cannot be an IFA by definition.
- Secondly, an IFA cannot vary specific terms of the modern award or enterprise agreement unless provided for by the flexibility term of that instrument. Inspectors should review the flexibility term of the relevant modern award or enterprise agreement when considering the relevance or validity of the terms of an IFA. For example, if a flexibility term of an enterprise agreement only provided for an IFA to vary terms relating to overtime rates, then an IFA term concerning leave loading would be inconsistent with the flexibility term and not operational to the extent that it attempted to alter the enterprise agreement provisions for leave loading.

The FW Act also provides that IFAs failing to meet certain requirements may still function as IFAs, but this provision only applies where the agreed arrangement "purports to be an IFA" under a flexibility term.[11] Accordingly, the intention of the parties will be an important consideration in determining whether an arrangement is itself an IFA. An arrangement that was not intended to be an IFA could not be considered to be an IFA, although the arrangement may be covered by other provisions of the FW Act and/or form part of a common law agreement or safety net contractual entitlement (SNCE).

12.3 Safety net contractual entitlements (SNCEs)

A safety net contractual entitlement (or SNCE) is defined in the FW Act as an entitlement in an employment contract relating to any of the subject matters dealt with by ss 61(2) and 139(1) of the FW Act. These subsections detail the minimum standards under the National Employment Standards (NES) and the terms that may be included in a modern award. Investigation and enforcement of SNCEs by Inspectors are dealt with in two different parts of the FW Act and the T&C Act:

- for the use of compliance powers during an investigation (see s706(2) of the FW Act). Inspectors should note that s706(2) is extended through the operation of sub-item 14(e) of Part 3 of Schedule 18 to the T&C Act); and
- for enforcement (see s541 of the FW Act). Inspectors should note that s541 is extended through the operation of sub-item 16(1)(e) of Schedule 16 to the T&C Act.

12.3.1 Contract law

As SNCEs are related to the contract of employment, some contract law principles are set out in this section of this manual for the information of Inspectors.

The engagement of an employee by an employer forms a common law contract of employment between the parties. All employers and employees have such a contract between them. A contract of employment is the agreement between the parties (whether oral or in writing) that covers the terms and conditions of employment. A written contract of employment may also include documents such as a letter of offer (if accepted) or a

[11] FW Act; s145(1)(a) and s204(1)(a).

document or agreement stating an employee's wage rate and hours of work. Common law contracts may also contain implied terms. Because of these factors, determining the terms of the contract can be a complicated task.

An employment contract cannot undercut an employee's minimum statutory entitlements. Therefore, legislation and instruments (such as Fair Work instruments) will prevail over a term of common law contract of employment unless it is possible to comply with the contract term without contravening legislation including the terms of the FW Act and/or a transitional or fair work instrument (e.g. where the contractual entitlement is more generous).

A common law contract may contain conditions that are not set out in legal minima prescribed by the FW Act or applicable Fair Work instrument, such as performance bonuses or provision of a car. In the past these terms could only be enforced at common law by the parties to the common law contract.

From 1 January 2010, Inspectors can exercise their compliance powers and commence enforcement proceedings in relation to certain terms of common law contracts at the same time as they are investigating and enforcing a contravention of specified statutory entitlements (such as a provision of the NES or modern award) under the SNCE provisions of the FW Act.

12.3.2 SNCE provisions under the FW Act

As noted above, a SNCE is an entitlement in an employment contract relating to any of the subject matters described in the specified NES (see s61(2)) or terms that may be included in a modern award (see s139(1)).

The SNCE provisions of the FW Act commenced to operate from 1 January 2010. However, the contract that contains the SNCE may have been made either before or after 1 January 2010.

Item 18 of Schedule 16 of the Transitional Act makes it clear that from 1 January 2010 an Inspector may exercise his or her compliance powers or seek enforcement in relation to a breach of a SNCE. However, the breach must have occurred after 1 January 2010. There is no ability to exercise compliance powers or commence enforcement proceedings in relation to SNCE breaches that occurred prior to 1 January 2010.

12.3.3 Matters dealt with by the NES

The matters dealt with by the NES are:

- maximum weekly hours
- requests for flexible working arrangements
- parental leave and related entitlements
- annual leave

- personal/carer's leave and compassionate leave
- community service leave
- long service leave
- public holidays
- notice of termination and redundancy pay
- Fair Work Information statement.

12.3.4 Terms that may be included in modern awards

The terms that may be included in modern awards are:

- minimum wages
- skill based classifications
- incentive based payments, piece rates and bonuses
- type of employment (e.g. full time, part time or casual)
- hours of work, rostering, notice periods, rest breaks
- overtime rates
- penalty rates
- annualised wage arrangements
- allowances
- leave, leave loadings and arrangements for taking leave
- superannuation
- procedures for consultation, representation and dispute settlement.

Examples of statutory contraventions

Before an Inspector can exercise their compliance powers in relation to an allegation that a SNCE has not been provided, the Inspector must reasonably believe that the employer has contravened the statutory entitlements or terms of an instrument listed in s706 (2) of the FW Act, or sub-item 14 (e) of Part 3 to Schedule 18 of the T&C Act. These include the employer's contravention of a term/provision of one or more of the following:

- the NES
- a modern award
- an enterprise agreement
- a workplace determination
- a national minimum wage order
- an equal remuneration order
- transitional instrument
- transitional Australian Pay and Classification Scale
- transitional federal minimum wage
- transitional special federal minimum wage
- take-home pay order
- WR Act equal remuneration orders
- a continuing schedule 6 instrument (transitional award)

Below are some examples of scenarios to assist Inspectors to understand when FWBC can and cannot use their compliance powers or seek to enforce common law contracts under the SNCE provisions of the FW Act.

Illustrative example
The wages term in the modern award that applies to Janey provides that she is entitled to be paid $20.00 per hour ($39,520 per annum). Janey is entitled under her contract of employment with her employer, Benny's Biscuits, to be paid $22.77 per hour ($45,000 per annum). Janey is entitled under her contract of employment to six weeks annual leave.

Since the commencement of her employment, Benny's Biscuits has paid Janey only $20.00 per hour ($39,520 per annum). After one year's service, Janey has accrued six weeks annual leave. However, on termination, Benny's Biscuits only pays her for three weeks annual leave.

In this scenario, Benny's Biscuits has met its statutory obligations in respect of Janey's minimum wage because it has paid the amount required under the modern award. However, Benny's Biscuits has contravened the NES in relation to Janey's annual leave entitlements. A contravention of the NES is a civil remedy provision and an Inspector has standing to apply to court for order(s) under s539 of the FW Act in relation to the one week's annual leave owing to Janey under the NES.

As there is a contravention of the NES, an Inspector also has standing to apply on Janey's behalf for an order under s541 of the FW Act in relation to the contraventions of her contract of employment. Therefore, the Inspector could take action in relation to:

- the additional two weeks annual leave (above the four weeks annual leave she is entitled to under the NES); plus
- the difference between $20.00 and $22.77 for each hour worked over the period; being the difference between what Janey was actually paid, and the amount Janey should have been paid under her contract of employment.

Illustrative example
In an alternative scenario, Benny's Biscuits has paid Janey only $20.00 per hour ($39,520 per annum) over the past year and did not meet its contractual obligation to pay Janey $22.77 per hour. However, Benny's Biscuits paid Janey her four weeks annual leave entitlements under the NES (although not under her contract of employment). In these circumstances, although Benny's Biscuits has breached the terms of Janey's employment contract in two key respects, it has not contravened any term or provision set out in s541(3) of the FW Act or sub-item 16 (1) (e) of Schedule 16, Item 16, 1e to the T&C Act. Therefore an Inspector would not have the ability to exercise their compliance powers nor the standing to apply to a court to enforce Janey's contractual entitlements.

However, Janey could enforce her contractual entitlements in a state or territory court or could apply for an order in relation to an entitlement derived from her contract under s543 of the FW Act.

Illustrative example
Mark is employed by Super Chef. Mark is contractually entitled to be paid $55,000 per annum. However, Super Chef has only paid Mark $45,000 in accordance with the modern award that applies to him.

Even though wages form part of a SNCE, an Inspector would not be able to exercise their compliance powers in investigating whether Super Chef had a contractual obligation to pay Mark the additional $10,000 unless the Inspector reasonably believes that Super Chef had not complied with the relevant statutory obligation or industrial instrument, referred to in s706(2) of the FW Act or sub-item 14(e) of Schedule 18 of the T&C Act, that applied to Mark.

However, if an Inspector reasonably believed that Super Chef had not paid Mark his annual leave entitlement at the appropriate base rate of pay, the Inspector would be able to exercise his or her compliance powers to exercise their compliance powers to investigate both the failure to pay annual leave and Mark's contractual wage entitlement. Base rate of pay is defined in s16 of the FW Act to mean the rate of pay that is payable to an employee for his ordinary hours of work (excluding allowances etc).

Where Mark's base rate of pay in his contract of employment is higher than the base rate that would otherwise apply to him under the modern award, Mark's base rate of pay for calculating his annual leave entitlement would derive from his contract of employment. If Super Chef has not paid Mark's annual leave in accordance with the applicable base rate of pay, it has not complied with a relevant statutory obligation. [12]

12.3.5 Conducting a SNCE investigation

SNCE investigations will be conducted within the FWBC's investigative processes. Allegations of SNCE contraventions will be wages and conditions investigations. These investigations will follow investigative procedures as set out in Chapter 3 - Investigations and Chapter 8 - Wages and conditions investigations. However, there are some particular considerations that arise in these investigations, as detailed below.

Importantly, an Inspector can only exercise compliance powers in relation to a SNCE if the Inspector has a reasonable belief that the employer has not complied with one or more of the listed statutory obligations.[13] However, the SNCE does not need to be the same subject matter as the statutory entitlement.[14] In the absence of exceptional circumstances, conducting SNCE audits and investigating confidential SNCE complaints as audits will not be possible.

[12] Fair Work Bill 2008 Explanatory Memorandum, paragraph 2620 – illustrative example.
[13] FW Act; s706(1)(b).
[14] See the illustrative example in the Fair Work Bill 2008 Explanatory Memorandum, pg 328.

12.3.6 Investigation

An allegation of a SNCE contravention can never be investigated in isolation. An investigation of such an allegation must be conducted either concurrently with, or subsequent to, an investigation into whether the employer has contravened a provision or term of an instrument listed in s706 (2) of the FW Act, or sub-item 14(e) of Part 3 of Schedule 18 to the T&C Act, before investigating the SNCE contravention.[15] In the situation where an Inspector applies to the court regarding an alleged SNCE contravention, there must also be contravention of a provision or term listed in s541(3) of the FW Act or item 16(1)(e) of Schedule 16 of the T&C Act.

If the Inspector is issuing a notice to produce records or documents (NTP), this would be considered an exercise of compliance powers under the FW Act. Accordingly, the Inspector could not issue such a NTP in relation to a SNCE contravention until forming a reasonable belief that the employer had contravened a statutory entitlement or term of an instrument listed in s706(2) of the FW Act or sub-item 14(e) of Schedule 18 to the T&C Act.

Due to this restriction, if a Inspector has yet to form such a reasonable belief, any NTP must be limited to seeking records or documents in order to investigate the potential contravention of a statutory entitlement or term of an instrument listed in s706(2) of the FW Act or sub-item 14(e) of Schedule 18 to the T&C Act.

If an Inspector establishes reasonable belief of a contravention of a statutory entitlement or term of an instrument listed in s706(2) of the FW Act or sub-item 14(e) of Schedule 18 to the T&C Act, the Inspector can then proceed to exercise compliance powers to further investigate the SNCE component of the complaint.

This further investigation can include the issue of a NTP in relation to the SNCE component of the complaint (which may be the second NTP issued in the investigation). The NTP issued at this secondary stage should note that the Inspector has a reasonable belief of the contravention of a relevant statutory entitlement or term of an instrument listed in s 706 (2) of the FW Act or sub-item 14 (e) of Schedule 18 to the T&C Act.

This second NTP will not be restricted to only seeking documents related to the contravention of the SNCE but could also seek relevant records or documents related to the contravention of the statutory entitlements or terms of the instrument listed in s706(2) of the FW Act or sub-item 14(e) of Schedule 18 to the T&C Act that may not have been requested through the original NTP.

Inspectors should also be aware that issuing two separate NTPs is not required where they already hold the required reasonable belief. It may be, that on the basis of evidence provided

[15] It is important to note that contraventions of provisions or terms of an instrument listed in FW Act, subsection 706 (2) and and sub-item 14(e) of Part 3 of Schedule 18 to the T&C Act mostly cover national system employees or employers but certain NES provisions, parental leave and notice of termination, cover all employees – see Part 6-3 of the FW Act.

by the complainant, the Inspector can form such a reasonable belief and conduct a concurrent investigation of both the SNCE contravention and the contravention of the statutory entitlement or term of an instrument listed in s706(2) of the FW Act or sub-item 14(e) of Schedule 18 to the T&C Act. In such a case, a single NTP can be issued to request documents in relation to both elements of the investigation.

12.3.6.1 Obtaining, managing and evaluating all available evidence

In the case of a SNCE investigation the points of proof and types of evidence can differ from a standard investigation. Determining the terms of a common law contract may be a complicated matter.
In order to establish the terms of the contract of employment, Inspectors will need to obtain (if available):

- a copy of the contract
- letters of offer
- similar documents signed upon engagement
- policies incorporated into the contract
- subsequent letters, emails or records of, or information about, verbal conversation between the parties.

In addition, Inspectors may need to look to other evidence, including:

- eye witness accounts
- original time and wage records
- relevant industrial or fair work instruments
- signed correspondence between parties
- documentary evidence, such as bank statements.[16]

Any interaction between the parties that affects the employee's entitlements could potentially form part of the contract of employment and would need to be reviewed by the Inspector.

12.3.6.2 Making a determination

Inspectors should refer to Chapter 3 – Investigations A, section 6.9.1 for guidance on establishing a contravention. Once a SNCE contravention has been established, appropriate investigation outcomes will need to be considered. Optional outcome points are defined to facilitate the exercise of discretion by Inspectors in completing matters where appropriate.

12.3.6.3 Complaints that lack sufficient evidence

There is potential that SNCE complaints, where there is no written contract of employment, may have insufficient or conflicting verbal evidence regrading the terms of the contract of employment. Where a complaint regarding a SNCE entitlement is unable to be sustained

due to lack of written or documentary evidence, Inspectors should make reference to the investigation procedures where no contravention is established.

12.3.6.4 Contravention letters

If a SNCE contravention is identified, in conjunction with a contravention of the NES or industrial instrument, the Inspector may make reference only to the SNCE in a contravention letter.

Provided contraventions of the NES or instrument are identified, and a contravention letter is issued seeking rectification of the contraventions, the Inspector can also include reference to the SNCE in this letter, by advising that if FWBC were to pursue the matter in court, it would seek rectification of the SNCE under s541 of the FW Act.

Inspectors should refer to Chapter 3 – Investigations, section 3.14 for guidance on issuing a contravention letter.[17]

12.3.6.5 Compliance notices

Issuing a compliance notice is not possible for a SNCE contravention. [18]

12.3.6.6 Mediation

Mediation may be used as an alternative to normal investigation techniques. Mediation may be used by FWBC to resolve SNCE contraventions. For further guidance on mediation please refer to Chapter 16 - Mediation.

12.3.6.7 Letters of caution

A letter of caution may be issued as an effective enforcement mechanism, for example, for a minor or technical contravention. As detailed in Chapter 23 -Enforcement of this manual, a letter of caution would not ordinarily be issued if there are monies owed to the complainant. A small claims referral or FWBC litigation should be considered instead.

12.3.6.8 Enforceable undertaking

FWBC cannot accept an enforceable undertaking for a SNCE contravention alone. Enforceable undertakings can only be used for a contravention of a civil remedy provision.[19]

[17] Inspectors are authorised to issue such letters under regulation 5.05 of Chapter 5 of the FW Regulations.
[18] FW Act; s716.
[19] FW Act; s715

Contravention of a SNCE is not a civil remedy provision.[20] Accordingly, any enforceable undertaking primarily must address the employer's contravention of the relevant statutory entitlements (such as the NES, modern award or enterprise agreement). Having established a contravention of a statutory entitlement, the enforceable undertaking could contain additional terms, including terms that address the SNCE contravention.

12.3.6.9 Small claims

A person may use small claims procedures under the FW Act to recover monies owed under a SNCE.[21] In small claims proceedings, the court may not award more than $20,000 (refer Chapter 14 – Non Litigation). A person may use other appropriate legal action where the claim exceeds what can be recovered under small claims.

12.3.7 Enforcement

The FW Act (s541) stipulates that an Inspector may apply to the court for an order regarding a contravention of a SNCE only when an application is being made regarding an employer's contravention of a term/provision of one or more of the following:

- the NES
- a modern award
- an enterprise agreement
- a workplace determination
- a national minimum wage order
- an equal remuneration order
- transitional instrument
- transitional Australian Pay and Classification Scale
- transitional federal minimum wage
- transitional special federal minimum wage
- take-home pay order
- WR Act equal remuneration orders
- a continuing schedule 6 instrument (transitional award).

SNCEs are not civil remedy provisions. This means that a court cannot order a pecuniary penalty under s546 of the FW Act for contravention of a SNCE.

However, the federal courts will be able to make orders to enforce the SNCE in the same way as they make orders to enforce common law contracts in the original or accrued jurisdiction of the relevant court.

[20] FW Act: s539
[21] FW Act; s548(1A)(a)(ii)

Inspectors should refer to Chapter 15 – Litigation of this manual for further information on litigation.

A national system employer or national system employee may also apply to the Federal Court or the Federal Magistrates Court to enforce a SNCE. This is in addition to the right to pursue breaches of contract of employment under the common law in a state or territory court.

12.3.8 Guarantee of annual earnings

The FW Act provides for an employer and an employee covered by a modern award to enter into a guarantee of annual earnings. The main effect of a guarantee of annual earnings is the modern award will cease to apply to the employee during a period in which their annual earnings exceed the high income threshold.

Under s330 of the FW Act, there are a number of formal requirements that need to be satisfied for a guarantee of annual earnings to be enforceable. Some of the requirements include the following:

- the guarantee must be in writing
- there must be an undertaking to pay an amount of earnings exceeding the high income threshold for a period of 12 months or more (a shorter period may be permissible in particular circumstances)
- the employee must agree to accept the undertaking
- the undertaking and acceptance are given before the start of the 12 month period
- the undertaking and acceptance must be given within 14 days of the start of employment, or within 14 days of the employer/employee agreeing to vary the terms and conditions of employment.

An agreement does not apply to the employee's employment at the start of the period.

The 'high income threshold' is indexed annually and is calculated in accordance with a formula set out in Regulation 2.13 of the Fair Work Regulations 2009.

- From 1 July 2009 to 30 June 2010 the threshold was $108,300
- From 1 July 2010 to 30 June 2011 the threshold was $113,800
- From 1 July 2011 to 30 June 2012 the threshold was $118,100
- From 1 July 2012 to 30 June 2013 the threshold was $123,300
- From 1 July 2013 to 30 June 2014 the threshold is $129,300

If at any stage the employee's earnings fall below the high income threshold, the guarantee of annual earnings will cease to operate. The employee's terms and conditions of employment will then derived from the relevant industrial instrument.

An employer must not exert undue influence or undue pressure on an employee in relation to a decision by an employee to accept a guarantee. This is also a civil penalty provision.

Inspectors should consult with their Assistant Director when investigating a complaint which addresses guarantees of annual earnings.

Chapter 13 – Termination of employment

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13.1 Introduction

This chapter provides Inspectors with an overview of protections regarding termination of employment and independent contractors, and provides direction on how to proceed with investigations in consideration of these provisions.
This chapter examines:

- unfair dismissal
- unlawful termination
- sham contracting
- prohibited conduct regarding contractors.

Each matter is detailed in a separate section in this chapter.

13.2 Termination of employment

The FW Act sets out specific rules and protections relating to the termination of an employment relationship. These rules relate to the entitlements an employee may be owed at the end of their employment and whether the termination of the employment was unfair or unlawful.

FWBC investigates and enforces entitlements that may be owed to an employee at the end of their employment under the NES, modern awards or Fair Work instruments, including, for example, accrued annual leave, unpaid wages, payment in lieu of notice and redundancy pay (refer Chapter 8 – Wages and entitlements investigations).

13.3 Unfair dismissal

An employee is able to take their own action seeking a remedy under the FW Act in relation to their alleged unfair dismissal from employment by lodging an application with FWC. The employee must lodge their application with FWC within 21 days of the date of termination. In the ordinary course of its work FWBC itself **does not investigate unfair dismissal,** and an Inspector is unable to make an application to FWC or the courts regarding unfair dismissal (except under s405 where previous orders made in respect of unfair dismissal have been contravened).

However, Inspectors are well placed to assist dismissed employees by providing impartial, objective and timely information about the remedies available to them through FWC.

13.3.1 Definition of unfair dismissal

Part 3-2 of FW Act (ss 379 – 405) details unfair dismissal as it relates to national system employees and national system employers (s380).

Unfair dismissal refers to a termination of employment where there was a dismissal that the FWC is satisfied was:

- harsh, unjust or unreasonable; and
- inconsistent with the Small Business Fair Dismissal Code; and
- not a case of genuine redundancy.

The FW Act defines "dismissed" (s386) and "genuine redundancy" (s389), and explains what constitutes consistency with the Small Business Fair Dismissal Code (s388). Where appropriate, Inspectors may refer parties to an investigation to a copy of the Small Business Fair Dismissal Code and related information on FWBC's website.

The concept of what is considered to be harsh, unjust and unreasonable is not defined as such in the FW Act. However, the FW Act (s387) specifies that in deciding whether a dismissal was harsh, unjust or unreasonable, FWC must have regard to a number of factors, including:

- whether there was a valid reason for the dismissal related to the employee's capacity and conduct
- whether the employee was notified of that reason and given an opportunity to respond
- any unreasonable refusal by the employer to allow the employee to have a support person present to assist during any discussions relating to dismissal
- if the dismissal related to unsatisfactory performance by the employee, whether the employee had been warned about that unsatisfactory performance before the dismissal
- the degree to which the size of the employer's enterprise, and/or the absence of dedicated human resource management specialists or expertise may have had an impact on the dismissal procedures followed
- any other matters FWC considers relevant.

13.3.2 Eligibility for unfair dismissal claims

A national system employee is only protected from unfair dismissal under the FW Act if they have completed at least the minimum employment period with the employer (ss 383-384) and the employment is covered by one or more of the following provisions:

- a modern award
- an enterprise agreement
- the person's annual rate of earnings is less than the high income threshold (initially $129300 from 1 July 2013, indexed each July).

The minimum employment period is six months, or twelve months if the employer is a small business employer (i.e. an employer who employed less than 15 employees at the time of the termination).[1]

[1] FW Act; s 23

13.3.3 Persons excluded from making an unfair dismissal claim

In order to make an unfair dismissal claim the person must have been a national system employee who has been dismissed, and who is eligible to make a claim.

However, the FW Act (s386(2)) provides that a person has not been dismissed (under the FW Act's definition) if the person was:

- engaged under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period or season or completion of the task
- an employee to whom a training arrangement applied and whose employment was for a specified period of time or limited to the duration of the training agreement, and the employment terminated at the end of the training agreement
- demoted in their employment, but the demotion did not involve a significant reduction in remuneration or duties and the person is still employed with the employer who effected the demotion.

In addition, a person would be excluded from seeking an unfair dismissal remedy under the FW Act if the person was:

- dismissed in the case of a genuine redundancy
- dismissed by a small business employer who has complied with the Small Business Fair Dismissal Code in relation to the dismissal.

13.3.4 Applications for remedy for an alleged unfair dismissal

As noted above, FWBC does not investigate complaints of alleged unfair dismissal. However, the FW Act provides that a person may apply to FWC for relief in respect of an unfair dismissal.

The application for an unfair dismissal remedy must be lodged with FWC **within 21 days** after the day the dismissal took effect**.** Applications may be lodged after this time only if FWC is satisfied there are exceptional circumstances. **When providing information about unfair dismissal remedies, Inspectors should advise the person of the 21 day time limit.**

An application fee is payable upon lodgement of the application. The fee may be waived for grounds of serious hardship by FWC on application.

The FW Act also has provisions discouraging persons from making applications that are vexatious or lacking in substance (s611). Orders can also be made against lawyers or paid agents who have encouraged actions where there is no reasonable prospect of success.

13.3.5 FWC procedures regarding unfair dismissal

When the unfair dismissal application is received, before assessing the merits of the case, FWC will initially consider the following matters:

- the application was made on time
- the person was protected from unfair dismissal (and so is eligible to seek a remedy under the FW Act)
- the dismissal was consistent with the Small Business Fair Dismissal Code
- the dismissal was a case of genuine redundancy.

If there are any contested facts, FWC will conduct a conference (s592) or (if appropriate) a hearing (s593). Representation by lawyers and paid agents is by permission of FWC, and then subject to certain terms (s596).

13.3.6 Remedies

If FWC finds that the dismissal was unfair, FWC can make orders for reinstatement (including to maintain continuity of employment or service and to restore lost pay) or for compensation (up to a maximum amount of 26 weeks pay). However, s381(1)(c) of the FW Act establishes that there will be an emphasis on reinstatement as a remedy for unfair dismissal and that FWC can only award compensation if it is satisfied it is appropriate.

13.4 Unlawful termination

13.4.1 Additional provisions, unlawful termination etc

Under the WR Act, there were specific provisions relating to "unlawful termination," which included termination of an employee's employment where:

- the employee was dismissed on certain prohibited grounds (WR Act; s659)
- the employer did not notify Centrelink (previously the CES) of the decision to terminate the employment of 15 or more employees (WR Act; s660); or
- the correct notice or payment in lieu of notice (PILN) was not given by the employer (WR Act; s661).

Under the FW Act the "unlawful termination" provisions are included in several sections, as detailed below.

13.4.2 Definition of unlawful termination

Part 6-4 of FW Act (ss 771 - 789) deals with unlawful termination of employment, as it relates to employees and employers (within their ordinary meanings). Therefore, these general protections have broader coverage than unfair dismissal, which only applies to national system employees and national system employers. This ensures that all employees in Australia who do not have a remedy for unlawful termination under the General Protections provisions, have a remedy under Part 6-4 of the FW Act.

The FW Act (s772) details that an employer must not terminate an employee's employment if one or more of the following reasons is a contributing factor in the termination:

- temporary absence from work because of illness or injury
- being temporarily absent from work to carry out a voluntary emergency management activity, where the absence is reasonable in all the circumstances
- trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours
- non-membership of a trade union
- seeking office as, or acting as, a representative of employees
- filing a complaint, or participation in proceedings, against an employer, involving alleged contraventions of laws or regulations
- being absent from work on maternity leave or other parental leave
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Under the FW Act, there are provisions[2] requiring an employer to notify Centrelink of certain terminations, namely where the terminations relate to 15 or more employees.[3] The requirement for an employer to provide notice of termination or pay in lieu to national system employees[4] is also extended to have application to all employees[5].

In addition, certain provisions relating to the termination of employees are encompassed under Part 3-1 of the FW Act (refer Chapter 7 – Workplace rights and adverse action). The FW Act establishes that a person must not make an unlawful termination application where they are entitled to make a general protections application in relation to conduct.[6]

13.4.3 Eligibility for unlawful termination applications

Any employee may make an application for relief if they have been dismissed on certain grounds.[7] These applications are to be made to FWC by either the employee or their industrial association.[8]

However, certain employees are excluded[9] from lodging claims in relation to contraventions of the provisions regarding notification to Centrelink.

[2] FW Act; s785
[3] Similar provisions in relation to notifying Centrelink of certain dismissals concerning national system employees are also found in s530 of the FW Act.
[4] FW Act; s117
[5] FW Act; s759
[6] FW Act; s723
[7] FW Act; s772
[8] FW Act; s773
[9] FW Act; s789

Entitlements for notice or payment in lieu thereof are provided for by the National Employment Standards (NES) and could be pursued in the same means as other employment entitlements.

13.4.4 Processes for seeking remedies for unlawful termination

Several options are available under the FW Act to seek remedy for an alleged unlawful termination.

13.4.4.1 Making an application for remedy to FWC

A person may apply to FWC for relief in respect of a termination that is allegedly unlawful.

The application must be lodged with FWC **within 21 days** after the day the termination took effect**.** Applications may be lodged after this time only if FWC is satisfied there are exceptional circumstances. **When providing information about unlawful termination remedies, Inspectors should advise the person of the 21 day time limit.**

An application fee is payable upon lodgement of the application. The fee may be waived for grounds of serious hardship by FWC on application.

As with unfair dismissal, there is provision that orders may be made where unlawful termination applications are vexatious or lacking in substance, or where lawyers or paid agents have encouraged actions where there is no reasonable prospect of success.

13.4.4.2 FWC procedures regarding unlawful termination

If an application for an unlawful termination is made, FWC will conduct a conference in private.[10] If FWC is satisfied that all reasonable attempts to resolve the matter are unsuccessful, a certificate will be issued. A court application for orders can be pursued by the applicant.

13.4.5 General protection from adverse actions

In addition to the provisions regarding unlawful termination (detailed in 20.4.1 above), the FW Act provides certain workplace protections to specified employees, including protection from adverse action[11] taken in relation to certain prohibited reasons (refer Chapter 14 – Workplace rights and adverse action and Chapter 15 - Discrimination). There is some potential overlap between the unfair dismissal protections available to all employees and the protections against adverse actions available to national system employees, and (as noted above) the FW Act states that a person must not make an unlawful termination application where they are entitled to make a general protections application in relation to conduct.[12]

[10] FW Act; s776
[11] FW Act; s342
[12] FW Act; s723

The remedy for an adverse action under the FW Act is either to FWC (to deal with the dispute) or to the courts (for an order). As for unfair dismissal, any application to FWC regarding an adverse action involving dismissal must be made within 60 days of that dismissal and accompanied by an application fee.

It remains open that a complaint might also be made to FWBC in regard to these matters (see 20.4.5 below).

13.4.6 Complaints to FWBC alleging unlawful termination or adverse action

Persons whose employment was terminated on grounds that may be unlawful termination or which constitutes adverse action under the FW Act are able to make a complaint to FWBC in respect of their termination.

Under the FW Act, an Inspector may apply to the Federal Court or the Federal Magistrates Court for an order in the case where employment was terminated on certain grounds[13] or where employment was terminated without notification being provided to Centrelink.[14] In relation to the general protections, an Inspector can also apply to the above courts for an order under many sections of the FW Act (see the table in s539 of the FW Act).

Accordingly, it may be appropriate for FWBC to investigate such complaints, provided that the complainant is not seeking remedy through FWC, court or other tribunal of competent jurisdiction.

13.4.6.1 Considerations for the Inspector

Where the complaint is alleged unlawful termination or adverse action involving dismissal, the complainant should be referred to FWC in the first instance. Where the alleged termination occurred over 60 days ago, the complainant should be advised of the timeframe and encouraged to seek urgent independent advice as to whether they should make an application to FWC outside of this time frame. Inspectors cannot provide advice as to whether an “out of time” application to FWC will be accepted.

In cases of alleged discrimination, remedy through one of several other agencies also may be available (refer Chapter 11 – Discrimination).

However, if the complaint is within FWBC’s jurisdiction and the complainant is not pursuing remedy through the FWC, courts or other tribunal of competent jurisdiction, then FWBC may investigate the complaint.

[13] FW Act; s772
[14] FW Act; s785

Chapter 14 - Non Litigation Outcomes

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14.1 Introduction

When an Inspector has determined that a contravention of Commonwealth workplace laws has occurred and that contravention:

- has not or cannot be rectified through voluntary compliance (i.e. complex matters)
- is sufficiently serious to warrant enforcement action, regardless of any voluntary compliance

The Inspector, in consultation with their Assistant Director, director and executive director, should consider if enforcement action is appropriate in the circumstances and if so which type of action should be taken.

The actions that may be recommended by an Inspector are:

- the issuing of a contravention letter[1] (see Chapter 3 – Investigations A for further information on contravention letters)
- the issuing of a penalty infringement notice (PIN)
- issuing a letter of caution
- a referral to small claims procedures
- entering into an enforceable undertaking
- the issuing of a compliance notice
- seeking an injunction
- FWBC litigation.

A record should be included on the file each time a relevant decision is made in the investigation, particularly in relation to enforcement decisions.

14.2 Infringement notices (INs)

An IN is a monetary penalty or fine imposed under the FW Regulations[2] as an alternative to litigation action in respect of particular contraventions. The maximum penalty payable under the IN is 10% of the maximum penalty a court could impose for the same contravention. At 1 July 2009, the maximum penalty available to a court for a contravention of the relevant provisions is 30 penalty units for an individual or 150 penalty units for a body corporate. Therefore, the maximum penalty able to be imposed via the IN process is 3 penalty units for an individual ($510) or 15 penalty units for a body corporate ($2550).

The IN provisions allow an Inspector to impose a penalty on a party for failing to meet obligations relating to record keeping and pay slips under the FW Act.[3] In accordance with the requirements of the FW Act, the form and content of employee records and pay slips are

[1] Authorised by FW Regulations; Chapter 5, Division 3; Reg 5.05
[2] FW Regulations; Chapter 4, Division 4, Reg 4.04
[3] FW Act, ss 535(1); 535(2); 536(1) and 536(2)

prescribed by Chapter 3, Division 3 of the FW Regulations. The possibility of being issued with a fine also encourages employers to more readily comply with their obligations, thereby assisting an Inspector to more efficiently and effectively undertake their compliance function.

An IN may be issued by an Inspector in respect of certain contraventions including:

- failing to make or keep time and wage type records[4]
- failing to comply with the contents requirements for records[5]
- failing to issue pay slips within one working day of paying an amount[6]
- failing to comply with the contents requirements for pay slips.[7]

In some instances, contraventions of the requirements to keep and provide employee records and pay slips may render the employer liable to a civil penalty under the FW Act, as an alternative to being issued the IN.[8]

Within FWBC, an infringement notice (IN) in the past has been referred to as a penalty infringement notice (PIN). The FW Act and FW Regulations use the phrase “infringement notice”.

14.2.1 Procedures prior to issuing an IN

Where an Inspector suspects that there has been a contravention of a provision for which an IN may be issued, the Inspector should take the steps detailed in sections 3 to 6 below prior to issuing an IN.

14.2.2 Collect evidence of the contravention

Inspectors must gather documentary and/or testimonial evidence before issuing an IN in order to demonstrate they have reasonable grounds to believe the contravention has occurred.

Such evidence may include:

- copies of time and wage records showing deficiencies
- pay slips showing deficiencies
- inability of the employer to produce records when required to do so (this is particularly relevant where it is alleged that no records exist). Gathering such

[4] FW Regulations; Chapter 4; Division 4; Regs 4.03 and 4.04; and FW Act; s535(1)
[5] FW Regulations; Chapter 4; Division 4; Regs 4.03 and 4.04; and FW Act; s535(2)
[6] FW Regulations; Chapter 4; Division 4; Regs 4.03 and 4.04; and FW Act; s536(1)
[7] FW Regulations; Chapter 4; Division 4; Regs 4.03 and 4.04; and FW Act; s536(2)
[8] FW Act; ss 535 and 536

evidence may involve the issuing of a Notice to Produce that clearly identifies what records are required

- admission from the employer or his/her representative that the records are not kept in the prescribed form. Gathering such evidence may include the offer of a Record of Interview to the employer in writing clearly stating that specific questions will be asked about records and pay slips etc.

The Inspector should be mindful that if an IN is not paid it may be withdrawn, and the contravention may instead be the subject of litigation action. As such, it is important that the evidence collected is capable of proving each element of the contravention.

14.2.3 Determine if an IN is appropriate

The contraventions for which an IN may be issued are strict liability provisions. Simply put, this means regardless of what was intended by the employer, if the physical elements of the contravention have occurred, liability exists and an IN can be issued. Nonetheless Inspectors have discretion in whether to issue an IN.

There may be instances when the Inspector determines that a lesser action such as a warning in the form of a contravention letter, or a greater action such as litigation is more appropriate than an IN. In any case, Inspectors must not issue an IN where FWBC has accepted an enforceable undertaking in relation to the contravention.[9]

The Inspector should consider whether an IN is appropriate having regard to the following:

14.2.3.1 Where a contravention letter may be suitable

An Inspector has the option of issuing either an IN or a contravention letter for an alleged contravention of record keeping and pay slip provisions.

The Inspector should take into account the employer's history of compliance with all Commonwealth workplace laws when determining what action to take. If it is the first time the employer has contravened an infringement notice provision, consideration should be given as to whether a contravention letter should be issued instead of an IN. The contravention letter (or letter of caution) should include a warning that any future contravention may lead to the issuing of an IN or FWBC litigating. In these circumstances it will be appropriate to schedule a follow-up inspection within six months to check for ongoing compliance.

In addition, an Inspector may refer a person contravening a record keeping provision for the first time to the information available on FWBC's (and FWO's) website. The Inspector should make a note in AIMS of any educative material provided to allow an Inspector in any future matter involving the same person to consider whether any wilful contraventions have occurred.

[9] FW Regulations; Chapter 4, Division 4, Reg 4.04(4).

A warning in the form of a contravention letter would not be appropriate where the employer's actions are considered wilful or repetitive, or where the employer's failure regarding records or pay slips has jeopardised the Inspector' ability to determine the entitlements owed to employees, particularly where the employees are considered 'vulnerable'.

14.2.3.2 Where litigation may be appropriate

In some cases, an Inspector (in consideration of FWBC Guidance Note 1 – Litigation) may form the view that litigation action should be pursued rather than the issuing of an IN or contravention letter. Based on the evidence before the Inspector, if it appears the contravention is a result of particularly serious, wilful, or repetitive behaviour intended to avoid obligations under the regulations, it may be necessary, with the approval of the delegate, to proceed to FWBC litigation. This would apply regardless of whether the person has previously contravened an infringement notice provision.

If it is determined litigation will be pursued for the record keeping and pay slip contraventions, then an IN would not be issued. It is important to consider that Regulation 4.09 prevents FWBC from initiating legal action in relation to an offence for which an IN has been issued **and** the penalty paid.

For example, if an IN was issued to an employer for failing to issue pay slips over a particular pay period, and the employer paid the penalty specified in the notice, then FWBC would not be able later to initiate litigation action against that employer for failing to issue pay slips for that same period. However, if the employer continued not to issue pay slips, then litigation could be initiated (or another IN given) for failure to issue pay slips for any subsequent period.

14.2.3.3 Where the contravention occurred over 12 months ago

It should be noted that an IN must be issued within 12 months of the day on which the alleged contravention occurred[10] - not from the day on which the complaint was received or the contravention detected. For example, an IN for failing to issue a pay slip can only be issued within 12 months of the date on which that pay slip should have been provided to the employee. If this time frame has passed, then either a contravention letter or litigation should be considered.

14.2.4 Determine if multiple INs are appropriate

In the event of multiple contraventions it is possible for an Inspector to issue a separate IN for each penalty provision contravened.

[10] FW Regulations; Chapter 4, Division 4, Reg 4.04(2).

An Inspector:

- can give a person two or more INs when the contraventions relate to two or more different penalty provisions, i.e. one IN for failing to make and keep records (FW Act; s535(1)) and another IN for not issuing pay slips (FW Act; s536(1))
- cannot give a person two or more INs where the contraventions relate to the same penalty provision, e.g. where the employer's records do not include the name of the employee (FW regulation 3.32(a)) or the date on which employment began (FW regulation 3.32(e)). Only one IN can be issued because both contraventions relate to the same penalty provision (FW Act; s535(2))
- cannot issue two or more INs for contravening the same penalty provision in respect of multiple employees, as both contraventions relate to the same penalty provision
- cannot issue two or more INs in relation to a contravention of a particular provision that took place on the same day or relate to the same action or conduct by the person.[11]

An Inspector can issue further INs for subsequent contraventions of the same penalty provision. Before issuing an IN for subsequent contraventions, an Inspector should seek guidance from the Legal Group.

In the case of multiple penalty provision contraventions, a separate IN must be completed for each separate contravention.

14.2.5 Seek approval to issue an IN

Before an Inspector can issue an IN they must obtain prior approval from an Assistant Director or above.

While approval may be granted verbally, particularly in circumstances where the Inspector is in the field, the approval must be recorded in AIMS as soon as possible (including the details of the authorising officer, time and date of approval).

14.2.6 Complete the IN form

Each office has an infringement notice book (IN book), which contains sequentially numbered IN forms.

The books will include triplicate copies of each notice. Copies are to be used as follows when completed:

- white/original copy: to be given to the person whom the Inspector believes has contravened the infringement notice provision

[11] FW Regulations; Chapter 4, Division 4, Reg 4.04(3).

- pink/second copy: to be kept on the case file
- yellow/third copy: to remain in the book as the office copy – for accounting, quality control, reporting, archival and other purposes.

When completing an IN form the Inspector should:

- print legibly and firmly in BLOCK LETTERS using a blue or black ballpoint pen
- clearly identify the name and address of the person the IN is being served on (e.g. the full name of an individual or the full legal, trading name and ACN of a company)
- provide full details of the alleged contravention including the time, date, location and the provision contravened
- provide a description of the evidence supporting the alleged contravention (i.e. conversations with the employer, copies of records obtained, deficiencies evident in the records, etc).

If an error is made while completing the IN form (prior to issue), the IN should be cancelled by writing "cancelled" across the form and all copies must remain in the IN book.

14.2.6.1 Penalty amount

An Inspector, in consultation with their Assistant Director, must exercise judgement and discretion when determining the penalty to be imposed via the IN process.

An Inspector may impose any amount up to one tenth of the maximum penalty that a court could order a person to pay as set out in section 558(2) of the FW Act. The maximum penalty able to be imposed via the IN process is 3 penalty units for an individual or 15 penalty units for a body corporate.

Section 12 of the FW Act defines "penalty unit" as used in the FW Act as having "the meaning given by section 4AA of the *Crimes Act 1914*". From the 28 December 2012 the value of a penalty unit increases from $110 to $170. This increase applies to contraventions of a civil remedy provision of the FW Act or Regulations committed on or after the 28 December 2012.

For contraventions that occurred **before** the 28 December 2012 the maximum penalty able to be imposed via the IN process is $330 (3 penalty units for an individual) or $1,650 (15 penalty units for a body corporate).

For contraventions that occur **on or after** the 28 December 2012 the maximum penalty able to be imposed via the IN process is $510 (3 penalty units for an individual) or $2,550 (15 penalty units for a body corporate).

As a guide it is recommended that an Inspector considers three ranges of penalty units. For example:

- **Low** - 1 penalty unit for an individual ($110/$170) and 5 penalty units for a body corporate ($550/$850)

Examples:

- The contravention has impeded but not prevented the ability of the Inspector to determine underpayments
- The employee was not deprived of significant information in relation to their entitlements but the information provided was incomplete
- The employer has not previously contravened an infringement notice provision.

- **Medium** – 2 penalty units for an individual ($220/$340) and 10 penalty units for a body corporate ($1,100/$1,700).

Examples:

- The contravention has hindered or impacted the ability of the Inspector to determine underpayments or a complainant's ability to recover entitlements which may be payable through the employer's lack of, or incomplete, record keeping
- The employer has not previously contravened an infringement notice provision.

- **High** – 3 penalty units for an individual ($330/$510) and 15 penalty units for a body corporate ($1,650/$2,550); i.e. the full penalty amount.

Examples:

- The behaviour was part of a wilful pattern of behaviour to avoid obligations under the FW regulations or Commonwealth workplace laws
- The contravention has jeopardised the Inspector's or a complainant's ability to recover entitlements which may be payable through the employer's refusal to maintain or keep records
- The employer has previously been issued with a contravention letter, warning that any future contravention may lead to the issuing of an IN or FWBC litigating.

14.2.7 Serve the IN

It is preferable that an IN be given to the employer (if an individual) or an appropriate officer of the company (if a corporation) in person. Alternately an IN may be served by registered post or by a process server. An IN should not be served by fax or email.

The Inspector should ensure that the recipient's name and position is recorded on the IN, and ask the recipient to sign the IN in the space marked "signature acknowledging receipt" in order to confirm service of the IN. If the recipient refuses to sign the IN, the Inspector should

makes notes detailing this on file, including the response given by the recipient when asked to sign the IN.

14.2.8 Payment of an IN

The recipient of an IN has 28 days[12] after the IN is served to pay the penalty specified in the IN, unless FWBC agrees to an extension of time to pay. The payment details appear on the reverse of the IN form and include Easypay or Bpay.

14.2.8.1 Where the person seeks to pay by another method

If the recipient of the IN contacts FWBC to advise he or she is unable to use the payment options, the Inspector should contact FWBC Chief Financial Officer (CFO) to make alternative arrangements for payments – possibly by cheque. Payment by cheque or other means can only be accepted with the express prior approval of the CFO.

14.2.8.2 Where the person seeks an extension of time to pay the IN

The recipient of an IN may apply to the nominated person (usually the relevant director) for an extension of time to pay[13] or for withdrawal[14] of the IN, provided the application is made within 28 days of the issuing of the IN. The extension and withdrawal details also appear on the reverse of the IN form.

Where the recipient of the IN makes such an application to the nominated person, the time to pay (pursuant to FW Regulations 4.06(2) – (4)) will be as follows:

- if the recipient of the IN applied for a further period of time in which to pay the penalty and that application is granted – within the further period allowed
- if the recipient of the IN applies for a further period of time in which to pay the penalty and the application is refused – within 7 days after the notice of the refusal is served on the recipient of the IN
- if the recipient of the IN applied for the notice to be withdrawn and the application is refused – within 28 days after the notice of the refusal is served on the person.

[12] FW Regulations; Chapter 4; Division 4; Reg 4.06
[13] FW Regulations; Chapter 4; Division 4; Reg 4.07
[14] FW Regulations; Chapter 4; Division 4; Reg 4.08

14.2.8.3 When the IN is paid

Once the IN has been paid the recipient's liability for the contravention is discharged and no litigation action may be brought against them in respect of that contravention. However, the payment of the IN is not to be considered an admission of guilt or a conviction, and the Inspector is not precluded from continuing to investigate the original complaint, provided it was not the subject of the IN.

14.2.9 Failure to pay an IN

If the IN is not paid the Inspector should seek guidance from their team leader as to whether the matter should be escalated by recommending litigation action. It is the ordinary practice that litigation would be recommended, unless there are significant mitigating circumstances affecting the IN recipient (such as proven illness, family tragedy or incapacity to pay).

Litigation involves seeking a higher penalty from the court for the original contravention of the relevant provision of the FW Act (i.e. ss 535 and 536). The maximum penalty a court could award for a contravention of this nature is 30 penalty units for an individual or 150 penalty units for a body corporate.[15]

If the team leader is satisfied that all reasonable efforts to secure compliance with the IN have been exhausted and that litigation will not be recommended, the Inspector and team leader should seek the advice of the Assistant Director or director as to whether the IN should stand. If the decision is made to let the IN stand (but payment is not pursued), the matter can be closed with the approval of an Assistant Director or above. There is no requirement to withdraw an unpaid IN, unless litigation is being pursued.

14.2.10 Withdrawing an IN

When litigation is recommended, the IN must be withdrawn to avoid the possibility of the IN being paid while the litigation is being prepared or after it is filed in court. The payment of the IN in these circumstances might discharge the liability for the contravention and prevent FWBC proceeding with the litigation.

The FW Regulations detail several circumstances under which an IN may be withdrawn by the nominated person or an Inspector, under Regulations 4.08(2) and 4.08(4).

14.2.10.1 Withdrawal by the 'nominated person'

If an IN is withdrawn in accordance with Regulation 4.08 (2) the nominated person must issue a notice withdrawing the IN in accordance with Regulation 4.08(2)(b). Arrangements would need to be made to refund any penalty that has been paid in relation to a withdrawn IN in accordance with Regulation 4.10.

[15] FW Act, s539(2), item 29; and s546(2).

A party will generally make the request directly to the nominated person. However, if the request is made through the Inspector, it should be referred to the nominated person within one working day.

The nominated person will generally liaise with the officer who approved the issuing of the IN and obtain facts from the Inspector before making his or her decision to withdraw the notice or to extend the time to pay the penalty.

The nominated person who considers the request to withdraw the IN should not be the same person who approved the issuing of the IN.

If the nominated person has not approved, or refused to approve the withdrawal of the IN within 14 days of receiving the application, the application is taken to have been refused (Regulation 4.08(3)).

The nominated person is:

- the relevant director
- the Executive Director, Dispute Resolution and Compliance; or
- an executive level 2 officer in the Dispute Resolution and Compliance Group.

14.2.10.2 Withdrawal by the Inspector

Regulation 4.08(4) provides that an Inspector may also withdraw an IN issued by them without an application having been made.

This action should not be undertaken unless approval has been gained in writing from the nominated person.

Circumstances such as the incorrect details (e.g. incorrect legal name of the employer) being put in an IN, or legal action being commenced, may be grounds for an Inspector to withdraw an IN.

In such cases the Inspector should follow the procedures for withdrawal set out below.

14.2.10.3 Procedures for withdrawal

If an IN is withdrawn after being issued, whether withdrawn by the nominated person or the Inspector, a notice withdrawing the IN must be served on the recipient of the IN (Regulation 4.08(3)).

The Inspector or nominated person must:

- write to the person notifying them that the IN has been withdrawn – this notice must include:
    - the full name, or surname and initials, and address of the recipient of the IN
    - the date that the IN was issued
    - the reference number
    - the person who approved the withdrawal; and

    - the reasons for the withdrawal
- annotate the IN book (in ball point pen) that it was withdrawn – naming the person who approved the withdrawal and the reasons for the withdrawal
- place a copy of the withdrawal letter to the employer on the case file along with details on why the withdrawal was approved
- arrange for the return or the refund of the penalty (if applicable).

14.2.11 Are there any appeal rights for recipients of an IN?

There is no election to go to court in the FW Act, only an election for the IN to be withdrawn.

As discussed above, the recipient of the IN is given the opportunity to apply to the nominated person to have the notice withdrawn or the time for payment of the prescribed penalty extended. These actions constitute a decision making process by FWBC as a federal government agency.

14.3 Letters of caution

A letter of caution is a formal warning issued to an employer in respect of a contravention where the Inspector has determined that there is sufficient evidence to start FWBC litigation but that it is not in the public interest to do so.

The factors relevant to determining the public interest are dealt with below in Chapter 24 - Litigation and in detail in Guidance Note 1 - Litigation Policy. By way of example a letter of caution may be appropriate in respect of trivial or technical contraventions. A letter of caution would not ordinarily be issued if there are monies owed to the complainant (a small claims referral or FWBC litigation should be considered instead).

14.3.1 Contents of a letter of caution

A letter of caution:

- sets out the background to and the determination of a contravention (in a similar way to a contravention letter)
- sets out the relevant public interest factors and states that FWBC has determined that it is not in the public interest to start litigation against the employer (this is the primary difference between a contravention letter and a letter of caution)
- issues a formal caution to the employer to comply with its obligations in future
- warns the employer that in the event of future non-compliance the issuing of the letter of caution will be relevant to FWBC's determination as to whether or not to litigate, and were that to occur, a copy of the letter of caution may be put before the court to demonstrate a history of non-compliance.

14.3.2 Process for issuing a letter of caution

The Inspector should draft a letter of caution when the Inspector has determined, in consultation with their Assistant Director, that there is sufficient evidence to prove a contravention, but it is not in the public interest to start FWBC litigation.

The draft letter of caution is submitted to the State Director, who should review the reasons supporting the issuing of the letter of caution (as set out in the letter), and if in agreement, sign and send the letter of caution by registered mail.

In drafting the letter of caution, the Inspector should refer to the template FWBC letter of caution. The Inspector may determine it is appropriate to refer the employer to educative material relevant to the contraventions. Refer to the 'Educative Tools and Resources Spreadsheet' for details of the resources available.

14.4 Small claims action

Small claims action refers to a legal proceeding started by the complainant to recover certain unpaid entitlements owed under the FW Act, a Fair Work instrument or a safety net contractual entitlement.[16] A small claims action is not an action taken by FWBC[17]. There is no penalty available under small claims procedures and any judgment awarded will be limited to recovery of the amount owed.[18] As an action taken under the FW Act, it is taken in a "limited costs" jurisdiction (subject to s570 of the FW Act). In suitable cases, small claims action is an effective way of achieving a result for a complainant and completing a matter.

Where a complainant takes their own legal action in a magistrates court or the Fair Work Division of the Federal Circuit Court, they can elect for the small claims procedure to apply to their case. When the small claims procedure is applied:

- the court can award an amount of up to $20,000 (under s548(2) of the FW Act at present)[19]
- the case is dealt with in an informal manner
- the court is not bound by rules of evidence
- the court can act without regard to legal formalities and technicalities
- the court may amend the papers commencing the proceedings if sufficient notice is given to any party adversely affected by the amendment.

[16] An employer might also take small claims action under s543 of the FW Act, as detailed in the Fair Work Bill 2008 Explanatory Memorandum (paragraph 2148). However, an Inspector would not be involved in such an action.
[17] The Workplace Relations Act 1996 did provide for Workplace Inspector initiated small claims action. The FW Act does not explicitly include or exclude the Inspector in this regard. However, current FWBC position is that such actions are not commenced by an Inspector.
[18] Some courts may make an order that includes recovery of the filing fee and/or interest in addition.
[19] The rules of some state or territory magistrates courts may prescribe a lower maximum limit.

When explaining small claims actions to complainants, an Inspector should ensure that the complainant understands:

- no party is entitled to have representation by a lawyer unless the court permits it (and if it is permitted, such legal representation may be subject to conditions of the court to ensure no other party is unfairly disadvantaged)
- parties may be allowed to be represented by an official of an industrial association, but only in specified circumstances as per the FW Regulations.

A referral to small claims action may be appropriate in cases where there is an underpayment that has not been rectified though voluntary compliance; and

- the matter is not sufficiently serious to warrant FWBC litigation (see Guidance Note 1 - Litigation Policy)
- it would otherwise be inconsistent with Guidance Note 1 - Litigation Policy to start FWBC litigation.

14.4.1 Referrals to small claims action

An Inspector may recommend small claims to a complainant in circumstances where:

- an investigation conducted by FWBC has found that there are one or more contraventions of Commonwealth workplace laws, resulting in an underpayment to the complainant, and
- the employer has been asked to rectify the contravention(s) by FWBC (via a contravention letter), but has failed to make payment of outstanding entitlements to the complainant.

Where an Inspector considers (after consultation with their Assistant Director or manager) that a matter is suitable for small claims action, the Inspector should contact the complainant to discuss the option of taking a small claims action. The Inspector should also ensure that the complainant understands that they are taking their own action and that accordingly they may wish to seek their own legal advice.

The Inspector should follow up the initial contact with a written confirmation that the matter would be best dealt with by small claims. The letter must specify to the complainant that they should respond in writing **within fourteen days** and that **failure to respond** will result in FWBC closing the investigation.

If the complainant does not respond or refuses the recommendation, no further action is taken and the investigation is closed.

If the complainant accepts the recommendation the Inspector may provide further assistance to the complainant, as detailed below.

14.4.2 Providing assistance to complainants in small claims actions

It is important that an Inspector understand that in assisting a complainant in a small claims matter, they are not representing them. The Inspector should explain to the complainant that the Inspector's role is to assist the court in arriving at the correct decision.

FWBC has adopted a three-tier process for determining the level of assistance to be provided by the Inspector in the small claims process:

14.4.2.1 Tier 1 - Small claims referral

There are occasions where an Inspector finds that although there are contraventions identified, there is little evidence to enable the Inspector to quantify the amount of underpayment. Such circumstances may arise where the employer has failed to keep employment records or where there are no witnesses to attest to a matter in dispute (such as the overtime hours worked or type of work performed).

Where the Inspector finds that the complainant's allegations of underpayment cannot be conclusively quantified with the evidence available, the complainant should be advised of the ability to pursue any alleged outstanding entitlements through small claims procedures. The complainant must be advised that FWBC is not in a position to quantify the alleged underpayment, and that FWBC's ability to assist further in any small claims action is limited due to the lack of supporting evidence. This action is categorised as a "small claims referral".

In these cases the Inspector should provide the complainant with a basic information pack, which contains general information about the small claims process under the FW Act and in the complainant's state or territory. Once the small claims referral is made and the basic information pack has been provided to the complainant, the Inspector is able to close the investigation file.

In addition, the Inspector may provide a report on the investigation completed, which will identify the conclusions that FWBC was able to reach based on the evidence considered in the investigation. However, the Inspector will not produce any calculations of alleged underpayments. The Inspector will not attend the court unless a specific request is made by the court in that regard.

(This level of assistance may also be appropriate to offer to a persistent complainant, as defined in Chapter 3 – section 3.9.3 - Persistent complainants.)

14.4.2.2 Tier 2 - Small claims procedure with moderate assistance

In some investigations, evidence may be available to support that the complainant is owed certain outstanding entitlements. However, the evidence available may be incomplete, inconsistent, or contradicted by other evidence and therefore the Inspector may not be able to rely on the evidence without reservation. In these investigations it is unlikely that the matter will have reasonable prospects of an order being made that the employer has contravened Commonwealth workplace laws.

In such cases the complainant will be provided with a detailed small claims kit (see 14.4.4 below) containing specific information provided by the Inspector, including a report on the investigation conducted and calculations of the amounts owing to the complainant (based on the evidence available to the Inspector).

The Inspector must identify the uncertainties, including any gaps or inconsistencies in the evidence collected, or any contrary evidence supplied by any parties in the report on the investigation conducted. In general, the Inspector will not attend the mention or hearing or act as a friend of the court, unless a specific request is made by the court in such regard.

14.4.2.3 Tier 3 - Small claims procedure with maximum assistance

In some investigations, the Inspector may collect evidence that shows the complainant was underpaid and determine that there is no compelling reason to doubt the evidence collected. However the matter may still not be suitable for FWBC litigation under Guidance Note 1 - Litigation Policy.

In these cases the complainant will be provided with a detailed small claims kit including a report on the investigation conducted and calculations of the amount owing to the complainant (as in Tier 2 above). In addition the Inspector will attend the court and act as a friend of the court (where permitted to do so by the laws and procedures applying to the court in question).

14.4.2.4 Consideration where the complainant is a vulnerable person

Where the complainant has been identified as a vulnerable person (as defined in Guidance Note 1 - Litigation Policy), the Inspector (in conjunction with their Assistant Director or manager) should carefully consider the appropriate assistance to be provided to the complainant. It may be suitable to provide a vulnerable complainant with maximum assistance (as per Tier 3 above) if the complainant would be unable to proceed with the small claims procedure independently. In these circumstances the Inspector should also consider whether FWBC litigation would better serve public interest considerations.

The Inspector should ensure that the appropriate level of assistance is provided so that the vulnerable claimant is able to pursue their small claims. However, any evidentiary weaknesses (as in Tier 2) must still be identified in the Inspector's report.

14.4.3 Where a complainant chooses to pursue small claims against FWBC advice

On occasion, a complainant may indicate that they wish to pursue their own small claims action through the courts regarding recovery of underpayments, even though the Inspector has not proposed that the complainant take such action.

The complainant is free to pursue their own small claims action at any time, but there are circumstances where FWBC is unable to assist the complainant.

Such circumstances where FWBC could not assist a complainant would include:

- where the investigation has been completed and the complaint was not sustained
- where the investigation of FWBC is still ongoing
- where the statute of limitations under the FW Act has expired.

Where appropriate, the Inspector should advise the complainant that the FW Act has small claims procedures, but that FWBC is unable to assist the complainant in pursuing the matter further. This does not limit the complainant's rights to pursue a matter themselves either under the FW Act or at common law.

Where an investigation has been conducted and the complaint has been recorded as "not sustained", the complainant should be advised that the view of FWBC is that the complaint was not sustained based on the available evidence. In the event that the complainant advises they will pursue a small claims action irrespective of FWBC's findings, the Inspector must advise the complainant that FWBC is unable to assist them in this regard.

Where the complaint is ongoing, the complainant should be advised that FWBC has not completed the investigation and so cannot provide advice of the outcome at this time. The complainant should also be advised that if they seek to pursue their own action, FWBC's investigation may be suspended until such time as the court of competent jurisdiction has made its findings. In these circumstances the Inspector should seek the advice of their Assistant Director as to whether the investigation should continue.

Where the limitation period has expired, the complainant should be advised of the provisions of s544 of the FW Act.[20]

14.4.4 Small claims information pack

A small claims information pack is a brief of materials compiled by the Inspector to assist the court in arriving at a decision. A small claims information pack may include:

- a report summarising the Inspector's findings
- calculations (note: FWBC can only provide calculations on the basis of minimum entitlements prescribed by the FW Act, a Fair Work instrument, or a safety net contractual entitlement, and not on any over award or common law payments the complainant may be seeking)
- extracts of the relevant legislative provisions
- extracts of the relevant Fair Work instrument
- company searches

[20] In the case of underpayments under the Workplace Relations Act 1996 (i.e. prior to 1 July 2009), the relevant provisions of that Act are ss 720 and 721.

- relevant correspondence (i.e. contravention letter and any reply)
- relevant documentary evidence gathered during the course of the investigation (i.e. time and wage records, pay slips, contracts, bank statements, records of interview, witness statements). This should only occur in accordance with Guidance Note 2 - Document Access Policy
- copies of the completed court documents
- a witness statement from the complainant in relation to their complaint (see Chapter 3).

A copy of the small claims kit should be provided to the complainant on or before the court date. Copies should also be available for the employer and the court on the first court date.

14.4.5 Appearing as a friend of the court

In cases where maximum assistance is provided (see Tier 3 above), an Inspector will appear as a friend of the court (or *amicus curiae*), where the court permits. When addressing the magistrate the Inspector should make it clear that they seek to appear as a friend of the court, not as a representative of either party, a legal practitioner, nor on behalf of FWBC as such.

In their capacity as a friend of the court an Inspector's duty is to assist the court in arriving at the correct decision. In a practical sense this may involve:

- answering the court's questions about the investigation, the Inspector's findings or calculations
- if requested, summarising the matter for the court
- clarifying any questions from the court or the employer about the relevant Fair Work instrument or the FW Act
- guiding both parties (complainant and employer) through the process.

A friend of the court does not represent either party. An Inspector must remain impartial in assisting complainants and may equally be required to assist the employer in understanding their obligations. A friend of the court is not a party to the proceedings and so cannot file pleadings, demand service of papers, lead additional evidence, examine witnesses or lodge an appeal without making special applications.

14.4.6 Small claims procedures

Small claims actions can be heard by state magistrates courts (local courts) or by the Fair Work Division of the Federal Magistrates Court. Court rules, procedures, forms and filing fees will vary from state to state. The Inspector should consult their Assistant Director for guidance about the applicable court procedures in their jurisdiction.

14.5 Enforceable undertakings

An enforceable undertaking is an option available to FWBC in cases where the Fair Work Ombudsman reasonably believes that a person has contravened a civil remedy provision. An Inspector is not able to enter into an enforceable undertaking. The Inspector only may recommend that an approved delegate of FWBC does so, in accordance with the practice below (also see Guidance Note 3 – Non Litigation Outcomes).

An enforceable undertaking is a written deed executed between the employer and FWBC which contains:

- an admission of contraventions
- an agreement by the employer to perform specific actions to remedy the contraventions (e.g. payment plan to rectify underpayments, making an apology, printing a public notice)
- a commitment to certain future compliance measures (e.g. regular internal audits, training for managers and staff, implementing compliance measures, future reporting to FWBC).

An enforceable undertaking is an alternative to FWBC taking litigation action (see Chapter 15 - Litigation). The purpose of an enforceable undertaking is to focus the employer on rectifying the contravention and on preventing similar contraventions in the future. The acceptance of a suitable enforceable undertaking can save the Inspector and FWBC the time and resources required to litigate a matter.

Acceptance of an enforceable undertaking should be considered as an alternative to FWBC litigation action where:

- the contravention is of a character that would ordinarily be considered suitable for litigation
- the contravention is admitted and the employer is willing to cooperate with FWBC
- it is in the public interest to accept the enforceable undertaking.

14.5.1 Public interest

In cases where the employer acknowledges the contravention and is cooperative with FWBC, the Inspector should consider if accepting an enforceable undertaking is in the public interest.

A relevant consideration in determining the public interest will be whether or not the objectives of litigation (namely rectification of the contravention, general and specific deterrence) can be achieved through the enforceable undertaking without the expense and delay associated with litigation. Factors relevant to determining public interest are dealt with in Chapter 15 – Litigation and in detail in Guidance Note 1 - Litigation Policy.

14.5.2 Process for entering into an enforceable undertaking

An Inspector does not enter into an enforceable undertaking. However, they should include in the Potential Litigation Summary (contained in the Brief of Evidence Template - see Chapter 15 - Litigation) a brief assessment of whether an enforceable undertaking would be suitable and in the public interest, taking into account factors such as the employer's level of cooperation, attitude, compliance history and the seriousness of the contravention.

Taking into account the Inspector's recommendation, the relevant director should approve either:

- litigation action; or
- enforceable undertaking.

Once the director and Inspector have ensured on a 'reasonable basis' that a contravention of the applicable instrument has occurred and that an enforceable undertaking is the appropriate option, a recommendation (via the Potential Litigation Summary) should be sent to the Legal Group. Prior to this recommendation being sent to the Legal Group, the director and Inspector must ensure:

- a compliance notice has not been issued in respect of the contravention (as an undertaking cannot be accepted in these circumstances)
- FWBC does not intend to seek an order of the courts for contravention of a civil remedy provision in relation to the matter (as such action is not available once an enforceable undertaking has been entered into).

If the Legal Group find all the criteria are satisfied, it is then up to the Enforceable Undertakings Committee to decide on the recommendation that an enforceable undertaking be negotiated.

All enforceable undertakings must be accepted and signed by the Operations Executive Director.

14.5.2.1 Who negotiates with an employer in respect of an enforceable undertaking?

As discussed previously, an Inspector is not able to enter into an enforceable undertaking. The Inspector only may recommend that an approved delegate of FWBC does so. Specifically, there are no hard and fast rules as to who negotiates in respect of an enforceable undertaking. However, where an employer is legally represented, it would nearly always be appropriate for the Legal Group to engage in the negotiations rather than Operations.

14.5.3 Failure to comply with an enforceable undertaking

In the event that the employer fails to comply with the enforceable undertaking, the Inspector should refer the matter for FWBC litigation (refer to Chapter 15 - Litigation).

While an undertaking is in place and the parties are complying, FWBC's enforcement and litigation options are limited. However, if a breach of the undertaking occurs, application can be made to the court for certain orders regarding the enforcement of the undertaking. If the court is satisfied that a person has contravened a term of the undertaking, the court may make one or more orders including:

- an order that the person complies with the term of the undertaking
- an order that compensation is awarded for loss that a person has suffered because of the contravention
- any other order that the court considers appropriate.

14.5.4 Whether civil remedies can be sought

An Inspector cannot commence proceedings for contravention of a civil remedy provision unless the undertaking has been withdrawn. However, it is noted that the rights of a person (other than an Inspector) to apply for an order in relation to the contravention remain.

In addition, FWBC cannot issue a compliance notice in relation to the contravention addressed by the undertaking, while the undertaking is on foot.

The FW Act allows that "the person" may withdraw or vary the undertaking at any time, but only with FWBC Director's consent (s715(3)). This provision allows the employer a mechanism by which agreed variation or cessation of the enforceable undertaking can be implemented. However, the FW Act does not appear to provide a mechanism to allow an Inspector or FWBC to readily withdraw from an enforceable undertaking. It is also noted that failure to comply with an enforceable undertaking is not itself a civil remedy provision. Accordingly, the remedy available to FWBC in the case where an enforceable undertaking is not complied with is the application to the court for orders as detailed in 23.5.3 above.

14.6 Compliance notices

A compliance notice provides Inspector with another option to address non-compliance without pursuing court proceedings from 1 July 2009.

14.6.1 Compliance notices and contravention letters

As detailed previously, Inspectors are able to use a contravention letter to detail an employer's non-compliance and the remedial action required (refer Chapter 3 – Investigations).

The issuing of a compliance notice (which may follow a contravention letter) provides another means of notification of the non-compliance. Inspectors should have regard to Guidance Note 3 – Non Litigation Outcomes when considering issuing a compliance notice. A compliance notice is a more formal notification, as failure to comply with a compliance notice is itself a contravention of s716(5) of the FW Act and a civil remedy provision. Further, recipients of a compliance notice can seek a review through the courts.

However, a compliance notice cannot be used in all circumstances, as detailed in 14.6.2 below. Where a compliance notice cannot be used to detail the contraventions, the Inspector will need to rely on the contravention letter as the primary means of detailing the contraventions to the employer.

14.6.2 Appropriate use of a compliance notice

A compliance notice can be used by an Inspector in circumstances where they reasonably believe that there has been a contravention of one or more of the "entitlement provisions", as listed below:

- a provision of the National Employment Standards
- a term of a modern award
- a term of an enterprise agreement
- a term of a workplace determination
- a term of a national minimum wage order
- a term of an equal remuneration order.

The T&C Act also provides that compliance notices can be issued in relation to contraventions of a term of a transitional instrument, transitional minimum wage instrument, or continuing Schedule 6 instrument.[21]

A compliance notice cannot be issued in relation to a contravention where the person has entered into an enforceable undertaking and that undertaking has not been withdrawn.

To avoid any doubt, it should be noted that Inspectors are not able to issue a compliance notice in relation to contraventions of the WR Act (or of any instruments under the WR Act) that occurred prior to 1 July 2009.[22]

If there is uncertainty as to whether a compliance notice can be issued in relation to a contravention, the Inspector should seek the advice of their Assistant Director.

[21] T&C Act, Schedule 18, Part 3, item 14(a).
[22] T&C Act, Schedule 18, Part 3, item 14, as detailed in the Explanatory Memorandum to the T&C Act, paragraph 672.

14.6.3 Contents of a compliance notice

A compliance notice must contain the information as specified in s716(3) of the FW Act, including the explanation that failure to comply with the notice may contravene a civil remedy provision and detailing the grounds under which the recipient may seek a review through the courts.

The compliance notice must include the following details:

- the specific action required to remedy the direct effects of the contravention; and/or
- the evidence required to be supplied by the person to show compliance with the notice; and
- the timeframe within which the person is required to comply (noting that the time allotted must be “reasonable”).

As a starting point, detailing the direct effects requires the Inspector to specify the particular employees who they reasonably believe have outstanding entitlements and the monetary amount of such entitlements.

The FW Act details that a person must comply with a compliance notice unless they have a reasonable excuse, and that failure to comply is a civil remedy provision.

14.6.4 Process for issuing a compliance notice

Where an Inspector has identified a contravention of the FW Act and an employer has not complied with a contravention letter, the Inspector must determine the appropriate enforcement mechanism for the contravention, which may be the issuing of a compliance notice. If further action is deemed to be required, this may involve attending a case conference to determine the appropriate mechanism. At case conference an Inspector will provide details of the contravention based on the evidence available.

If the contravention is related to an entitlement provision and the contravention can be rectified by taking a specific action, then the Inspector may recommend that a compliance notice be issued. In wages and conditions investigations this means:

- there is sufficient evidence to calculate the quantum of the underpayments
- accurate calculations of the underpayments have been performed.

Compliance notices must only be issued where the Inspector is satisfied that there is sufficient evidence to prove a contravention. This would follow a process of investigative evaluation which involves the Inspector liaising with their Assistant Director to decide on the most appropriate course of action, and consideration of all the evidence obtained in order to determine a contravention.

As a matter of best practice the Inspector should serve a compliance notice by hand. That is, by personally delivering it to the director of a company or by utilising a process server. Alternatively, a compliance notice can be served by fax; in this case the Inspector should retain a copy of the fax transmission report and contact parties shortly after to confirm receipt. An Inspector can also serve a compliance notice by sending it by registered post with a receipt attached to confirm service.

The Inspector should consider attaching a cover letter to the compliance notice – providing further guidance about the determinations and the employer's options to resolve the matter.

An employer is provided 14 days to take the steps required to rectify the contravention identified in the compliance notice. As noted previously, failure to comply with a compliance notice is a civil remedy provision. As such, if an employer fails to take the steps identified in the compliance notice, FWBC is able to seek an order for the contravention of the compliance notice. If this does occur, the Inspector should case conference the matter and may be required to prepare a brief of evidence.

If an employer chooses to comply with the compliance notice, the contravention is taken to be nullified and FWBC will not take further enforcement action (e.g. litigation). Therefore, it is necessary to consider the seriousness of the contravention before recommending the issue of a compliance notice.

14.6.5 Review of a compliance notice

The FW Act provides that a person who has received a compliance notice may seek a review through the courts on grounds that:

- the person has not committed the contravention set out in the notice, and/or
- the notice does not comply with s716(2) or (3) of the FW Act.

The court may stay the operation of the notice, and after reviewing the notice, the court may confirm, cancel or vary it.

It is noted that the recipient of the compliance notice may also have review rights under other avenues and legislation. If they enquire about review rights they may have in addition to those specified in the FW Act, they should be advised to seek their own legal advice.

14.6.6 Withdrawal of a compliance notice

There are also certain circumstances where FWBC may wish to withdraw a compliance notice that has been issued by an Inspector, either due to an identified error in the compliance notice or in order to commence litigation action against the recipient. Although the FW Act does not set out an explicit power or procedure for the withdrawal of a

compliance notice, it implies that a compliance notice can be withdrawn as opposed to cancelled or varied by a court.[23]

The policy of FWBC is that where an error is discovered (either by the Inspector or the recipient) in the wording or issuing of a compliance notice, FWBC may withdraw the compliance notice without the need for a formal review by a court. This withdrawal would be appropriate in order to avoid incurring unnecessary costs associated with the court review process.

In addition, where an employer has failed to comply with the notice and the matter is proceeding to litigation, FWBC may withdraw a compliance notice to avoid an employer attempting to comply with the notice subsequent to commencement of litigation. Any proposed withdrawal of a compliance notice in circumstances where a matter is proceeding to litigation should first be discussed with the Legal Group.

In any case, a compliance notice may only be withdrawn with the approval of an appropriate State Director. The recipient of a withdrawn compliance notice must be advised in writing of the reason for the withdrawal and the date on which the compliance notice was withdrawn. If the reason for withdrawal is litigation, the withdrawal letter must make clear that the compliance notice has been withdrawn because the time for complying with the notice has passed and that FWBC is considering litigation action in relation to the matters specified in the compliance notice, as well as the recipient's failure to comply with the notice. A copy of this correspondence must be placed on file and the Inspector must make notes detailing the reasons for withdrawal of the compliance notice and the officer who approved the withdrawal.

[23] FW Act; s716(4A)(b)(i) makes reference to "where a notice has not been withdrawn" implying that there are circumstances where a compliance notice may be withdrawn.

Chapter 15 Litigation

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15.1 Introduction

Litigation, initiated for the purpose of enforcing Commonwealth workplace relations laws, is a legislated function of the Fair Work Ombudsman.

Litigation taken by FWBC seeks the imposition of a civil penalty in addition to other orders which may include, for example, the recovery of any underpayments. The current maximum civil penalty that may be imposed for a contravention of the FW Act is 300 penalty units ($51000) in respect of a body corporate and 60 penalty units ($10200) for an individual. FWBC litigation is the most significant enforcement tool available to Inspectors. For the most part, litigation undertaken by FWBC seeks orders as available under Part 4-1 of the FW Act which deals with civil remedies. The core provision which sets out the remedies available is dealt with in s539(2). Inspectors also should have regard to Guidance Note 1 – Litigation Policy.

FWBC litigation should be considered as an enforcement option primarily in cases where voluntary compliance has failed or is not possible (such as complex matters). However, in some instances it may be appropriate to take litigation action for serious contraventions which have already been rectified. FWBC retains the discretion to initiate litigation regardless of any voluntary compliance that may have occurred.

15.2 Forms of FWBC Civil Penalty proceedings

15.2.1 Orders under ss 545-547

Under the provisions of the FW Act, in the case of contraventions of civil penalty provisions, the courts may make certain orders (ss 545 – 547). Penalties can be sought from the Federal Court, the Federal Circuit Court, or an eligible state or territory court.

It also should be noted that FWBC litigation can only be taken in respect of civil penalty provisions under the FW Act and FW Regulations. Where an Inspector believes that a criminal offence has occurred, enforcement action can only be initiated by the CDPP (refer to 24.10 below).

15.2.1.1

General provisions

It is open to the Federal Court and the Federal Circuit Court to make any order it considers appropriate, including an injunction or an order for compensation or reinstatement.

Where a complainant is seeking reinstatement or injunction as the primary cause for the complaint, it is important that Inspectors turn their minds to the full range of remedies available, including compensation.

The FW Act, in relation to contraventions of civil remedy provisions, allows that the Federal Court or Federal Magistrates Court may make “an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention” (s545(2)(a)). However, it is unlikely that injunctions will be sought on a regular basis. Where an Inspector believes that an injunction may be appropriate, they should discuss the matter with their Assistant

Director, and formally detail the reasons that an injunction is appropriate as part of a recommendation to litigate.

Provisions relating to industrial action

In addition to the general provisions, the FW Act also allows that an Inspector (and other parties) can seek an injunction in relation to various matters relating to **industrial action.**

15.2.1.2 In particular:

- under s417(3), an Inspector can apply to the Federal Court or Federal Circuit Court for an injunction or other order in relation to industrial action taken in contravention of s417(1)
- under ss 421(1) and (3), an Inspector can apply to the Federal Court or Federal Magistrates Court for an injunction or other order in relation to the contravention of orders made under ss 422, 419 or 420.

Injunctions and reinstatement are not available in the following circumstances:

- as remedies if the matter is brought before an eligible state or territory court, and the compensation is limited to ordering an employer to pay an employee such amount as is due under the FW Act or a Fair Work instrument.
- For contraventions of a civil remedy provision regarding transitional instruments and entitlements preserved under the T&C Act.[1] This effectively preserves the limitations on injunctions that existed under the WR Act for instruments initially made under the WR Act. Accordingly, the Inspector must consider the order being sought, and litigation matters must be lodged with the appropriate court.

15.3 Powers under the FWBI Act.

FWBC Director has powers under the FWBI Act to intervene in certain court proceedings and to make submissions in relation to proceedings before FWC.

15.3.1 Court Interventions

Section 71 of the FWBI Act allows the Director to intervene in the public interest in civil court proceedings. The proceedings must relate to a matter that arises under the *Independent Contractors Act 2006*, the FW Act or the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (TPCA Act) which involves a building industry participant or building work.

The Act does not prescribe the process for notification of intention to intervene. However, the Director generally writes to the Registrar of the relevant court to notify of the intention to exercise this power under section 71. This notification to the court will be completed by FWBC's solicitor on the record.

Where the Director intervenes in court proceedings, the Director becomes a party to the proceedings and has all the rights, duties and responsibilities of such a party.

[1] T&C Act, Schedule 16, item 17

Any decision to intervene in a proceeding must be made by the Director or the Director's delegates.

15.3.2 Submissions to the Fair Work Commission

Section 72 of the FWBI Act allows the Director, by giving written notice to the General Manager of FWC, to make submissions in a matter before FWC that involves a building industry participant or building work. In order for the Director to make such submissions to FWC, the matter must arise under the FW Act or the TPCA Act.

The Director will exercise the right to intervene in any matter before FWC where it is considered that intervention would advance the objectives of the FW Act or the TPCA Act.

The intention of the Director making submissions to FWC is to ensure that the parties and FWC are fully aware of the impact of the federal legislation. The Director may wish to submit that FWC should make a particular order, such as an order that workers on strike return to work.

15.3.3 Notification from the Fair Work Commission

Section 74 of the FWBI Act requires the General Manager of the Fair Work Commission to notify the Director of applications lodged with FWC under the FW Act where that application relates to a matter that involves a building industry participant or building work. This ensures the Director is alerted to proceedings to assess if a submission is appropriate.

Notifications of matters before FWC that involve building participants are received by the Manager, FWBC Legal Administration in Melbourne. An assessment is made before any matters are referred to the Group Chief Counsel for further consideration.

15.3.4 Inspector Role in Interventions and Submissions

The Director may intervene in proceedings in a court or make submissions to FWC regarding a matter which is already under investigation, or is likely to come under investigation by FWBC.

Early indications of hearings are critical to ensure interventions are lodged within the allotted timeframe. This applies to both FWC and court matters. Applications for orders to stop industrial action under section 418 FW Act must be determined within 2 days. The earlier FWBC is made aware of an impending hearing and has become acquainted with the facts of the matter, the better placed the Director will be to give consideration to sections 71 and 72 FWBI Act.

Where a matter under investigation by FWBC becomes the subject of proceedings before a court, the Director may consider whether to intervene. Relevant factors in making this decision will be the likely benefits of intervention, the impact of the intervention on the

investigation, progress in the investigation and whether coercive powers are likely to be used.

Inspectors can assist the intervention process in a number of ways, specifically:

- keeping informed of developments and in particular those which are likely to give rise to FWC or court proceedings;
- maintaining up to date records of events so that they can provide details to FWBC representatives who will be appearing in proceedings;
- ensuring investigations are progressed without unnecessary delay; and
- assisting in the briefing of FWBC representatives who will be appearing in the proceedings.

15.4 Deciding whether to recommend a matter for FWBC litigation

The Commonwealth prosecution policy makes clear that it is not the rule that all offences brought to the attention of the authorities must be prosecuted.

As a government agency FWBC must be accountable, consistent and transparent in its decisions on which matters should, or should not be litigated. In determining whether a matter should be recommended for litigation the Inspector must, in consultation with their Assistant Director, director or executive director, undertake a two step evaluation as follows.

15.4.1 Evidential evaluation

The Inspector should objectively assess the available evidence and be satisfied that the investigation has provided sufficient proof of each element of the contravention so that a court of law is more likely than not to accept the complaint alleged.

In performing the evidential evaluation the Inspector must consider:

- whether the evidence gathered is admissible, substantial and reliable
- whether any witnesses are available, competent and credible
- whether there are admissions, or there are likely to be admissions, made by the employer
- whether there are any lines of defence which are plainly open to or have been indicated by the employer
- what, if any, further evidence may be obtained to strengthen the case
- any other factors which could affect a successful litigation.

The evidentiary evaluation must be documented in the Potential Litigation Summary that forms part of the Brief of Evidence.

For further guidance on evidential evaluation please refer to Guidance Note 1 - Litigation Policy.

15.4.2 Public interest evaluation

Once the Inspector is satisfied that sufficient evidence exists to support litigation, the Inspector must consider whether in all the circumstances the litigation is in the public interest.

The public interest evaluation requires the Inspector to fairly and objectively balance the factors for and against pursuing the litigation. Deciding on public interest is not a simple exercise of listing the factors on each side. An Inspector must exercise judgment in assessing the importance of each factor prior to making an overall recommendation.

The factors which can properly be taken into account in deciding whether or not the public interest requires that litigation be started are detailed in Guidance Note 1 section 14 – Relevant Public Interest factors - Litigation Policy. While the relevant factors will vary from case to case, they commonly include:

- the seriousness of the alleged contravention (including the type of contravention, the amount of the underpayment and the consequences of the contravention). Conversely the triviality of the alleged contravention should also be considered, including whether or not it is of a technical nature
- the characteristics and culpability of the employer (including their compliance history and their level of cooperation and contrition)
- Whether the nature of the alleged contravention is of considerable level of industry or public concern
- the impact of alleged contravention on the complainant and others
- the need for deterrence (in general, for the industry or location, and for the individual employer)
- mitigating or aggravating circumstances and the availability and efficacy of alternatives (such as small claims action, enforceable undertakings and letters of caution), including whether the effect litigation will be unduly harsh or oppressive.

A decision whether or not to start litigation must not, however, be inappropriately influenced by external factors such as:

- race, religion, sex, national origin or political associations, activities or beliefs
- personal feelings
- political considerations
- media attention
- possible advantage or disadvantage to the Inspector (personally or professionally), the employer, employer groups or industrial associations including unions.

Generally speaking, the more serious the alleged contravention, the greater the likelihood that the public interest will require litigation. FWBC will usually litigate, unless, having regard to the provable facts and the whole of the surrounding circumstances, the public interest dictates that litigation not be undertaken. Where the evidence is strong and the prospects of success are good, the public interest grounds for not pursuing litigation must be compelling.

For specific guidance on the public interest test refer to Guidance Note 1 - Litigation Policy.

15.4.3 Case conferencing and other assistance

A case conference is a key evaluation and review point for matters likely to proceed to litigation. A case conference is not a compulsory step prior to recommending litigation. However, a case conference can provide guidance to the Inspector on whether or not to recommend a matter for FWBC litigation and can assist in identifying any further steps that should be undertaken before making a recommendation.

If, after a case conference the Inspector and/or Assistant Director form the opinion that further advice is needed before making a decision, the Inspector should consult with the Legal Group. Where the Inspector, after consulting with their Assistant Director, forms the opinion that both the evidential and public interest tests have been satisfied, the Inspector should recommend the matter for litigation to their director. At this point a brief of evidence should be prepared and forwarded to their director and the Legal Group for consideration.

15.5 Brief of evidence

A brief of evidence is a collection of documents that sets out:

- the alleged contraventions
- the details of the employer
- the background to the matter
- the recommendation and reasons to litigate
- the evidence obtained through the investigation that proves the elements of the alleged contravention.

The brief of evidence is compiled by the Inspector in consultation with their Assistant Director when the decision is made to recommend the matter for litigation.

The brief of evidence should, in the first instance, be forwarded to their director for consideration. If their director agrees with the Inspector's recommendation the brief of evidence should be provided to the Legal Group.

A brief of evidence is likely to be viewed by managers, internal and external lawyers and, in some instances, the employer's legal representatives. Therefore a brief of evidence needs to be both comprehensive and understandable by a person who has no prior knowledge of the case.

It is important that the brief of evidence be presented in an orderly and manageable format so that FWBC's legal representative can easily and effectively:

- understand the allegation(s)
- assess the available evidence against the allegations
- ensure basic jurisdictional and other threshold requirements are met
- identify what further evidence the Inspector should attempt to obtain (if any)
- prepare the relevant court documents.

A well-structured and thought out brief of evidence saves significant cost and delay. Briefs of evidence which are poorly structured, sloppy or disorganised are more difficult to understand and assess and may, where necessary, be returned to the Inspector with a request that they be recompiled.

The following information regarding form and content is a guide to assist Inspectors to compile a brief of evidence. It should be noted that the standard format may not be appropriate to every case. Inspectors may need to adapt their approach to better suit the nuances of their particular matter.

15.5.1 Form of the brief of evidence

For ease of use the brief of evidence should:

- be assembled in a ring binder or folder
- contain a comprehensive index
- use separate numbered dividers or tabs to order and identify documents
- be labelled (front and side) with the matter name and, if more than one folder is required, a volume number.

Original documents should be retained by the Inspector and should not be provided to the Legal Group unless specifically requested (to maintain the chain of evidence – see Chapter 21 - Evidence). Original documents should be inserted into a clear plastic pocket and should not be hole punched, marked or paginated.

All witness statements and records of interview that form part of the brief should be paginated.
The Inspector may attach to the paper brief a CD containing a copy of all Word documents and Excel spread sheets included in the brief of evidence. Electronic copies of documents like interview transcripts or calculations can be very useful to the lawyer in preparing the formal court documents.

15.5.2 Number of copies

The Inspector must prepare two complete copies of a brief of evidence:

- original copy, containing any original documents or exhibits, to be retained by the Inspector
- Legal Group copy, to be retained by the lawyer allocated the file.

A third copy of the brief will be prepared by the legal group if the matter is to be sent to an external legal provider.

15.5.3 Content of a brief of evidence

When preparing a brief of evidence, Inspectors are to use the documents under the heading "Brief of evidence template" found on the Inspectors Resource page in the Investigations section.

15.5.4 Potential litigation summary (PLS)

The potential litigation summary (PLS) forms part of the brief of evidence. The PLS should provide a comprehensive overview of the case and the Fair Work Industry Inspector's reasons to litigate.

The PLS should, where relevant, include:

- an outline of the nature of the contraventions alleged
- details of the employer
- details of the complaint
- details of the applicable Fair Work instrument or a safety net contractual entitlement
- relevant history to the contraventions (a timeline may be helpful)
- the specifics of each alleged contravention, including the relevant sections of the FW Act and/or the FW Regulations and/or the Fair Work instrument that have been contravened
- an estimate of any underpayment and any rectification that may have occurred
- an analysis of the evidence in support of the contravention
- a concise chronology of the investigation
- an assessment as to how the matter meets Guidance Note 1 - Litigation Policy in regards to the evidential evaluation and the public interest test
- an assessment as to whether the acceptance of an enforceable undertaking would be a suitable alternative to litigation
- consideration of the involvement of individuals in the contraventions and an assessment of the appropriateness of bringing proceedings against an involved individual under s550 of the FW Act (e.g. a director or human resources manager)
- any matters relevant to the success of the proceedings, including strength of evidence, possible defences, and the witness credibility, demeanour and likely cooperation; and
- a recommendation regarding orders to be sought from the court to remedy the contravention.

15.5.5 Persons involved in contraventions

FWBC takes seriously the need to enforce compliance with Commonwealth workplace laws. FWBC considers that holding individuals accountable for contraventions in which they are involved in is an appropriate compliance tool. 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.*

"Involved in"[2] requires that a person has:

- aided, abetted, counseled or procured the contravention; or
- induced the contravention, whether by threats or promises or otherwise; or

[2] 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.

- been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
- conspired with others to effect the contravention.

Examples of a person "involved in" a contravention may include:

- a company Director[3];
- a sole director and shareholder who abrogated his authority to others[4]; or
- the principal employer (through the actions of its contracted "employment issues" consultant who made offers of Australian Workplace Agreements)[5].

15.6 Exhibits

Exhibits are the documents in the brief of evidence that are relied on to prove the elements of the alleged contravention. The type of exhibits that appear in a brief of evidence will depend upon the nature of the alleged contravention and the available evidence. For information on evidence rules, collection, handling and storage please refer to Chapter 3.

The categories of exhibits and types of documents that commonly appear in a brief of evidence include:

Inspector's details

- Inspector's appointment
- Inspectors identity card
- Directions to inspectors, 1 June 2012

Employer's details

- current ASIC searches and company extracts
- ABN search results
- business name records
- White Pages or internet search results

Complainant's details

- complaint form
- employee records
- qualifications and supporting documents

Fair Work instrument details

- relevant extracts
- copy of Fair Work instrument
- copy of lodgement details

Testimonial evidence

- record of interview transcript
- statutory declarations
- completed witness statements

Underpayment details

- calculation spread sheet
- bank statements
- wage records
- time sheets
- rosters
- employee time records
- log books
- pay slips
- group certificates
- Centrelink documents
- tax file number declarations
- separation advice

Correspondence

- notices to produce records or documents and related correspondence

[3] *Hortle v APrint (Aust) Pty Ltd and Anor* [2007] FMCA 1547
[4] *Fleming v Restaurant Services Group & Ors* [2008] FMCA 455
[5] *Balding v Ten Talents Pty Ltd & Anor (No.3)* [2008] FMCA 255

- award citation checks

Miscellaneous

- Inspector's file notes
- case conference submissions
- media articles
- penalty infringement notices issued/ withdrawn
- contravention letter
- compliance notice
- other relevant correspondence

15.7 Progressing a matter to court

When a brief of evidence is received by the Legal Group it is reviewed by a lawyer to assess whether there is a case to answer. Where a case is established the brief of evidence, along with a legal assessment of the brief, may be provided to an external legal provider for independent advice on FWBC's prospects of success.

Where the prospects of success are not assessed to be good, the lawyer may refer the brief of evidence back to the Inspector to gather further evidence to strengthen the case or may, where a significant impediment to litigation is identified (eg. absence of jurisdiction), advise that the recommendation to litigate be withdrawn.

Where the advice on prospects of success is sufficient to support litigation, the lawyer must prepare a minute concerning the proposed litigation for consideration by FWBC Litigation Advisory Committee.

In preparing a CDR with recommendations to the Litigation Advisory Committee, it is required that this recommendation is co-signed by both the case lawyer and the Inspector.

This will ensure that advice and any recommendation on whether or not to litigate is jointly agreed upon by both the Legal and Operations Groups. If either party cannot agree, the matter is to be referred to the relevant Assistant Director, State Director, Executive Director and if necessary Operations Chief and Chief Counsel for consideration prior to referral to the Litigation Advisory Committee.

FWBC LAC comprises FWBC Director, Chief Counsel, Operations Chief and relevant legal and operations staff involved in the matter under consideration. The LAC will express a view as to appropriateness and the manner of enforcement action. Those views are then considered by FWBC Director who must authorise commencement of any litigation.

If litigation is authorised, FWBC lawyer will prepare the necessary court documents or arrange for them to be prepared. Once the court documents are finalised and have been approved by an SES officer, the documents will be filed with the appropriate court and served on the alleged wrongdoer.

15.8 The appropriate court

The court in which FWBC starts litigation will depend upon the particular type of action the Inspector initiates. For wages and conditions matters FWBC litigates in the Federal Court of Australia, the Federal Circuit Court and local or magistrates courts (as applicable) in each

state. For complex matters such as coercion, FWBC can only litigate in the Federal Court of Australia and the Federal Circuit Court.

The Legal Group will also take into consideration issues such as costs, delays, procedure, FWBC's experience of particular jurisdictions and the specific nature of the case before making a recommendation on which court is appropriate for each matter. The Inspector should consult with the Legal Group if they have any concerns or questions in this regard.

15.9 Court procedures

Each court has its own set of rules which set out the procedures to be followed. The way a matter progresses through court will depend on the individual court's processes and on the employer's response to the case.

15.10 The Inspector's role in litigation matters

An Inspector's involvement in a case does not end with the preparation of a brief of evidence. While the nature and extent of an Inspector's role will vary from case to case an Inspector can reasonably expect, where required, to:

- gather further necessary evidence to strengthen the case
- prepare or revise calculation spread sheets
- proof read court documents to ensure factual accuracy
- liaise with complainants and witnesses (which may include serving them with a subpoena to appear at the hearing)
- attending a mediation
- drafting affidavits (with the assistance of the Legal Group)
- attending contravention hearings and penalty hearings
- appearing as a witness
- contacting complainants and keeping them informed throughout the litigation process.

The Inspector should manage complainant expectations by remaining in regular contact throughout the litigation process and providing updates as appropriate.

15.10.1 Appearing as a witness

Ordinarily, by the time a matter reaches the hearing stage (phase 4 or 5) the Inspector will have provided an affidavit containing all of their relevant evidence. Where that evidence is disputed by the employer the Inspector may be called to appear as a witness at the hearing. Appearing as a witness and the protocols of the court can be confusing and intimidating if it is an unfamiliar experience. It is strongly recommended that Inspectors discuss the court procedures and what is expected of them with the Legal Group before their court appearance.

In the general course of events, Inspectors and other witnesses can expect the following:

- the witness is called when it is their turn to give evidence and is shown to the witness box at the front of the courtroom
- the court officer will swear in the witness by reading out the oath (made on a religious text) or an affirmation (non-religious option) and will ask the witness to swear to tell the truth
- the witness will be asked to take their seat in the witness box
- the witness will be asked to say their name and occupation
- the witness will be asked questions by FWBC's legal representatives (e.g. "is this your affidavit?")
- the employer's representative will then cross-examine the witness by asking additional questions
- FWBC's legal representatives may ask further questions of the witness, referred to as re-examination
- the judicial officer may also ask the witness questions about their evidence
- the witness may be asked to identify documents shown to them
- after the witness has given their evidence they will be excused by the court. The witness is free to leave or may stay in the courtroom if they wish, unless they are expected to give evidence again later in the proceedings.

Inspectors may find the following points useful when preparing to appear as a witness:

- Know your evidence - read through your affidavit before court;
- Take with you to court your affidavit and any relevant notes that you may need to refer to when giving evidence;
- You may take material into the witness box but you must not refer to it unless you have been given permission;
- Consider your appearance - dress appropriately and always look and act professionally;
- when you get to court, tell FWBC legal representative what you have brought with you;
- arrive early to find the courtroom and to meet with FWBC legal representatives;
- On arriving, wait outside the court. Turn off your mobile phone, remove hats and sunglasses. You are not allowed inside before you have given your evidence. When it is your turn to give evidence, you will be called on by a court official;
- On entering the court, face the judge/commissioner and bow slightly from the waist prior to walking to the witness box;
- You will be required to take an oath or affirmation. Remain standing until you have done so;
- Don't sit until you are authorised to do so. When in the witness box either stand up straight or sit erect;
- address the judicial officer as 'Your Honour' ;
- Your evidence in chief is likely to consist of confirming your identity and the contents of your affidavit;
- The defence is likely to seek to cross-examine you at length on the contents of your affidavit and surrounding matters, including your right to institute proceedings and powers;

- Direct your answers to the questioning barrister, the judge if he is asking the questions or to the jury if there is one present
- Do not nod, always respond verbally. The proceedings are recorded and the audio equipment cannot record a nod
- speak clearly, as the microphone in the witness box only records your voice, it does not make it louder;
- Listen carefully to the question and make sure you understand it before you answer. If you do not understand a question, ask for it to be repeated;
- Avoid being combative in your responses. Answer the questions in a direct and honest manner;
- Keep your answers brief and to the point. If possible answer with a “Yes” or “No”;
- if an objection is raised about a question, wait until the judicial officer resolves the objection before you answer - the judicial officer may direct you not to answer the question;
- If you make a mistake, admit it immediately. Don’t try to cover it up;
- do not guess - if you are not sure about an answer, just say so;
- If you cannot recall a particular point, say you cannot recall. Do not guess answers – if you do not know the answer - say so;
- With the court’s permission you may refer to original notes to refresh your memory. Be aware that defence counsel may seek to examine any original notes you refer to or ask questions on the notes;
- After you have given your evidence and been excused as a witness, you may remain in court and listen to other evidence. If, however, there is a possibility you may be recalled to give further evidence, you might not be excused as a witness and will have to leave the court;
- Know your powers as an Inspector (FWBC Guide, Ch 1.3);
- do not discuss your evidence with other witnesses;
- if the Inspector or any of the witnesses requires an interpreter, or allowances to be made for a disability or special needs, the Inspector should discuss the appropriate accommodations with the Legal Group before the hearing.

In addition, if the Inspector is attending court to observe:

- stand up each time the court starts or adjourns (i.e. when the judicial officer comes in or out of the room) - the court officer will announce this by saying ‘All rise’ or ‘Please stand’; and
- if you need to go in or out of the court room while the court is in session, pause at the door briefly and bow to the crest, which is usually located above the judicial officer’s seat.

15.11 Commonwealth Director of Public Prosecutions (CDPP) referrals

FWBC does not have the ability to take legal action in relation to criminal offences. Despite this, Inspectors should be aware that employers may be liable to prosecution for certain offences under the Criminal Code Act 1995 (Cth) (Criminal Code). Such offences include:

- provision of false or misleading information to a Commonwealth public official[6] (subsection 137.1 of the Criminal Code)
- provision of false or misleading documents to a Commonwealth public official (subsection 137.2 of the Criminal Code)
- obstruction of a Commonwealth public official (subsection 139.1 of the Criminal Code).

Where there is evidence of one or more of the above having occurred the Inspector should consider referring the matter to the CDPP for enforcement action.

To refer a matter to the CDPP the Inspector will need to prepare a criminal brief in accordance with the guidelines set out in the Guide to referring criminal briefs to CDPP. The completed brief should then be sent to their director for approval.

If their director approves the referral, the criminal brief will be cleared by the Legal Group and forwarded to the CDPP.

In some instances, once a matter has been referred, the CDPP lawyer may request additional evidence be gathered before the matter proceeds to criminal prosecution. The Inspector should work with the CDPP and the Legal Group to obtain and forward that further evidence as soon as is practical.

In referring a matter to the CDPP it is important to remember that the burden of proof for criminal matters is higher than that which applied in FWBC litigations, as offences alleged by the CDPP must be proved beyond reasonable doubt.

[6] An Inspector is a 'Commonwealth public official'

Chapter 17 Targeted Audits

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17.1 Introduction

A targeted audit is a proactive FWBC initiative aimed at improving compliance with Commonwealth workplace laws in industries or areas that have been identified as needing education and/or intervention. The purposes of a targeted audit are to:

- educate employers about their responsibilities under the relevant Commonwealth workplace laws
- view and assess employment records in order to identify the scope and nature of contraventions occurring within the targeted industry or location
- detect non-compliant employers and seek rectification of identified contraventions.

Targeted audit activity is a proactive compliance strategy usually incorporating stakeholder involvement, education initiatives, and voluntary compliance strategies, with escalation of a matter to field staff for investigation, enforcement or litigation only occurring where required. Targeted audit activities use a client-focussed process designed to achieve long term behavioural change by building the capacity within industry for compliance to be achieved and maintained. As such, the audit activity is conducted in cooperation with employers, employer organisations, and industrial associations. In accordance with legislative provisions and the educational objectives of targeted audits, there is no requirement for a complaint to be made before a Inspector can seek access to an employer's records.

Local audit programs are conducted by Inspectors in response to local circumstances or issues that arise.

The decision to conduct an audit program is made by the State Director –in consultation with the Inspectors on the relevant targeted audit team at a local level. Examples of activities that result in an audit program include:

- **industrial referrals** – initiated as a result of information received as a complaint or referral from an industrial association or employer organisation
- **confidential complaints** – initiated by Inspectors as a result of the receipt of a confidential complaint
- **reported complaints** – initiated as a result of intelligence received by Inspectors in relation to a specific employer
- **follow-up audits** – conducted by Inspectors following a completed audit in order to assess the long term compliance of a high risk employer.
- **political and media referrals** – initiated as a result of information received from ministerial sources or the media.

17.2 Conducting targeted Audits

The process of conducting a national targeted audit is simplified into four (4) phases – proposal, planning, audit and completion.

The proposal phase involves the identification of the industry or area that is to be targeted in the audit and preparation of a formal targeted audit proposal, including a specific audit brief and action plan. This phase is completed by the Targeting Audits Unit and endorsed by Operations leadership.

The planning phase starts with engaging the relevant stakeholders by informing them of the audit and inviting employer organisations and industrial associations to promote the audit and assist with educating employers.

Distribution of information to employers in the chosen industry or business sector is undertaken in order to provide employers with information and the opportunity to prepare before Inspectors start the audit phase of the audit.

Inspectors in each region involved in the targeted audit activity then create a database of employers to be targeted during the audit. These employers are notified of their selection for audit and requested to send in (or make available for inspection during a site visit) employment records and other information for specified periods of time. The type of records and information requested will be determined by the criteria specified in the audit proposal.

The audit phase commences when the documentation is received and analysed, and any necessary investigation is conducted. This is the main phase in which the Inspector is involved (see 10.5 below).

The completion phase involves compiling and assessing the results and writing final reports for internal and external stakeholders. A public report is developed which is posted on the FWBC internet site and the findings are presented to the relevant parties. This phase is completed by the Targeting Audits Unit.

The process of conducting regional targeted audits is similar to that used to conduct national targeted audits. The major difference between the two types of audits is the decision making and consultation process used to identify the potential industry or area to target. Targeted audits and audit programs on the regional level involve Directors – Regional Service and Targeting and Inspectors in the compliance activity decision making and consultation process. There are also administrative differences such as proposal, correspondence and report templates that are specific to each region.

17.2.1 Preliminary Steps

17.2.1.1 *Record of Decision to Investigate*

Where the use of an s.712 notice is determined to be necessary, the Inspector must complete a Record of Decision to Investigate form (RDI). The RDI must be actioned and attached to AIMS and a copy placed onto the hard copy TRIM file.

17.2.2 The audit phase

The main involvement of Inspectors in targeted audits is in the audit phase - when the documentation is requested from the employer, analysed, and any necessary remedial action is identified. The analysis of records is carried out by Inspectors in the same way that investigations of complaints are conducted, except that the focus of the assessment is determined by the aim of the audit rather than any allegations made by a complainant.

There are two compliance models used by the FWBC in actioning audits. These are the desk based compliance audit, the field compliance audit,. In addition, confidential complaints can be actioned as an audit of a single employer. More comprehensive details of each of these models is provided below.

NOTE: When conducting targeted audits', Inspectors should examine the relationship between the head contractor and any subcontractors to ascertain if sham contracting exists between the parties.

For information on recording targeted audits in AIMS, please refer to the AIMS User Manual, located on the FWBC Intranet.

17.2.3 Desk based compliance audits

The audit phase typically begins with the Inspector issuing a notification of audit letter and a targeted audit entity form to each of the employers being audited. These documents include an informal request that the employer provides records for a specified two or four week period, as described by the audit objectives. The specified period is often selected to include a public holiday. In addition, standard practice is that if the full workforce of an employer is up to twenty (20) employees, records for all employees will be requested. Otherwise a sample of records for employees is requested, with instruction given to the employer to include in the sample employees with a range of ages and classifications.

If the employer fails to respond to the informal request for a sample of employment records (or else fails to provide the full sample of records that are requested), the Inspector should confirm coverage and look to making a formal request for the relevant documents or records that are sought. The formal request authorised by s712 of the FW Act is the notice to produce records or documents (see Chapter 3 – Evidence, section 3.11 Obtaining documentary evidence).

It should be noted that on occasion an employer may respond to the initial request for information and records claiming either or both of the following:

- they had no employees during the period of the audit
- they are not covered by Commonwealth workplace laws.

To confirm coverage, the Inspector should refer to the Australian Securities and Investment Commission (ASIC) site to establish whether or not the entity is incorporated where appropriate, or use ABN Lookup to confirm the owner of the ABN. If it is confirmed that the employer is not within the jurisdiction of the FWBC, then the Inspector will advise the employer that the audit is closed.

When an employer does provide records, an initial assessment is conducted during the triage process by a team of Inspectors to determine whether or not any contraventions have been identified. There are templates that have been created to assist the Inspector to monitor the progress of the audit. The initial assessment of the suitability of employers for audit according to defined criteria is called the audit triage. The triage process map lists the

tasks, relevant timeframe and decision points in undertaking the initial triage assessment phase. The audit triage checklist is used to assist Inspectors in identifying contraventions of the record keeping and pay slip requirements under the FW Act and FW Regulations, as well as any contraventions of fair work instruments.

If an employer has indicated that one or more of their employees is covered by an individual flexibility arrangement (IFA), Inspectors should be guided by the IFA targeted audit checklist and *Chapter 12 - Investigation of individually negotiated entitlements* in determining whether further investigation is necessary.

If the employer is compliant with Commonwealth workplace laws, an outcome of audit letter is sent to the employer by the Inspector indicating that there were no contraventions in the samples provided and advising that the audit process is complete. A Case Decision Record should then be created outlining details of the decision made and the factors considered..

If one or more contraventions are identified, the nature of the contraventions is assessed. The Inspector will contact the employer to discuss and confirm the findings, and issue an Outcome of Audit Letter to the employer. The audit findings letter contains a summary of the alleged contraventions, the remedial action required, and an explanation of the consequences of non-compliance. The issuing of an Outcome of Audit Letter ensures that there is a record of the contravention having occurred, being detected, and being brought to the attention of the employer for rectification. Inspectors may also consider enclosing educative resource material with the audit finding letter to assist the employer in understanding the findings.

If the contraventions are only minor or technical contraventions of the employer's obligations in relation to employee records and pay slips under the FW Act (ss 535-536) and FW Regulations,[1] the Inspector will issue a Compliance Commitment Form with the audit findings letter. The correspondence from the Inspector will require the employer to rectify the contravention and to provide evidence of this rectification by completing and returning the compliance commitment form to the Inspector within fourteen (14) days. When the employer returns the completed compliance commitment form, the Inspector will review the details. If the Inspector is satisfied that compliance has been achieved a Finalisation of Audit Letter will be issued to the employer and the audit will be closed. If compliance has not been achieved, the audit may need to be escalated.

Where more significant contraventions have been found, usually underpayments, the Inspector will issue a payment made to employees form with the audit findings letter. The correspondence from the Inspector will require that the employer conducts a self-audit for all employees for a specified period of time, and to rectify any underpayments for all employees for that specified period. This specified period for self-audit and rectification of underpayments will be consistent with the parameters of the targeted audit. It is commonly the period from twelve months before the audit's commencement until the current date. However, if the Inspector identifies that underpayments are likely to have occurred for longer, the Inspector (in conjunction with the Assistant Director) can direct the employer to self-audit and rectify underpayments for greater time periods.

[1] A technical contravention that can be resolved at this stage might include non-monetary contraventions which do not cause any disadvantage to an employee, such as the employer's failure to record the full name of the employee when the employee's identity is not in dispute.

Evidence that the self-audit process has been conducted and that rectification payments have been made to employees is to be supplied to the Inspector. The employer provides this evidence by completing the payment made to employees form and returning it within fourteen (14) days. The Inspector then critically assesses the evidence provided by the employer, and sends a confirmation of back payment letter to a sample of employees to confirm that they have received their back payment. When the Inspector is satisfied that rectification has been achieved, the Inspector will record the result and complete the matter. The employer is advised of the completion through the Finalisation of Audit Letter.

If the employer does not comply with the audit findings letter or the employer has not responded to a formal request for documents and records (such as a notice to produce records or documents), the matter may need to be escalated, and a standard investigation process will be implemented (refer to Chapter 3 – Investigations for further details).

On occasion, the employer may respond to the audit findings letter with new evidence that disputes some or all of the alleged contraventions. In such cases, the Inspector should consider the new evidence and advise the employer if the audit findings letter stands in full, stands in part, or is withdrawn. The employer must be advised in writing of the Inspector's determination, including if the employer is now required to rectify any matters and/or comply with any or all of the items of the original audit findings letter.

17.2.4 Field compliance audits

Field compliance audits are usually audits of employers' record keeping and pay slip requirements in a specified geographical area such as a shopping centre, industrial park, locality or industry sector.

Field compliance audits are generally initiated by sending each employer a field employer notification of audit letter confirming a forthcoming visit by the FWBC, and requesting that records are available at the time of the proposed visit. However, in some cases, cold calls are made, and the FWBC may advertise the audit through local media releases and networks. For example, if the field audits target employers in a shopping centre complex, the centre management may be notified.

In essence a field based audit follows many of the conventions of the desk based model with one major difference. By virtue of being at the employer's premises, the Inspector has the opportunity to review documents such as pay slips and employment records on the spot. During this visit, the Inspector may provide the employer with a self-audit check list. The Inspector may also provide pay and record keeping templates and/or provide the 'Employer obligations in relation to employee records and pay slips' Fact Sheet to help explain the compliance requirements, as well as best practice record keeping techniques, to the employer.

In the event that the records or documents requested by the Inspector are not available, or there is a suspected contravention, the Inspector should consider further audit activity or investigation. This may include reverting to the desk based audit where a formal request for

relevant records or documents will be initiated (such as a notice to produce records or documents).

At the conclusion of all field compliance audits, a site visit document will be completed by the Inspector and jointly signed by both the Inspector and the employer or their authorised representative. Where the employer or representative declines to sign the entry, the Inspector should make a note (such as in their field notebook) and sign the note. The site visit document acts as a record of the visit, and details the advice and instructions provided to the employer or representative by the Inspector. During the course of a field compliance audit, the Inspector may choose to provide an Employer Education Pack.

17.2.5 Matters that may require escalation to Investigation

The Inspector may identify matters during an audit that may require escalation to investigation.

For example, the Inspector may become aware of the apparent contravention of the provisions of the FW Act that relate to complex matters, or the Inspector may believe that the contraventions identified are sufficiently serious to warrant enforcement action, regardless of the employer's willingness to comply with the audit findings letter. Furthermore, where an employer refuses to engage in the audit process, or does not respond to the request for information and records provided by a Inspector, the matter should be escalated to investigation (see Chapter 3 –Investigations). In these cases, the Inspector should discuss the matter with their Assistant Director and State Director. The decision to upgrade a matter from an audit to an investigation is at the State Directors discretion, based on the merits of the individual case in question.

The Inspector may also have contact with employees during an audit that can give rise to specific complaints being made to the Inspector about the employer's alleged non-compliance. In such cases, the Inspector should inform any employee with a complaint of their ability to complete a complaint form, to facilitate an investigation of the specific allegations made by the employee. The Inspector should inform their Assistant Director of the allegations, and seek the advice of their Assistant Director as to whether such matters would be considered as part of the audit, logged onto a follow up register for a subsequent audit, or examined separately as an investigation.

At their conclusion, all targeted audit files have the outcome recorded in AIMS.

Chapter 19 Review of Investigations

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19.1 Introduction

FWBC has established a Quality Assurance Team (QA Team) to undertake reviews of Operations activities. To ensure the integrity of these reviews the QA Team operates as a separate unit located in the Professional Standards Branch.

FWBC is committed to ensure its decisions are impartial, reasonable, fair, timely and transparent. Australian Public Service (APS) employees must adhere to the APS Code of Conduct and behave in a way that upholds APS Values and relationships.

The operations of the QA Team form an integral part of FWBC providing its services in a fashion that demonstrates adherence to APS Values and provides the opportunity for continuous improvement of our service delivery to the Australian community.

Advice to the public of their right to seek a review of a decision should be included in all correspondence where there is potential for the person concerned to be dissatisfied with the decision taken by FWBC. Information on File Reviews is also located on the FWBC website.

19.2 Types of Review

The QA Team is involved in a range of reviews to that broadly speaking fall into two categories.

The first type of review managed by the QA Team, called a **'File Review'**, relates to a citizen's right to have a decision taken by FWBC independently reviewed in a fashion consistent with Australian Government standards. A file review is a reactive activity.

The second type review undertaken by the QA Team, called a **'Quality Review'**, proactively examines Operations activities to identify systemic problems and recommend improvements that can be made to existing operational procedures. A quality review is a proactive activity.

19.3 File Reviews

FWBC has adopted a three tier approach to the conduct of file reviews that are both based on and consistent with the:

- approach set out in the FWBC Manual; and
- standards prescribed by the Commonwealth Ombudsman generally.

19.3.1 Informal discussions

Parties to an investigation may request a review if they are dissatisfied with the:

- service provided to them; or
- the investigation outcome.

A matter where litigation has commenced is not subject to the file review process.

19.4 Steps for Inspectors handling an initial review request

A party making a request for review of a decision would normally contact the Fair Work Building Industry Inspector or the relevant Assistant Director in the first instance. In these circumstances, the following steps should be adopted:

(a) The Fair Work Building Industry Inspector or Assistant Director should try and resolve the issue prior to implementing a formal file review process. (NB: *This can be challenging, but an attempt should be made to work through the issues. Fair Work Building Industry Inspectors should bear in mind that, in many instances, the party wishing to seek a review may be under considerable stress and emotional strain. Inspectors must at all times, remain courteous and professional assisting the person to the best of their abilities. Experience indicates that many complaints can be resolved at this stage by explaining what steps were taken and the considerations involved in making a decision during the course of the investigation.*)

(b) Where the issue is unable to be informally resolved the Fair Work Building Industry Inspector should:
- provide the State Directors contact details to the party raising concerns; and
- immediately brief his or her Assistant Director and State Director on the issue and the previous action taken to resolve the matter.

A review involves the assessment of procedures and decisions taken by Fair Work Building Industry Inspectors and their Assistant Director. Given this, it is envisaged that the decision regarding which officer is best placed to handle further action on the matter is the relevant State Director.

If the party contacts the State Director because they are dissatisfied with the earlier discussion undertaken with the Fair Work Building Industry Inspector or Assistant Director, then the State Director should:
- discuss the grievance;
- further attempt to informally resolve the matter; and
- if unable to resolve the matter, advise the party of their right to a formal review.

Regardless of the outcome, the relevant State Director must raise a formal report of the matter and forward to the Director – QA. An entry must also be made in AIMS and the TRIM file recording this.

19.5 Considering the APS Code of Conduct

If a State Director believes that the conduct under review may constitute a breach of the APS Code of Conduct, the matter must be immediately referred to the relevant Executive Director – Operations. The Executive Director will liaise with the Executive Director – People, Learning and Culture to confirm whether the conduct under review needs to be subject of further action, such as a formal code of conduct investigation.

19.6 Procedural fairness for the original Inspector

As in any investigation by a Commonwealth agency, the Fair Work Building Industry Inspector has an obligation to afford procedural fairness to the parties involved. With respect to file reviews, this obligation extends to the manner in which a reviewing FWBC staff member, Fair

Work Building Industry Inspector or the QA Team deal with the original Fair Work Building Industry Inspector.

19.7 When a review request is made before the outcome is determined

At times, a party to a complaint may request a review in relation to an investigation where it appears to FWBC that a file review is not yet appropriate.

In cases where an investigation is in progress, but no determination has been made as to the outcome of the case, the investigation will continue until an outcome is determined. Any concerns about the process to date that have been raised by the party seeking the review will be passed to the State Director and the investigating Fair Work Building Industry Inspector for consideration in the ongoing investigation. Any outstanding concerns at the completion of the investigation can be considered as part of a formal File Review process if required.

19.8 Commencing a File Review

Should the cause of the complaint not be resolved at the informal or State Director level, then the three tiered formal File Review process applies. Decisions on the type of review to be undertaken rests with the Director – QA Team. The QA Team has the following responsibilities:

- liaison and correspondence with the aggrieved party seeking the review;
- manage the allocation of matters subject to a file review;
- ensure timeframes allocated for file reviews are met;
- report on file review outcomes both internally and externally; and
- manage requests and liaison with the Commonwealth Ombudsman

A File Review may also be commenced by FWBC on its own initiative as a mechanism to examine the manner in which an investigation was carried out.

19.9 Tier 1 file reviews

A Tier 1 file review involves an examination of the existing investigation file for the purpose of reviewing the process undertaken and the decision(s) made in relation to the matter. A Tier 1 file review is not a re-investigation of the original complaint.

A Tier 1 file review can be undertaken by one of the following:

- the State Director of the office who conducted the investigation;
- another State Director or senior officer within the Operations Unit;
- another senior officer within FWBC; or
- the QA Team.

A Tier 1 file review is required to be completed within 30 days of receipt by the reviewing officer.
At the completion of the review the reviewing officer is required to forward a Report to the Director - QA Team detailing:

- a general description of the investigation and review;
- whether procedures followed are consistent with the FWBC Manual, FWBC Guide or relevant formal procedures;

- if procedures were not followed, what steps were adopted and what were the outcomes of that failure;
- was the decision correct, regardless of the procedures not being properly followed and recorded; and
- a formal outcome of the review using one of the five categories below.

The following are the formal outcomes from a Tier 1 file review:

19.9.1 Outcome 1 - Process and decision correct

In these instances, the reviewing officer determines the original Fair Work Building Industry Inspector conducted the investigation in accordance with the FWBC Operations Manual. In addition, the reviewing officer further determines that, based on the evidence gathered throughout the investigation, the outcome determined by the original Fair Work Building Industry Inspector was one which was reasonably open.

Upon reaching this determination, the reviewing officer must provide a written report to the director detailing the investigation and outcome of the review. The report must include a recommendation that no further action be taken by the FWBC.

Should the director approve the report, the director will advise the person who sought the file review of the outcome, using the standard completion letter. The director will provide a copy of the letter to the reviewing officer and the original Fair Work Building Industry Inspector. In addition, the director will send an email to the executive director and the File Review Team (with high importance) that includes a copy of the reviewing officer's report, the completion letter, and the director's views on the matter.

Should the director not agree with the recommendations made, they may refer the matter back for further action at the Tier 1 level, refer the matter for re-investigation or Tier 2 review, or complete the matter if they deem it appropriate to do so. Where the matter has been referred for a Tier 2 review, all parties must be advised of this action by the File Review Team with two days of the referral. This information also should be included on the hard copy file.

;

19.9.2 Outcome 2 - Decision correct but file or process is deficient

In these instances, the reviewing officer determines that the overall decision is the most appropriate, but identifies deficiencies in the investigation process or gaps in the evidence gathered. Upon reaching this determination, the reviewing officer should return the file to the director, with a review report including a summary of findings detailing any identified deficiencies and the suggested remedial action.

Some common examples of Outcome 2 determinations are:

- the file contained no documentation showing how a contravention was quantified (such as calculations)
- one area of investigation was not sufficiently explored or explained (e.g. a threshold issue regarding whether the complainant was a contractor or employee)
- witness information was not present on the file (e.g. a witness statement was not attached, or there was no record of a relevant witness being interviewed)

- not all alleged or identified contraventions have been addressed adequately in the file (such as the file does not explain why certain alleged contraventions were unproven, or what action was sought from the employer for all of the identified contraventions).

Upon receiving the file and reviewing the remedial actions suggested, the director will decide if the recommendations are agreed. If so, the director will return the file to the original Fair Work Building Industry Inspector for action. The original Fair Work Building Industry Inspector is not expected to fully re-investigate the complaint, but should, where appropriate, note or implement the suggested remedial action recommended by the reviewing officer.

While these actions likely will not alter the outcome of the investigation, the purpose of this process is to educate the original Fair Work Building Industry Inspector and reduce the risk of repetition. Once the deficiencies have been rectified or noted (as appropriate), the original Fair Work Building Industry Inspector should notify the director and reviewing officer. The director will advise the party seeking review of the outcome, using the standard completion letter, and provide a copy of the letter to the reviewing officer and the original Fair Work Building Industry Inspector.

In addition, the director will send an email to the executive director and the File Review Team (with high importance) that includes a copy of the reviewing officer's report, the actions taken to remedy the deficiencies identified in the report, the completion letter, and the director's views on the matter. This information also should be included on the hard copy file.

Should the relevant director not agree with the recommendations made by the reviewing officer, they may refer the matter back for further action at the Tier 1 level, refer the matter for re-investigation or for a Tier 2 review, or complete the matter if they deem appropriate to do so. In these circumstances all stakeholders must be advised of the referral.

19.9.3 Outcome 3 - File to be considered for re-investigation within the region

In some instances, the reviewing officer establishes the outcome of the original investigation was determined without sufficient inquiry and evidence.

Having reached this determination, the reviewing officer must provide a written report to the director detailing the investigation (using the review report template and the outcome of review letter). Importantly, the report must include a recommendation that the investigation either be reinvestigated by another Fair Work Building Industry Inspector within the region or referred to the File Review Team for a Tier 2 review.

In deciding whether the re-investigation would be best conducted within the regional office or by the File Review Team, the reviewing officer should consider all of the circumstances of the investigation and the request for file review. It is only cases where there are no elements that would make a Tier 2 review more appropriate (see 12.4.1.6 below) that a re-investigation within the region should be proposed.

If the director agrees with a recommendation to reinvestigate within the region, then the director will reallocate the file to another suitably qualified Senior Fair Work Building Industry Inspector who has not previously had any dealings with investigation. The matter will be re-investigated and the Senior Fair Work Building Industry Inspector who re-investigated the matter will provide an additional report on this re-investigation to the director on the conclusion of this re-investigation. This additional report and outcome must be approved by the director

prior to the parties being notified of the final outcome of the review. The director will advise the parties of the outcome of this re-investigation in writing. In addition, the director will send an email to the executive director and the File Review Team (with high importance) that includes a copy of the reviewing officer's recommendation report, a copy of the re-investigation report, the completion letter, and the director's views on the matter. This information also should be included on the hard copy file.

If the director disagrees with a reviewing officer's recommendation to reinvestigate the matter within the region, the director will forward the recommendation report and their views to the relevant executive director for approval and referral to the File Review Team.

19.9.4 Outcome 4 - File to be considered for a Tier 2 review

In some circumstances, the reviewing officer will establish that the outcome of the original investigation was determined without sufficient inquiry and evidence, and that the matter should be re-investigated by the File Review Team (a Tier 2 review).

Circumstances that would make the escalation to a Tier 2 review the appropriate recommendation include:

- where third parties (media, members of parliament) have an interest in the case
- where concerns have been raised concerning the independence or impartiality of the original investigation
- where there are no suitable Senior Fair Work Building Industry Inspectors available within the region to undertake a re-investigation
- where there appear to be systemic issues that need broader consideration throughout the FWBC.

Upon reaching this determination, the reviewing officer must provide a written report to the director detailing the investigation and outcome of the review. The report must include the reasons for a recommendation that the matter should be re-investigated by the File Review Team as a Tier 2 review.

If the director agrees with the recommendation to refer the matter for a Tier 2 review, the director will endorse the report and forward it with their views to the relevant executive director for approval and referral to the File Review Team.

If the director does not agree with the recommendation to escalate to Tier 2, they may refer the matter back for further action at the Tier 1 level, or complete the matter if they deem appropriate to do so. In these circumstances all stakeholders must be advised by the director of the review outcome. In addition, the director will send an email to the executive director and the File Review Team (with high importance) that includes a copy of the reviewing officer's report, the completion letter, and the director's views on the matter.

19.9.5 Person provides new or additional evidence during Tier 1 review

The purpose of the review process is not to provide an avenue for a complainant to seek further entitlements beyond those previously investigated, but rather to seek recourse to a review of the circumstances of a previous investigation. Accordingly, in circumstances where

new evidence (as opposed to evidence that ordinarily would have been obtained in a standard investigation) arises which may potentially change the outcome of the investigation, consideration should be given to an escalation to Tier 2 for a re-investigation of the complaint.

Should a complainant make further allegations of potential contraventions that were not investigated during the initial investigation, it may be appropriate to direct the complainant to lodge a new complaint for investigation.

The Director - QA Team will consider the findings and outcomes of the Tier 1 file review and, after consultation with relevant Operations management, advise the complainant accordingly. At the completion of the Tier 1 file review, the file(s) and control of the matter is returned to the relevant State Director.

Activities and correspondence related to a Tier 1 file review are placed on the original investigation file with relevant entries being made in AIMS under the original AIMS reference number. The QA Team will also raise a separate TRIM File.

Should the result of the review require the matter to be re-opened, the case duration remains the original date of the complaint being lodged rather than any later date.

19.10 Tier 2 file reviews

A Tier 2 file review involves a *'de novo'* or new investigation of the matter. A decision to commence a Tier 2 File Review is made by the Director QA. Usually a Tier 2 file review would not take place unless:

- a Tier 1 file review has already been conducted that recommends a Tier 2 file review be undertaken;
- where there appears to be systemic issues that need broader consideration throughout FWBC;
- if a review request cannot be resolved through a Tier 1 file review. *For example, if there is no suitable senior officer available to undertake the re-investigation or other special circumstances*; or
- at the request of the Commonwealth Ombudsman.

The responsibility for the conduct of a Tier 2 file review will remain with the QA Team and can be undertaken by:

- the QA Team; or
- a senior officer of FWBC.

It is envisaged Tier 2 file reviews will only take place on complex matters. While recognising there will be variations taking into account the specific nature of a de novo investigation, generally the course of enquiries conducted, will be in accordance with FWBC Operations procedures.

When a Tier 2 file review is undertaken, the original TRIM files are obtained by the reviewing officer and the evidence contained in it will be copied for reinvestigation purposes. The original file will be kept intact for evidentiary purposes.

In most instances it is expected that the Tier 2 file review will be conducted as a field based investigation, with personal contact with the parties seen as a vital and important tool to satisfactorily conclude the matter.

At the completion of the review, the reviewing officer is required to forward a Report to the Director - QA Team detailing:

- a general description of the investigation and review;
- whether procedures followed are consistent with the FWBC Guide, FWBC Manual or relevant formal procedures laid down;
- if procedures were not followed what steps were adopted and what were the outcomes of that failure;
- whether the decision was correct, regardless that procedures were not being properly followed and recorded; and
- a formal outcome of the review using one of the four categories below.

The following are the formal outcomes that can be used from a Tier 2 file review:

- case outcome ranging from 'no further action' to 'litigation recommended';
- where the reviewing officer determines that contraventions have occurred, those matters will be processed in accordance with normal FWBC litigation policy;
- where the FWBC Guide and FWBC Manual has been adhered to, and the process and decision are correct, the original decision will be upheld; and
- file to be considered for referral to the Commonwealth Ombudsman or other external agency as appropriate.

The Director – QA Team will consider the findings and outcomes of the Tier 2 file review and after consultation with relevant Operations management, advise the complainant accordingly.

An internal report of the outcomes to the Executive of FWBC will also consider:

- any identified deficiencies in the original investigation;
- training recommendations; and
- additional enforcement measures where appropriate.

Template documents used during the administration of a Tier 2 file review are usually derived from those used during a Tier 1 file review.

19.11 Tier Three file reviews

[12.4.3] In instances where an investigation has been subjected to both Tier 1 and Tier 2 reviews and the person seeking review remains aggrieved, the executive director must contact the person in writing and refer them to the Commonwealth Ombudsman (refer 12.6 below for further information on the Commonwealth Ombudsman).

A Tier Three file review is one undertaken externally by the Commonwealth Ombudsman to investigate the administrative actions of FWBC. The Commonwealth Ombudsman can decide which matters to investigate and how the investigation is to be carried out. However, it is envisaged the Commonwealth Ombudsman will carry out Tier Three file reviews based on:

- a person seeking a review who has not been satisfied with the conduct or outcome of an earlier Tier 1 and/or Tier 2 file review; or
- a review conducted by the Ombudsman on their own account

During an investigation, the Commonwealth Ombudsman has the power under the *Ombudsman Act 1976* to:

- require a person or agency to provide documents or other written records relevant to an investigation, even if the information is confidential, sensitive, incriminating or subject to legal professional privilege (s9);
- require a person to attend a specified place and answer questions (s9);
- formally examine witnesses (s13); and
- visit agency premises and inspect documents (s14).

At the conclusion of an investigation, the Commonwealth Ombudsman may determine if an administrative deficiency has occurred and make recommendations about:

- how any maladministration may be remedied; and
- report to the relevant minister, or to parliament.

In reaching that decision, the Commonwealth Ombudsman will take into consideration factors including whether the action or inaction involved;

- an unreasonable delay;
- was unlawful, unreasonable, unjust, oppressive, improperly discriminatory, poorly explained, or
- involved a decision which failed to take account of relevant information, was based on irrelevant grounds, or lacked procedural fairness.

All inquiries and correspondence from the Commonwealth Ombudsman should be directed to the Director – QA Team.

[12.6] The Office of the Commonwealth Ombudsman (hereafter "Commonwealth Ombudsman") is established by the Ombudsman Act 1976 and is empowered to investigate the administrative actions of prescribed government departments and agencies, including the FWBC. The term "administrative action" is not defined by the *Ombudsman Act 1976* but the Commonwealth Ombudsman interprets it broadly to include administrative decisions, policy development, the exercise of statutory powers, and other matters (including the FWBC's own investigation and file review procedures). The Commonwealth Ombudsman is principally concerned with correcting maladministration.

The Commonwealth Ombudsman sometimes receives contact from persons who are dissatisfied with the outcome of the FWBC's file reviews. This may result from a referral from the FWBC, as the third tier of the FWBC's review request procedure is to refer persons to the Commonwealth Ombudsman. In addition, the Commonwealth Ombudsman may receive contact from parties to or persons affected by a FWBC investigation at any time (even if that person has not requested that the FWBC conduct a file review). Most contacts made to the Commonwealth Ombudsman about the FWBC are likely to relate to an alleged unreasonable delay or error in decision making during the FWBC's investigation or file review process.

The Commonwealth Ombudsman's role is not to be an advocate for individual persons but an impartial investigator. The Commonwealth Ombudsman's investigations and recommendations will help the FWBC monitor and continually improve its processes, as well as providing an extra level of review to persons dissatisfied with the outcome of the FWBC's investigations and/or internal file review process. From time to time, the Commonwealth Ombudsman also may conduct an own motion investigation regarding the FWBC's

administrative actions, even if no contact from persons about the FWBC's actions has been made.

In dealings with the Commonwealth Ombudsman, the FWBC and the individual Fair Work Building Industry Inspector should follow the procedures outlined in this chapter, to help ensure that due process is observed in responding to Commonwealth Ombudsman inquiries. This will also help ensure that the FWBC is open and transparent about its activities and that the Commonwealth Ombudsman is provided with all necessary information to assist it in ensuring government agencies are accountable and that deficiencies in administrative decision making are minimised. It is also important for Fair Work Building Industry Inspectors to follow these procedures because failing to do so may of itself constitute an administrative deficiency.

19.11.1 Provision of information to the Commonwealth Ombudsman

The FW Act provides that the Fair Work Ombudsman may authorise the disclosure of certain information if he reasonably believes it is likely to assist in the administration or enforcement of a law of the Commonwealth, a state or a territory.[1] The FWBC has delegated this power to Fair Work Building Industry Inspectors (see the Delegation of Powers).

The Ombudsman Act 1976 includes protections for agencies and their staff who provide information that the Commonwealth Ombudsman has formally requested or information that the agency or staff reasonably believe is relevant to a Commonwealth Ombudsman investigation. The protections include that:

- the information cannot be used in evidence against the person (other than for giving false or misleading information)
- the disclosure does not breach the Privacy Act 1988
- the disclosure does not affect a claim that may be made for legal professional privilege.

The FWBC must provide information requested by the Commonwealth Ombudsman unless the information is outside the Commonwealth Ombudsman's jurisdiction because it is not related to administrative action, or the Attorney General exempts the FWBC from providing the information. If the Fair Work Building Industry Inspector has any concern that information requested by the Commonwealth Ombudsman should not be provided for either of these reasons, the Fair Work Building Industry Inspector should discuss this with Government Policy (WRP&E) and their director. Failure to provide required information or providing false or misleading information to the Commonwealth Ombudsman could result in criminal charges or other action.

As noted above, any requests for information from the Commonwealth Ombudsman should be made via Government Policy (WRP&E) in the first instance. Accordingly, the Fair Work Building Industry Inspector should advise Government Policy (WRP&E) of any request for information made of the Fair Work Building Industry Inspector by the Commonwealth Ombudsman, and Government Policy (WRP&E) will respond to the request as detailed in 12.5.2 above.

[1] FW Act; s 718(2)(b).

19.11.2 Results of a Commonwealth Ombudsman investigation

The Commonwealth Ombudsman can investigate administrative actions of the FWBC. The Commonwealth Ombudsman can decide which matters to investigate and how the investigation is to be carried out. However, the investigation must be in private and the Commonwealth Ombudsman cannot release the information publicly except as permitted by the relevant sections of the *Ombudsman Act 1976*.

During an investigation, the Commonwealth Ombudsman has the power to:

- require a person or agency to provide documents or other written records relevant to an investigation (even if the information is confidential, sensitive, incriminating or subject to legal professional privilege) (s9)
- require a person to attend a specified place and answer questions (s9)
- formally examine witnesses (s13)
- visit agency premises and inspect documents (s14).

At the conclusion of its investigation, the Commonwealth Ombudsman will determine if an administrative deficiency has occurred. In reaching this decision, the Commonwealth Ombudsman will take into consideration factors including whether the action or inaction involved an unreasonable delay, was unlawful, unreasonable, unjust, oppressive, improperly discriminatory, poorly explained, involved a decision which failed to take account of relevant information, was based on irrelevant grounds, or lacked procedural fairness. The Commonwealth Ombudsman may make recommendations about how any maladministration may be remedied, or report to the relevant minister or to parliament. Government Policy (WRP&E) will consider the Commonwealth Ombudsman's findings and, if required, initiate action to address any recommendations.

19.12 Internal file reviews

Where FWBC has been unsuccessful in litigation it has initiated, or the agency has discontinued litigation without obtaining an undertaking and/or financial settlement, the QA Team may conduct a review of the matter.

This category of review examines the formal records available and conducts discussions with relevant staff who have been involved in the conduct of the matter. As the matter under review has been settled, different outcomes to other types of review are appropriate. The determinations available are:

- process and decision correct;
- decision correct but the file and/or process is deficient; or
- decision incorrect as the file and/or process is deficient.

A detailed report is compiled for the Chief Executive Officer. Briefings of findings and recommendations are conducted by the reviewing officer with relevant staff.

19.13 Quality Reviews

The purpose of quality reviews is to proactively assess whether Operations activities comply with the:

- FWBC Manual, FWBC Guide and AIMS User Guide;
- attempt to identify any systemic mistakes or misunderstandings by staff of procedures; and
- assist FWBC identify opportunities for improvement to agency procedures and practices.

Quality reviews are not designed as a performance management tool, rather as a means for identifying scope for development at the organisational level. Notwithstanding this, if critical issues are identified, these will be brought to the attention of Operations management for their consideration.

19.13.1 Identification of matters for Quality Review

Quality reviews are undertaken on activity undertaken by FWBC Operations. As quality reviews are a proactive activity, there is more flexibility in the manner in which these are undertaken with each group of reviews tailored to a particular circumstance.
Generally, there are a number of ways in which a Operations activity may be subject to a quality review. These include:

- a request from the FWBC Executive or Operations management that a particular category of matters or process requires examination to assess its effectiveness;
- an assessment is required to identify if a particular category of matters or process has a higher than acceptable risk of non-compliance with formal Operations procedures; or
- random selection of matters to assess if procedures generally are being adhered to in a particular area.

Other than exceptional circumstances, it is envisaged that quality reviews will only be conducted on finalised matters.

19.13.2 Focus and Conduct of Quality Reviews

Quality Reviews are undertaken with a specific focus in a particular area as well as looking more generally at the conduct of the matter against FWBC procedures.

In conjunction with FWBC Executive members, the Director – QA Team develops a work plan identifying the matters to be reviewed. The work plan will also include any specific issues to be examined as well as planned timeframes for completion of the review.

The QA Team will contact the relevant State Directors and notify them of the review. This is accompanied by a formal request for the TRIM Files to be forwarded to a QA Team member. At the completion of the review, the files are returned to the office concerned.

A Quality Review is only able to examine the formal record rather than the actual conduct of the manner in which a matter was investigated. Such reviews cannot take into account activity that is unrecorded on the formal TRIM File and/or AIMS.

19.13.3 Reporting Quality Reviews

Reports of quality reviews are raised as separate TRIM files rather than integrated into an existing Operations file.

Quality Review reports tend to comprise two tiers, with a detailed review report of each matter examined that is then coupled to a summary report containing matters of a similar category. Summary reports also include recommendations arising from the findings of the detailed report.
These reports are provided to senior FWBC management for their consideration of any systemic issues identified, proposed changes recommended and any future quality reviews to be undertaken.

19.13.4 Conclusion

Results of File Review and Quality Review activities are maintained by the QA Team for reporting purposes.

The file review and quality assurance review process is designed to form an integral component of a continuous improvement process in the operations of FWBC. This can only be achieved through engendering a positive and non-adversarial attitude to the review process.

Key Messages

- The FWBC treats complaints about the agency and Fair Work Building Industry Inspectors seriously
- Review requests are actioned by the FWBC according to a three tiered approach, including Tier 2 reviews by a File Review Team
- The Fair Work Building Industry Inspector who conducted the original investigation must be afforded procedural fairness in the review process
- Any dealings with the Commonwealth Ombudsman should be according to the procedures outlines in this chapter