4. COMPLIANCE

4.1 Introduction

The objective of the compliance function of OWS is to ensure that the provisions of federal awards, Schedule 1A in Victoria, certified agreements or the *Workplace Relations Act 1996* (the Act) are observed.

This may be achieved by undertaking targeted compliance activities and investigating claims from employees and employers.

4.2 Key Performance Indicators

The Commonwealth/State national benchmark standard for this activity is that 80% of cases should be finalised within three months of being received in the office:

4.3 Ministerial Delegations and Directions

Under s.84(5) of the Act, the Minister may by notice published in the *Gazette*, give directions specifying the manner in which Advisers exercise and perform their powers and functions. Under s.84(6), Advisers are required to comply with the directions given. The Minister has delegated his powers to issue directions to the Secretary under section 348 of the Act.

The current Ministerial Directions were published in Commonwealth of Australia Gazette, Special Gazette No. S 360 of 30 September 2002. They direct that:

- litigation by a DEWR/OEA Adviser, for breaches of a federal award or certified agreement, can only be initiated with the prior approval of
    - a State/Territory Manager or Deputy State/Territory Manager;
    - the Assistant Secretary with functional responsibility for OWS;
    - the Group Manager with functional responsibility for OWS;
    - the Senior Manager Legal and Compliance, of the OEA; or
    - the Head of the Interim Building Industry Taskforce or the Group manager with functional responsibility for the building and construction industry.
- litigation by an Adviser of a Contracted State, for breaches of a federal award or certified agreement, can only be initiated with the prior approval of
    - the Assistant Secretary with functional responsibility for OWS; or
    - the Group Manager with functional responsibility for OWS;
- litigation for offences under the Act can only be initiated with the prior approval of
    - the Group Manager with functional responsibility for OWS;
    - the Senior Manager Legal and Compliance, of the OEA; or
    - the Head of the Interim Building Industry Taskforce or the Group manager with functional responsibility for the building and construction industry.

State/Territory OWS Managers should ensure each Adviser is familiar with the Ministerial Directions.

4.4 Appointment of Inspectors (Advisers)

Only officers appointed under section 84 of the Act can exercise powers and perform the functions of an Adviser. Ss 84(2) and 85(1) of the Act provide the Minister with the power to appoint officers as Advisers and issue them with identity cards. The Minister has delegated these powers in accordance with s 348 of the Act to the person occupying the office of:

- Group Manager, of the Group with functional responsibility for the Office of Workplace Services; or
- Assistant Secretary, with functional responsibility for the Office of Workplace Services.

Requests for an officer to be appointed as an Adviser and issued with an identity card should be sent by a senior manager to the Assistant Secretary in National Office with functional responsibility for the Office of Workplace Services. The request should contain:

- the full name of the officer and a statement that the officer has the necessary skills and knowledge to satisfactorily perform the functions of an Adviser on the appropriate form; and
- two recent passport size photographs of the officer.

Requests from Contracted States should also be forwarded to the Assistant Secretary in National office with functional responsibility for the Office of Workplace Services, through the relevant State's contract manager.

4.5 Identity Cards

Advisers are issued with an identity card which should be carried at all times when exercising their powers or performing functions as an Adviser. This does not mean that the identity card has to be overtly displayed. However, Advisers are required to produce the card when asked to do so or when circumstances warrant it being produced (eg, where an Adviser's powers or functions are being challenged or denied).

When an Adviser permanently ceases to perform Adviser functions (eg due to retirement, resignation, transfer, etc) they must return their identity card to a senior manager in the office who should forward it to the Assistant Secretary, Office of Workplace Services. If the absence is temporary (eg LSL, temporary transfer, extended leave, etc) the identity card should be surrendered to a senior manager (or Contract Manager) for safekeeping.

4.6 Claims Investigation

Where an allegation about a possible breach matter is received, the officer should:

- establish whether the provision of a federal award, Schedule 1A, a certified agreement or the Act apply to the party;
- determine whether the allegations are supported by the facts; and
- check whether the matter is already the subject of court/AIRC proceedings.
    - Where it is revealed that the matter is the subject of court/AIRC proceedings the person should be advised that the matter will not be investigated pending the outcome of the hearing(s).

      Note that where the court/AIRC is only dealing with an unfair dismissal case, the officer could handle any other matters (eg unpaid wages) in the usual way. This might not be the appropriate course of action in all States and Territories, however, particularly where the AIRC has a history of negotiating an outcome with the parties in full settlement of all outstanding award matters.

When an Adviser reaches a conclusion that a breach may exist and the matter is not before the court/AIRC, Advisers are required to take every reasonable step to gain voluntary compliance.

While the conclusions reached and the decisions made by Advisers are not ones that directly determine the rights and entitlements of individuals (this is the role and responsibility of the AIRC and the courts), considerations such as natural justice and acting within one's authority are important principles that should be kept in mind. This means that in coming to a conclusion that may affect a person's rights or entitlements:

- relevant persons must be given a chance to put their side of the case before the decision is made;
- decisions must be made objectively, without bias;
- the conclusion or decision must be made by an appropriate person, ie a person who is empowered, classified and/or authorised to reach the conclusion or make the decision; and
- the factors and criteria taken into account in reaching a conclusion or making a decision must be right and proper for the purpose for which they are used.

Regular liaison with claimants

Advisers should advise claimants of any key developments and provide them with regular updates, particularly where there are delays in finalising a matter.

Record keeping

Advisers must also keep appropriate records of investigation on file, including records of correspondence provided by the claimant, interviews, phone contacts, findings, key decision making points with supporting reasoning, etc. Drafts need not be kept. Files should be retained in accordance with Departmental guidelines.

4.7 Determining Whether a Matter is a Claim

To be considered as a claim, a matter must be submitted in writing, signed by the claimant and relate to a breach of an award, Schedule 1A, certified agreement or the Act. Where a matter does not meet the above criteria, it should be handled as an enquiry and the client should be informed accordingly.

Note that under the OWS/OEA Agreement, the OEA will deal with all enquiries in relation to possible breaches of AWAs, freedom of association matters, coercion during agreement making, right of entry and strike pay. After consideration, the OEA may refer cases to the OWS (through the relevant manager) for investigation.

4.8 Arrangements for Transferring Claims Between States/Territories

The general policy is that the office where the claim is lodged should do as much as possible to finalise a claim before considering referral. As a minimum the office that receives the claim should first vet it to determine if there are reasonable grounds for an investigation.

The office which receives a claim should have primary carriage of the investigation. However, if the employer does not have a presence in the State/Territory where the claim is lodged, primary carriage should be transferred to the State/Territory where the employer is based – unless agreed otherwise by the two offices.

Where assistance from another State/Territory is required to access records or otherwise finalise the matter, that should be arranged in discussions between the offices involved. Unless agreed otherwise by the offices, the primary carriage of the investigation rests with the office where the claim was lodged. All transfers should be appropriately documented.

4.9 Referral of Matters to and from the Building Industry Taskforce (BIT)

Section 3.9 of this guide summarises the role and responsibilities of BIT.

Where a matter appears to fall within the responsibility of BIT, OWS Advisers should discuss whether it should be referred to BIT with his or her local Manager. If considered appropriate, the OWS Manager should refer the matter to BIT.

OWS Managers should liaise their BIT counterparts on local protocols for the referral of matters between the two areas.

4.10 Confidentiality

Where a claimant requests confidentiality, the investigating Adviser can request information on the circumstances and, if considered reasonable, the claim should be investigated confidentially. Where a claim is dealt with confidentially, claimants should be advised that:

- while every effort will be made not to reveal their identity, no guarantee can be given that the general nature of information sought or questions asked during the investigation will not identify a specific employee or group of employees; and/or
- non-disclosure of their identity may make it impractical to investigate the matter or prejudice the likelihood of a successful investigation, eg where an employer has only one or two employees.

Where a claim is investigated confidentially, the investigating Adviser should take all reasonable steps to maintain that confidentiality, including by ensuring that any other officer who participates in the claim investigation process is advised of the need for confidentiality.

Similar principles apply when investigating a claim (eg breach of Act/Regs) from an employer or other party.

4.11 Determining the Method of Claims Investigation

Non-sensitive claims

Non-sensitive claims may be resolved by:

- office-based investigations;
- workplace-based investigations;
- mediation; or
- a combination of the above.

The primary method of investigation should be determined by consideration of the issues involved and of which option is both cost and time effective.

Sensitive claims

On occasions, an Adviser may identify sensitivities that may require them to seek guidance before deciding how to best investigate a claim or progress an existing investigation. Such sensitivities may be, for example, approaches from Parliamentarians, the identification of a broader dispute that DEWR may have an interest in/involvement with, other/impending court or AIRC action, etc.

In such circumstances, Advisers will need to exercise sound judgement and initially seek guidance from their State or Territory OWS Manager and/or OWS National Office, who will be responsible to alerting relevant areas of the Department and determining how the matter should be handled.

4.12 Mediation

Mediation is used as an alternative to normal investigative techniques in resolving claims over wages and/or conditions. It is aimed at achieving voluntary rectification (in accordance with the Ministerial Directions).

Where an agreed outcome is not achieved, the claim will revert to an investigation.

State/Territory OWS Managers are responsible for determining local policies on when and how mediation will be undertaken, consistent with the following principles:

- Before OWS will mediate any claim, both parties have to agree in writing and sign the mediation agreement.
- Only OWS Advisers who have undertaken accredited mediation training[1] will act as a mediator.
- No person shall serve as a mediator in any dispute in which that person has any financial or personal interest in the result of the mediation.
- Should the dispute not be resolved at the mediation, the mediator may not act as an expert, adviser or arbitrator in any subsequent actions on this matter.
- Mediation sessions are private. The parties may bring a support person or persons to the mediation sessions. Such persons may attend only with the permission of the parties and with the consent of the mediator and are to be advised that they are covered by the provisions of the mediation agreement signed by the parties.
- Any confidential information disclosed to a mediator by the parties in the course of the mediation shall not be divulged by the mediator.
- Parties are not required to settle in the mediation. However, if a settlement is reached, the terms of the settlement should be set down in writing, binding upon the parties.
- Where parties do not abide by any mediated outcome, it is the party's responsibility to resolve the matter.

4.13 Office-based and Workplace Investigations

Office-based Investigations

All office-based investigations should be undertaken by appropriately trained and skilled staff, or by staff who are being trained.

1 Subject to the development of any accreditation requirements from NADRAC

- There is no legal authority to demand documents for use in an office-based investigation where an Adviser has not previously demanded the documents during an inspection of the workplace. Sub-section 86(2) of the Act only allows documents to be demanded where they were not available/produced at the time of a prior inspection. Officers therefore can only request that documents be provided on a voluntary basis.

Workplace investigations

Only officers who are appointed as Advisers under s.84 of the Act can undertake a workplace investigation. This is because at any time during the investigation the Adviser may need to advise the employer of their authority and powers under the Act.

- Staff who may be accompanying an Adviser (eg to receive on-the-job training) can be denied access by the employer or his/her representative on the premises.

Any information collected as part of the investigation should be assembled bearing in mind the evidentiary requirements that may be necessary should the case be finally dealt with in a court. This may include collecting & copying records which contain facts, obtaining supporting statements or records of interview, etc.

4.14 Cases Where Other Employees May Be Affected

Where the nature of the breach by an employer indicates that other employees may be affected, the employer should be so notified and required to check relevant records and resolve the matter for any employees who may be similarly affected. The employer should also be required to inform the Adviser what action was taken to comply with the requirement.

Local guidelines should address procedural issues associated with this policy, including alternatives (eg workplace inspection) where the employer does not comply with an Adviser's instructions.

4.15 Determining Whether the Case is Sustained or Not Sustained

Where following an assessment of the facts, the allegations are supported, the breach is regarded as sustained.

Where, the party in breach indicates a willingness to resolve the matter, the officer should request that the party confirm in writing that the matter has been resolved (eg, the money has been paid) in respect of all persons who may have been affected. The claimant should then be advised to notify the Department if the breach recurs.

Note that State/Territory OWS Managers are responsible for ensuring that there are quality control checks on the accuracy of cases being regarded as sustained or not sustained.

4.16 Over-award and Offsetting Entitlements

In some circumstances an Adviser will need to decide upon the relationship between terms and conditions of employment which have been agreed to (at common law) and the provisions in federal awards, certified agreements or the WR Act (including Schedule 1A). This is particularly the case where an employee is receiving a higher entitlement in lieu of another award entitlement. This is generally known as offsetting entitlements.

When dealing with offsetting entitlements the following principles should apply:

- OWS does not have a role in investigating and/or enforcing over-award/agreement pay rates and conditions as such arrangements are entered into under common law. Claimants should be advised to pursue any such payments themselves, possibly by taking their own civil action;

- if the employer has made over-award payments to the employee that are general, (ie, they are not specific in the sense that they were earmarked as payment for a particular entitlement) then those payments can be used to offset other underpayments;

- however, if the employer has made over-award payments to the employee that are specific in nature, (ie, they are earmarked as being payments for a specific purpose or entitlement) then those payments can only be applied to those purposes or entitlements. They can not be used to offset other underpayments.

    : in this case, if the employee has not been disadvantaged in terms of their overall entitlements (ie over-award payments and underpayments combined) the employee should be advised that no further action will be taken by the Department. However, an Adviser will still have an obligation to advise the employee of their right to take their own legal action (see 5.5 and 5.6);

    : if the employee has been disadvantaged in terms of their overall entitlements then it would be appropriate for an Adviser to investigate and finalise the matter in the usual way.

It should be noted that in most cases, offsetting should only be applied over individual pay periods ie not over the entire period of employment.

The Full Federal Court in *Poletti v Ecob* [1989] 91 ALR 381 held that where outstanding award entitlements are owing to the employee and the employer pays a sum to the employee for purposes other than satisfaction of the award, the employer cannot afterwards claim to have thereby met award obligations.

Poletti v Ecob also confirmed two principles in relation to the off-setting of award entitlements:

- if the employer and employee have agreed that the employer will make payments to the employee that are general (that is, not specific in the sense that they are 'earmarked' as payment for a particular purpose or for a particular entitlement) then those payments can be applied to offset award entitlements; but

- if the employer has made payments to the employee that are specific in nature (that is, that are 'earmarked' as being payments for a particular purpose or entitlement) then those payments can only be applied to award entitlements of a similar nature – that is, there can only be an offset of 'like against like'."

A copy of a brief on *Poletti v Ecob* is available on TAR – see section 3.9 of this Guide.

4.17 Failure to Voluntarily Comply

Litigation action can only be initiated after an Adviser has made every reasonable effort to obtain voluntary compliance. An Adviser can conclude that they have made every reasonable endeavour to seek voluntary compliance once the following steps have occurred:

- after investigation, the party considered in breach is provided with written notification of the breach(es), advice on possible action to resolve the case (including for any other employees who may be affected) and given an opportunity to respond within a reasonable period;

- the Adviser has given full consideration to any response from the party in breach, assessed any additional information provided and contacted the party where any further issues need clarification; and

- the party has been issued with a final letter warning that litigation action may be taken and given a reasonable period to respond eg at least seven days.

4.18 Offers to Settle

An Adviser is not responsible for recommending to a claimant whether to accept or reject an offer. If asked for advice by a claimant, the Adviser should not provide a personal opinion but rather confine their comments to outlining the facts of the case including any strengths or weaknesses in the evidence which may have implications in deciding a matter in a court. The Adviser should also ensure that the claimant is fully informed of the investigation outcomes, including an estimate of the amount of the underpayment so they can make an informed judgement about any offer made.

Full settlement of all matters

Where an employer makes an offer in full settlement (including by instalments), all offers by the employer should be documented on the file (eg, either by a file note or by attaching a copy of the formal offer document). Where the claimant accepts an offer they should do so in writing.

When the Adviser has confirmation that the money has been paid, the case is finalised as 'voluntary compliance'.

The settlement of a claim does not preclude an Adviser from initiating litigation action for penalty.

In cases where the claimant rejects all offers to settle from the employer, the Adviser should advise the claimant of the options available to the Department and the claimant, including small claims action. This outcome should also be documented on the file. When Departmental litigation is approved and/or when the claimant is advised of their right to take their own litigation the case is considered finalised for KPI purposes.

Payment by instalments

If a claimant accepts a settlement by payment in instalments, the claimant should be advised that it is not the responsibility of the Adviser to monitor and pursue any outstanding payments.

If the claimant contacts the Department after the employer stops paying instalments before the agreed settlement time frame and where the claimant provides evidence that they have taken all reasonable steps to recover the money owed, the Adviser should assist the claimant as considered appropriate.

Settlement of some matters or for part of the period

In some situations an employer may make an offer to partially settle a case by agreeing to resolve part but not all of the alleged breaches or the period alleged. Where the claimant accepts the part settlement, the Adviser should establish whether the case should be pursued for the remaining alleged breaches or period. If the claimant wishes to continue with the case for the remaining breaches and/or period, the case will remain open and litigation options may need to be considered.

4.19 Public Sector Employees

While information and advice about the provisions of federal awards, certified agreements and the Act can be provided to public sector employees, it is appropriate that employees of Commonwealth, State and Territory governments and Government Business Enterprises have their allegations of breaches and/or offences initially dealt with through the internal investigation and dispute resolution procedures which are available for public sector employees.

Accordingly, officers should, in the first instance, advise public sector employees:

- to refer their allegations to the personnel manager in their agency for advice (including any avenues for review); and
- where the allegation involves a certified agreement or an AWA, that the matter should initially be dealt with through the dispute resolution procedures specifically provided for in the agreement.

It is expected that the above procedures will, in most cases, lead to the resolution of the matter. If the above procedures have not been effective, the matter should then be handled in

the same way as an enquiry or claim from a private sector employee or employer. Noting that:

- under section 6 of the WR Act the Crown (ie the Commonwealth, State or Territory governments) cannot be prosecuted for an offence; and
- section 6 does not prohibit civil actions re wages etc.

Where an investigation is initiated, OWS-NO should be informed. OWS-No will subsequently liaise with the area of the department responsible for public sector issues, which may be able to assist in resolving the matter.

Unless individual contracts with the Contracted States specify otherwise, Contracted States should consult with OWS National Office where it is believed that a matter raised by a Commonwealth public sector employee warrants investigation.

4.20 Targeted Activities

An important strategy in increasing the observance of federal awards and certified agreements is to undertake activities which specifically target industries and issues. Targeted activity can be undertaken by telephone, letter, workplace visits or by a combination of these methods.

The main criteria for considering whether or not to conduct a targeted compliance campaign include:

- the extent to which there are compliance problems in the industry, identified by calls to WageLine or complaints received;
- the nature and seriousness of those problems; eg. whether they are technical, monetary, contrary to the intention of the Act;
- the extent to which the problems can be addressed by other means; eg, liaison with the parties about amending the award, liaison with organisations about providing correct advice to members, additions to WageNet;
- the time lapsed since the last campaign for that industry, and the outcomes of any evaluations of the impact of that campaign;
- the extent to which a campaign is likely to have an ongoing effect on compliance levels, including the demonstration effect of any prosecutions;
- the availability of staff resources and the impact such a campaign would have on achievement of national benchmarks in other areas of activity;
- the likely cost of the campaign; and
- activities undertaken in the industry by other parties.

Once a decision is made to conduct a targeted campaign, the following should be considered in developing the campaign:

- Objectives – Ensure the elements of the campaign meet its objectives
- Target - What is the campaign targeting?
- Consultation arrangements - Which areas of the Department, Government(s), Government Federal members, industry parties, etc should be consulted/advised
- Extent of involvement of other interested parties - eg State inspectorates, industry parties, etc
- Educative activities - What approaches will be taken prior to the compliance campaign?
- Compliance campaign - How will the compliance campaign be implemented, including addressing rural and regional issues?
- Evaluation - What steps will be taken to determine the success or failure of the campaign, including measuring the impact on compliance levels?
- Timeframe - When will the strategy/activities be implemented?

State and Territory offices are responsible for developing operational guidelines within the parameters of the above criteria.

4.21 Failure to Produce Documents

Where documents are unavailable, an Adviser has three main options:

(1) Make arrangements for the Adviser to be provided with a copy of the relevant documents in accordance with reg 131L - reg 131M also refers.

If a request pursuant to regs 131L and 131M is ignored, consideration should be given to initiating litigation action in accordance with reg 9.

(2) Issue a 'Notice to Produce' under section 86(1)(b)(iv). Where documents are not produced in accordance with this notice, a 'second Notice to Produce' should be issued under sub-section 86(2) - which requires the employer to produce documents within a specified time of not less than 14 days.

If a sub-section 86(2) notice is also ignored, consideration should then be given to initiating litigation action in accordance with reg 9 and section 305 of the WR Act, for both instances of failing to produce.

(3) Initiate action for a breach of section 305 (Obstruction) – see section 4.21 of this Guide

Notices to be in Writing

Issuing notices involves the exercise of powers under the Act. Accordingly, all notices will need to be signed by an Adviser - for evidentiary purposes, notices should also clearly specify what documents, or type of documents are required to be produced.

4.22 Obstruction

Obstruction can occur in three ways:

(1) Hindering or obstructing an Adviser in the exercise of powers, or performing any functions, as an Adviser

Where a physical assault occurs, the matter should be immediately reported to both the State/Territory OWS Manager and the Police. In such circumstances, advice should be sought by the State/Territory OWS Manager from the Department's Legal area on the most appropriate form of legal action to be taken. Liaison should also occur with OWS-NO.

Hindering or obstructing an Adviser may occur in other ways eg, not allowing entry, failure to make witnesses available, intimidatory behaviour, etc. State/Territory OWS Managers should consider each case on its merits before deciding whether to recommend the initiation of litigation action under section 305 of the Act.

(2) Circumstances periodically arise where an Adviser is denied access to documents necessary to determine observance with a federal award, Schedule 1A in Victoria, a certified agreement or the Act. When this occurs, the Adviser should advise the person of their authority and powers under the Act. Where access is still denied the Adviser should explain that it is an offence under the Act to obstruct an Adviser and that penalties apply (see section 305 and regs 131L and 131M).

If an Adviser is still refused access the Adviser should inform the person responsible for the records, in writing, that they are in breach of the Act and can be prosecuted. If access is still denied, the matter should be referred to the State/Territory OWS Manager for a decision on the appropriate action in line with the litigation section of these guidelines.

(3) Making a statement to an Adviser, whether orally or in writing, that the person knows to be false or misleading can also be obstruction – s305(c) refers. State/Territory OWS Manager should consider such matters in line with the litigation section of these guidelines.