5. LITIGATION

5.1 Introduction

The Act provides for identified parties to initiate litigation against a party who has breached their award, certified agreement or the Act.

These guidelines apply where an OWS Adviser is initiating litigation action or where assistance is being provided.

In determining whether to initiate litigation, the following matters need to be considered:

- That OWS-initiated litigation action should only be taken as a last resort, after every reasonable effort has been made to secure voluntary compliance and only with the approval of the delegate specified in the Ministerial Directions
- The type and seriousness of the breaches
- The most effective method of resolving the matter taking into account the impact on compliance

The following types of litigation are provided for:

Departmental Litigation

- Actions under s 178 of the Act, which have as their primary legislative purpose the seeking of a penalty for a breach of a provision (or provisions) of a federal award or a certified agreement.
    - Power to seek penalties is given to Advisers, the parties to a federal award or certified agreement and any person whose employment at the time of a breach was affected by the breach
        : underpayments (s178(6)) and interest (s179A&B refers) can also be sought by Advisers when taking action under s178.
- Offences under the Act, such as obstruction (s305), or time and wage records or payslip regulations (reg9)
- litigation action can be initiated against any party in breach of their obligations, regardless of whether they are an employer or employee

Employee Litigation

- Employees can take their own actions under s178 and s179 of the Act, including by using the small claim procedure in accordance with s179D.
    - The role of suing for recovery of entitlements under s179 is given to employees, not the Adviser.

- Employees can also take their own common law/civil action under relevant State/Territory legislation.

5.2 Quality Assurance

State/Territory OWS Managers are responsible for ensuring that there are quality control checks in place to ensure that:

- Local guidelines are in place to ensure that appropriate cases are recommended for approval by the relevant delegate for Departmental prosecution, and
- Claimants are advised of their right to take their own action (including the level of assistance given by the Department) where a claim is found to be sustained and voluntary compliance has not been achieved.

5.3 Litigation by the Department

Offences under the Act

Regulation 9 provides Advisers with the authority to institute or give evidence in any proceedings or conduct or assist in the conduct of legal action for offences under the Act, eg, obstructing Advisers (s.305), and time and wages records and pay slips (parts 9A and 9B of the regulations).

The Ministerial Directions prescribe that legal action relating to contravention of the provisions of the Act requires the approval of the Group Manager with functional responsibility for the Office of Workplace Services. Any recommendation for litigation action must be forwarded to the Group Manager through the Assistant Secretary responsible for OWS by the State/Territory OWS Manager (or the Contract Managers in respect of the Contracted States).

Obstruction

Under s 305 it is an offence to hinder or obstruct an Adviser in the exercise of their powers or functions, to unreasonably contravene a requirement made by an Adviser, or to make false or misleading statements. As this offence is punishable by six months imprisonment (maximum), it:

- must be heard in a court of competent jurisdiction, which includes the Federal Court or the Local Court exercising criminal jurisdiction;
- requires the offender to be a natural person; and
- should only be used:
    - where the person obstructing the Adviser has been provided with a reasonable opportunity to comply with the Adviser's directions (and does not have a reasonable excuse for not complying);
    - the obstruction involves an assault;

: 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;

- the obstruction involves intimidation or threatening behaviour; or
- the obstruction involves other behaviour considered serious enough to prejudice the Adviser being able to perform his or her duties, or which may encourage other persons to obstruct Advisers if action is not taken

: this includes where a party may systematically and/or unreasonably delay compliance or not comply with their lawful obligations (eg refusing to allow an inspection, not providing records within a reasonable period, etc).

State/Territory OWS Managers should consider the strength of evidence available for all incidents of obstruction and consult with the Department's Legal area (and OWS-NO as appropriate) on possible legal action.

Breaches of Part 9A and 9B of the Regulations

Regulation 131L provides that an employer must make a copy of a record available to an Adviser for inspection and copying, either on the employer's premises or other specified premises. When an employer fails to make a copy of a record available to an Adviser for inspection and copying, it may give rise to an offence under r131L.

It is not necessary to make any further demand under s 86(1)(b)(iv) or s 86(2). Breaches of r131L should be considered in the context of overall award enforcement.

Breaches of awards and certified agreements - Section 178 actions

The primary legislative purpose of litigation action under s178 is to seek to have a court impose a penalty for a breach of a provision (or provisions) of a federal award or a certified agreement. The secondary purpose is to seek an order for a party to pay the claimant the full amount of any underpayment (s178(6) refers).

Once every 'reasonable' action has been taken to achieve voluntary compliance and it has been decided that voluntary compliance is unlikely to occur within a reasonable period, the following factors should be considered in deciding whether to sue for a penalty under s178:

- whether the breach was wilful; taking into account factors such as the compliance history of the party, whether they acted in good faith or not, etc;
- whether the breach was serious in nature; taking into account factors such as the length of time the party failed to observe the provision(s), OH&S matters, the number of other people similarly affected, the degree to which the matter affected the claimant or others concerned, the amount of any underpayment(s), etc;
- the extent of any over-award or offsetting payments (also see 4.15 of this guide);
- the extent of compliance in a particular industry sector or with the particular provisions

of a federal award; which may include consideration of the need to establish a precedent in a court of law;

- whether another party is taking or proposing to take similar action and/or whether the claimant has the capacity to initiate their own private action or initiate action through a union/employer organisation or with the assistance of another organisation;
- the strength of the evidence in a particular case, the likelihood of a penalty being granted by a court and the likelihood of recovery (eg, the company's solvency). In practical terms, it will sometimes be appropriate for the Department to place some weight on the desirability to recover entitlements;
- the likely cost of the action (this should not preclude litigation – it must be considered as just one (not major) factor in the overall context of a decision);
- previous court decisions which relate to the matter;
- any relevant legal advice relating to the matter; and
- depending on the circumstances of the case, any other considerations which might justify the Adviser taking litigation action.

The above factors must be considered in an overall context. It is not necessary for a proposal to litigate to address each of the above considerations. For example, a serious breach may justify litigation, as may an action against a party which has demonstrated history of non-compliance.

Other considerations

Small Claims Procedure - $10,000 Limit

Amounts of less than $10,000 should generally be dealt with under the small claims procedure. However, if a particular case clearly warrants litigation action by the Department on the basis of the above criteria, the amount of $10,000 should not be seen as a limit which precludes such action from being recommended or approved.

Voluntary compliance

It would only be in exceptional circumstances that Advisers would sue for penalties where an employer has voluntarily resolved the matter beforehand.

Restriction on obtaining additional evidence

The formal initiation of legal action generally restricts Advisers from obtaining additional evidence from an employer. It is therefore desirable that advice about the merits of the case be sought from the Australian Government Solicitor on the strength of available evidence before formally instigating legal action.

5.4 Recommendations to litigate

Submissions

All recommendations to litigate should:

- provide a brief factual summary of the case/claim;
- briefly address the nature of the main breach(es);
- address any of the considerations in section 5.3 (above) which may be relevant;
- clearly indicate how respondency has been established;
- provide a summary of what action has been taken to secure voluntary compliance;
- indicate the nature of any legal advice obtained;
- outline any potential problems that may be associated with litigation;
- indicate confidence of success;
- be signed by an Adviser; and
- subject to local arrangements, be submitted through a senior officer/manager to an authorised delegate.

Delegations for Approval of Litigation Action

Delegations for the approval of litigation action are specified in the Ministerial Directions.

Litigation action in relation to breaches of a federal award, AIRC order or certified agreement can only be approved by a State Manager, Deputy State Manager or the Assistant Secretary or Group Manager with functional responsibility for the Office of Workplace Services. The approval arrangements for litigation action by Contracted States are outlined in their respective contracts.

Litigation action for offences under the Act can only be approved the Group Manager, with functional responsibility for the Office of Workplace Services.

5.5 Where Departmental Litigation is Not Approved

If the delegate has decided that it will not litigate a case, the delegate should advise the relevant Adviser of the reason(s) for the decision. The delegate and Adviser should consult to determine the most appropriate way of informing the claimant of the decision. In such cases, the claimant should be advised of the option of undertaking their own litigation.

5.6 Where Court Imposed Penalties and Payments are Not Paid

Where, following Departmental litigation, a party has failed to comply with a court order which imposed a penalty and/or ordered payments, the relevant State/Territory OWS Manager should liaise with OWS-NO in arranging for the relevant Sheriff's office (or other relevant organisation) to enforce the court order.

5.7 Claimant/Employee Litigation

Claimants can pursue their own litigation under s.178. Employees can also pursue actions under s.179 of the Act. Where action is taken under s.179, a small claims procedure is also provided for at s.179D. State and Territory jurisdictions also have their own civil remedies which can be accessed by individuals.

The level of assistance provided by the Department to claimants taking their own litigation action will depend upon:

- the circumstances of the case
- the alternative avenues available to the claimant for assistance
- the amount of evidence which would be admissible in a court.

Depending upon the circumstances, the Department should provide a report of the findings of its investigation and basic information on the court procedures in order to assist a claimant in taking their own action. This will generally be in the form of a small claims kit which has been put together by the State Office which is consistent with local magistrate/small claims court requirements.

If the Department has decided that it will not litigate the case and the Adviser has advised the claimant that they have the option of undertaking their own litigation the case is considered to be finalised.

5.8 Small Claims Procedure

Where a claimant does not accept an offer of settlement or where no offer of voluntary settlement is made by the party in breach, the claimant (if an employee) can decide to proceed with a s.179 action using the small claims procedure under s.179D of the Act. It should be noted however that a court cannot award a payment exceeding $10,000 under s.179D. In some States/Territories, it may be possible to settle matters under State/Territory legislation.

State/Territory OWS Managers are responsible for ensuring that the small claims kit and any reports prepared are in accordance with the procedures and standards required by the courts in their State or Territory.

5.9 Sampling

It may be beneficial for State Offices to liaise with their local courts to assess their preparedness to determine an entire case on the basis of a sample period only. Sampling is a process where the parties agree (in writing) to argue a case on the basis of an agreed period and to apply the result to the entire period of the alleged breach. For example, the parties could agree to argue the case on the basis of time and wage records covering a three week period and extrapolate the outcome to cover the remaining 25 weeks in question. This saves both parties and the court considerable time and expense.

Consistent with the concept of sampling, an order may be sought from the court to require a party to apply the results of the first case to settle all similar cases for other claimants.

5.10 Subpoena to Appear or Produce Documents

Advisers should not encourage employers or employees to summon them as a witness and/or to produce documents for court hearings. If a subpoena is issued, however, it must be complied with and OWS management should be notified immediately. When appearing as a witness, the Adviser should, unless directed or otherwise by the court, make every reasonable effort to confine their comments to the breach notice, questions asked and/or relevant departmental documents and reports.

If an Adviser is notified by an employer or employee of their intention to summons the Adviser to appear as a witness or produce documents relating to the investigation, the Adviser should:

- advise the employer or employee that the court may make any documents summoned available to the other party;
- specify which documents may be relevant or appropriate for use by the employer or employee during the hearing; and
- offer the relevant documents to the employer or employee, if this has not already been done (the Privacy Act does not restrict the court from access to departmental records).

Where a subpoena is issued, the Adviser should:

- only provide the papers subject to the subpoena - if the case papers are requested, only provide these and not the entire file on the employer which may include previous unrelated investigations;
- clearly advise the party issuing the summons that the Adviser can appear as a witness - but will/can not 'run' the case from the witness box;
- make available copies of the breach notice and the departmental report to both parties and the court at the hearing; and
- take to the court all other documentation relating to the investigation and provide them on request by the court.

Because all documents relating to an investigation can be subpoenaed by either party for a hearing, Advisers should ensure that files are properly maintained and that only relevant/appropriate documents are filed.

5.11 Legal Representation - Small Claims Matters

In some jurisdictions, Magistrates may allow legal representation on request from either party. Under s.179D(2)(e) of the Act, if the court allows a party to be represented by counsel, the onus is on the court (not the Department) to ensure the other party is not disadvantaged.

Where State/Territory OWS Managers have concerns about the operation of the s179D procedure in their State or Territory, they should consider:

- liaising with OWS-NO and the Department's Legal area on the most appropriate manner in which issues can be raised with either the Chief Magistrate, relevant Magistrate(s) and/or the Court Registrar;
- ensuring that the relevant court has written material on the federal procedures in a form which may be circulated to other Magistrates within the jurisdiction; and
- ensuring that claimants are provided with a copy of s.179D(2)(e) before the hearing, which they may tender to the court if they object to the other party being represented by counsel or if they think they are being disadvantaged.

5.12 Matter Finalised

Where the Department has decided not to litigate the case and the Adviser has advised the claimant that they have the option of undertaking their own small claims action the case is considered finalised whether or not it goes to litigation. However, it is important that records be kept where claimants take small claims action and, where possible, Advisers should request that the claimant advise them of the outcome of the hearing (eg, date of decision, any amount ordered, how non-legalistic, informal, etc the hearing was conducted). This information may allow future claimants to be better advised about the hearing processes and allow offices to tailor their small claims kits or other material to better meet the needs of claimants/courts. It is not expected that Advisers would attend hearings or chase up parties solely for the purpose of discovering this information.

5.13 Appeals

Relevant State/Territory OWS Managers must consult the Assistant Secretary of OWS in National Office regarding any proposed appeals involving matters dealt with by the Department. Each matter will be considered on a case by case basis.