



**Australian Government**

**Australian Building and Construction Commission**

# **ABCC Operations Manual**

**Please note that this manual has not yet been fully converted to ABCC policies and procedures as not all of these have yet been developed.**

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## Part A: Powers, structures and investigation processes

### ABCC Operations Manual

#### Chapter 1

## Introduction

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## Chapter 1

### 1.1 Introduction

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

### 1.2 Role of the ABC Commissioner

The ABC Commissioner is a statutory office holder pursuant to the *Building and Construction Industry Improvement Act 2005* (BCII Act). The ABC Commissioner has the following functions:

- (a) monitoring and promoting appropriate standards of [conduct](#) by [building industry participants](#), including by:
  - (i) monitoring and promoting compliance with this Act, the [Independent Contractors Act 2006](#) , the FW Act and the [Fair Work \(Transitional Provisions and Consequential Amendments\) Act 2009](#) ; and
  - (ii) monitoring and promoting compliance with the [Building Code](#); and
  - (iii) referring matters to other relevant agencies and bodies;
- (b) investigating suspected contraventions, by [building industry participants](#), of:
  - (i) this Act, the [Independent Contractors Act 2006](#) , the FW Act, the [Fair Work \(Transitional Provisions and Consequential Amendments\) Act 2009 or a Commonwealth industrial instrument](#); and
  - (ii) the [Building Code](#);
- (c) instituting, or intervening in, proceedings, or making submissions, in accordance with this Act;
- (d) providing assistance and advice to building industry participants regarding their rights and obligations under this Act, the Independent Contractors Act 2006 , the FW Act and the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 ;
- (e) providing representation to a building industry participant who is, or might become, a party to a proceeding under this Act, the Independent Contractors Act 2006 , the FW Act or the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 , if the ABC Commissioner considers that providing the representation would promote the enforcement of this Act, the Independent *Contractors Act 2006* , the FW Act or the [Fair Work \(Transitional Provisions and Consequential Amendments\) Act 2009](#) ;

- (f) disseminating information about this Act, the Independent Contractors Act 2006 , the FW Act, the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 and the Building Code, and about other matters affecting building industry participants, including disseminating information by facilitating ongoing discussions with building industry participants;
- (g) any other functions conferred on the ABC Commissioner by this Act or by another Act;
- (h) any other functions conferred on the ABC Commissioner by the regulations.

The Office of the Australian Building and Construction Commissioner (ABCC) is a statutory agency pursuant to the BCII Act. The ABCC comprises the ABC Commissioner, all of the ABC Inspectors, and other staff.<sup>1</sup>

### **1.3 Role and powers of ABC Inspectors**

ABC Inspectors are appointed and empowered to perform certain functions under the BCII Act. This includes monitoring compliance with the FW Act. In general, ABC Inspectors are also appointed as Fair Work Inspectors under the [FW Act](#) <sup>2</sup>. Importantly there is no requirement for a complaint to be made before an ABC Inspector can exercise compliance powers.

The functions of ABC Inspectors include the advancement of harmonious and co-operative workplace relations by promoting compliance with Commonwealth workplace laws, particularly those relating to provisions of the BCII Act, [FW Act](#) and the [Fair Work Regulations 2009 \(FW Regulations\)](#) including but not limited to:

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

With respect to investigations regarding underpayments of wages and entitlements, these provisions may include matters such as:

- outstanding entitlements of employees and ensuring that employees are paid their correct entitlements going forward in their employment relationship for agreements lodged with the Workplace Authority before 1 January 2010 which have failed the Fairness Test or No Disadvantage Test
- common law contracts which may be in contravention of the mandatory National Employment Standards (NES) (from 1 January 2010)

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<sup>1</sup> BCII Act; 26 & FW Act; s696(2)

<sup>2</sup> BCII Act; S57 & FW Act; s706

- provisions of the [Independent Contractors Act 2006](#) (Cth), including those regarding prohibited conduct in relation to opt-in agreements entered into from 11 December 2006
- entitlements under transitional instruments and other provisions that are in operation under the *Fair Work (Transitional and Consequential Amendments) Act 2009* (Cth) ([Transitional Act](#)), (refer 1.8.3 below)
- certain orders of Fair Work Australia (FWA)
- entitlements under the NES or modern awards (from 1 January 2010) ([Chapter 12](#) – National employment framework)

In addition, ABC 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 1.7.1 below).

**Throughout this ABCC Operations Manual, the legislative instruments specified above are referred to collectively as Commonwealth workplace laws.**

Dual appointment under the BCII Act and the FW Act confers ABC Inspectors with 'compliance powers' in order to perform the above functions. These powers may be exercised at any time during working hours, or at any other time an ABC Inspector deems necessary for compliance purposes.

In performing their functions ABC Inspectors may be exercising powers under the BCII Act, the FW Act, or both.

### **1.3.1 Powers of ABC Inspectors to enter premises**

ABC Inspectors, as duly appointed Fair Work Inspectors, in addition to exercising powers through Chapter 7, Part 2, Division 2 of the BCII Act, will also be able to exercise powers through Chapter 5, Part 5-2, Division 3, Subdivision D of the FW Act.

An ABC Inspector may, without force enter premises if the ABC Inspector reasonably believes that the [BCII Act](#), [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). ABC 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.

ABC Inspectors 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.

### **1.3.2 Powers of ABC Inspectors while on premises**

While on premises, an ABC 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 ABC 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 on document to an ABC 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.<sup>3</sup>

### 1.3.3 Persons assisting ABC Inspectors

Where an ABC Inspector is exercising functions as a FW Inspector, a person, referred to as an assistant, may accompany the ABC Inspector onto the premises if the ABC Inspector is satisfied that the assistant is both required and suitably qualified to assist the ABC Inspector.

The assistant may assist the ABC 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 ABC Inspector.<sup>4</sup> Examples of assistants which may be engaged include IT specialists, forensic accountants or interpreters.

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

### 1.3.4 Power to ask for a person's name and address

Where an ABC Inspector is exercising functions as a FW Inspector, the ABC Inspector has the power to require a person to provide their name and address if the ABC Inspector *reasonably believes* the person has contravened a civil remedy provision of the FW Act. Supporting evidence can be required if the ABC Inspector *reasonably believes* the information they have been given is false (see s711 of the FW Act).

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

### 1.3.5 Power to require persons to produce records or documents

The mechanism used by ABC Inspectors to obtain records or documents will depend on the compliance purpose for which the ABC Inspector is exercising his functions. There are four possible options exercisable by the ABC Inspector.

Where an ABC Inspector is seeking records or documents in relation to a compliance purpose as defined by the BCII Act, the ABC Inspector may visit the premises of an employer and, while on the premises, require under s59(5)(e) of the BCII Act that any person who has custody of, or access to, a record or document produce the document or record to the ABC Inspector.

If a person receives a request for records or documents under s59(5)(e) and fails to comply with this request, an ABC Inspector may serve a written notice on the person

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<sup>3</sup> FW Act; s709

<sup>4</sup> FW Act; s710(3)



requiring them to produce the document at a specified place within a specified period (not being less than 14 days).

Failure to comply with a request for records or documents under either limb of s59 does not render the person liable to either a civil penalty or a penalty infringement notice. However, it may amount to hindering or obstructing a Commonwealth public official.

Where an ABC Inspector, appointed as a FW Inspector, is seeking records or documents in relation to a compliance purpose as defined by the FW Act, the ABC Inspector may visit the premises of an employer and 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 ABC Inspector.

In addition, an ABC Inspector, appointed as a FW Inspector, who is seeking records or documents in relation to a compliance purpose as defined by the FW Act, the ABC Inspector may require a person by notice to produce records or documents in accordance with s712 of the [FW Act](#). [Section 712 provides that such a](#) notice must be in writing and be served on the person. In addition, the notice must 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.

A failure to comply with either s709 or s712 may lead to the imposition of a civil penalty under the FW Act.

Where these powers are exercised, best practice dictates that a receipt must be issued when any records or documents are supplied to the ABC Inspector. Under s59(7), a receipt must be issued where the ABC Inspector intends to retain the documents provided.

Further information on these provisions can be found in Chapter 21 – Evidence.

### **1.3.6 Power to keep records or documents**

If a record or document is produced to an ABC Inspector in accordance with s59(6) or 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 ABC 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.<sup>5</sup>

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<sup>5</sup> s714(2) FW Act; s59(6) BCII Act

## 1.4 Role of Legal Group

Legal Group works collaboratively with Field Operations Group (including the ABC Inspectors) during the investigation and, where necessary, the litigation process. Legal Group also provides legal support to ABC Inspectors and the ABCC generally in performing its statutory functions.

The primary responsibilities of Legal Group include to:

- provide legal advice to ABC Inspectors in relation to matters under investigation (and to other groups, branches and teams within the ABCC)
- undertake the assessment of matters recommended for litigation
- prepare, coordinate and conduct litigation activities
- where necessary and appropriate, brief external legal providers.

Legal Group comprises the Group Chief Counsel, Legal, principal lawyers, senior lawyers and lawyers. Legal Group lawyers are Australian legal practitioners and hold a practising certificate in accordance with the requirements of the legal services regulating body in the jurisdiction in which they are resident. Legal Group lawyers are, therefore, subject to the professional practice rules which apply in each of the states and which are mandated by legislation.

Legal Group lawyers must:

- act in accordance with the general principles of professional conduct
- discharge their obligations in relation to the administration of justice
- supply legal services of the highest standard unaffected by self-interest.

A failure to comply with legal profession rules is capable of constituting unsatisfactory professional conduct or professional misconduct.

In accordance with the professional practice rules, Legal Group lawyers:

- must provide professional legal services to the ABCC in a timely manner without regard to the policy, investigative or administrative objectives of the ABCC
- must not “act as the mere mouthpiece” of the ABCC or of the instructing ABC Inspector but, rather, exercise the forensic judgments called for during the case independently, after appropriate consideration of the ABCC’s and any instructing ABC Inspector’s wishes where practical.

Each state has legal officers appointed to provide legal support for their region. ABC Inspectors should consult their Team Leader to find out their relevant Legal Group contact.

**Note: Northern Territory and Tasmania legal support is provided from the offices of Western Australia and Victoria respectively.**

For further information on obtaining legal advice please refer to Chapter 10 – Procedural matters in investigations. For further information on ABCC litigation please refer to Chapter 22 – Enforcement and Chapter 23 – Litigation.

## 1.5 Role of Public Affairs Branch

The Public Affairs Branch is responsible for promoting the education and compliance message within the broad community, building the ABCC's profile with media outlets and our key stakeholders and using the media to foster general deterrence against non-compliance with workplace laws.

The Public Affairs Branch is responsible for designing and delivering educative solutions for Australian workers and employers with a particular focus on small to medium sized enterprises. The education team is also responsible for developing and implementing an ABCC education strategy.

## **1.6 Purpose of the ABCC Operations Manual**

The ABCC Operations Manual provides nationally consistent best practice guidance on the full range of ABCC functions. The Manual will be used by all ABC Inspectors in the conduct of investigations and its contents are applicable to specific aspects of matters investigated within the jurisdiction of the ABCC.

The guidance contained within this Manual covers matters such as the conduct of education campaigns, audits and investigations into suspected contraventions of Commonwealth workplace relations law and associated technical information by providing:

- guidance for all ABC Inspectors, team leaders, managers and support staff
- clear direction on investigation techniques
- clear expectations in relation to the conduct of investigations, escalation points and management intervention.

## **1.7 Relationship between the Manual and the ABCC's Guidance Notes**

In addition to this Manual and the [FWO Standard](#), the ABCC also produces Guidance Notes. The ABCC's Guidance Notes are a means by which the ABCC publishes and disseminates advice on its policies and procedures and on the interpretation of the laws it enforces. ABC Inspectors need to have regard to the ABCC's Guidance Notes when making decisions, in conjunction with the information contained in this Manual and the FWO Standard.

An important distinction is that while the Manual and FWO Standard are internal documents only, the ABCC's Guidance Notes are available to the public on the ABCC's internet page. Because Guidance Notes are public documents, they are a useful tool to help ABC Inspectors explain the ABCC's policies to the public on a range of topics.

If a version of the Manual is inconsistent with any of ABCC's Guidance Notes, the later version (by publication date) of the Manual takes precedence.

The ABCC has produced the following Guidance Notes:

- [ABCC Guidance Note 1 – Litigation Policy](#)
- ABCC Guidance Note 2 – ABCC Investigative Process
- ABCC Guidance Note 3 – Written Undertakings Policy

## Transition from Workplace Relations Act to Fair Work Act – some practical implications

The FW Act represents a significant reform of the manner in which workplace relations are conducted, managed, regulated and enforced in the federal system. It is the government's intention that the laws will deliver a balanced, modern workplace relations system that will allow Australia to become more competitive and prosperous without taking away workplace rights and guaranteed minimum standards.<sup>6</sup> The transition from the old system to the new Fair Work system will occur in a staged manner.

### 1.7.1 Repeal of the WR Act – conduct before the repeal

As a consequence of the transition to the new federal workplace relations legislative regime, the [WR Act](#) has been repealed (with the exception of Schedules 1 and 10) effective from 1 July 2009. Schedules 1 and 10 of the WR Act will continue to operate, but these schedules will now form the *Fair Work (Registered Organisations) Act 2009* (Cth).

The repeal of the WR Act does not threaten the integrity of any investigations being conducted at the date of transition (i.e. 1 July 2009) nor does it mean that the ABCC cannot investigate new complaints relating to pre-1 July 2009 conduct. Under the provisions of the *Fair Work (Transitional and Consequential Amendments) Act* (Cth) 2009 ([Transitional Act](#)) the WR Act continues to apply in relation to conduct that occurred before the WR Act repeal day (1 July 2009)<sup>7</sup>. ABC Inspectors are empowered to conduct (or continue) investigations under the BCII Act into alleged contraventions which occurred prior to 1 July 2009. In addition, the Transitional Act contains provisions that enable ABC Inspectors, through their appointment as FW Inspectors, to commence (or continue) investigations into alleged contraventions which occurred prior to 1 July 2009 where the ABC Inspector is exercising functions as a FW Inspector.

In addition, FW Inspectors, including dual appointed ABC Inspectors, have access to some new compliance powers under the FW Act in relation to these investigations, although the full range of new compliance powers is not available. For example, FW Inspectors cannot issue a compliance notice in relation to pre-1 July 2009 contraventions. Rather, where a compliance power is not available to be used, ABC Inspectors are expected to utilise either the relevant enforcement mechanisms that were available to them immediately prior to 1 July 2009 (under the relevant provisions of either the FW Act or BCII Act, as appropriate) or such other mechanisms as specifically provided for under the Transitional Act.

### 1.7.2 The bridging period

Specific sections of the [FW Act](#) commence in a staged manner, including the commencement of the National Employment Standards (NES) and modern awards (refer Chapter 12 – National employment framework). In order to ensure that workers are still protected by some statutory minima after the repeal of the [WR Act](#), the concept of a “bridging period” has been introduced. The Transitional Act defines the bridging period as being the period between the day of the repeal of the [WR Act](#)

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<sup>6</sup> Hon Julia Gillard, Deputy Prime Minister; Second Reading Speech Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009; 19 March 2009.

<sup>7</sup> Transitional Act; Schedule 2, item 11.

and the commencement of the [FW Act](#) safety net provisions. In practice, this bridging period is from 1 July 2009 to 31 December 2009 inclusive.

During the bridging period, the interaction between the new legislation, new Fair Work agreements, transitional awards and agreements, and existing [WR Act](#) statutory entitlements is complicated. It is important for ABC Inspectors to ensure they understand the manner in which the [WR Act's](#) statutory entitlements may continue to apply. This issue is discussed in further detail in Chapter 12 – National employment framework.

### 1.7.3 Existing workplace relations instruments

The Transitional Act defines a number of instruments as [WR Act](#) instruments and provides for these instruments to continue to operate within the new legislative framework as “transitional instruments”. ABC Inspectors are able to enforce transitional instruments in the same way as they can enforce [FW Act](#) instruments<sup>8</sup> (although, as noted above, there may be some limitations on the applicable enforcement mechanism). These issues are discussed in detail in Chapter 12 – National employment framework. However, in summary each of the following instruments is a WR Act instrument (and therefore a transitional instrument):

- an award
- a notional agreement preserving state awards (NAPSA)
- a workplace agreement (whether it is a collective agreement or ITEA)
- a workplace determination
- a preserved State agreement (whether collective or individual)
- an AWA
- a pre-reform certified agreement
- a pre-reform AWA
- an old IR agreement
- a section 170MX award.

In essence, this means that transitional instruments will continue to apply to employers, employees and organisations as if the [WR Act](#) had not been repealed. The rules governing content of agreements that applied under the [WR Act](#) will continue, with the following additions:

- processes for variation and termination of transitional instruments (including giving FWA various powers)
- cessation of unmodernised award-based instruments and NAPSAs
- a process for parties to enterprise awards and enterprise NAPSAs to apply to FWA (by the end of 2013) to have their instruments “modernised”
- sunseting at 27 March 2011 instruments that rely on the conciliation and arbitration power (such as pre-reform certified agreements made before 27 March 2006).

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<sup>8</sup> Transitional Act; Schedule 18, item 14

#### **1.7.4 The distinction between coverage and application**

The progressive nature of the introduction of statutory entitlements, such as the NES and modern awards, causes a further potential difficulty for investigating ABC Inspectors. Under the terms of the [FW Act](#) and the Transitional Act, there is a distinction to be made between coverage of an instrument and application of the instrument. In all cases, “coverage” is to be interpreted by ABC Inspectors as meaning the instrument has the capacity to apply to the person in question (whether or not it actually applies). Application is to be interpreted by ABC Inspectors in accordance with its ordinary meaning. This issue is discussed in further detail in Chapter 12 – National employment framework.

#### **1.8 Role of ABCC in adhering to international labour conventions**

The FWO and ABCC are the Australian Government agencies primarily responsible for progressing Australia’s obligations under the International Labour Organisation (ILO) Convention No 81 – the Labour Inspection Convention.

The ILO is a United Nations agency devoted to promoting rights at work, encouraging decent employment opportunities, enhancing social protection and strengthening dialogue in handling work-related issues for women and men, globally.<sup>9</sup>

The ILO has developed a number of conventions and recommendations about work, employment, social security, social policy and human rights related issues. Australia has ratified ILO Convention No 81, which relates to labour inspection in industry and commerce. This convention requires the maintenance of a system of labour inspection which, among other things, assists with the enforcement of legal provisions relating to conditions of work and the provision of technical information and advice to employers and employees concerning the most effective ways of complying with the provisions.

The ILO Convention requires reports to be prepared on the activities of the ABCC. These reporting requirements are important for public accountability and these requirements have been previously met by the WO in its Annual reports and will in the future be met by the FWO and ABCC.

#### **1.9 Official conduct and Australian Public Service (APS) Values**

As Australian Public Service (APS) employees, every employee at the ABCC is accountable to the public and parliament for the decisions they make. APS employees are required to make reasonable, fair, just, timely and transparent decisions.<sup>10</sup> ABC Inspectors must demonstrate honesty, integrity, determination, responsiveness, objectivity, proficiency, respect and professionalism, and adhere to the [APS Code of Conduct](#) and [APS Values](#) throughout all investigations.

#### **1.10 APS Values and Code of Conduct**

All employees of the ABCC are required under the [Public Service Act 1999](#) (Cth) and associated regulations, to adhere to the [APS Code of Conduct](#) and behave, at all times, in a way which upholds the values of the APS.

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<sup>9</sup> The International Labour Organisation, The ILO at a glance, available at [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---webdev/documents/publication/wcms\\_082367.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---webdev/documents/publication/wcms_082367.pdf) . Viewed 16 Feb 2009.

<sup>10</sup> Australian Public Service Commission, [Public Service Code of Conduct – Guidelines](#). Viewed 16 Feb 2009

The [APS Values](#) state that the APS:

- is apolitical, performing its functions in an impartial and professional manner
- is a public service in which employment decisions are based on merit
- provides a workplace that is free from discrimination and recognises and utilises the diversity of the Australian community it serves
- has the highest ethical standards
- is openly accountable for its actions within the framework of ministerial responsibility to the government, the parliament and the Australian public
- is responsive to the government in providing frank, honest, comprehensive, accurate and timely advice, and in implementing the government's policies and programs
- delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public
- has leadership of the highest quality
- establishes workplace relations that value communication, consultation, co-operation and input from employees on matters that affect their workplace
- provides a fair, flexible, safe and rewarding workplace
- focuses on achieving results and managing performance
- promotes equity in employment
- provides a reasonable opportunity to all eligible members of the community to apply for APS employment
- is a career-based service to enhance the effectiveness and cohesion of Australia's democratic system of government
- provides a fair system of review of decisions taken in respect of employees.

The [APS Code of Conduct](#) requires that an employee must:

- behave honestly and with integrity in the course of APS employment
- act with care and diligence in the course of APS employment
- when acting in the course of APS employment, treat everyone with respect and courtesy, and without harassment
- when acting in the course of APS employment, comply with all applicable Australian laws
- comply with any lawful and reasonable direction given by someone in the employee's agency who has authority to give the direction
- maintain appropriate confidentiality about dealings that the employee has with any minister or minister's member of staff
- disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment
- use Commonwealth resources in a proper manner
- not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment
- not make improper use of:
  - a) inside information

- b) the employee's duties, status, power or authority, in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person
- at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS
- while on duty overseas, at all times behave in a way that upholds the good reputation of Australia
- comply with any other conduct requirement that is prescribed by the regulations.

Failure of an APS employee to adhere to either the [APS Values](#) or the APS [Code of Conduct](#) may attract sanctions.

### 1.11 ABCC shared behaviours **(Note "Under Development")**

The ABCC has developed a set of shared behaviours which all employees of the ABCC, including ABC Inspectors, are required to adhere to in their day to day work. In meeting these shared behaviours the entire ABCC workforce contributes significantly to 'creating a fairer Australian workplace'.

ABCC is committed to being:

- client focused
- responsive
- proactive
- impartial
- professional
- accountable
- supportive
- respectful.

These behaviours were developed through nationwide consultation with ABCC staff and reflect the attributes and behaviours expected of all ABCC employees.

### 1.12 Conflict of interest

A conflict of interest is usually a situation arising from conflict between the performance of public duty as an APS employee, and private or personal interests. Conflicts of interest may be categorised as actual, perceived, or potential and all must be assessed and dealt with appropriately. Most commonly, conflict issues may arise where private, financial or personal interests could conflict with official duties.

Public officers have a responsibility to always serve the public interest in performing their duties. Personal interests, whether these are financial, or relate to family, friends or associates, should not influence the performance of that public duty.

It is not always possible to avoid a conflict of interest, particularly in small communities, or some specialist industries. A conflict of interest in itself is not necessarily wrong, or unethical. However, identifying and managing the situation appropriately is critical.



It is the obligation of all APS employees to declare and/or avoid potential conflict of interest in accordance with the APS Code of Conduct.

The [APS Code of Conduct](#) requires that an APS employee:

- must behave honestly and with integrity in the course of APS Employment (section 13(1) of the [Public Service Act 1999](#) (PS Act))
- must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment (section 13(7) of the PS Act)
- must not make improper use of inside information or the employee's duties, status, power or authority, in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person (section 13(10) of the PS Act).

The PS Act requires employees to disclose and take reasonable steps to avoid any conflict of interest.

**Although senior managers have a particularly important role in ensuring conflict of interest situations are managed appropriately within the agency, identifying a conflict of interest is an *individual responsibility*.**

When a case is assigned to an ABC Inspector, they must initially consider whether a conflict exists and **report it** to their manager immediately. Where the ABC Inspector's manager determines that it is necessary to reassign the matter in question, the ABC Inspector and their manager must make a note on the Nexus system.

ABCC employees must **notify their manager** about any real or apparent conflict of interest.

To ensure that all potential conflicts of interest are disclosed and appropriately managed, there are two procedures that must be followed.

### **1.12.1 Annual Disclosure Declarations**

The annual disclosure declaration is a declaration of financial and other personal interests which must be completed annually by certain agency employees. These employees are those who, because of the nature of their work or responsibilities within the agency, the ABCC considers that the annual declaration is applicable.

This declaration is to be forwarded on completion to your State Director.

When completing the annual disclosure declaration, these employees must declare private financial interests that may be a conflict such as:

- real estate
- shareholdings
- trusts or nominee companies
- company directorships or partnerships
- other investments, assets or substantial sources of income

- gifts, sponsored travel and hospitality
- liabilities.

### 1.12.2 Investigation Related Disclosure Declarations

The investigation related disclosure declaration is a declaration of financial and other personal interests which must be completed immediately upon the ABC Inspector becoming aware that a specific investigation may present them with a potential conflict of interest (actual or perceived).

This declaration is to be forwarded on completion to the ABC Inspector's team leader and director who will make an assessment as to the appropriate management of the conflict.

When completing the investigation related disclosure declaration, ABC Inspectors must declare any private interest that may be a conflict such as:

- personal and other interests such as personal relationships (e.g. sporting, social or cultural activities as well as family, sexual or other relationships)
- real estate
- shareholdings
- trusts or nominee companies
- company directorships or partnerships
- other investments, assets or substantial sources of income
- gifts, sponsored travel and hospitality
- liabilities.

After any employee has disclosed a potential conflict of interest, their manager and director will decide whether:

- there is, or could be, a conflict of interest
- to ask the person to divest the interest
- to change the person's duties or to transfer the person to another workplace investigation where there is no conflict, or
- to allow the person to continue their duties.

Ultimately it is the ABCC's responsibility to determine what action should be taken where there is a conflict and as such, Team Leaders and the State Directors are obliged to ensure that the ABCC is informed of any potential conflict of interest that may represent a risk to the agency.

***The requirement to be aware of and to avoid or manage real and perceived conflicts of interest applies to all APS employees.***

### 1.13 Gifts and other benefits

Under the [APS Code of Conduct](#) employees must ensure they do not use their official position to obtain a benefit for themselves or others. Situations can arise in the course of an investigation where an ABC Inspector may be offered a gift or benefit from a party to a complaint.

In circumstances where it may be ill-mannered or embarrassing to refuse a gift or benefit and it is valued under \$100, an ABC Inspector may accept the gift provided the acceptance is promptly reported in writing to the relevant director with a proposal recommending its acceptance, retention or disposal. The director will then make a determination. The director is required to provide the executive board with a monthly report of all gifts and other benefits received.

Offers of substantial gifts or hospitality over \$100 must be refused in the absence of exceptional circumstances. If an ABC Inspector is offered a gift or benefit of a value of more than \$100 and believes that there are exceptional circumstances necessitating acceptance, then approval to receive this gift must be obtained from an SES Band 2 ABCC Officer. In all other circumstances the gift or benefit must be refused.

If an ABC Inspector receives an offer of a gift or benefit, they must consider the relationship between the individual or organisation making the offer and the ABCC. The main risk of accepting a gift or benefit is that it may result in an actual or perceived conflict of interest, or be seen as a bribe, which is an offence under the Criminal Code and a breach of the [APS Code of Conduct](#).

When deciding whether to accept a gift or benefit an ABC Inspector should exercise judgement and common sense and remember that the reputation of the APS is paramount. ABC Inspectors who are unsure about whether or not to accept a gift or benefit should seek the advice of their Team Leader, and State Director as required. For further information please refer to [Finance Direction 9 - Giving and Receiving Gifts](#).

## ABCC Operations Manual

### Chapter 2

## The investigation process

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## 2.1. *Introduction*

The purpose of this chapter is to provide further information about each of the key stages in the investigation process. In many instances, this information will be further supported by chapters of the ABCC Operations Manual dealing with specific aspects of investigations. By reading and understanding this chapter, ABC Inspectors will gain an understanding of the discretions they exercise in the course of their day to day work, how to properly exercise those discretions, as well as escalation and sign off points in investigations.

## 2.2. *The structure of Field Operations Group*

Investigations are undertaken by ABC Inspectors in the Field Operations Group of the ABCC (with assistance from other groups where appropriate).

In brief, the ABCC Field Operations Group is comprised of the ABC Inspectors located in ABCC offices throughout the country. The Group Manager, Field Operations, is responsible for overseeing the Field Operations Group, in association with the Regional Executive Directors.

For ABC Inspectors, their relevant director is the State Director – ABCC Operations for their region.

The term “region” is used in this ABCC Operations Manual to describe that geographic area for which the Executive Director is responsible.

In general, ABC Inspectors in the course of an investigation will most commonly seek the advice and assistance of their Team Leader in the first instance, with matters requiring further escalation being referred to their State Director. However, certain investigative processes (e.g. case conference) will involve consultation with other Field Operations staff and/or with other branches.

### 2.2.1. *State referrals (from 1 January 2010)*

In December 2009, the Commonwealth passed the *Fair Work Amendment (State Referrals and Other Measures) Act 2009*. This Act enabled states to refer certain matters to the Commonwealth so that a national workplace relations system could be established.

The states of South Australia, Queensland, Tasmania and New South Wales also passed complementary legislation for the referral of their workplace relations powers to the Commonwealth (Western Australia has indicated that it will not refer its powers at this time).

This means that, from 1 January 2010, many employers and employees located in the referring states became covered by one set of workplace laws, regardless of whether the employing entity is a sole trader, partnership or incorporated entity.

It should be noted that Victoria initially referred its powers to the Commonwealth in 1996 but extended the referral under the *Fair Work Amendment (State Referrals and Other Measures) Act 2009*. The Northern Territory and the Australian Capital Territory are an existing part of the Commonwealth workplace relations system.

### 2.3. *Investigations*

All matters received for investigation by the ABCC are categorised as “complaints”. An investigation is the formal term used to describe the objective gathering of information by ABC Inspectors, to determine whether there has been a contravention of Commonwealth workplace laws. The parties to the complaint investigation are referred to by the ABCC as the complainant and the alleged wrongdoer, even if the investigation did not result from a direct contact by an aggrieved person (e.g. as in a referral of a matter from a Member of Parliament or the Department of Immigration and Citizenship).

Commonwealth workplace laws include the *Building and Construction Industry Improvement Act 2005* (BCII Act), *Fair Work Act 2009* (“[FW Act](#)”), the [Workplace Relations Act 1996](#) (“WR Act”), the [Independent Contractors Act 2006](#) (“IC Act”), or a Commonwealth industrial instrument, and the associated regulations to each of these acts.

ABC Inspectors have powers which they can exercise for compliance purposes, as specified in the BCII Act or the FW Act where the ABC Inspector is exercising powers as a FW Inspector<sup>11</sup> (including determining whether the BCII Act, [FW Act](#) or a fair work instrument is being or has been complied with). The BCII Act also gives ABC Inspectors ‘standing’ to bring proceedings involving building industry participants for contraventions of Commonwealth workplace laws under a number of legislative provisions, including those civil remedy provisions<sup>12</sup> specified in the [FW Act](#). Where an ABC Inspector is also a FW Inspector, they will have standing to commence proceedings as part of this role in relation to contraventions of Commonwealth workplace laws.

The ABCC conducts investigations, with no bias toward one form of outcome over another. The outcome of any investigation depends on the particular facts and circumstances of the matter in question. The investigative framework within which ABC Inspectors are expected to operate and the method of investigation adopted, should not vary irrespective of the prospective outcome.

### 2.4. *The investigation process*

Investigations may proceed through numerous phases. These include:

- A complaint is received from either the 1800 number, the ABCC Website or from the FWO Infoline where an assessment has been made that an AVR is not appropriate. Alternatively, if an AVR has been conducted, the AVR process has failed.
- Where complaints are received from either the 1800 number, the ABCC Website or from the FWO Infoline where an assessment has been made that an AVR is not appropriate, they are allocated to an ABC Investigator as a preliminary investigation.
- A preliminary investigation is one where initial enquiries are conducted to establish if the allegation has sufficient veracity from which to commence a full investigation.

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<sup>11</sup> BCII Act s59(1) and FW Act; s706

<sup>12</sup> FW Act; s539

- Investigations that are referred to the ABCC as a result of a failed AVR will be allocated directly to an investigator as an investigation
- the full investigation phase, incorporating the compliance phase, commences when a complaint is referred to the ABCC from the FWO. In this stage the ABC Inspector continues to investigate the complaint and reaches a determination either that a contravention of Commonwealth workplace laws has occurred, or the complaint is not substantiated. Where applicable, the ABC Inspector issues a contravention letter and/or compliance notice and the alleged wrongdoer is informed of the ways in which they must now rectify the contravention. Compliance by an alleged wrongdoer at this stage is regarded as voluntary compliance. However, even where there has been voluntary compliance, if a matter involves serious contraventions, an ABC Inspector may recommend the matter for litigation.
- the enforcement phase. In this stage, the alleged wrongdoer has failed (or is unable) to rectify the contravention or the contravention is considered serious. The ABC Inspector, in consultation with their Team Leader and State Director, must assess the suitability of the matter for litigation having regard to Guidance Note 1 - [ABCC Litigation Policy](#) Under the policy, there are alternatives to litigation, including issuing a letter of caution and entering into an enforceable undertaking.

The above list is by no means exhaustive, and is to illustrate the stages of investigation only. ABC Inspectors should also have regard to Guidance Note 3 – ABCC’s Written Undertakings Policy concerning these processes as outlined above.

ABC Inspectors also educate complainants, alleged wrongdoers and other parties on an ongoing basis throughout the investigation process. For instance, if sending out written material of any kind to parties affected by a complaint, the ABC inspector might include information about entitlements and obligations (such as fact sheets about the ABCC, pay slips, modern awards, the NES and/or general protections).

The following figure (*Figure 1*) provides an overview of how investigations flow through the ABCC, giving a pictorial representation of the various finalisation and outcome options available to ABC Inspectors in the conduct of investigations.

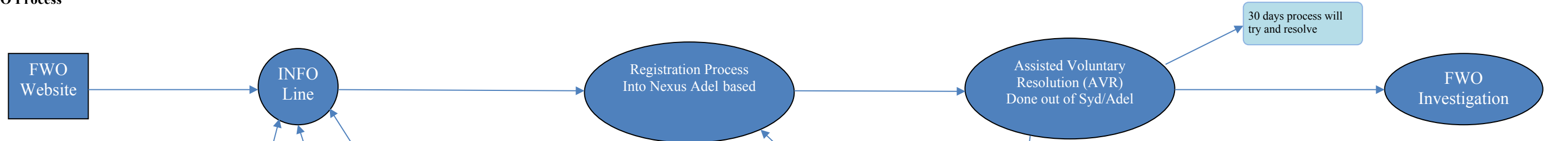
The existence of a number of optional outcome points allows ABC Inspectors to exercise judgment and discretion in dealing with individual matters. For example, an ABC Inspector may elect to finalise a matter at an early stage of an investigation when the facts surrounding an alleged breach have been determined, where the circumstances are appropriate and their Team Leader agrees. Alternatively, an ABC Inspector may progress a matter to full investigation because of considerations specific to a matter, even in the presence of apparent cooperation by the alleged wrongdoer.

Figure 1 below provides an overview of the investigation process rather than a step-by-step procedure. The ABC Inspector might find that a complaint can be resolved by methods from an earlier phase (e.g. a matter still might be resolved by voluntary compliance after the next stage of investigation has begun).

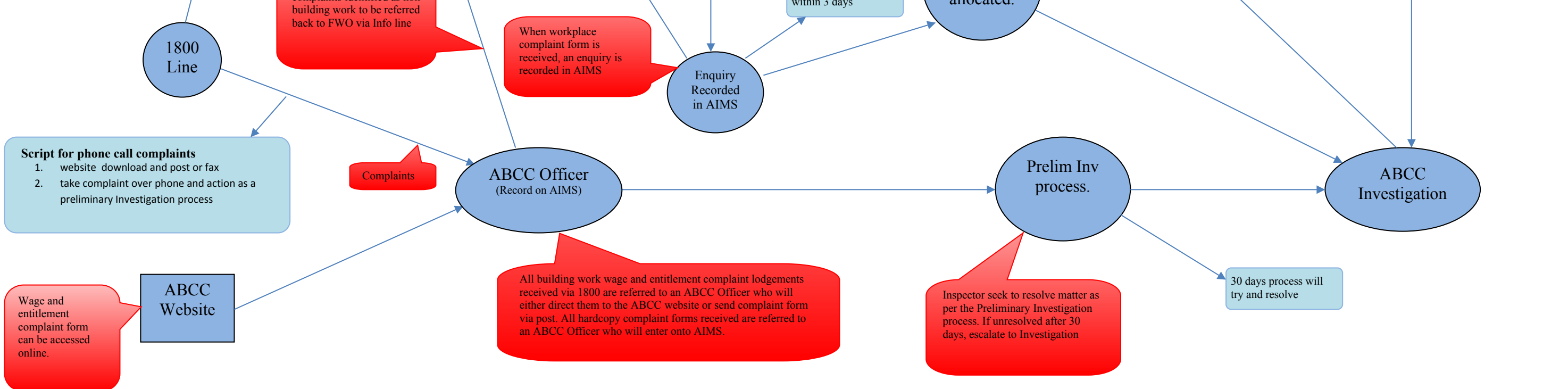


# Wages & Entitlement Compliance Flow

## FWO Process



## ABCC Process



## 2.5. *Receipt of complaints*

Complaints can be received by the ABCC through any number of means. These may include the following examples;

- 1800 line;
- Reports from industry participants;
- State departments;
- Ministerials;
- Through other investigations; and
- Fair Work Ombudsman

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

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

A percentage of complaints received from the FWO are allegations of underpayments of wages and other entitlements, or failure to provide certain conditions (known as wages and conditions complaints). Other complaints received by the ABCC including alleged unlawful industrial action, right of entry breaches, sham contracting and workplace discrimination are known as complex cases (refer section 2.11 below).

## 2.6. *When the ABCC is unable to investigate a complaint*

It is imperative that, as a client focused agency, ABC Inspectors undertake appropriate and timely initial inquiries to determine if the ABCC is the appropriate agency to investigate the complaint.

There are occasions where ABCC does not or is unable to investigate a complaint. Common instances include where:

- the ABCC does not have jurisdiction
- the complaint is outside the time limits<sup>13</sup> under the FW Act
- a court, commission or other agency is already investigating the complaint

In such cases, the ABC Inspector must inform the complainant of the reasons the ABCC is unable to investigate the complaint. Wherever possible, the ABC Inspector should also provide the complainant with referral details of the correct Commonwealth agency or other body (as appropriate) that possesses jurisdiction and authority to investigate the complaint.

On occasion, ABC 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 ABC Inspector should continue to investigate the complaint.

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<sup>13</sup> FW Act; ss 544 and 545(5)

However, if the complainant's representative is actively making submissions to the alleged wrongdoer (such as sending letters of demand, or seeking payment of additional amounts as calculated by the representative), the ABC Inspector should discuss the matter with their Team Leader. Where the representative is advocating for the complainant to the alleged wrongdoer, it may be appropriate for the ABCC to cease its investigation.

### *2.7. Where the complainant seeks remedy for termination*

It is common that complainants are no longer employed by the alleged wrongdoer. Where the complainant indicates (either in the complaint form, in other correspondence or during conversation with the ABC Inspector) that they are seeking a remedy for the termination of their employment (such as reinstatement or compensation for their termination), the ABC Inspector should:

- advise the complainant that the ABCC is unable to seek a remedy for the complainant in relation to the termination or their employment
- advise the complainant that remedies for termination may be available under the FW Act (such as unfair dismissal, unlawful termination or general protections). As part of this process, ABC Inspectors should take particular care to ensure complainants are aware of the short time-frame complainants have to lodge an application with FWA (14 days from dismissal in an unfair dismissal case)<sup>14</sup> and what to do in the event that their time to lodge an application with FWA has expired.<sup>15</sup> Further, a comprehensive [file note](#) should be kept of the advice given as the ABC Inspector may be called to give evidence should the complainant apply to FWA for an extension of time.
- advise the complainant that the ABCC will investigate any other alleged contraventions of Commonwealth workplace laws in their complaint.

This does not mean that the ABCC has no role in matters where the complainant has been terminated. The ABCC does investigate and enforce compliance with notice requirements,<sup>16</sup> redundancy pay<sup>17</sup> and associated entitlements. Refer to Chapter 19 – Termination and contractors for more information

In addition, the ABC Inspector should note that the ABCC will follow different procedures where the termination has resulted from alleged discrimination. In this case, the ABC Inspector should follow the specific procedures as detailed in Chapter 14 – Discrimination.

### *2.8. Assisted voluntary resolution (AVR) (nb: For the information of ABC Inspector only)*

The criteria to determine whether a complaint may be resolved via AVR can be found in Chapter 5 – Assisted voluntary resolution. In practice, matters suitable for AVR are generally restricted to wages and conditions complaints where there are no complicating factors. Accordingly, complex cases (including discrimination) are not usually suitable for AVR. Where a complaint is suitable for AVR, there will be regular

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<sup>14</sup> FW Act; s394(2)

<sup>15</sup> FW Act; s394(3)

<sup>16</sup> FW Act; ss 117-118

<sup>17</sup> FW Act; ss 119-120

communication with both parties. The AVR process will be limited to the recovery of the complainant's legal entitlements only.

Note that an AVR process can also be initiated at the request of either party at any time during the course of an investigation. Should this occur, the process outlined above, should be followed by ABC Inspectors.

### *2.8.1. Finalisation through AVR (nb: For the information of ABC Inspector only)*

Where the FW Inspector has received written confirmation that AVR is achieved between the complainant and alleged wrongdoer, finalisation letters to both parties to confirm that the FWO or the ABCC considers the complaint resolved. A copy of this correspondence must be kept on the hard copy file and noted in Nexus (*to be performed by FWO*) or AIMS. The hard copy file is signed off by the relevant FWO or ABCC Team Leader.

## *2.9. Full investigation*

Where AVR is not achieved or is inappropriate, a full investigation will begin. Upon making the decision to upgrade the Preliminary Investigation to a full investigation, the investigating ABC Inspector must complete a "[Record of Decision by an ABC Inspector to investigate](#)" form. This form is to be saved as a DM8 document and linked to the AIMS record.

A full investigation involves starting an in-depth examination of the issues. During the early stages of a full investigation, it is advantageous for the ABC Inspector to assess the likelihood of the potential contravention fitting within the [ABCC Litigation Policy](#). While all full investigations will require the collection of records and other evidence, early awareness of the potential outcome will enable ABC Inspectors to more appropriately determine the necessity of obtaining additional supporting information such as formal witness statements and records of interview. A [checklist of documents](#) that investigators can seek to obtain has been prepared. Full investigations are discussed in detail in Chapter 6 – Full investigations.

During the full investigation stage the ABC Inspector will obtain and manage information and evidence in accordance with both the legislative requirements and the ABCC Operations Manual and [FWO Standard](#). Additionally, a full investigation requires the ABC Inspector to ensure that the evidence obtained is subjected to ongoing evaluation (investigative evaluation) or further evaluation before any recommendations to litigate are given (evidential evaluation).

On completing a full investigation, the ABC Inspector will either issue a contravention letter and/or compliance notice (where sufficient evidence has been gathered) or finalise the complaint because the allegation of a contravention was not sustained. These issues are discussed in detail in Chapter 6 – Full investigations.

### *2.9.1. Investigative evaluation*

Investigative evaluation is an ongoing process which takes place throughout the life of an investigation. This process involves the ABC Inspector evaluating the material, information and evidence gathered during the investigation, and focuses on identifying:

- information that has been discovered
- additional information that may be needed

- consistency between versions of events and occurrences
- conflicts between different materials gathered.

Investigative evaluation also involves the ABC Inspector liaising with their Team Leader to decide on the most appropriate course of action. At the investigative evaluation stage, ABC Inspectors are required to assess the evidence gathered and decisions made during the investigation to ensure that all decisions made are transparent, accountable, timely and defensible.

With regard to the exercising of s.59 powers under the BCII Act, the following processes need to be evaluated with regard how evidence has been obtained and what could be considered should compliance with these powers not be forthcoming. The processes are as follows;

Step 1 The ABC Inspector should issue s59(5)(e) Notice to Produce where voluntary co-operation is not forthcoming;

Step 2: Should the s59(5)(e) Notice not be complied with, the ABC Inspector should issue a s59(6)

Step 3 Where a s59(6) is not complied with, the ABC Inspector is to issue a letter which will include inter alia the following “The failure to comply with the ABCC’s s59(6) Notice to Produce is potentially a breach of s.149.1 of the Commonwealth’s Criminal Code Act 1995 which states;

149.1 Obstruction of Commonwealth public officials

(1) A person is guilty of an offence if:

- (a) the person knows that another person is a public official; and
- (b) the first-mentioned person obstructs, hinders, intimidates or resists the official in the performance of the official's functions; and
- (c) the official is a Commonwealth public official; and
- (d) the functions are functions as a Commonwealth public official.

Penalty: Imprisonment for 2 years.”

The matter is to be brought to the Executive Director’s attention, and where appropriate General Manager, Field Operations attention;

Step 4: Where cooperation is still not forthcoming Executive Director and/or the General Manager, Field Operations will make a personal intervention;

Step 5: Where cooperation is still not forthcoming, a recommendation will be made re the use of s52 and prosecution for obstruction of a Commonwealth officer.

ABC Inspectors and Team Leaders are required, from time to time, to engage in formal evaluation of the evidence gathered and discuss the ABC Inspector’s decision making process during the progress of the investigation. The aim is to assist ABC Inspectors in the decision making process, provide a forum in which to discuss concerns with their team leader, and provide training and mentoring.

### **2.9.2. Finalisation after full investigation**

Where it is determined that there has been a contravention and the contravention letter and/or compliance notice has been complied with, records that are full,

accurate and evidentially admissible must be kept on the hard copy file and noted in AIMS. The complainant and alleged wrongdoer must be notified in writing of the [outcome of the investigation](#), and the investigation closed on both the hard copy file and in AIMS. ABC Inspectors and Team Leaders must be satisfied that the criteria for closing a complaint have been justified before the Team Leader approves and signs off on complaint closure.

## *2.10. 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 the ABCC's Legal Group
- whether significant resources will be involved, and if so, are appropriate
- whether considerable cooperation across regions is required.

### *2.10.1. 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 ABC 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.

Although case conference is usually considered during the investigation of a complaint, it may be appropriate to case conference other matters under investigation, including complex cases and targeted investigations.

A case conference is an important tool for ABC 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 ABC Inspectors and ABCC 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.

### *2.10.2. Matters to case conference*

It is the expectation of the ABCC that ABC 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 ABCC 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 individual underpayment of \$5000 or more, or a total enforceable underpayment to employees of \$20,000 or more, 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 ABCC Operations Manual also specify further instances where case conference is a requirement (e.g. in industrial action and discrimination investigations).

### *2.10.3. Alternatives to case conference*

In accordance with the [FWO Standard](#), ABC Inspectors, team leaders and managers are required to conduct investigative evaluations throughout the course of their investigations. These evaluations and subsequent discussions with Legal Group, Field Operations and directors, as required, preclude the need for a formal case conference for many ABCC investigations.

### *2.10.4. Structure of a case conference*

Ordinarily, case conferencing occurs on a regularly scheduled basis, however 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 ABC Inspectors should consult their team leader, manager or director.

The ABC Inspector nominating the investigation for a case conference is required to complete a case conference summary. This summary 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 summaries to all case conference attendees.

Typically, the case conference includes the ABC Inspector and (depending on the case) the ABC Inspector's Team Leader, and the staff listed below:

- State Legal Director
- State Director
- 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 State Legal Director is to provide advice on matters of a legal nature raised at case conference. For this reason, it is expected that the ABC Inspector in conjunction with their Team Leader will conduct an

assessment as to whether legal advice is required prior to taking the matter to case conference. State Legal Directors need only be required to attend where legal issues are in question.

#### *2.10.5. 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 director and executive director or their delegates will confirm the determination on the case conference summary document drafted by the ABC Inspector. The ABC Inspector is required to record the determination on AIMS and the hard copy file.

The case conference will determine if investigations are to be referred back to a case conference. The ABC 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.

In the event that there is disagreement regarding the outcome of the case conference on a particular investigation, a review panel (with alternative members chaired by the Group Manager of Field Operations) shall be formed. The ABC Inspector will document the reason(s) for the review.

#### *2.11. Complex case investigations*

##### *2.11.1. Complex cases*

The ABCC will not have a separate unit dealing with complex investigations. A complex case in broad terms is one that does not relate to wages and conditions. A complex investigation usually differs from a standard wages and conditions investigation because of the nature of the alleged contraventions being investigated. However, there may be exceptions, and at times complex cases do have wages and conditions components. In addition, the manner in which the complaint was received (e.g. ministerial) or media interest in an issue may result in an investigation being deemed complex.

The ABCC considers that a complex case is usually a complaint alleging a contravention of one or more of the following provisions of the BCII Act and/or the FW Act:

### **Enterprise Agreements**



- Contravention of bargaining orders

### **Equal Remuneration Orders**

- Contravention of equal remuneration orders

### **General Protections**

- Workplace rights including:
  - Adverse action
  - Coercion
  - Undue influence or pressure
  - Misrepresentations
- Industrial Activities including:
  - Coercion
  - Misrepresentation
  - Inducements—membership action
- Other protections including:
  - Discrimination
  - Demand of bargaining fees
  - Dismissal due to temporary absence or illness
  - Coercion regarding the allocation of duties or employment
- Sham arrangements

### **Industrial Action**

- Industrial action before nominal expiry date of enterprise agreement etc.
- Unlawful Industrial Action s38 BCII Act
- Contravention of FWA orders to stop industrial action
- Interferences with protected action ballots
- Payments relating to periods of industrial action

### **Right of Entry**

- Prohibitions including:
  - Hindering or obstructing
  - Refusing or delaying entry into premises
  - Misrepresentations
  - Unauthorised use or disclosure of information or documents

A number of these concepts are discussed in other chapters of this Manual.

### 2.12. Mediation

Mediation may be used as an alternative to normal investigation techniques in resolving complaints (wages and conditions complaints in particular). Mediation is aimed at achieving voluntary rectification of the complaint, by arriving at an outcome that is mutually suitable to both parties.

Mediation may be used at any stage during the investigation of a complaint. It is a formal dispute resolution process that is only undertaken by designated ABCC staff who have completed accredited mediation training. *[Training has been scheduled. This manual will be updated when this has been completed]* ABCC staff assisting during mediation will not have any involvement in conducting any related investigation.

For further information as to the suitability of matters for mediation, the process and outcomes (refer to Chapter 8 – Mediation).

### 2.13. Recommendation to progress to enforcement

Having developed an investigation to a point where the information and evidence obtained indicates that enforcement (such as small claims or litigation) is a potential outcome, the ABC Inspector should discuss this with their Team Leader in the first instance. If any doubt exists as to suspected contraventions of legislation, guidance can be sought from Legal Group at any time during an investigation.

The decision to recommend a matter for litigation can involve many complex considerations. For detailed information on this topic, ABC Inspectors should refer to the [ABCC Litigation Policy](#). However as a general guide the following categorisation applies:

- Where the contravention is minor in nature (refer [ABCC Litigation Policy](#)) and does not involve any special circumstances (*such as vulnerable employees or recurrent contraventions by the alleged wrongdoer*), voluntary compliance should be encouraged. Where voluntary compliance is obtained in these circumstances, it is probable that the file should be closed, with little likelihood of litigation occurring. In these instances, ABC Inspectors should always consult their Team Leader prior to closing the file.
- Where the contravention is not minor in nature (and the contravention is not viewed as a genuine mistake), or involves special circumstances (*e.g. vulnerable employees or recurrent contraventions by the alleged wrongdoer*), it is unlikely that voluntary compliance alone will be sufficient to close the file. In addition, where the matter is a complex case (*such as an alleged contravention of the coercion provisions of the FW Act*), the matter will likely be recommended for litigation. In these instances, the ABC Inspector should consult with Legal Group to determine what, if any, further action should be taken, in addition to bringing the case to the attention of their Team Leader during case review. Examples of probable further action include issuing a letter of caution, recommending an enforceable undertaking or proceeding to litigation.

### *2.13.1. Progression to litigation*

Having concluded that an investigation may progress to litigation, the ABC Inspector should compile and submit a minute and brief of evidence to their manager with an appropriate recommendation.

Once an initial investigative evaluation (refer 2.9.1. above) has revealed there may be grounds for litigation the ABC Inspector, Team Leader, as appropriate, are to consult with the State Director about potential litigation.

The ABC Inspector is required to provide a potential litigation summary to the director on the merits of the case, detailing why the case should proceed to litigation (refer to Chapter 22 – Enforcement and Chapter 23 – Litigation). Based on this information the director will make a determination on whether a full evidential evaluation (refer 2.13 below) should take place and with a view to proceeding to litigation.

In considering the potential litigation summary, the State Director should also consider other courses of action in addition to ABCC litigation or enforceable undertakings. These other courses of action include:

- referral to alternative dispute resolution mechanisms, such as mediation
- the issuing of a penalty infringement notice (PIN)
- issuing a letter of caution
- a referral to small claims procedures
- the issuing of a compliance notice (where one has not been issued)
- seeking an injunction.

For further information on these mechanisms please refer to Chapter 8 – Mediation, Chapter 22 – Enforcement and Chapter 23 - Litigation.

The decision of the State Director should be recorded on the hard copy file and noted in AIMS.

### *2.13.2. Finalisation through no further action*

The State Director retains discretion to decide that there will be no further action in relation to the complaint. In this case, records that are full, accurate and evidentially admissible must be kept on the hard copy file and noted in AIMS. The complainant and alleged wrongdoer must be notified in writing of the outcome of the investigation and the investigation closed on both the hard copy file and in AIMS. The ABC Inspector and Team Leader must be satisfied that the criteria for closing a complaint have been fulfilled before the Team Leader approves complaint closure.

### *2.14. Evidential evaluation*

Evidential evaluation is the stage before a formal recommendation to litigate is made and submitted to Legal Group for consideration. At the evidential evaluation, material collected by the ABC Inspector is tested for admissibility as evidence. The evidential evaluation provides an opportunity for ABC Inspectors to address material or evidence which can strengthen the case or is detrimental to the case, which allows the Legal Group to determine the likelihood of a successful litigation.

The Legal Group evaluation will consider issues such as;

- the strength of the matter,
- the relevant burden of proof,
- whether sufficient evidence exists against the alleged wrongdoer to be able to proceed to litigation, and
- public interest considerations.

A further evidential evaluation will usually be carried out in consultation with Legal Group after the submission of a brief of evidence.

#### *2.14.1. Finalisation due to insufficient evidence or no further action*

Where a determination is made that there is insufficient evidence or that it is not in the public interest to proceed to litigation, the recommendation to litigate should be withdrawn. Other enforcement options should be considered including small claims action, or issuing a letter of caution or accepting an undertaking. When a determination is made that no further action is required, records that are full, accurate and evidentially admissible must be kept on the file, and the investigation finalised both on the hard copy file and AIMS. The complainant and alleged wrongdoer must be notified in writing of the outcome of the investigation.

#### *2.15. Litigation*

Once a determination is made by Legal Group that it is appropriate for a complaint to proceed to litigation, Legal Group will start their internal processes to prepare the matter to be lodged in court. The ABC Inspector responsible for the complaint is required to provide information and assistance to Legal Group as requested, as a matter of priority. For further information on litigation please refer to Chapter 22 - Enforcement and Chapter 23 - Litigation.

Throughout the litigation process the ABC Inspector is responsible for monitoring the progress of the complaint and keeping the complainant informed of developments. This includes not only providing updates and information to their State Director and Executive Director and responding to requests from the complainant, but also instigating regular contact with complainants to provide appropriate updates.

If an ABC Inspector has queries regarding the progress of a complaint through the litigation process, they are encouraged to contact the lawyer responsible for the file, the relevant Principal Lawyer or Group Chief Counsel, Legal.

#### *2.16. Key performance indicators (KPIs)*

The ABCC has certain key performance indicators (KPIs) for the investigation and finalisation of complaints. In conducting their work, ABC Inspectors should be mindful of achieving the KPIs.

#### *2.17. 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 ABC 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 the ABCC. A key concept for all stages of investigations is the requirement to maintain contemporaneous file notes. All ABCC employees who have contact to any party in relation to a ABCC 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 an employer during a full 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 full investigation.

#### *2.17.1. 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 ABC 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 ABC Inspectors are:

- planning and preparation
- decision making
- collation and assessment of evidence
- determination
- outcome.

#### *2.17.2. 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 ABC 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 (refer [FWO Standard](#)).

### *2.17.3. Keys to sound investigation management*

A full investigation of a wages and entitlement matter which has been referred from FWO begins when either

- an AVR is not appropriate or
- where an AVR has been conducted, it has failed to reach a solution.

This escalation marks the beginning of an in-depth collection of records and other evidence and, where necessary, supporting information such as statements and records of interview. Investigation management uses the following keys.

Otherwise, preliminary investigations are commenced where complaints are received from the 1800 line, the ABCC website or through information obtained in the field.

### *2.17.4. Planning and preparation*

Planning and preparation for an investigation is necessary in order to assist the ABC 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 alleged wrongdoer 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.

Avenues of inquiry are the various sources an ABC 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 alleged wrongdoer and the complainant,
- statements from the complainant and other witnesses, and
- records of interview.

During planning and preparation the ABC Inspector evaluates the facts in issue and identifies the possible avenues of inquiry to be pursued. The investigation plan document may assist the ABC Inspector in planning the investigative steps, evidence collation methods, and deadlines for conducting interviews or obtaining statements.

### *2.17.5. Decision making*

Decision making is an integral skill that is utilised throughout the investigation management process. For further information in relation to decision making please refer to Chapter 6 – Full investigations.

Having established the facts in issue and the possible avenues of inquiry, the ABC Inspector utilises the investigative mindset approach to prioritise tasks (refer chapter 6.3 of this Manual). 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 team leader and manager engagement to ensure that the minimum standards of an investigation as specified in the [FWO Standard](#) 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 team leaders and managers. For further detail on the evidence matrix please refer to Chapter 20 – Evidence.

### *2.17.6. Collation and assessment of evidence*

Every full investigation will require an ABC Inspector to access and evaluate material. Determining whether or not material is sufficiently relevant to an investigation may be a difficult task, particularly during the earlier stages when the exact nature of the alleged contravention may not be clear. ABC Inspectors should consider whether or not it makes the facts in question more or less probable, as this is the underlying test applied by the courts when considering relevance.

Additionally, in any investigation the ABC Inspector should try to identify as early as possible the potential contravention(s) and the facts that will likely be in issue in order to effectively gather relevant evidentiary materials. Identification and location of potential sources of material alone are not sufficient to efficiently progress an investigation. ABC Inspectors must become adept at understanding the relevance of material, the best manner of gathering material and the appropriate storage of material relevant to each investigation. These aspects of understanding and managing material are critical to the admissibility and integrity of the material should the investigation proceed to litigation.

As litigation is a potential outcome for all investigations, ABC Inspectors should treat all evidence in a manner that will maintain its integrity should the evidence be required to support litigation. For more information on evidence please refer to Chapter 20 – Evidence.

The ABC Inspector must aim to collect as much potentially relevant material as is legally obtainable. Having completed the evidence matrix, an ABC Inspector has identified the points of proof for each allegation and is aware of what factors the evidence should relate to. However, this must be balanced with the need to adhere to a holistic investigative approach that avoids the development of tunnel vision and encompasses all avenues of inquiry identified in planning and preparation.

### **2.17.7. Determination**

Following the collation and assessment of all evidence, a determination is required to be made as to whether or not there are substantiated contraventions of Commonwealth workplace laws. This is done using investigative evaluation, which involves the assessment of all the material gathered, whether or not it is evidentially admissible.

Involving team leaders and managers is encouraged at this point of the investigation management process. This involvement allows Team Leaders to objectively assess an investigation and enable them to give recommendations and advice to ABC Inspectors as to the appropriate determination. The decision making process used by ABC Inspectors to arrive at the determination utilises the investigative mindset.

### **2.17.8. Outcomes**

The primary function of ABC Inspectors is to objectively determine whether applicable provisions of Commonwealth workplace laws are being observed. It is important that ABC Inspectors understand and appreciate that, because of the complexity of workplace relations investigations, there are a number of possible outcomes from an investigation.

The range of possible investigation outcomes includes:

- no further action (including where no contraventions are sustained, or the matter is referred to another agency);
- referral to another agency;
- resolution through formal alternative dispute resolution (such as mediation);
- referral to small claims procedures;
- a Letter of Caution;
- entering into a Written Undertaking;
- publication of non-compliance with a Building Industry Law pursuant to section 67 of the BCII Act
- seeking an injunction; and
- ABC Commissioner litigation.

For further information on which of these outcomes are to be applied, please refer to:

Chapter 6 – Full investigations, Chapter 7 - Wages and conditions investigations, Chapter 22 – Enforcement and Chapter 23 - Litigation.

### **2.18. Recording information**

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 the ABCC. ABC 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 the [FWO Standard](#) and 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.

Record keeping must include records of the decisions made by the ABC 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. For further information see Chapter 20 – Evidence.

### *2.19. File Management*

The following procedures are to be adhered to when dealing with official ABCC files. These procedures should be read in conjunction with the [ABCC guidelines on 'Corporate Information Management' and 'Classified and Sensitive Document Handling'](#).

ABCC files are to be raised and used in instances where a case is upgraded to an 'Investigation' status within AIMS. Plain file covers are neither recognised nor acceptable as official files.

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

All ABCC operational files should be classified 'Operations in Confidence' and therefore, each document in the file should also be classified as 'Operations in Confidence'. This is to be clearly marked at the top and bottom of each page of every document contained on the file.

All documents should be attached to the file in date order. The oldest document 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. All documents are to be given a folio number. The bottom folio is number one.

All investigations that are identified as being complex and/or protracted and may involve a breach of the BCII Act and/or FW Act, the Investigator will complete and attach to the file:

- an “[Evidence Matrix](#)” (legal team will pre prepare an “Evidence Matrix” for the most common offences which will then be located on the AIMS system), and
- an [Investigation Plan](#) Refer : Operations

Only documents that relate to the investigation or the subject matter should appear on the file. Original documents should be kept on file. Drafts and copies should also be kept.

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.

An [ABCC File Index sheet](#) will also be attached to the front inside cover of the file [Operations](#). The index sheet will include the folio number; a short title of the documents, the date the document was attached to the file and the initials of the person who placed the document on file.

Once an investigation has been finalised, a [File Closure Checklist](#) is to be completed which should be the last document placed on the file [Operations](#). This checklist is to include the background to the investigation, the actions taken, and the reason for closing the investigation.

A report from a Legal officer setting out reasons why an investigation should be finalised may be attached to the file, but should not take the place of a File Closure Checklist.

Before a file is closed it should be forwarded to a Team Leader for a quality assurance check.

Team Leaders are responsible for ensuring adherence to these guidelines. In particular, team leaders must ensure all necessary documentation including a [File Closure Checklist](#) and [File Index](#) have been properly completed and attached prior to closing the file.

## ***2.20. Transcribing & storage of recorded conversations***

The following procedures are to be followed when interviews of conversations have been recorded digitally or on a tape recorder.

In the first instance all recorded conversations should be down-loaded to a compact disc and secured in a suitable storage medium that has limited access. A register is to be maintained in a secure area. Approval from a Team Leader is required before

any interviews are sent to a transcribing service. The Team Leader will determine whether it is necessary for the recorded conversation to be transcribed or whether a summary of the conversation will suffice. If the latter is sufficient then arrangements can be made to prepare the summary in-house.

Auscript are the preferred transcribing service as they are capable of transcribing all files that have been digitally 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 team leader 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 team leader they will endorse the invoice as approved and forward immediately 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 (refer paragraph 2.19).

#### **2.21. CCRS & Telephone Subscriber Details (TSDS) requests**

In order to assist the investigation of specific breaches of the BCII Act and/or FW Act, investigators can request that an application be made for Call Charge Records (**CCR**)s and TSDs 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 the ABCC, the following procedures will be followed when applying for CCRs and TSDs.

- In the first instance Investigators should discuss with their Team Leader the appropriateness of requesting such records. Team Leaders must be satisfied that the information is reasonably necessary for enforcing provisions of the BCII Act and/or FW Act. General or non-specific requests will be declined.
- Once satisfied of the proper need for a request, the Team Leader 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 BCII Act and/or FW Act.
- Once completed and approved, the Statement in Support will be forwarded to an authorised officer of the ABCC (Deputy Commissioner Operations or Group Manager, Field Operations)

for authorisation. If the authorised officer is satisfied that the application is warranted a request for the applicable records will be organised by the investigating ABC Inspector.

- All correspondence pertaining to requests for CCRs or TSDs will be held on a file which will be maintained by the Executive Assistant to the Group Manager, Field Operations. Copies should also be included in AIMS.

Investigators are required to respect the sensitive and personal nature of information contained in CCRs and TSDs. This includes:

- 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.

## 2.22. *Company and Director searches*

The following procedures are to be followed when requests for company and/or director searches are to be purchased from Lawpoint.

In the first instance approval is sought from a Team Leader or State Director. The company's ABN/ACN or state registered number must be obtained the [www.asic.gov.au](http://www.asic.gov.au) website. For a director search, a date of birth or an approximate date of birth is necessary.

This information, namely instrument of approval, the identifying number, the Director's date of birth and if available, the investigations numbers is to be forwarded to the Executive Assistant to the Group Manager, Field Operations via email. The requested search(s) will be returned by email and will be saved by the Executive Assistant as a DM document. (NB. *There is a cost involved for every search.*)

## 2.23. *Diary Instructions*

The official ABCC black diary is no longer to be used to record case notes.

### 2.23.1. *Case Notes*

Notes are required for both investigative reasons and for the recording of information which may be used as evidence in court or some other judicial hearings.

To ensure this occurs, investigators should maintain extensive notes of all investigations, including details of dates, times, inquiries made, persons spoken to, addresses, telephone numbers, exhibits/documents collected, diagrams, and service of requirement notices.

Additionally, investigators should endeavour to record accurate details of conversations with complainants, witnesses, victims and potential respondents.

Notes may be made using the [Operations in Confidence file note](#) or directly into AIMS. Refer to the [ABCC guidance document on note taking](#) for information on note taking. Original notes should be copied to DM, linked to AIMS and filed in the hard copy file.

## 2.24. *File Quality Review (FQR) (nb: The following section relating to FQR procedures and processes is for information only. The FQR is still to be developed by the ABCC)*

The ABCC is committed to implementing quality management systems to ensure all necessary activities for planning, developing and implementing the services it provides are efficient, effective and integrated throughout the agency. Implementing quality management systems involves the improvement of all these activities and their inter-relationships with each other.

The File Quality Review (FQR) framework is one of these systems that encompasses a consistent approach to the continual improvement and quality assurance of the ABCC's activities in relation to investigations.

The FQR is an examination of a random sample of finalised investigation files to determine compliance with the [FWO Standard](#) and ABCC Operations Manual. Additional assessment criteria may be explored as a consequence of direction given by the Group Manager Field Operations; the Executive Director, Field Operations; or

the State Director, Field Operations. The FQR can also identify systemic issues that may need to be addressed to continue to improve the quality of the ABCC's decision making processes.

ABC Inspectors should note that the FQR is distinct from the review request procedure that occurs when a party to a complaint seeks a review (see Chapter 11 – Review of investigations for the review request procedure).

#### *2.24.1. Features of the FQR*

The following features are common to each FQR:

- The FQR sample consists of finalised investigation files and the sample size is determined during the planning stage of each FQR.
- An assessment criteria checklist is developed (based on requirements of the [FWO Standard](#) and ABCC Operations Manual) to assist the review of investigation files during each FQR.
- The investigation file is assessed using the hard copy investigation file in conjunction with the electronic data contained in the complaint database.
- On conclusion of each FQR, a report is produced detailing the findings and recommendations for improvement. This report is endorsed by the Group Manager, Field Operations and recommendations are implemented by the Executive Director, Field Operations in consultation with other business units across the ABCC.

## Chapter 3

# FWO Inquiries and registration

*(Note – This chapter is for information purposes only. For Wages & Conditions, this will continue to operate through FWO. All other matters will be registered as per the ABCC's existing arrangements)*

*A new chapter will be developed to describe the inquiries and registration processes of the ABCC*

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### 3.1 Introduction

This chapter introduces the various types of inquiries the FWO receives via the Customer Contact branch (within the Customer Service Group). The role of the Customer Contact branch is to provide advice, information and assistance to enable the community to resolve workplace relations inquiries and complaints through the following channels and functions:

- Fair Work Infoline
- Independent Contractors Hotline
- Email/web support
- Live Chat
- Complaints registration
- Anti-Discrimination
- Assisted Voluntary Resolution of complaints

This chapter also outlines the role of Customer Contact SA (CCSA) in registering complaints, managing the primary inquiry channels and conducting compliance activities in relation to Fairness Test and No Disadvantage Test referrals from the Workplace Authority (WPA).

After reading this chapter Fair Work Inspectors will be able to describe the inquiry functions of the FWO, the scope of the inquiries to be addressed by the FWO and how these inquiries are actioned. Fair Work Inspectors will also be able to specify the appropriate processes for investigating and actioning Fairness Test and No Disadvantage Test investigations.

### 3.2 The Customer Service Group

The Customer Service Group integrates all of the FWO's inquiry and contact points into one unified, client focused group. The Customer Service Group comprises the Customer Contact branch, the Process Innovation and Knowledge Services branch and the Customer Service Improvement branch. It is important to note that the Customer Contact branch provides the first formal consideration of potential compliance issues. The majority of public contact with the FWO is received via the Fair Work Infoline.

#### 3.2.1 Inquiry functions

The FWO has a number of channels through which it receives inquiries. They include the Fair Work Infoline (FWIL), Live Help, and Contact Us (online). The FWIL is a key educatory branch of the FWO. The FWIL provides advice, information and education to employers, employees, contractors and the community in relation to workplace rights and responsibilities within the national workplace relations system.

FWIL advisors discuss fair work instruments and Fair Work legislation with callers to ensure they are aware of their obligations in the workplace, and the complaint process to follow if those obligations are not met.

Inquiries are received by the FWIL via the following channels:

- telephone (13 13 94)
- Live Help Online
- email



- post.

The FWIL is administered by FWIL advisors across five Customer Contact sites located in Queensland, Victoria, Western Australia, New South Wales and South Australia. Depending on the nature of a caller's inquiry, a FWIL Advisor will provide information as relevant, transfer the call, forward the written inquiry to another more appropriate area within FWO, or refer the caller to an external agency.

Common inquiries received by the FWIL relate to employment conditions and entitlements (such as minimum rates of pay and leave provisions) and the complaints process (for new or existing complaints). Other inquiries include those regarding targeted campaigns being run by the FWO, another government agency (such as DEEWR), or by the media.

### *3.2.2 Telephone inquiries*

The national telephone number the public calls to contact the FWIL is 13 13 94. The FWIL's operation hours are between 8:00am and 6:00pm (local time in each state and territory), Monday to Friday.

### *3.2.3 Fair Work Live Help*

Fair Work Live Help operates during the same business hours as the FWIL. Outside these hours, persons are directed to email in their queries via the Contact Us link located on the website.

Live Help is administered by FWIL advisors who "chat" live online with a person using text messages (similar to instant messaging). Both the FWO and the Fair Work Online website homepages contain a link to Live Help.

FWIL advisers administering Live Help are alerted whenever a user enters the FWO website with a visual display of the user's details, in addition to an audible tone. FWIL advisers follow a user through the site and note what pages the user is accessing.

Live Help contains pro-forma responses. These pro forma responses are used by FWIL advisors where appropriate to respond to the user's inquiry. This promotes consistency of information and enables timely responses. Where a pro forma response is not appropriate, the FWIL advisor will use free text to respond appropriately.

### *3.2.4 Written inquiries*

Persons can submit written inquiries to the FWO at any time through the Contact Us page on the FWO or Fair Work Online websites, or by sending in a letter or fax. When responding to these requests FWIL advisors use "The common phrases manual", which provides pro forma responses to frequently asked questions. These responses are used where possible to help maintain consistency of information. Where a pro forma response is not appropriate, the FWIL advisor will draft an appropriate response.

### 3.2.5 *Scope of Inquiries*

FWIL advisors answer inquiries that relate to the role of the FWO, and that relate to Commonwealth legislative workplace rights and responsibilities and are within the FWO's jurisdiction. The FWIL scope of advice includes:

- **advice on the FW Act**
  - National Employment Standards
  - enforcement/compliance of workplace laws
  - investigation of alleged Workplace Relations Act 1996 and FW Act contraventions
  - Independent Contractors Act
  - record keeping
  - right of entry compliance (except for ABCC inquiries)
  - federal long service leave (award/CA/AWA)
  
- **enterprise agreements and agreement based transitional instruments**
  - wages
  - conditions/entitlements
  
- **modern awards and award based transitional instruments**
  - applicable modern award or instrument coverage
  - rates of pay
  - conditions/entitlements
  
- **general protections**
  - Anti-Discrimination – under the FW Act
  
- **historical information**
  - Workplace Relations Act 1996
  
- **complaints process**
  - how complaints are handled and the investigation process
  - progress of a current complaint
  - education and targeted campaign activities including current FWO targeted campaigns
  - coercion, undue influence or pressure, freedom of association, unlawful termination
  - powers of Fair Work Inspectors

For information on the appropriate course of action for inquiries not within the FWO scope of inquiries, please refer to 3.2.6 below.

### 3.2.6 *External agency referrals*

Where an inquiry is outside the scope of the FWO to answer, the FWIL Advisor is to:

- explain the role of the FWO
- provide the user with the appropriate contact details for the correct agency
- ask the user if they wish to hold the line while the call is transferred
- transfer the call to the appropriate recipient.

In some instances (e.g. the Australian Taxation Office, Department of Immigration and Citizenship, and Office of the Australian Building and Construction

Commissioner), the FWO has arrangements in place for referral of matters (refer Chapter 11 – Procedural matters in investigations). If there is any doubt about who a query should be referred to, the FWIL Advisor should seek advice from their team leader before proceeding.

Some common external agency referrals include:

**Australian Taxation Office (ATO)** - all questions relating to tax are referred to the ATO on 13 28 61 or to the [ATO website](#).

**Superannuation Helpline** - all questions relating to superannuation are referred to the ATO Superannuation Helpline on 13 10 20 or to the [ATO Superannuation website](#).

**Fair Work Australia (FWA)** –questions relating to agreement making, including creating or varying agreements, conciliation or relating to unfair dismissal and unlawful termination and minimum wage or determining the federal minimum wage are referred to FWA on 1300 799 675 or to the [FWA website](#) (also refer to 3.7 below regarding lodgement of forms and fees at the FWO’s offices).

**Department of Education, Employment and Workplace Relations (DEEWR)** – all questions relating to workplace statistics, government funded employment schemes, job assistance schemes, or disadvantaged worker schemes are referred to DEEWR on (02) 6121 6000 or to the [DEEWR website](#).

**General Employee Entitlements and Redundancy Scheme (GEERS)** – all employee questions relating insolvent companies are referred to GEERS on 1300 135 040 or to the [GEERS website](#).

**Centrelink** – all questions relating to the Work for the Dole scheme, separation certificates, job finding assistance or employment payment assistance (e.g. Austudy) are referred to Centrelink on 13 28 50 or to the [Centrelink website](#).

**New Apprenticeship Hotline** – questions relating to apprenticeships or traineeships that are not related to wages and conditions are referred to the New Apprenticeship Hotline on 1800 639 629, to the [New Apprenticeship website](#), or to a relevant state body.

**National Anti-Discrimination Gateway** – all questions relating to discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, religion, or political opinion outside the jurisdiction of FWO<sup>18</sup> are referred to the Australian Human Rights Commission (AHRC) on 1300 656 419 or to the [AHRC website](#), and/or to the appropriate state anti-discrimination body as detailed on the national anti-discrimination information gateway ([www.antidiscrimination.gov.au](http://www.antidiscrimination.gov.au)). For further information on discrimination matters within the jurisdiction of the FWO, refer to Chapter 15 – Discrimination.

**Bullying and harassment** – any questions relating to bullying and harassment are referred to the relevant occupational health and safety body.

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<sup>18</sup> refer FW Act s351

**State industrial relations bodies** – any questions relating to employment that is outside the jurisdiction of the FWO (e.g. state matters in Western Australia) are referred to the relevant state body.

For a more comprehensive list please see the Fair Work Ombudsman Client Service Centre Referral Directory.

### *3.3 Actioning inquiries*

FWIL advisors attempt to resolve inquiries at the first point of contact, where the query falls within the FWIL scope of advice.

#### *3.3.1 Telephone Inquiries*

In answering telephone inquiries, the following procedures are followed.

##### (a) Complicated inquiries

When FWIL advisors are unable to answer telephone inquiries at the first point of contact, and the inquiry is within the FWIL scope of advice, they have an option to consult or transfer the call to a more experienced FWIL Advisor via Soft Phone (desktop telephony interface).

If the FWIL Advisor is unable to reach a more experienced FWIL Advisor within 60 seconds, they are able to organise a call back for the caller and capture the following details in the CCMS (Infra) ticket as appropriate (details such as caller name, caller contact details, the caller's query and the reason why the FWIL Advisor was unable to answer the query).

Once this information is captured the FWIL Advisor will forward the CCMS ticket into the Level 2 Escalations Queue.

When experienced FWIL Advisors are unable to answer inquiries that have been escalated to them, and the inquiry is within the FWIL scope of advice, they escalate the inquiry to their Quality Coach (QC) through CCMS.

When QCs are unable to answer an inquiry escalated to them, and the inquiry is within the FWIL scope of advice, they escalate the inquiry to the Process Improvement and Knowledge Services Team (PIKS) for further investigation. Once a response is provided by PIKS the person is contacted and their inquiry resolved.

##### (b) Complaint inquiries

When FWIL Advisors receive telephone inquiries regarding the process of a specific complaint, they obtain appropriate details from the person to satisfy privacy and record them in the CCMS ticket as follows:

If the caller is an employer who has had a complaint lodged against them:

- complaint reference number (preferable)
- business name (mandatory)
- employer's name (mandatory)

If the caller is an employee who has lodged a complaint:

- complaint reference number (preferable)
- full employee name (mandatory)
- employee address (mandatory)
- employee date of birth (mandatory)

The FWIL advisor then escalates the call to the Level 2 Complaints and Framework queue through CCMS Infra.

#### (c) Inquiries for other areas of the FWO

When FWIL advisors receive Live Help Inquiries requiring a transfer to another area within FWO, they obtain appropriate details from the caller:

- caller's name
- caller's contact details
- The reason for the call
- Who they are calling for (if applicable)

They then provide the caller details to the appropriate area of the FWO.

Below are some common referrals and the action to be taken by FWIL Advisors:

- inquiries from journalists or media organisations are referred to the FWO's Director Media and Stakeholder Relations.
- general inquiries requesting information on targeted campaigns are referred to the Targeted Campaigns Unit in Adelaide (for national targeted campaigns) and to the appropriate contact in the state or territory targeted compliance team (for state campaigns). If an inquiry comes from an employer who is being audited, the Fair Work Inspector checks whether the matter has been allocated to a Fair Work Inspector and refers the inquiry accordingly
- inquiries regarding issues with the FWO website and published resources and materials are referred to the Workplace Relations Communications and Solutions Branch.

When referring inquiries with the FWO it is important that the FWIL Advisor obtains as much information as possible including the person's name and contact details and records this in Nexus if a current complaint exists.

#### (d) State referral employers

When FWIL advisors receive Live Help inquiries from state referral employers in QLD, NSW, SA or TAS, they obtain appropriate details from the caller:

- caller name
- caller contact details
- the caller's query

They then forward the caller details to an appropriate state referral queue through CCMS Infra for a call back.

#### (e) Referral to FWA

When FWIL advisors receive Live Help inquiries that fall within FWA's scope of advice, they provide the person with the web link for the FWA website as well as the FWA telephone number.

(f) Referral of an inquiry to an external agency

When FWIL advisors receive Live Help inquiries outside FWIL scope of advice, they provide the person with the appropriate contact details for the correct agency (where applicable).

3.3.2 *Written inquiries*

FWIL advisors attempt to resolve written inquiries as detailed below.

(a) Complex inquiries

When FWIL advisors are unable to answer written inquiries, and the inquiry is within the FWIL scope of advice, they escalate the inquiry to their Quality Coach (QC) through CCMS.

When QCs are unable to answer an inquiry escalated to them, and the inquiry is within the FWIL scope of advice, they escalate the inquiry to PIKS.

(b) Complaints inquiries

When FWIL advisors receive written inquiries regarding the progress of a specific complaint, they obtain appropriate details from the writer to satisfy privacy.

If the writer is an employer who has had a complaint lodged against them:

- complaint reference number (preferable)
- business name (mandatory)
- employer's name (mandatory)

If the writer is an employee who has lodged a complaint:

- complaint reference number (preferable)
- full employee name (mandatory)
- employee address (mandatory)
- employee date of birth (mandatory)

The FWIL advisor then advises on the progress of the complaint, escalating to the Fair Work Inspector assigned to the complaint, if necessary.

(c) Inquiries for other areas of the FWO

When FWIL Advisors receive written inquiries requiring a transfer to another area within the FWO, they obtain appropriate details from the writer:

- writer's name
- writer's contact details
- the reason for the correspondence
- who they are writing to (if applicable)

They then provide the details to the appropriate area of the FWO.

(d) State referral employers

When FWIL Advisors receive written inquiries from state referral employers in QLD, NSW, SA or TAS, they obtain appropriate details from the writer:

- writer's name
- writer's contact details
- the writer's query

They then forward the details to an appropriate state referral queue through CCMS Infra for a call back.

(e) Referral to FWA

When FWIL advisors receive written inquiries that fall within FWA scope, they:

- send the writer a letter indicating their details are being forwarded to FWA
- forward the writer's details to FWA.

(f) Referral of an inquiry to an external agency

When FWIL Advisors receive inquiries outside FWIL scope, they provide the writer with the appropriate contact details for the correct agency (where applicable).

When FWIL Advisors receive enquiries about building work which has already been referred to the ABCC, they will warm transfer that person to the ABCC's 1800 number. The FWIL Advisor will introduce the person and explain the enquiry to the ABCC Inspector before transferring the person to the ABCC.

### 3.4 Customer Contact South Australia (CCSA)

Within the Customer Contact branch, Customer Contact SA (CCSA) is a specialist team of Fair Work Inspectors and registration officers located in Adelaide.

The role of CCSA is to:

- monitor and provide initial responses to incoming complaints
- ensure compliance with the No Disadvantage Test and residual Fairness Test processes
- register complaints lodged with the FWO.

Fair Work Inspectors in CCSA assess each incoming general inquiry by determining the nature of the inquiry and decide on an appropriate course of action. The appropriate course of action for dealing with an inquiry may include:

- providing the relevant information or directing the inquirer to a [FWO website](#) or [fact sheet](#)
- providing information regarding current complaints or referring them to the allocated Fair Work Inspector
- escalating matters by referral to the relevant area within the FWO or director
- referring inquiries to an external agency.

CCSA administers the following inquiry channels, including the Contact Centre (SA), Fairness Test Team, Claims Registration Team and Assisted Voluntary Resolution Team. The Contact Centre and Fairness Test Team consists of Fair Work Inspectors, and the Claims Registration Team is composed of registration officers who do not have the authority of a Fair Work Inspector.

#### *3.4.1 CCSA's role*

It is the role of the Fair Work Inspector in CCSA to determine the appropriate response to an inquiry. Fair Work Inspectors action calls by either:

- answering the caller's inquiry
- referring the caller to an external agency
- forwarding the call to an appropriate person in the FWO.

Common types of complainant inquiries include:

- requests for a progress update on their complaint
- requests for assistance in completing a wages and conditions complaint form
- requests to speak to an individual Fair Work Inspector
- requests to lodge complaints
- requests to withdraw complaints.

Common types of alleged wrongdoer inquiries include:

- follow-ups to notification of a complaint made against them
- disputing a complaint made against them
- advising that a complaint has been resolved directly with the complainant
- questions regarding employment entitlements
- agreement lodgement questions (which may be referred to FWA).

Common types of other inquiries include:

- questions regarding employment terms and conditions
- media inquiries
- inquiries from MPs
- inquiries from the public regarding targeted campaigns
- union and stakeholder inquiries.

#### *3.4.2 Scope of inquiries*

Fair Work Inspectors in CCSA answer inquiries that relate to compliance with Commonwealth workplace laws and are within the FWO's jurisdiction. This includes inquiries about:

- how complaints are handled and the investigation process
- the role of the FWO
- progress of current complaints
- education and targeted campaign activities including current FWO targeted campaigns
- compliance relating to compensation resulting from an agreement not meeting the Fairness Test



- compensation relating to an ITEA for a new employee or a greenfields agreement failing the No Disadvantage Test<sup>19</sup>
- enforcement of complex matters such as coercion, undue influence or pressure, freedom of association, unlawful termination, and right of entry
- compliance with time and wage record keeping requirements
- compliance relating to the provision of adequate pay slips to all employees
- the powers of Fair Work Inspectors
- enforcement of infringement notices.

For information on the appropriate course of action for inquiries not within the FWO scope of inquiries please refer to 3.4.3 below.

#### *3.4.3 Referral of an inquiry to a Fair Work Inspector*

The most common referral made by CCSA within the FWO is to Fair Work Inspectors in a region. This occurs primarily when CCSA receives a general inquiry regarding the progress of an existing complaint. These inquiries can be from a complainant, an alleged wrongdoer or a representative of one of these parties.

#### *3.4.4 Referral of complex matters*

If an inquiry is received in CCSA that relates to a complex matter (such as coercion, undue influence or pressure, freedom of association, unlawful termination or right of entry), CCSA completes a [complex case referral form](#) and advises the Assistant Director of CCSA, who will assess and refer where appropriate. Inquiries that relate to discrimination are routed to specialist advisors (see Chapter 2 – The investigation process, section 2.11.5 and Chapter 15 – Discrimination for further information.) CCSA also refer matters to other branches within the FWO and external agencies, where appropriate.

#### *3.4.5 Referral of anonymous information*

If anonymous information is received in CCSA (e.g. a caller identifies an alleged wrongdoer who pays his adult workers \$5 an hour) the Fair Work Inspector completes a [Referral of information note](#) and advises the Assistant Director of CCSA, who will assess and refer where appropriate.

#### *3.4.6 Inquiries from public sector employees*

Inquiries from public sector employees, such as questions regarding specific provisions of an enterprise agreement or other fair work instrument, can be answered by the FWO as per the usual FWO inquiry processes.

If an inquiry is received from a public sector employee, the FWO may also consider referring the inquirer to the relevant Client Contact Team within DEEWR's Public Sector Branch for any general advice on agreement making and public sector conditions of employment.

The FWO may also provide contact details of the Australian Public Service Commission (APSC) if the inquirer seeks advice on APS employment issues such as recruitment, probation, mobility, and termination.

(also see section 4.6.7 of this Manual for complaints from public sector employees)

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<sup>19</sup> See sections 346S and 346ZG of the WR Act.

### 3.5 *Registration of complaints*

#### 3.5.1 *Using Nexus*

Nexus is the FWO's specialised customer relationship management (CRM) system. This system is used by the FWO to record information about complaints and audits relating to compliance with Commonwealth workplace laws and to manage workloads effectively. It is accessed from the business applications menu of the FWO intranet.

Nexus presently stores information relating to:

- complaint and audit case information, including processing and status
- complainant and entity information required to investigate complaints and conduct audits and targeted campaigns
- correspondence generated throughout the course of a complaint and audit
- file notes relating to each complaint and audit
- audit trails of actions.

Nexus also has management tools to monitor and report on the FWO workloads and performance.

The [Nexus Users Manual](#) can be found in Document Manager (DM) or by accessing the help menu in Nexus. Problems encountered using Nexus should be reported to your local administrator in the first instance.

#### 3.5.2 *Registration of complaints*

For non-confidential complaints, the registration officer usually sends acknowledgement letters to both the complainant and the alleged wrongdoer. Both parties are provided with the complaint reference number and information on the role of the FWO. Both parties are advised that they will be contacted by a Fair Work Inspector within 14 days of the date on the letter. Encouragement is given in these letters for each to resolve the matter directly with the other party.

However, there are circumstances where the registration officer will send an acknowledgement letter to the complainant only. These include:

- where the complaint is confidential
- where the complainant is classified as vulnerable (please refer to the [FWO Litigation Policy](#) for further information as to vulnerable complainants)
- where the complaint alleges discrimination
- where the complaint alleges other complex matters that are not appropriate to raise with the alleged wrongdoer at the time of registration.

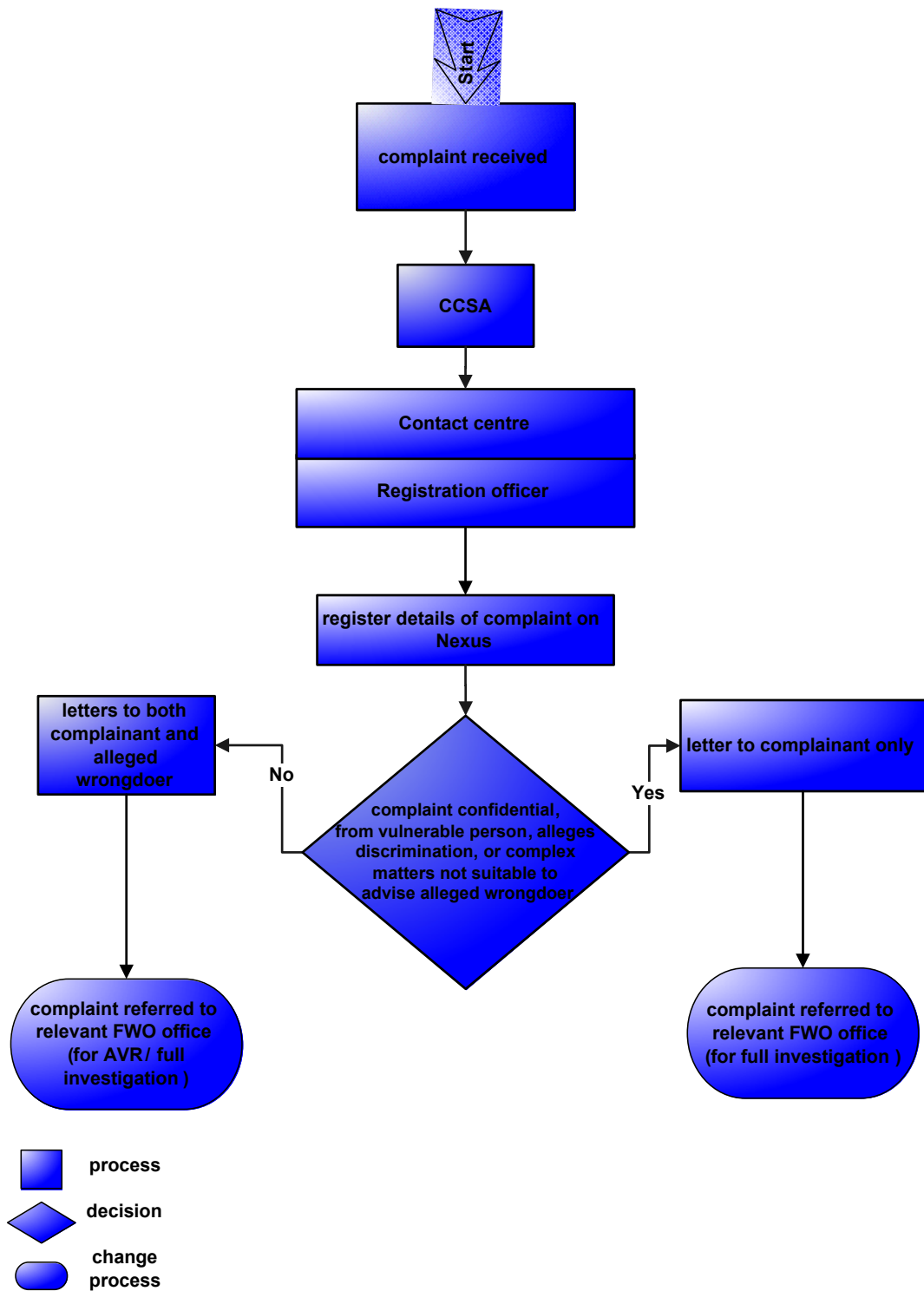
In these cases, the registration officer sends the complainant a letter acknowledging receipt of their complaint. This letter provides the complainant with their reference number and information on the role of the FWO. The letter states that the complainant will be contacted by a Fair Work Inspector within **10 days** of the date on the letter to discuss the details of the complaint. The alleged wrongdoer is not sent an acknowledgement letter and is not contacted by the registration officer at this stage.

If there is uncertainty regarding whether an alleged wrongdoer should be sent an acknowledgement letter at the time of complaint registration, the registration officer should seek the advice of their team leader before deciding which letters are appropriate and whether the alleged wrongdoer should be contacted at this stage. (Reference should be made to Chapter 6 – Full Investigations, Section 6.4 Confidential complaints for further information regarding contact and investigation for a confidential complaint, and to Chapter 15 – Discrimination, Section 15.4.3 for details regarding the registration of discrimination complaints.)

### *3.5.3 Distribution of complaints to offices*

After sending acknowledgment letters, the registration officer distributes all complaints to the relevant office in accordance with where the work which is the subject of the complaint was performed. The way complaints are subsequently distributed to individual Fair Work Inspectors is determined by local processes at each office.

Figure 3: FWO Registration process



## Key Messages

- The FWO has a number of channels through which it receives inquiries . They include the Fair Work Infoline (FWIL), Live Help, and Contact Us (online)
- CCSA is responsible for undertaking Fairness Test and No Disadvantage Test investigations and the registration and allocation of complaints
- Inquiries received by the FWO will only be investigated if within the FWO's jurisdiction
- Matters not within the FWO's jurisdiction will be referred to the appropriate agency
- During the bridging period , the No Disadvantage Test applies to the enterprise agreements and ITEAs lodged
- The BOOT applies to any enterprise agreement lodged after 1 January 2010 .

## ABCC Operations Manual

### Chapter 4

## Investigation overview

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# ABCC Operations Manual

## Chapter 4

### Investigation overview

#### 25.1. Introduction

This chapter provides an overview of the types of investigations the ABCC undertakes, how complaints enter the ABCC, and the ABCC's approach to investigating complaints.

The ABCC investigates all matters within the jurisdiction of applicable Commonwealth workplace laws, including the Building and Construction Industry Improvement Act 2005 (BCII Act), the [Fair Work Act 2009 \(Cth\)](#) (FW Act) and the [Independent Contractors Act 2006](#) (Cth) (and supporting regulations). Types of investigations include wages and conditions investigations and complex investigations.

#### 25.2. Types of complaints

All matters received for investigation by the ABCC are categorised as complaints. An investigation is the formal term used to describe the objective gathering of information by ABC Inspectors to determine if a contravention of Commonwealth workplace laws has occurred.

##### 25.2.1. Alleged underpayments

Wages and conditions complaints comprise of a small but growing percentage of all matters under investigation by the ABCC. They largely deal with remuneration issues including payments for time worked, leave, overtime, penalty rates, allowances and termination entitlements. These investigations may also include matters not directly related to payments such as meal breaks, rosters, payslips and record keeping. These complaints are investigated in accordance with the ABCC investigation process as outlined in Chapter 2 – The investigation process and with reference to the detailed information provided in Chapter 7 – Wages and conditions investigations.

##### 25.2.2. Complex investigations

A complex investigation differs from a wages and conditions investigation because of the type of alleged contraventions being investigated. Some complex investigations deal with contraventions of certain provisions of the [FW Act](#), such as duress (undue influence or pressure), coercion, or freedom of association issues. Other investigations that attract parliamentary, ministerial and/or media attention may merit being treated as a complex investigation to ensure appropriate risk management.

The ABCC considers a complex investigation to be a complaint alleging a contravention of one or more of the following provisions of the BCII Act and the [FW Act](#):

## **Part 2-4—Enterprise Agreements**

- Contravention of bargaining orders

## **Part 3-1—General Protections**

Workplace rights including:

- Adverse action
- Coercion
- Undue influence or pressure
- Misrepresentations
- Industrial Activities including:
  - Coercion
  - Misrepresentation
- Inducements—membership action
- Other protections including:
  - Discrimination
  - Demand of bargaining fees
  - Dismissal due to temporary absence or illness
  - Coercion regarding the allocation of duties or employment
  - Sham arrangements

## **Part 3-3—Industrial Action**

- Industrial action before nominal expiry date of enterprise agreement etc.
- Industrially motivated Unlawful Industrial Action - s38 BCII Act
- Contravention of FWA orders to stop industrial action
- Interferences with protected action ballots
- Payments relating to periods of industrial action

## **Part 3-4—Right of Entry**

Prohibitions including:

- Hindering or obstructing
- Refusing or delaying entry into premises
- Misrepresentations
- Unauthorised use or disclosure of information or documents

ABC Inspectors who receive a matter that they believe may meet the ABCC's definition of complex should consult with their Team Leader or State Director. Further information on these matters is provided in Chapter 2 – The investigation process (section 2.11).

### **25.3. Sources of complaints**

As noted earlier in this Manual (Chapter 2, paragraph 2.5), the ABCC receives complaints from a variety of sources. Some of these are explained in more detail below.

#### **25.3.1. Reviews**

Requests for review of a particular investigation may be received from a variety of parties involved in an investigation and in a number of forms. However, review



requests are generally received from the alleged wrongdoer or the complainant involved in the investigation. A request for a review can be received during an investigation, but the majority are received after the conclusion of an investigation, either by phone, email, or letter. ABC Inspectors must inform the party seeking review that it is preferable for the request to be received in writing to formally document the reasons for seeking the request (although failure to submit the request in writing will not prevent a file review from commencing). If an ABC Inspector receives a request for a review, the ABC Inspector is to follow the procedure as outlined in Chapter 11 – Review of investigations.

### **25.3.2. Ministerials**

Ministerials are correspondence sent to the ABCC from the minister's office following an approach to the minister or a local member from a constituent. The subject of the ministerial may relate to matters involving an individual or group such as a union or employer association. Ministerials are received at the ABCC by the Public Affairs unit and allocated to a regional ABCC office for action.

ABC Inspectors are required to investigate ministerials as a priority as they are one of the ABCC's primary methods of directly communicating with key stakeholders like the minister, members of parliament and constituents. Appropriate reporting standards relating to ministerials include the provision of real time updates to Team Leaders and the State Director, and reporting to Parliamentary Policy with updates within set time frames. For further information on investigating ministerials please refer to Chapter 10 – Procedural matters in investigations.

### **25.3.3. Media**

When a statement is made in the media about an alleged contravention of Commonwealth workplace laws, the ABCC will consider commencing an investigation. It is the responsibility of the Public Affairs unit to monitor media and forward any reports containing allegations of contraventions within the ABCC's jurisdiction to the appropriate State Director for allocation to an ABC Inspector who will investigate the matter as a high profile complaint.

When an ABC Inspector is allocated a high profile complaint they should discuss the priority of the matter with their State Director and Team Leader. The ABC Inspector is required to provide regular updates to their Team Leader and State Director as requested when investigating allegations made in the media. For further information on investigating media allegations please refer to the [FWO Standard](#) (Section 1.5 – Media interaction) and Chapter 10 – Procedural matters in investigations.

ABC Inspectors also should ensure that they notify their Team Leader if they become aware of potential media interest in an investigation. For example, if a party to an investigation implies that they are going to approach the media regarding the investigation, the ABC Inspector is to alert their Team Leader immediately. Under no circumstances should ABC Inspectors deal directly with inquiries from the media. In all instances these should be referred to the relevant State Director and the Executive Director, Public Affairs unit who will decide on the appropriate response.

In addition, ABC Inspectors should remain aware that only the ABC Commissioner in his capacity as agency head can authorise agreements with parties to ABCC investigations about the nature of the ABCC's media statements. This provision applies to all matters at any of their stages, and extends to matters that are mediated (however described) by any ABCC staff.

## **25.4. Referrals from other agencies**

The ABCC has established information sharing relationships with other Commonwealth and state government agencies. Some of these relationships have been formalised through memoranda of understanding (MOUs) or written agreements.

### **25.4.1. Department of Immigration and Citizenship (DIAC)**

The Department of Immigration and Citizenship (DIAC) has responsibility for visas for overseas workers in Australia.

The ABCC enforces Commonwealth workplace laws relating to all employees in Australia, including overseas workers. Investigations relating to the employment of overseas workers and the referral processes between DIAC and ABCC are discussed in detail in Chapter 9 - Overseas workers investigations and Chapter 10 - Procedural matters in investigations.

### **25.4.2. Office of the Fair Work Ombudsman (FWO)**

The ABCC and the FWO have a formal agreement in relation to referrals and allocation of work between agencies.

If an ABC Inspector is allocated a complaint which they believe relates to 'non-building work'<sup>20</sup>, they should discuss the complaint with their Team Leader. If it appears that the complaint should be referred to the FWO for investigation, the Team Leader or ABC Inspector will contact the Group Manager of Field Operations, who will contact the relevant officer at the FWO to discuss the circumstances of the case and whether referral is appropriate. The referral processes between the ABCC and FWO are discussed in detail in Chapter 10 – Procedural matters in investigations.

### **25.4.3. The Australian Taxation Office (ATO)**

The Australian Taxation Office is tasked with protecting the tax revenue and it administers various forms of legislation in executing that objective.

The ABCC enforces Commonwealth workplace laws relating to all employees in Australia. Both the ATO and the ABCC will investigate matters where employees have been classified as sub-contractors where in fact their terms of engagement would indicate that they are actually employees. Whilst each organisation's assessment may be based upon separate criteria, nevertheless the ABCC may possibly receive sham contract referrals from the ATO.

### **25.4.4. The Australian Securities and Investment Commission**

The Australian Securities and Investment Commission administers legislation relating to the good governance of corporations. It enforces company and financial services laws to protect consumers, investors and creditors; regulates and informs the public about *Australian* companies.

The ABCC may receive referrals from ASIC where it identifies companies which have difficulty in meeting its obligations to employees.

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<sup>20</sup> as defined by the *Building and Construction Industry Improvement Act 2005* (Cth)

#### **25.4.5. Other government agencies**

If an ABC Inspector is allocated a complaint referred from another public sector agency (whether federal or state), they are required to investigate the complaint in accordance with usual procedures and in accordance with the [FWO Standard](#). Where the referring agency requests updates, ABC Inspectors must ensure that information is released in accordance with the [Privacy Act 1998 \(Cth\)](#).

### **25.5. Complaints outside the ABCC investigation process**

#### **25.5.1. Complaints outside the ABCC's jurisdiction**

The ABCC is unable to enforce or litigate in respect of complaints that are outside the scope of matters investigated by ABC Inspectors under the BCII Act and/or the [FW Act](#).

Common allegations that are received in complaints that the ABCC does not have jurisdiction to pursue may include:

- complainants seeking to recover monies owed to them for work done as genuine independent contractors,
- complainants whose employment entitlements are covered by Western Australian state legislation, and
- unfair dismissal.

As this is not an exhaustive list, ABC Inspectors must ensure that any assessment of jurisdictional issues is conducted in accordance with the [FWO Standard](#). Where a decision is made that no further action is to be taken by the ABCC, the complainant and the alleged wrongdoer are to be notified of this outcome in writing. The letter should briefly state the reasons the complaint will not be investigated and where appropriate, refer the parties to an alternate organisation. In the event that the complainant has requested confidential status, this letter should be sent only to the complainant.

Where it becomes apparent that the complainant may pursue common law claims ancillary to a complaint under Commonwealth workplace laws or relevant industrial instruments, ABC Inspectors should encourage both the complainant and alleged wrongdoer to resolve these matters at the same time.

#### **25.5.2. Existing Fair Work Australia action**

The ABCC is able investigate complaints that are the subject of proceedings before Fair Work Australia (FWA). Under s74 of the BCII Act, the General Manager of FWA must inform the ABC Commissioner of all FWA matters that involve building industry participants or relate to building work. In such instances, a complainant may have already been made to the ABCC. The officer receiving notice from the General Manager of FWA must check AIMS to determine if an investigation exists in relation to the same matter.

If an investigation has already commenced, the relevant ABCC officer must consider the utility of continuing any ongoing investigation. In addition, consideration should be given as to whether the ABC Commissioner should make a submission to

FWA in relation to the matter. Advice should be sought from Legal Group in such situations.

Where the matter before FWA relates to a different issue to that which is being investigated, normal investigation procedures and practices should be followed. For example, **there is no bar to an ABC Inspector investigating an underpayment complaint where the complainant has an unfair dismissal complaint before FWA**. Further information on unfair dismissal can be found in Chapter 2 – The investigation process (section 2.7).

Where an ABC Inspector becomes aware that FWA is handling a matter that is the subject of a complaint, the ABC Inspector needs to establish which elements of the matter FWA is handling and, where crossover exists, cease investigating those elements. If they are unsure of what action to take, ABC Inspectors should seek the advice of their Team Leaders.

### **25.5.3. Court or other tribunal action**

The ABCC ordinarily<sup>21</sup> will not investigate complaints that are the subject of proceedings before a court. Where a complainant has a matter before the courts, ABC Inspectors must ensure that any complaint investigated by the ABCC is in relation to a different issue and is not being dealt with in the court proceedings.

Where an ABC Inspector, having already commenced an investigation, becomes aware that a court or other tribunal of competent jurisdiction is investigating a matter that is the subject of a complaint, the ABC Inspector should suspend the investigation of that matter. This may involve ceasing the investigation entirely, or ceasing to investigate certain aspects of the complaint (where the court is only dealing with some of the issues raised by the complainant). ABC Inspectors should seek the advice of their Team Leaders and/or internal lawyers in this regard.

In most cases the ABCC will not offer to provide details of our findings (either of a complete or incomplete investigation) to a court, FWA or other tribunal. However, it remains open for the court or tribunal, or the parties to the matter to request via the appropriate methods that information be provided which they might tender to the court (refer Chapter 10 - Procedural matters in investigations, section 10.3 - Dealing with requests for information).

In any case, the ABCC cannot investigate a complaint which has already been decided through court, FWA or tribunal proceedings. The ABCC does not have the authority to overrule a decision made by a court, tribunal or the FWA.

The ABC Commissioner may intervene in the public interest in civil proceedings before a court in a matter that arises out of the BCII Act, or the IC Act, the FW Act, the Fair Work (*transitional Provisions and Consequential Amendments*) Act 2009 and where it involves a building industry participant or building work.

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<sup>21</sup> The FW Act (s 682) does allow action to be taken by the Fair Work Ombudsman where matters are already before a court, but this is not a common practice. If ABC Inspectors believe such action is appropriate, they first should discuss the investigation with their team leader with a view to case conference and litigation.

## **25.6. Peripheral issues in ABCC investigations**

### **25.6.1. Allegations of criminal activity**

During an investigation allegations may be raised about either the complainant or the alleged wrongdoer being involved in criminal activity. If an ABC Inspector receives such an allegation they should discuss this with their Team Leader to determine the appropriate course of action including the relevant options that may be available in accordance with Chapter 22 – Enforcement and Chapter 23 – Litigation.

In some cases, the complainant may be the subject of legal proceedings brought by the alleged wrongdoer, who seeks to delay the ABCC's investigation pending the outcome of these proceedings. As noted above (4.5.2), where a court matter involves a different issue to the ABCC complaint, the ABC Inspector is able to continue with the investigation of the complaint. However, the distinction may not be clear, if the alleged wrongdoer's proceedings relate to the complainant's activities during their employment. Again, the ABC Inspector should discuss this situation with their Team Leader to determine the appropriate course of action for the ABCC.

### **25.6.2. Allegations of an employee withholding property**

Where an alleged wrongdoer claims that the employee making the complaint is withholding property belonging to the alleged wrongdoer, the ABC Inspector must advise the alleged wrongdoer that this is a separate issue which they need to pursue through their own action as the ABCC is only able to enforce Commonwealth workplace laws.

### **25.6.3. Allegations of fraud**

If a complainant or alleged wrongdoer makes allegations of fraud (e.g. in relation to taxation or social security), the ABC Inspector is to explain that the ABCC does not have powers to investigate fraud and should refer them to the relevant agency or the police.

### **25.6.4. Alleged cash in hand payments**

An alleged wrongdoer 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 alleged wrongdoer cannot present evidence to confirm these allegations then they cannot be taken into consideration in calculating the amounts paid to the complainant.

### **25.6.5. Additional entitlements not claimed**

When a [complaint form](#) 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 ABC Inspector discovers that the complainant was underpaid their hourly rate of pay).

The ABCC is obliged to investigate all contraventions of Commonwealth workplace laws, irrespective of whether the contraventions are stipulated on a complaint form. ABC Inspectors should ensure that both the complainant and alleged wrongdoer are

informed of the additional contraventions found. ABC Inspectors should seek to achieve compliance in all respects.

#### **25.6.6. Contraventions affecting other employees**

Records provided by the alleged wrongdoer may show that other employees have also been adversely affected by one or more contraventions (e.g. records may show that the alleged wrongdoer underpaid all employees). ABC Inspectors should ensure that the alleged wrongdoer is informed of the additional persons affected by the contraventions, and should seek compliance in all respects.

#### **25.6.7. Complaints from public sector employees**

When a complaint is received from a public sector employee, the ABCC 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), the ABCC will investigate the complaint. At the completion of the investigation, the ABC 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. The complainant should be advised that the ABCC 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 - [ABCC Litigation Policy](#).

(also see section 3.4.8 of this Manual for inquiries from public sector employees)

#### **25.6.8. Persons seeking to delay investigations due to illness**

Although uncommon, there are occasions where a person seeks to delay the ABCC's investigation on medical grounds (e.g. in the case of an alleged wrongdoer suffering a long term illness). The ABC 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 the ABCC.

#### **25.6.9. 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 employer's family (such as a parent, spouse, child, or sibling).

In these cases, the ABC Inspector will need to critically examine whether a contract of employment exists between an employer and employee. Often there will be a need to obtain evidence that a legitimate employment relationship was in place. Relevant evidence would include the alleged wrongdoer's employment records, instructions or directions issued to the complainant, records of conversation with the complainant, records of interview with the alleged wrongdoer, witness statements

from employees, and other records or documents detailing payments made to the complainant by the alleged wrongdoer.

(Also see Chapter 24 – Insolvent employers, section 24.9 for some other considerations that can impact an investigation).

## 25.7. Statutory time limits

ABC Inspectors should bear in mind that there are statutory time limits that apply at the commencement of litigation, specifically:

- it is a requirement of the [FW Act](#), that proceedings commence within six years<sup>22</sup> of an alleged contravention, and that actions to recover moneys through the costs must be taken within six years of when the payment was due to be made.
- The BCII Act does not currently specify a limitations period. Under the *Judiciary Act 1903* (s79(3)(a)) the applicable limitations 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.

Determining when a contravention occurred can be a difficult matter and often depends on the wording of the particular industrial or fair work instrument in question. ABC Inspectors should speak to their Team Leader or seek legal advice if they believe a contravention may have occurred more than two years ago to ensure that appropriate priority is given to complaints that may be approaching the statutory time limit.

## Chapter 5

# FWO Assisted voluntary resolution

*(NOTE: This chapter is for information only. This process will continue to operate through FWO)*

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<sup>22</sup> FW Act; s544

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## 25.1. Introduction

Assisted voluntary resolution (AVR) occurs at the early stages of the investigation process. Facilitated by Fair Work Inspectors, the AVR process seeks to assist complainants and alleged wrongdoers reach a fair, mutually acceptable outcome through negotiation and active engagement, facilitated by Fair Work Inspectors. The AVR Team, within the Customer Service Group, is responsible for conducting AVR.

This chapter will assist Fair Work Inspectors to identify appropriate situations in which to use the AVR compliance methodology, to facilitate successful outcomes using AVR, and to make adequate and accountable records during and following an AVR.

## 25.2. Underlying principles of AVR

AVR is one of several methodologies that can be applied by Fair Work Inspectors in seeking to secure compliance outcomes.<sup>23</sup> AVR is an element in the strategic approach taken by the FWO to achieve a high level of quality and service that meets and/or exceeds the public's expectations. AVR is also one of the key ways in which the FWO fulfils its legislative role of promoting harmonious, productive and cooperative workplace relations. During AVR Fair Work Inspectors provide education, assistance and advice to complainants and alleged wrongdoers, to ensure that employers and employees understand their rights and obligations under Commonwealth workplace law.

AVR provides the inspectorate with the knowledge and ability to make appropriate decisions in a timely manner. The FWO has certain key performance indicators (KPIs) for the investigation and finalisation of complaints. In conducting AVR, Fair Work Inspectors should be mindful of achieving the KPIs.

If a complaint has not been resolved through AVR within the first thirty (30) days, the complaint may be allocated to the relevant RST or state agency office to undertake a full investigation.

## 25.3. What is assisted voluntary resolution (AVR)?

AVR is a compliance tool that is applied by Fair Work Inspectors in order to better understand the matters in dispute (MID) between the parties. AVR utilises negotiation techniques and strategies to assist the parties reach an appropriate resolution in a timely manner.

AVR is not a formal alternative dispute resolution process such as mediation (refer Chapter 8 - Mediation), but rather AVR is an informal approach. It provides an opportunity for Fair Work Inspectors to guide both complainants and alleged wrongdoers in reaching agreement without the need for formal mediation, full investigation, or enforcement action in most cases. However, it remains open for the FWO to take further action (including full investigation, enforcement and litigation)<sup>24</sup> even when AVR is achieved.

AVR is directed toward assisting the parties to come to a fair and mutually acceptable resolution. While Fair Work Inspectors should not dictate an agreement or

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<sup>23</sup> Other compliance methodologies include full investigation, mediation, and auditing. See Chapter 6 – Full investigations, Chapter 8 – Mediation and Chapter 10 – Targeted campaigns of this Manual for further information on these compliance methodologies.

<sup>24</sup> See Chapter 6 – Full investigations, Chapter 23 – Enforcement and Chapter 24 – Litigation of this Manual for further information.

outcome, it is appropriate for Fair Work Inspectors to provide parties with some assistance to formulate a suitable appropriate resolution.

In any case, it is important to ensure that the parties are informed of the relevant legislation. In particular Fair Work Inspectors should endeavour to make complainants aware of their statutory entitlements and that the resolution being sought is fair, and in keeping with the practices of the FWO.

The Fair Work Inspector can assist parties in their negotiations by the following methods:

- providing parties with information about how to obtain current information regarding their rights and obligations (i.e. through education materials on the the FWO website, or Fair Work Infoline)
- assist the complainant to appropriately identify a resolution they seek, and communicate the potential resolution to the alleged wrongdoer (or vice versa)
- if either party advises the Fair Work Inspector of an offer of resolution they wish to propose, then the Fair Work Inspector will present each offer to the other party and subsequently inform the offering party of the response that was received. If a Fair Work Inspector encounters an offer which does not appear to be fair and reasonable, the Fair Work Inspector should seek advice from their team leader (see section 5.7.4, and the principles regarding offers as detailed in section 6.11.2.1 for further information)
- assist parties in formulating proposed solutions
- provide information and assistance to enable both parties to calculate outstanding entitlements (see 5.7.2.6)

Notes of all communications are to be recorded on Nexus and a signed and dated hard copy put on the file.

#### **25.4. Where does AVR fit into the investigation process?**

AVR is a compliance tool that can be applied in the **early phase of the FWO's investigation process**. While this phase occurs before the complaint proceeds to full investigation, it is important that Fair Work Inspectors remain aware of the requirements of the [FWO Standard](#) and the FWO Operations Manual in the conduct of the AVR process.

Generally, matters are assessed for their suitability for AVR upon lodgement. Where suitable, AVR will be conducted by Fair Work Inspectors within the Contact Centre or AVR group. During AVR the Fair Work Inspector must initiate contact with both the complainant and alleged wrongdoer and establish that the FWO has jurisdiction to investigate. Although the Fair Work Inspector may form a preliminary view as to the merits of the complaint during the AVR process, a formal determination as to whether a contravention of Commonwealth workplace laws has occurred is not required during AVR.

By enabling matters to be resolved through AVR, the FWO can reduce the likelihood of parties being drawn into adversarial positions. AVR also increases the efficiency with which Fair Work Inspectors can attend to matters as it may reduce the need to undertake full investigations.

In the event that the complaint is not resolved through AVR the case is usually escalated to a full investigation.<sup>25</sup> In these circumstances, the information and any

documentation gathered during the AVR process will be considered and examined further in the subsequent full investigation of the complaint.

### **25.5. Matters not appropriate for AVR**

Generally, AVR is suitable for wages and conditions complaints where there are no complicating factors. There is no definitive list of suitable or unsuitable complaints. Rather, there exists a set of principles that Fair Work Inspectors should follow when deciding if a matter is suitable for AVR.

Fair Work Inspectors must assess each complaint on a case by case basis. In some cases AVR is neither possible nor appropriate. In these instances complaints should be progressed directly to full investigation.

In deciding whether a matter is suitable for AVR, the Fair Work Inspector will have regard to the following principles.

AVR may be suitable:

- for a complaint that could be resolved based on non-contested facts (e.g. parties are able to rely upon the agreed available documentary evidence (such as employment records))
- where the alleged wrongdoer's compliance posture indicates a willingness to comply
- where parties have begun discussions regarding an offer of settlement of the matters in dispute.

AVR may not be suitable:

- if the Fair Work Inspector needs to look beyond documentary evidence to examine the intentions of the parties (e.g. a dispute concerning whether the complainant is an employee or not)
- where an alleged wrongdoer is disengaged with the compliance process (this includes current and previous behaviour)
- where there are complaints from multiple parties against an alleged wrongdoer (including where there is more than one current complaint or where there is a history of complaints against the same alleged wrongdoer)
- where the characteristics of the complainant indicate vulnerability (as defined in the [FWO Litigation Policy](#)).

Some examples of complaints which generally progress directly to full investigation without attempting AVR include where:

- the complaint is confidential
- the complaint is from an overseas worker employed in Australia under a visa
- the complaint relates to unpaid trial work or unpaid work experience
- the allegations involve complex matters, such as general protections (including discrimination and sham arrangements), industrial action or right of entry (see Chapter 2 – The investigation process, section 2.11 for a full list of complex matters)

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<sup>25</sup> Although typical, allocation to full investigation is not the only available course of action. For example, it may be appropriate to refer a matter that is not resolved through AVR for mediation.

- the alleged wrongdoer has a history of non-compliance
- the allegations are of a particularly serious nature
- the Fair Work Inspector using their discretion decides AVR is not appropriate or in the public interest.

It is important to note that the above is a not an exhaustive list of examples, and should not be used as the sole criteria for determining suitability for AVR. Fair Work Inspectors are encouraged to exercise their judgement and discretion in determining whether AVR is appropriate, in accordance with the above principles.

Where an employer is insolvent, the Fair Work Inspector should refer to Chapter 25 – Insolvent alleged wrongdoers to confirm whether the insolvency is of a type that leads directly to complaint finalisation (such as bankruptcy, liquidation or deregistration), or if the insolvency is of a type that requires the FWO to continue its enquiries and investigation (such as administration).

If the complaint does require further action, the Fair Work Inspector should discuss the stage of insolvency in further detail with their team leader, to decide whether AVR is likely to resolve the matter or whether the complaint will be required to be allocated to full investigation. Fair Work Inspectors should conduct an ABR search to confirm the status of insolvency prior to determining what action is necessary.

## 25.6. Assessing the likelihood of AVR being achieved

In many instances a Fair Work Inspector is able to assess the likelihood of a complaint being finalised in the AVR phase. Some indicators that AVR is likely to succeed include:

- the alleged wrongdoer is proactive in contacting the FWO and demonstrates a willingness to resolve the matter
- the alleged wrongdoer responds promptly to phone, email or fax messages
- the alleged wrongdoer acknowledges a contravention
- the alleged wrongdoer and complainant are openly communicating.

Indicators that AVR is unlikely to succeed include:

- the alleged wrongdoer has not responded to the FWO's initial correspondence notifying them that a complaint has been lodged
- the alleged wrongdoer denies receiving the notification letter
- the alleged wrongdoer disputes allegations and/or makes counter-allegations
- the alleged wrongdoer does not respond to phone, email or fax messages
- the alleged wrongdoer is evasive and does not meet agreed timeframes (e.g. an agreement to rectify an underpayment is not met)
- the complainant has unsuccessfully tried to resolve the matter directly with the alleged wrongdoer
- the complainant does not accept the amount that the alleged wrongdoer offers the complainant to resolve the matter
- an administrator has been appointed to the company (also refer Chapter 25 – Insolvent employers for further information)
- a complaint exceeds **30 days** in age (at which time, a full investigation will commence).

When it appears unlikely that the complaint will be resolved through the AVR process, Fair Work Inspectors will refer the matter to the ABCC for a full

investigation, during which a decision will be made concerning the appropriate options to continue the investigation of the complaint (see Chapter 6 – Full investigations and Chapter 7 – Wages and conditions investigations).

## **25.7. The phases of AVR**

The AVR process is conducted by Fair Work Inspectors within the Customer Service Group. While AVR is a less formal process than a full investigation, it is still conducted within the investigative framework, and Fair Work Inspectors conduct AVR negotiations within the following phased approach:

### **Phase One – Initial contact**

#### **25.7.1.1. Receipt, registration and assessment**

Upon receipt and registration of a complaint in the Contact Centre, complaints are assessed for their suitability to undergo AVR. When determining if a complaint is suitable, Fair Work Inspectors should give consideration to the principles established in section 5.5 above.

Fair Work Inspectors should:

- read the complaint form and accompanying documentation
- determine whether the matter is suitable for AVR (and if not, progress the matter directly to full investigation)
- complete a [preliminary phase case decision record \(CDR\)](#), establishing FWO jurisdiction, and determining the suitability of the complaint for AVR.

If a complaint is considered suitable for AVR, initial AVR letters are sent to both the alleged wrongdoer and the complainant. These letters inform the party that the matter will be progressed through the AVR process, and states that a Fair Work Inspector will contact the party within 7 days to clarify details regarding the dispute.

#### **25.7.1.2. Contact with parties**

Prior to contacting the parties, the Fair Work Inspector should:

- read the complaint form and accompanying documentation,
- review the preliminary phase CDR, and
- determine the matters in dispute.

The initial phase in the AVR process involves a Fair Work Inspector contacting the parties to determine or confirm the nature of the complaint.

During this phase, Fair Work Inspectors will contact the parties in order to obtain their perspective regarding the allegations. Fair Work Inspectors should keep in mind that the FWO can only seek to recover entitlements under relevant Commonwealth workplace laws.

The information obtained during this contact will facilitate the Fair Work Inspectors consideration of the matters in dispute. As such, it is important that Fair Work Inspectors probe parties for not only those complaints identified on the complaint form, but also any other relevant concerns. Comprehensive notes of the contents of each conversation are to be kept at all times.

### **25.7.1.3. Contact with the complainant**

The Fair Work Inspector will first contact the complainant to clarify the complaint, and:

- explain the investigation process
- detail the purpose and processes of AVR
- explain the AVR does not of itself preclude the FWO from commencing a full investigation or taking further action (including enforcement or litigation) if required
- clarify the complaint by getting as much information as possible about the circumstances surrounding the complaint
- ascertain the complainant's attitude to the AVR process
- make comprehensive notes of the contents of the conversation and put a signed and dated hard copy of the Nexus note on the file.

### **25.7.1.4. Contact with the alleged wrongdoer**

Having completed the above process, the Fair Work Inspector will contact the alleged wrongdoer and:

- explain the investigation process
- detail the purpose and processes of AVR
- explain the AVR does not of itself preclude the FWO from commencing a full investigation or taking further action (including enforcement or litigation) if required
- establish/confirm the fair work instrument
- confirm the legal entity of the alleged wrongdoer including the trading name and its incorporation date (if incorporated)
- elicit the alleged wrongdoer's version of events in relation to the circumstances of the complaint
- ascertain the alleged wrongdoer's response and attitude to the complaint
- make comprehensive notes of the contents of the conversation and put a signed and dated hard copy of the Nexus note on the file.

### **Phase Two – FWO consideration of allegations**

After obtaining relevant information regarding the complaint, Fair Work Inspectors will be required to conduct a review of the allegations, and form a preliminary view on the complaint.

### **25.7.1.5. Decision points**

After the Fair Work Inspector has reviewed the documentation supplied with the complaint and spoken to both parties, the Fair Work Inspector will:

- ensure the FWO has jurisdiction based on the information at hand
- review the evidence (verbal and documentary) provided by both parties
- prepare a [matters in dispute \(MID\) matrix](#)
- come to a preliminary view of the applicable fair work instrument based on the information at hand (where available)
- consider based on the available information if there is a prima facie ("on the face of it") contravention of Commonwealth workplace laws.

### **25.7.1.6. Matters in dispute matrix**

After gathering the perspectives of both parties, Fair Work Inspectors are required to prepare a 'matters in dispute (MID) matrix' using the [MID Matrix template](#). The MID matrix is a summary of allegations, and each party's perspective of the allegation.

This process incorporates an initial assessment of the information provided to date. The Fair Work Inspector should take into account the statements from all relevant parties, any documentary evidence provided, and the provisions of the relevant fair work instrument and/or legislation.

The MID matrix assists Fair Work Inspectors to formulate a preliminary view of whether the complaint has merit, and develop proposed solutions to resolve the complaint. The proposed solution may be an offer of settlement proposed by one of the parties, or a solution formulated by the Fair Work Inspector.

Fair Work Inspectors are required to present the MID matrix, their preliminary view and proposed solutions (including the basis for the decisions) to their team leader prior to progressing the matter further. In order to formulate solutions, the Fair Work Inspector must consider whether a contravention is apparent. This process is discussed below.

#### **25.7.1.7. Consider whether a contravention is apparent**

The consideration as to whether a contravention is apparent may be straightforward (e.g. the complainant alleges payment of an hourly rate below the applicable minimum rate). While a final determination of the contravention is not to be made at this point, the Fair Work Inspector should establish that the complaint has reasonable basis (and relates to a matter over which the FWO has jurisdiction) before proceeding further with AVR.

If the Fair Work Inspector encounters complicated issues that prevent them forming a view as to whether or not the complaint has basis, they should consider escalating the matter to a full investigation. Comprehensive notes of the preliminary view should be made in Nexus, and a signed and dated hard copy of the Nexus note should be placed in the file.

#### **25.7.1.8. No prima facie contravention**

Where it appears that there is no contravention of Commonwealth workplace laws, the Fair Work Inspector will:

- contact the complainant and explain to them that there is no apparent contravention and the basis upon which that view has been formed
- invite the complainant to respond with additional information regarding the alleged contravention
- consider the complainant's response, including whether they are able to provide additional evidence or information to the FWO that would establish or support the allegation of a contravention, and whether the complainant maintains that there are further matters within the FWO's jurisdiction that require investigation
- where it is found (following discussion with the complainant) that there are no contraventions to investigate further, advise the alleged wrongdoer of this outcome, and finalise the complaint
- make comprehensive notes of the contents of the conversations and put a signed and dated hard copy of the Nexus note on the file.

This phase is not intended to result in a determination regarding the entitlements of the complainant. Rather a Fair Work Inspector may form a preliminary view of whether the complaint has merit or not. Should a complainant disagree with this preliminary view, and show cause for the challenge, then the complaint should be forwarded for a full investigation.

#### **25.7.1.9. Where a prima facie contravention is apparent**

Where there appears to be a prima facie contravention, the Fair Work Inspector will have discussions to assist the parties resolve the complaint. Such resolution will usually involve some action being taken by the alleged wrongdoer, such as:

- payment of outstanding amounts in full
- payment of a negotiated amount
- payment of amounts in agreed instalments
- provision of pay slips (in the case of alleged non-monetary contraventions).

#### **25.7.1.10. Estimating entitlements**

In some cases, the most appropriate solution recommended by the FWO may be payment to resolve a complaint (as it appears to the FWO that the complainant has outstanding entitlements). Alleged wrongdoers may request assistance from the FWO to estimate the quantum of the required payment. Fair Work Inspectors should provide reasonable information and assistance (such as copies of published rates of pay) to enable the parties to perform their own calculations of the outstanding entitlements.

Often one or both of the parties may request that the Fair Work Inspector calculates or estimates the outstanding entitlements during the AVR process. The Fair Work Inspector should only provide an estimate where they have been given sufficient records or details of hours worked, amounts received, and other relevant information upon which to base the estimate. Any estimation provided must include a disclaimer drawing the parties' attention to the fact that the estimate is based on the information and records provided to the Fair Work Inspector during the AVR process, and should not be relied upon outside of the AVR process. A sample disclaimer appears below:

*"The estimation of the entitlement contained in this letter is only an estimation. It is based on information available to the Fair Work Ombudsman at the time of the estimation. The estimation is not legal advice and must not be relied upon by the parties as the Fair Work Ombudsman's concluded views of the matter. The Fair Work Ombudsman reserves the right to revise the estimation up or down should further information become available."*

### **Phase Three – Negotiating outcomes**

#### **25.7.1.11. Negotiating solutions with the alleged wrongdoer**

Once a prima facie contravention has been established, and a proposed solution has been approved by a team leader (which may be part of the MID matrix), the Fair Work Inspector should present the recommended solution to the alleged wrongdoer.

Fair Work Inspectors should explain their preliminary view, and basis of the recommended solution, however, Fair Work Inspectors should not give the impression that this is a determination of a contravention.



Where necessary, the Fair Work Inspector may discuss alternative solutions or alternative outcomes with the alleged wrongdoer. If the alleged wrongdoer continues to dispute the preliminary view, or does not accept the proposed solutions, then the matter may be allocated to full investigation.

Upon tentative acceptance of the solution, the Fair Work Inspector can proceed to offer the complainant the recommended solution.

#### **Phase Four - Presenting the offer to the complainant**

Fair Work Inspectors should present the agreed offer of settlement to the complainant. The details of this offer should be made verbally. If a party requests an offer or acceptance of an offer in writing, the Fair Work Inspector can request this from the parties. A Fair Work Inspector cannot compel a party to put an offer or acceptance in writing. However if the party refuses, a Fair Work Inspector can confirm in writing, where a party has made or accepted an offer.

If the complainant does not choose to accept the offer, or an alternative offer, then the matter may be allocated for further investigation.

Should the complainant accept the offer, the Fair Work Inspector can proceed to the finalisation stage (see section 5.7.5).

Fair Work Inspectors should seek to ensure that any proposed solutions are fair and mutually acceptable. If a Fair Work Inspector believes that an offer of settlement may undermine a complainant's statutory entitlements, they should seek advice from their team leader, prior to presenting the offer to the party, as to its fairness. Possible outcomes may include:

- working with the alleged wrongdoer to formulate an alternative solution
- passing on the offer to the complainant, notifying them that the alleged wrongdoer's offer may be less than their statutory entitlements
- allocating the complaint for full investigation.

#### **Phase Five – Closing the AVR process**

The AVR closure phase results either in the finalisation of a complaint through a mutually acceptable resolution, or the allocation of the complaint to RST for full investigation.

#### **25.7.1.12. How AVR is achieved**

An AVR is successfully achieved when there is an agreement that is mutually acceptable to both the alleged wrongdoer and the complainant. When the agreed resolution is reached, then the AVR process is completed.

Fair Work Inspectors should obtain confirmation of resolution of the matter in the event that both parties agree to a resolution. This can be in the form of:

- confirmation of the total amount to be paid and the agreed payment schedule, in the case of payment by instalments (preferably in writing, for example an email to undertake payments)
- confirmation of the action taken to resolve any non-monetary component of the complaint (such as the provision of pay slips)
- confirmation from the parties of any other action that has been taken to achieve AVR.

A [CDR](#) recording confirmation, and reasons for file closure, must be placed in Nexus and on the hard copy file. A file closure cover sheet or Nexus summary sheet should be printed, and placed on file.

#### **25.7.1.13. Finalisation**

When AVR is achieved, finalisation letters are sent to both parties.

These letters outline the actions the parties have committed to undertake in order to resolve the complaint and confirm that the AVR is considered finalised, pending those actions. As noted earlier in this chapter, it remains open for the FWO to take further action (including full investigation, enforcement and litigation), even when AVR is achieved.

The complainant is advised that they should submit a new complaint in the event that the alleged wrongdoer fails to adhere to the agreement accepted during the AVR process. The new complaint is forwarded immediately for a full investigation.

A copy of this correspondence must be kept on the hard copy file and noted in Nexus. The hard copy file is signed off by the Fair Work Inspector's team leader.

#### **25.7.1.14. When AVR is not achieved**

When AVR is not achieved, the matter may be escalated to a full investigation in accordance with the investigation process overview (Chapter 2 – The investigation process, Figure 1). Fair Work Inspectors should complete a CDR, outlining the reason for allocation.

In these instances, Fair Work Inspectors should notify both the complainant and alleged wrongdoer of the escalation in writing, as the complaint has not been resolved. A file referral cover sheet should be printed, and placed on file.

Fair Work Inspectors should ensure that all documentation from the AVR is retained on file (see 5.8 below), for the information of other Fair Work Inspectors during the full investigation process. However, as determinations are not made during the AVR process, the Fair Work Inspector who conducts the full investigation will be required to confirm all information gathered during the AVR with parties, and should not rely on the untested information obtained during AVR in making a determination.

## 25.8. Documentary requirements for AVR

Fair Work Inspectors are generally facilitative in their role during the AVR process, with the majority of their participation being informal in nature. Nonetheless, all contact that occurs between the Fair Work Inspector and either of the parties is to be recorded on Nexus, and a signed and dated hard copy of the Nexus note is to be included on the file.

When constructing a hard copy file, Fair Work Inspectors should ensure this file can stand alone (all important documents from the Nexus database 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).

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.

[A case decision record](#) (CDR) should be included on the file each time each time a relevant decision is made. In particular, how the Fair Work Inspector determined the jurisdiction, employing entity and fair work instrument or relevant legislative provision should be recorded.

Also, where contraventions are identified or the complaint is not sustained, the CDR should contain the decisions and action proposed and agreed to and signed off by the Fair Work Inspector's team leader or manager.

Where a complainant withdraws their complaint, the Fair Work Inspector should first confirm the reasons for withdrawal with the complainant, and then notify the complainant and the alleged wrongdoer using the appropriate '[complainant withdrawal letter](#)'.

As AVR involves attempted resolution of the complaint without full investigation, often there will not be complete documentary evidence collected and assessed in the AVR process. Regardless, documents (including employment records) may be supplied voluntarily by alleged wrongdoers and complainants during AVR. It is also acceptable for Fair Work Inspectors to informally request documents in order to form a view on the merits of the complaint or to estimate the outstanding statutory entitlements (see 5.7.7 above).<sup>26</sup> Notices to produce (NTPs) are not typically features of AVR and are more appropriately used in full investigations. Any documents collected in the AVR process should be handled in accordance with Chapter 21 - Evidence.

If an alleged wrongdoer indicates during the AVR process that they do not have employment records (which are required to be kept by the FW Act), further action in the form of an escalation to full investigation should be considered. However, an absence of employment records will not necessarily defeat the complaint, nor prevent AVR from succeeding.

## 25.9. Recording AVR in Nexus

AVR is recorded in Nexus. While AVR is being undertaken, the status of the complaint is set to AVR.

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<sup>26</sup> Caution should be exercised to ensure that Fair Work Inspectors do not exercise compliance powers for safety net contractual entitlement (SNCE) complaints during the AVR process (refer Chapter 17 – Investigation of individually negotiated entitlements).

Where AVR is achieved, the AVR is recorded as successful. The Fair Work Inspector selects the appropriate outcome in Nexus and closes the complaint.

Where AVR is not achieved, the AVR is recorded as unsuccessful and the status of the complaint is changed to investigation.

Whether AVR is achieved or a complaint is allocated to full investigation, a [case decision record](#) (CDR) must be completed by the Fair Work Inspector with carriage of the file and a copy (signed by the team leader) put on the file.

## Key Messages

- AVR is one of several compliance methodologies that a Fair Work Inspector can apply
- AVR seeks to assist parties reach a fair , mutually acceptable outcome through negotiation and active engagement , facilitated by Fair Work Inspectors
- Fair Work Inspectors must establish whether a complaint is suitable for AVR
- Fair Work Inspectors must be able to identify and assess the characteristics of a complaint that indicate if AVR is likely to achieve an outcome
- If AVR is not achieved within 30 days the complaint is progressed to a full investigation

# ABCC Operations Manual

**Note: This section is still being constructed to adopt policies and procedures that have yet to be developed. Eg: Reference to certain guidance notes have been excluded as they have not yet been developed.**

## Chapter 6

### Full investigations

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## 25.1. Introduction

This chapter deals with certain features that are common to all full investigations. It provides ABC Inspectors with an overview of concepts and investigative techniques, as well as dealing with practical issues such as contravention letters, record keeping and statutory requirements. From this chapter ABC Inspectors should develop a clear understanding of the requirements of a full investigation, irrespective of the nature of the particular alleged contraventions being investigated.

## 25.2. What is a full investigation?

ABC Inspectors must be cognisant of the fact that regardless of whether you are using your BCII or FW Act powers, you must comply with the relevant standards to which these powers apply. Unless noted otherwise, the provisions of this chapter apply to both forms of investigation.

A full investigation involves ABC Inspectors obtaining, managing and evaluating evidence in order to determine whether a contravention of Commonwealth workplace laws has occurred. The ABCC has adopted a nationally consistent process, as documented in the [FWO Standard](#), 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 a full investigation, it is advantageous for the ABC Inspector to assess the likelihood of the potential contravention fitting within the [ABCC Litigation Policy](#). While all full investigations will require the collection of records and other evidence, early awareness of the potential outcome will enable ABC Inspectors to more appropriately determine the necessity of obtaining additional, supporting information such as formal statements and records of interview.

ABC Inspectors are required to ensure that the evidence obtained during a full investigation is subjected to critical evaluation both before a matter is finalised (investigative evaluation) and before any recommendation to litigate is made (evidential evaluation). Investigative evaluation is discussed in this chapter at 6.12 below. Further detail on evidential evaluation can be found in Chapter 22 – Enforcement and Chapter 23 - Litigation.

## 25.3. The investigative mindset

The *Investigative Mindset*, a concept originating from international investigative best practice, involves applying a set of principles to the investigation process. This enables ABC 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 FWO and will also meet the requirements of the ABCC'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 the ABCC functions.

The application of the investigative mindset will encourage continuous improvement to the way in which ABC Inspectors examine material and make decisions. There is no step-by-step process that will assist the ABC Inspector to develop the mindset.

The doctrine highlights that the investigative mindset is a state of mind or attitude and can be adopted by ABC 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 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.

ABC Inspectors must keep an open mind and be receptive to alternative views or explanations. ABC 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, ABC Inspectors should be aware of factors which adversely affect the quality of decisions taken. In general, ABCC Team Leaders must be aware of and manage the following limitations in the decision making of ABC 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, ABC Inspectors can enhance their objective and disciplined approach to decision making.

### **25.3.1. Investigation pitfalls**

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

There is potential for error in any investigation. Team Leaders 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. ABC 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 ABC Inspector should acknowledge and seek to rectify the problem as soon as it is discovered. The ABC Inspector's Team Leader should be notified, and depending on the scale of the problem, the State Director might also need to be advised. Under guidance from the Team Leader and/or State Director, the ABC Inspector should attempt to rectify the error immediately. Internal discussions and any subsequent actions taken by the ABC Inspector should be documented on the case file.

The personal and professional limitations of ABC Inspectors must be recognised and acknowledged by their Team Leader and/or State Director. Within the ABCC, there should be no reluctance to hand over responsibility for an investigation to a more qualified ABC Inspector.

ABC 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 manager, independent review panel or court reviews an investigation or its methods, those undertaking the review must be able to determine if the ABC 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.

## **25.4. Confidential complaints**

The ABCC has the capacity to investigate confidential complaints. The complaint form asks the complainant to confirm if they authorise the ABCC to reveal their identity. If the complainant does not clearly authorise the ABCC 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 ABCC does not provide notification of the confidential complaint to the alleged wrongdoer, and the ABC Inspector must not contact the alleged wrongdoer without first obtaining the permission of the complainant.

### **25.4.1. Contacting the confidential complainant**

The ABC Inspector is restricted in the range of activities they may undertake in the investigation of a confidential complaint. Before making any contact with the alleged wrongdoer, the ABC 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 the ABCC. It should be explained to the complainant that if contraventions are identified and an alleged wrongdoer does not voluntarily comply, the ability for the ABCC to use enforcement and litigation options will be severely limited while the complaint remains confidential (refer Chapter 22 – Enforcement and Chapter 23 – Litigation).

ABC Inspectors also must advise confidential complainants if it appears that investigation cannot be investigated confidentially (before the alleged wrongdoer is contacted). In such cases, the ABC 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 ABC Inspector should seek written confirmation from the complainant. When the written confirmation is received, the ABC Inspector should remove the confidential status of the complaint in AIMS and proceed to the next stage of investigation (refer 6.4.2 below). Where the complainant elects not to waive confidentiality, the ABC Inspector should seek direction from their Team Leader as to what actions remain available.

### **25.4.2. Progressing a confidential complaint**

Confidential complaints may be progressed in a variety of ways. As best practice, it is recommended that ABC Inspectors progress confidential complaints as an audit. In this case, if the alleged wrongdoer asks the ABC Inspector if a complaint has been lodged, the ABC 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<sup>27</sup> that can be provided at this time. The ABC Inspector is not required to provide further detail. The ABC Inspector should not advise the alleged wrongdoer

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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.

that a confidential complaint has been lodged, as this may result in the alleged wrongdoer focusing their efforts on identifying a complainant.

#### **25.4.3. Where a complainant decides to waive confidentiality during the investigation**

In some instances, a complainant may decide after the ABC Inspector has made initial contact with the employer that they no longer wish to remain confidential. This can pose difficulties for the ABC 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 ABC Inspector should discuss the matter with their Team Leader, in order to reach a decision as to the appropriate course of action. This may result in:

- the investigation continuing as a confidential complaint (audit)
- the investigation ceasing
- the identity of the complainant being revealed to the alleged wrongdoer, and the investigation continuing as a full investigation.

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

#### **25.4.4. Where a confidential complaint does not result in voluntary compliance**

Where there are identified contraventions and the alleged wrongdoer is unwilling to rectify them, consideration will be given to the relevant enforcement and litigation options (refer Chapter 22 – Enforcement and Chapter 23 – Litigation). At this stage, the ABC Inspector must ensure that the confidential complainant is advised that confidential status cannot be maintained once the decision has been made by the ABCC to proceed to enforcement or litigation (including small claims). The ABC Inspector should consider the complainant's own views in this regard concerning their confidentiality, and these views will be a factor in considering whether the ABCC proceeds with enforcement and litigation option.

### **25.5. Preliminary investigative steps**

#### **25.5.1. Establishing jurisdiction**

For an ABC Inspector to be authorised to investigate a complaint under Commonwealth workplace laws, the ABC Inspector usually will need to establish that there is an employment relationship (subject of the complaint) that falls within the jurisdiction of the ABCC.<sup>28</sup> This is often a complicated process and can involve extensive inquiries and investigation by the ABC Inspector.

For detailed information on determining whether there is an employment relationship in place (as opposed to a contracting arrangement), see Chapter 7 – Wages and conditions investigations.

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There are also some matters (discrimination) relating to prospective employees and contractors where ABCC has jurisdiction (refer Chapter 10 - Discrimination, and Chapter 8 – Wages and conditions investigations).

For employment during the period **prior to 1 July 2009**, satisfying one of the following criteria will establish that the ABCC has jurisdiction to investigate a complaint:

- the complainant is employed in the ACT, NT or Victoria
- the alleged wrongdoer is a constitutional corporation
- the terms and conditions of the complainant's employment are provided by a federal industrial instrument or provision under the Workplace Relations Act 1997 including - the Australian Fair Pay and Conditions Standard, an Australian Workplace Agreement (AWA), a Collective Agreement or pre-reform Certified Agreement (CA), an Individual Transitional Employment Agreement (ITEA), a Preserved State Agreement (PSA), or a Notional Agreement Preserving a State Award (NAPSA)
- the alleged wrongdoer is respondent to a federal award either preserved or transitional (whether the alleged wrongdoer is a constitutional corporation or not)
- the alleged contravention which is the subject of the complaint is prohibited under the relevant federal industrial instrument
- the work being performed by the complainant is building work and complies with the provisions of s5 of the BCII Act

For the period from 1 July 2009 onwards, the following provisions of the [FW Act](#) and the [Transitional Act](#) will also need to be considered:

- whether the employer is a national system employer (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 Australia (FWA)
- 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 (refer Chapter 12 – National employment framework)
- whether any alleged adverse action relating to discrimination occurred or continued on or after 1 July 2009 (see Chapter 14 – Discrimination).

In addition, for the period from 1 January 2010, the following further provisions of the FWACT and the [Transitional Act](#) will need to be considered:

- whether any of the complainant's entitlements are provided by the National Employment Standards (NES) under the FW Act (refer Chapter 12 – National employment framework)
- whether the terms and conditions of the complainant's employment are provided by a modern award (refer Chapter 12 – National employment framework)

- 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 (refer Chapter 12 – National employment framework)
- whether a state referral of powers means that the employment terms and conditions are now provided by Commonwealth workplace laws.

### 25.5.2. Establishing jurisdiction for the ABCC

Establishing the jurisdiction for the ABCC essentially encompasses all those mention previously in paragraph 6.5.1 but requires that the matter also include either a building industry participant and/or involves building work as defined in the BCII Act.<sup>29</sup>

### 25.5.3. When should you use the powers as an FW Inspector?

Essentially, ABC Inspectors who are also duly appointed FW Inspectors would use exercise their powers as a FW Inspector when investigating matters under the Fair Work Act 2009. Prior to being appointed as FW Inspectors, ABC inspectors employed the powers under the BCII Act to investigate breaches under the FW Act. (*eg S59(5)(e) and S59(6) powers to obtain documents*)

As duly appointed FW Inspectors, S712 of the FW Act is now available to ABC Inspectors to obtain documents but the inspector must be cognisant that in exercising these powers, that person is a FW Inspector for the purposes of exercising that power and is not an ABC Inspector.

Some examples of breaches where an ABC Inspector would exercise their powers as a duly appointed FW Inspector are as following;

- Wages & Entitlement matters
- General protections matters (Part 3-1 of the FW Act)
- Industrial Action (*not building work*) (Part 3-3 of the FW Act)
- Right of Entry matters (Part 3-4 of the FW Act)

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<sup>29</sup> BCII Act; s5

#### 25.5.4. When should you use the powers as an ABC Inspector?

The powers to be exercised by an ABC Inspector under the BCII should be exercised whenever the investigation is in regard to a breach under the BCII Act and not the FW Act. Examples include the following;

- Chapter 5, Part 2 of the BCII Act – Unlawful Industrial Action;
- Chapter 5, Part 4 of the BCII Act – Miscellaneous (Strike Pay);
- Chapter 6, Discrimination, coercion and unfair contracts

#### 25.5.5. Determining if an alleged wrongdoer is a constitutional corporation

The most common way of identifying an alleged wrongdoer 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 CCSA when registering a complaint.

In some matters the alleged wrongdoer will raise questions about the ABCC 's jurisdiction. This is particularly common where the alleged wrongdoer is an incorporated not for profit or government funded organisation. In such cases it is necessary to determine whether the alleged wrongdoer is either:

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

Most commonly, the ABCC deals with trading corporations. The test for whether an entity is a trading corporation so as to give the ABCC 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 ABC Inspector should make inquiries about the entity's operating activities. If any such trading activities are identified, the ABC 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 alleged wrongdoer's activities.

ABC Inspectors should consult their Team Leader and/or Legal Group if they require further assistance on jurisdictional matters. Also refer to Chapter 12 – National employment framework, section 12.2 of this Manual for additional information.

#### 25.5.6. Statute of limitations

As the capacity of the ABCC to litigate is restricted by the time limits set within the [FW Act](#) (six years), ABC Inspectors must ensure that due consideration is given to this issue. ABC Inspectors must also be cognisant that in certain circumstances, this statute of limitations is prescribed by state law, the minimum being 2 years. Consequently, inspectors should consult with the relevant legal sections to determine which statutes of limitations apply. For further information in relation to the statute of limitations refer to Chapter 4 – Investigation overview.

### **25.5.7. Checking history of complaints**

ABC Inspectors should conduct a search to check whether either party to a complaint has any history with the ABCC recorded in AIMS. This information may assist ABC Inspectors in planning their investigations and may also determine whether the complaint should be referred to the regional State Director.

#### **25.5.7.1. Complainant with a history of lodging complaints**

A complainant with a history of lodging complaints may meet the definition of a persistent complainant (refer to Chapter 10 – Procedural matters in investigations). Where the ABC Inspector determines that the person is a persistent complainant, the ABC Inspector may elect to inform the complainant that the matter is not going to be investigated further by the ABCC at this time and advise the complainant of their options for seeking resolution. This decision should be made in conjunction with the ABC Inspector's Team Leader and with the approval of the director on a case by case basis.

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

#### **25.5.7.2. Alleged wrongdoer with a series or history of complaints**

Where a search on AIMS identifies multiple active complaints against a single alleged wrongdoer, the ABC 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 alleged wrongdoer has a history of complaints and these complaints have been sustained, it may be an indication that the alleged wrongdoer is intentionally failing to meet their obligations under Commonwealth workplace laws. ABC Inspectors must bring these matters to the attention of their Team Leader to assess how to progress the investigation. Approaches that may be suggested by Team Leaders include a referral to the relevant State Director.

## 25.6. Identifying the applicable industrial, transitional or fair work instrument

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

- 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 alleged wrongdoer
- ask the complainant
- search Infra to establish whether the alleged wrongdoer is respondent to awards or certified agreements, etc
- search the FWA website for transitional and fair work instruments, etc
- obtain confirmation from FWA 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 ABC 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 ABC 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 or instrument. For those employees where there is no such applicable instrument (often called an award/ agreement free employee), the ABC Inspector should seek to ensure the complainant is receiving the minimum entitlements under the [FW Act](#) or [Transitional Act](#).

The ABC 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 ABC Inspector should seek the advice of their Team Leader in making such identification where needed.

When ABC 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.

When constructing a hard copy file, ABC Inspectors should ensure this file can stand alone (all important documents from the AIMS database 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)

A Case Decision Record ([CDR](#)) should be included on the file each time a relevant decision is made. In particular, how the ABC Inspector determined the jurisdiction, employing entity and industrial instrument should be recorded.

Also, where contraventions are identified or the complaint is not sustained, the [CDR](#) should contain the decisions and action proposed and agreed to and signed off by the ABC Inspector's Team Leader.



Where a complainant withdraws their complaint, the ABC Inspector should respond to the complainant and alleged wrongdoer using the [withdrawal of complaint template letters](#).

Any complaint where contraventions are identified and not rectified as a result of the contravention letter process should contain a [CDR](#) outlining the outcome of that contravention process. Also, the [CDR](#) should include a recommendation detailing the appropriate action (such as referral for litigation, issue a letter of caution, issue an enforceable undertaking, issue a compliance notice, offer mediation or offer small claims action). Again, the [CDR](#) should contain the action proposed to be taken and must be agreed to and signed off by the ABC Inspector's Team Leader or director.

## **25.7. Managing the expectations of the parties**

### **25.7.1. 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.<sup>30</sup> 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. ABC 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 finalising a matter. It is the expectation of the ABC Commissioner that ABC 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, ABC Inspectors must ensure that all contact is noted on the file and in AIMS.

### **25.7.2. Managing expectations**

ABC Inspectors should ensure parties understand that the role of the ABCC is to enforce minimum entitlements and that in carrying out this role, ABC Inspectors do not represent or advocate for either party. When dealing with parties to an investigation, ABC 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 ABC Inspector must remain open-minded regarding the potential outcome of the investigation.

An ABC 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. The ABC Inspector must be unbiased (refer Chapter 1 – Introduction, section 1.11 – Conflict of interest) and take into account all relevant considerations.

ABC 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 ABCC litigation action. In relation to complex investigations in particular, ABC Inspectors should ensure that complainants understand that a contravention does not necessarily result in underpayments or compensation for the complainant.

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NSW Ombudsman, *Investigating Complaints*, 2004, p. 74.

ABC 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.<sup>31</sup> ABC Inspectors should avoid complicated technical or legal language. Any verbal advice to a complainant should be promptly and fully documented by the ABC Inspector.

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

ABC Inspectors should avoid giving the impression to alleged wrongdoers that assisted voluntary resolution (AVR) or voluntary compliance will always result in a complaint being closed. Although AVR and voluntary compliance are acceptable resolutions in most wages and conditions cases, there are occasions where litigation action might still be pursued. ABC Inspectors are to seek the advice of their Team Leader in such cases.

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

When engaging with stakeholders relevant to an investigation, ABC Inspectors are required to ensure that they make contemporaneous file notes. All ABCC employees who have contact to any party in relation to an ABCC investigation are required to make a file note containing details of the event (e.g. a phone call to a complainant during AVR, or a meeting with an employer during a full investigation). A [file note template](#) has been developed which contains all relevant information which may be required should an ABC Inspector be called to account for the actions or decisions in the future.

## **25.8. Establishing the facts**

In some investigations, establishing the facts and forming a view whether a contravention has occurred will be straightforward. Cases where the facts are harder to establish may involve conflicting versions of events where the facts are in dispute.

It is important to note that when facts are in dispute, it does not necessarily mean that one of the parties is being dishonest. Often two people can interpret the same situation differently or recall the same events differently, particularly if some time has passed.

Establishing the facts involves gathering evidence from a range of sources. Evidence, admissibility and the legal concepts surrounding these issues are dealt with in detail in Chapter 20 - Evidence.

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NSW Ombudsman, *Investigating Complaints*, 2004, p. 74.

## **25.9. Making a determination**

### **25.9.1. Establishing a contravention**

A contravention is established when the ABC 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 ABC Inspectors until all available evidence has been collated and assessed. A premature determination made without considering all of the evidence may result in the ABC Inspector making an incorrect determination.

To establish whether a contravention has or has not occurred, the ABC 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 ABC Inspector has collected and considered all available evidence (refer to Chapter 20 - Evidence for further information on evidential evaluation).

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

Once all available evidence has been collated and assessed, the ABC 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 ABC Inspector critically evaluating the material gathered and can also provide intervention and escalation points for Team Leaders (see 6.12 below).

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

### **25.9.2. Where no contravention is established**

Sometimes, after considering the evidence, an ABC Inspector determines that no contravention is established. If the investigation was started in response to a complaint (as is often the case), the ABC 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. Finalisation letters must be sent to both parties.

## **25.10. Contravention letters**

When an ABC Inspector is satisfied that a person has contravened Commonwealth workplace laws, the ABC 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 alleged wrongdoer of the failure including what provisions have been contravened, how they have been contravened, and the information the ABC Inspector has relied on to make their determination
- requires the alleged wrongdoer to take specified action within a specified period to rectify the failure (if appropriate)
- requires the alleged wrongdoer to inform the ABC Inspector of action taken to rectify the contravention (if appropriate)
- advises the alleged wrongdoer of the potential consequences of failing to comply with the contravention letter.

The contravention letter is authorised by the [FW Regulations](#)<sup>32</sup> and forms part of the ongoing process of procedural fairness provided to an alleged wrongdoer by advising the alleged wrongdoer of the contravention and its potential consequences, explaining the evidence that was used in reaching the determination and providing the alleged wrongdoer with the opportunity to respond, including submitting additional evidence.

### **25.10.1. 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 ABC Inspector.

Best practice provides that contravention letters are sent by registered post to the alleged wrongdoer'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 ABC 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 ABC Inspector has determined there are only non-monetary contraventions and corrective action is not possible (such as in certain complex cases, or where the alleged wrongdoer has not supplied rosters or issued pay slips). Where rectification is not possible, the contravention letter would also advise the alleged wrongdoer 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 22 – Enforcement and Chapter 23 -Litigation).

Minor variations to these pro-forma [contravention letter](#) may be necessary, depending on the circumstances of the individual investigation. The most common example of this is where an alleged wrongdoer 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 alleged wrongdoer of the contravention, acknowledge that the contravention has been rectified, and advise that the investigation is finalised.

### **25.10.2. Responses to a contravention letter**

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FW Regulations; Chapter 5, Part 5-2, Division 3, Reg 5.05.

The alleged wrongdoer might respond to the [contravention letter](#) with full voluntary compliance, in which case the investigation will usually be finalised (see 6.11.2 below).

The alleged wrongdoer may respond to the contravention letter by providing new evidence that disproves some or all of the alleged contraventions. In such cases, the ABC Inspector would consider the new evidence and advise the alleged wrongdoer if the contravention letter stands in full, stands in part, or is withdrawn. The alleged wrongdoer will be advised in writing to comply with any remaining items of the contravention letter.

On occasion, the ABC 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 ABC Inspector (in consultation with their Team Leader) might issue a final letter that provides the alleged wrongdoer with a further seven days to rectify the contraventions. The final letter also will detail the consequences of continued non-compliance. A template [final letter](#) is available on the intranet.

Sometimes, the alleged wrongdoer 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).

### **25.11. Potential outcomes of full investigations**

The range of potential outcomes of full investigations includes:

- no further action
- referral to alternative dispute resolution mechanisms (such as mediation)
- directed voluntary compliance through the contravention letter process
- the issuing of a penalty infringement notice
- 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
- ABCC litigation

For further information on ABCC mediation, refer to Chapter 8 – Mediation. For information on penalty infringement notices, [letters of caution](#), small claims procedures, enforceable undertakings, [compliance notices](#), injunctions, ABCC litigation, and the processes involved with each of these outcomes, refer to Chapter 22 – Enforcement and Chapter 23 - Litigation.

### 25.11.1. Referrals to other agencies

If, during a full investigation a complaint is determined to be outside the ABCC's jurisdiction, the ABC Inspector should refer the matter to another appropriate agency. The ABC 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 ABC Inspector in consultation with their Team Leader and the State Director.

### 25.11.2. Voluntary compliance

Voluntary compliance is the most common way in which complaints are finalised following a full investigation. When it is determined that one or more contraventions have occurred and a [contravention letter](#) is issued, an ABC Inspector must give the alleged wrongdoer a reasonable opportunity to voluntarily rectify the matter.

Where a [contravention letter](#) stipulates an underpayment amount, the alleged wrongdoer may achieve voluntary compliance in one of three different ways;

- offer to settle,
- full settlement of all matters, 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 ABC Inspector issuing a formal compliance notice.

### 25.11.3. Offers to settle

An offer to settle is an amount proposed (often by the alleged wrongdoer) in settlement of any underpayment resulting from the complaint. The ABC Inspector must refer all offers made by the alleged wrongdoer to the complainant (and vice versa), maintaining impartiality and a facilitative role. The ABC Inspector should provide all parties with information as to the appropriate entitlements, in order that an informed decision can be made by them. The ABC Inspector should also recommend that the complainant seek their own legal advice as to whether it is in their interests to accept an offer to settle. The ABC Inspector must make notes of all involvement in an offer to settle.

Where an offer to settle has been accepted by the complainant, the ABC Inspector must obtain written confirmation from the complainant of their acceptance of the offer to settle, including the terms of settlement and the actual amount (gross and net) to be paid to the complainant. In practice, it is not uncommon for these negotiations to result in resolution, but not necessarily full compliance with the [FW Act](#). Should this occur the ABC Inspector must seek authorisation from their Team Leader before the investigation can be finalised.

It should be noted that a settlement by the parties will not prevent the ABCC from pursuing litigation if such action is appropriate. However, in most cases, where the complainant has accepted an offer to settle and been paid the full amounts agreed between the parties, the ABCC's investigation will have been completed.

### **25.11.3.1. Full settlement of all matters**

Full settlement of all matters is the payment in full by the alleged wrongdoer of all outstanding entitlements owing to the complainant, as determined by the ABC Inspector in the contravention letter. Record of the payment being made (gross and net) should be provided to the ABC Inspector by the alleged wrongdoer and confirmed with the complainant. The details must be entered in an AIMS note and a hard copy attached to the file.

### **25.11.3.2. Payment by instalments**

Rather than embark on a course of action that jeopardises the viability of the business and the livelihood of both alleged wrongdoers and employees, ABC Inspectors are to exercise a flexible and commonsense approach to recovering these monies. This includes payment arrangements, whereby an alleged wrongdoer 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 ABC Inspector, although the request to pay by instalments is usually made by the alleged wrongdoer.

The proposal needs to be approved by a Team Leader who will take into consideration:

- the reason for payment by instalments
- whether immediate payment would jeopardise the alleged wrongdoer's ability to carry on its business
- the amount to be paid and the period the alleged wrongdoer proposes to take for full settlement
- the alleged wrongdoer's history
- the complainant's views.

If the instalments are approved, a detailed instalment plan needs to be signed by the alleged wrongdoer. Confirmation of approval of the instalment plan must be sent to both parties. The alleged wrongdoer should be advised that any default on an instalment payment may be followed by action to recover the remaining amount owing.

The complainant should be advised that following the first instalment (which will be confirmed by the ABC Inspector), the complainant will have to monitor the remaining instalments and advise the ABC Inspector if a payment is not received.

Matters approved to be settled by instalments should be finalised as voluntary compliance in AIMS once confirmation of the first payment has been received. The total amount of the instalments should be entered into the payments section. The matter can be reopened if the ABC Inspector is subsequently informed that payments have not been made in accordance with the instalment plan.

In all circumstances, where a complainant refuses to accept a payment schedule that appears reasonable, ABC Inspectors should seek the advice of their Team Leader. It is also appropriate for the ABC 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 (refer Chapter 22 – Enforcement, section 22.4 Small claims action).

### **25.11.3.3. General principles of voluntary compliance**

Irrespective of the method of voluntary compliance, ABC Inspectors should obtain a [Record of Payments made to employees form](#) (signed by the alleged wrongdoer) 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 alleged wrongdoer with the contravention letter.

ABC 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 alleged wrongdoers and deterring others from contravening Commonwealth workplace laws. This may occur even if there has been voluntary compliance.

### **25.12. Investigative evaluation**

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

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, ABC 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).<sup>33</sup>

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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 Team Leaders to objectively assess an investigation, it enables them to finalise investigations or guide ABC Inspectors to alternative avenues of inquiry.

Evidential evaluation is discussed in detail in Chapter 22 – Enforcement and Chapter 23 - Litigation.

### **25.13. Reporting of outcomes to FWO**

At the completion of all investigations involving the Fair Work Act, an outcomes report will be required for the notification of the Fair Work Ombudsman as per the requirements of the memorandum of understanding. To facilitate this process, the Fair Work Ombudsman has provided a "[Reporting of Outcomes to FWO](#)" spreadsheet to facilitate the reporting process.

# ABCC Operations Manual

## Chapter 7

### Wages and conditions investigations

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## **10.1. Introduction**

This chapter provides details about wages and conditions investigations, the actions expected of ABC Inspectors in conducting these investigations, and the possible outcomes. By reading this chapter, ABC Inspectors should develop a clear understanding of a wages and conditions investigation.

## **10.2. Wages and conditions investigations**

Wages and conditions investigations comprise the vast majority of matters handled by the ABCC. They largely deal with remuneration issues including payments for time worked, leave, overtime, penalty rates, allowances and termination entitlements. These investigations may also include matters not directly related to payment such as meal breaks, rosters, pay slips, and record keeping. These non-monetary entitlements are generally referred to as conditions.

Wages and conditions investigations are most commonly instigated by the lodgement of a complaint form. They may also result from targeted campaigns, ministerials, media reports, or other information provided to the ABCC (refer Chapter 2 – The investigation process and Chapter 3 – Inquiries and registration). The usual parties to a wages and conditions complaint are the complainant (often an employee or former employee) and the alleged wrongdoer (often the complainant’s employer or former employer).

Where a complaint form has been lodged, the primary aim of the investigation is to determine whether the allegations made by the complainant are supported by the facts.

Where the investigation does not result from allegations made in a complaint form, the aim of the investigation will usually be determined by other means. Regardless of whether the investigation results from lodgement of a complaint form or not, the ABC Inspector should always be alert to any contraventions that may be uncovered and seek appropriate remedial action.

## **10.3. Establishing the facts**

Establishing the facts is discussed in Chapter 6 – Full investigations. Cases where the facts are harder to establish may involve conflicting versions of events or where

the facts are in dispute. 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 alleged wrongdoer 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 alleged wrongdoer 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 alleged wrongdoer argues that the employee has falsified their timesheet.
- A complainant alleges that they have not been paid for working overtime. The alleged wrongdoer states that the overtime worked was not authorised.

Establishing the facts can also be difficult when proper records have not been kept (e.g. the alleged wrongdoer's records may fail to record the overtime hours worked, or the amount of leave accrued).

Establishing the facts involves gathering evidence from a range of sources. Evidence, admissibility and the legal concepts surrounding these issues are dealt with in detail in Chapter 20 – Evidence.

When ABC 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. Specifically, a [CDR](#) must be used to document when an investigation changes phase, for example, when a case is referred from AVR for a full investigation.

In addition, Team Leaders and ABC Inspectors are required, especially in the full investigation phase of a complaint, to review the information and evidence of the complaint and to discuss the ABC Inspectors decision making process. This should be documented on the hard copy file and noted in AIMS.

When constructing a hard copy file, ABC Inspectors should ensure this file can stand alone (all important documents from the AIMS database 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). In addition, all significant documentation should be attached to files with a corresponding reference.

An evidence matrix is to be included on all wages and conditions investigations where appropriate once the complaint has been identified by the ABC Inspector as requiring investigation (see Chapter 20 – Evidence, section 20.8). On closure of the investigation, both the Team Leader and ABC Inspector must sign off on the investigation file. Team Leader actioned investigation files should be co-signed by a peer or State Director.

#### **10.4. Confirming the employment or contractor status**

Defining the status under which an individual (usually the complainant) is engaged needs to be considered by the ABC Inspector. Confirming whether a complainant is an employee or a contractor provides the ABCC 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 ABC Inspector will likely form a view early in the investigation as to whether the relationship is one of employment or contracting.

## Employees

Broadly, employees are engaged under an employment contract also known as a 'contract of service' (which need not be in writing), and 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 ABC 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](#)

## 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. 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](#)).

### **Indicators for determining employment status**

In assessing whether a worker is an employee or a contractor, the ABC 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 ABC 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 ABC 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.

### **Background to the multi factor test**

The multi factor test operates by looking at the total relationship between the parties. No single issue concerning control, economic independence or the description of the relationship in a contract will be determinative. However, courts will 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 ABC 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 ABC Inspector is not expected to be proficient in case law, and should seek the advice of their Team Leader or Legal Group as needed (see also 7.4.8 below).

### **Where the relationship is defined in the written contract**

ABC 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. ABC Inspectors should remain alert to the potential that the matter may involve issues of “sham contracting” as well as the alleged underpayment.

In such cases, the ABC 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 an ABC 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 ABC Inspector should proceed with the investigation on that basis.

### **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 ABC Inspector to ascertain the true nature of the relationship.

### **Making an assessment**

As noted above, the ABC Inspector will early in the investigation need to assess whether there is an employment relationship or contracting arrangement in place, using the multi factor test (see 7.4.3 above).

In some cases, the evidence does not clearly indicate the nature of the arrangement. In the first instance, a ABC Inspector should review the case with their Team Leader 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 alleged wrongdoer disputes the ABC 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.



## **Assistance from Legal Group**

Where the determination is difficult, the ABC Inspector should contact ABCC Legal for advice and assistance in making an assessment. ABCC Legal will provide advice as to the likely determination a court may make regarding the complainant's status of employment. To assist ABCC Legal the ABC Inspector must provide the allocated lawyer all available information relevant to the multi factor test.

### **Where the ABC Inspector assesses that the complainant is an employee**

Where the ABC Inspector, having applied the multi factor test, finds that the complainant is an employee, then the ABC Inspector will investigate whether the complainant received their correct entitlements as an employee. (Consideration would also be given as to whether this was a sham contracting arrangement, as detailed in Chapter 19 – Termination and contractors).

### **Where the ABC Inspector assesses that the complainant is a contractor**

In some circumstances, the ABC Inspector (having applied the multi factor test) 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 ABC Inspector must advise the complainant that as they are not an employee, the entitlements sought under the FW Act do not apply.

The ABCC 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 ABCC 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 ABC Inspector should further investigate these matters in accordance with their powers under the relevant legislation (refer Chapter 1 - Introduction (Section 1.3))

## **10.5. Employment records**

An ABC 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 ABC Inspector to investigate whether an employee has received the full wages and entitlements owing under Commonwealth workplace laws.

### **Employer obligations under the FW Act**

In accordance with the requirements of the legislation,<sup>34</sup> 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<sup>35</sup> 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](#).

## **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 ABC Inspectors, employees and former employees upon request.

### **Records requirements**

Under the [FW Regulations](#):

- employers must make (or cause to be made) a record relating to an employee containing the prescribed details<sup>36</sup>
- employers must keep (or cause to be kept) all records for each employee for a minimum of seven years<sup>37</sup>
- records should be in a legible form in the English language, and in a form that is readily accessible to a ABC Inspector<sup>38</sup>
- records must not be altered unless for the purposes of correcting an error<sup>39</sup>
- records must not be false or misleading.<sup>40</sup>

#### **10.5.1.1. 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).

#### **10.5.1.2. 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,

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<sup>34</sup> FW Act; s 535

<sup>35</sup> FW Act; s 536

<sup>36</sup> FW Regulations; Chapter 3, Division 3, Subdivision 1, Reg 3.32

<sup>37</sup> FW Regulations; Chapter 3, Division 3, Subdivision 1, Reg 3.32

<sup>38</sup> FW Regulations, Chapter 3, Division 3, Subdivision 1, Reg 3.31

<sup>39</sup> FW Regulations; Chapter 3, Division 3, Subdivision 1, Reg 3.44(4)

<sup>40</sup> FW Regulations; Chapter 3, Division 3, Subdivision 1, Reg 3.44(1)

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<sup>41</sup>. 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<sup>42</sup>.

#### **10.5.1.3. Pay records**

Employers are required to keep records of payments made to employees.<sup>43</sup> 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
- the details of any incentive-based payment, bonus, loading, penalty rate, or other monetary allowance or separately identifiable entitlement paid to the employee.

#### **10.5.1.4. 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.

#### **10.5.1.5. 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

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<sup>41</sup> FW Regulations; Chapter 3, Division 3, note to Subdivision 1

<sup>42</sup> FW Regulations; Chapter 3, Division 3, Subdivision 1, Reg 3.35

<sup>43</sup> FW Act; s535

- 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.

#### **10.5.1.6. 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.

#### **10.5.1.7. 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 keeps a record including:

- the guarantee and (where applicable)
- the date of any revocation.

### 10.5.1.8. Termination records

Where the employment has been terminated, the records must be made and kept which shows the details of an employee's termination,<sup>44</sup> 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.

### 10.5.1.9. 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.<sup>45</sup> 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.

For further information regarding transmission or transfer of business, refer to Chapter 18 – Transfer of business.

### 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.<sup>46</sup>

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.<sup>47</sup>

Pay slips must show:<sup>48</sup>

- 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

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<sup>44</sup> FW Regulations; Chapter 3, Division 3, Reg 3.40

<sup>45</sup> FW Regulations; Chapter 3, Division 3, Reg 3.41

<sup>46</sup> FW Act; s536(1)

<sup>47</sup> FW Regulations; Chapter 3, Division 3, Subdivision 2, Reg 3.45

<sup>48</sup> FW Regulations, Chapter 3, Division 3, Subdivision 2, Reg 3.46

- 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
- 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<sup>49</sup>, 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 ABC Inspector should make enquiries with the complainant as to whether they have kept any of their pay slips.

### **Absence of records**

Where ABC Inspectors are unable to obtain employment records, the complaint under investigation will not necessarily be defeated. ABC 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 ABC 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)<sup>50</sup> or recommendation to proceed to ABCC litigation (refer Chapter 22 – Enforcement and Chapter 23 - Litigation).

### **The collection of records**

The collection of employment records occurs in the majority of ABCC investigations. When ABC Inspectors receive employment records, they must ensure that these records are managed in accordance with the ABCC 's evidence management procedures (refer Chapter 20 – Evidence). 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, ABCC practice is to retain copies of employment records and return the originals to the employer wherever practical.

### **The identification of record keeping and pay slip contraventions**

Where the only contraventions identified in the ABC Inspector's investigation are of record keeping or pay slip requirements, ABC Inspectors have a discretionary ability to undertake educative action (see 7.5.7.1) or enforcement action (7.5.7.2).

However, where the ABC 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.

#### **10.5.1.10.     Educative action**

Where only technical<sup>51</sup> record keeping or pay slip deficiencies are identified or the employer (alleged wrongdoer) is a first time offender, ABC Inspectors may issue a contravention letter and provide relevant fact sheets to the alleged wrongdoer in relation to the alleged record keeping or pay slip contravention. In such cases it would be appropriate for the ABC Inspector to follow up with the alleged wrongdoer 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.

#### **10.5.1.11.     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 alleged wrongdoer is a first time offender or not), enforcement action is available, including the issuing of a PIN<sup>52</sup> or the progression to ABCC litigation.

In brief, a PIN may be issued wherever a ABC Inspector reasonably believes the alleged wrong-doer has contravened particular civil penalty provisions of the [FW Act](#).<sup>53</sup> Specifically, an ABC Inspector may issue a PIN in respect of contraventions of ss535(1), 535(2), 536(1) and 536(2), namely where the alleged wrongdoer 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](#) <sup>54</sup> (refer Chapter 22 – Enforcement for more information).

ABCC 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 ABCC Litigation Policy, Chapter 22 – Enforcement and Chapter 23 - Litigation).

#### **10.5.1.12.     Deductions from wages and entitlements**

ABC 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 moneys that are payable to an employee under Commonwealth workplace laws.

The ABC 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 moneys that are deducted from the wages or other entitlements paid to an employee.

Deductions should not be confused with “off-setting”, which is where an employer has paid an employee above the minimum for some entitlements or pay periods and

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<sup>49</sup> FW Regulations; Division 3, Subdivision 2, Reg 3.46(3)

<sup>50</sup> FW Act; s558; FW Regulations, Chapter 4, Part 4-1, Reg 4.04

<sup>51</sup> 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.

<sup>52</sup> As authorised by FW Act s558 and FW Regulations, Chapter 4, Part 4-1, Reg 4.04

<sup>53</sup> FW Regulations, Chapter 4, Part 4-1, Reg 4.03

<sup>54</sup> FW Act; s558(2) and the note to FW Regulations, Chapter 4, Part 4-1, Reg 4.05

below the minimum for others, and seeks to have the “above minimum” amounts offset against the underpayments (refer 7.9 below).

## **10.6. ABCC practice regarding deductions**

An ABC 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 ABC Inspector. The provisions relating to deductions have changed over time and are detailed below. The ABC Inspector will need to consider when the deduction(s) occurred, in order to determine the provision(s) applicable at the time.

### **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.

### **For the period from 27 March 2006 to 22 September 2006**

#### **10.6.1.1. 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 circumstances where any deductions were allowed under the WR Act, irrespective of whether they were agreed, for the benefit of the employee, or fair.

#### **10.6.1.2. 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.<sup>55</sup>

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

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<sup>55</sup> *Stewart, Andrew, Stewart’s Guide to Employment Law, The Federation Press, December 2007, p.190*



- Tasmania – Industrial Relations Act 1984 (ss 47, 51).<sup>56</sup>

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, ABC Inspectors do not enforce provisions of state laws. Advice should be sought from a Team Leader regarding these provisions if required.

### **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. Deductions are permitted under the following circumstances:

- there was a clear agreement between the employer and employee for the deduction to occur
- the deduction was for the benefit of the employee
- in all the circumstances, the deduction is fair.

That is, 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 recover any overpayments of entitlements in instances where the deduction does not reduce employee entitlements below the employee's minimum legislated entitlements. However, any such recovery action would be taken by the employer, and is not a matter for the ABCC.

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 7.5.4 above.

### **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](#) (including awards, NAPSAs, and workplace agreements) may also contain provisions that permit deductions in specified circumstances. For example, some awards allow employers to withhold pay, 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 ABC Inspector to review the relevant provisions of the applicable industrial instrument to determine whether deductions are permitted.

The ABC 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

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<sup>56</sup> Stewart, Andrew, *Stewart's Guide to Employment Law*, The Federation Press, December 2007, p.190

appear these provisions are not enforceable,<sup>57</sup> 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.

### **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 FWA order; or
- the deduction is authorised by or under a law of the Commonwealth, a state or territory, or an order of the court.

Some of these points are expanded below.

### **Deductions for the benefit of the employee**

Deductions which are for the benefit of the employee (i.e. the employee is not disadvantaged by the financial deduction), 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 9 - Overseas workers investigations).

Examples of deductions which are not considered to be for the benefit of an employee include:

- legal and agent expenses
- plane tickets for overseas workers and their families
- non-market value rents (which is applicable to all employees)
- deductions for use of company vehicles
- deductions for mobile phone bills for work related use
- deductions for shortages in cash tills
- costs of employee uniforms
- costs of damages to the employer’s property
- costs of breakages or loss of the employer’s assets
- some medical expenses/insurance, including private health insurance.<sup>58</sup>

## **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.

## **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 moneys from an employee's wages.

## **Minimum entitlements**

The [Transitional Act](#) and [FW Act](#) provide for guaranteed minimum wages.<sup>59</sup> 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 [Transitional Act](#) or [FW Act](#).

In addition, certain statutory entitlements owing on termination can not be withheld under the provisions of the [Transitional Act](#) and [FW Act](#). A common issue faced by ABC 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 a statutory entitlement contained within the [Transitional Act](#) and [FW Act](#),<sup>60</sup> 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. In these cases, the ABC Inspector should seek the advice of the Process Innovation and Knowledge Services (PIKS) branch on the operation of the withholding provisions of the transitional or fair work instrument.

## **Role of the ABC Inspector regarding deductions**

The role of the ABC 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

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<sup>57</sup> For the period 27 March 2006 to 30 June 2009 only

<sup>58</sup> Also see FW Act s326 and FW Regulations; Chapter 2, Part 2-9, Division 2, Reg 2.12.

<sup>59</sup> Transitional minimum wage provisions operate from 1 July 2009 under the Transitional 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).

<sup>60</sup> 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).

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 moneys 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 ABC Inspector would also consider whether there were contraventions of s344 of the [FW Act](#) (refer Chapter 15 – Undue influence or pressure, duress and coercion investigations).

## 10.7. Making a determination

### Determining whether there has been a contravention

Determination of a contravention is discussed in detail in Chapter 6 – Full investigations. In summary, once all available evidence has been collated and assessed the ABC 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 [CDR](#) should be included on the file when this determination has been made. The CDR should contain the decisions and action proposed, and be agreed to and signed off by the ABC Inspector's Team Leader.

### Issuing a contravention letter

Where an ABC Inspector is satisfied that a person has contravened a Commonwealth workplace relations law, the ABC Inspector should issue a contravention letter.<sup>61</sup>

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.

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<sup>61</sup> ABC Inspectors are authorised to issue such letters under regulation 5.05 of Chapter 5 of the FW Regulations.

A contravention letter is a written notification that:

- informs the alleged wrongdoer of the contravention
- requires the alleged wrongdoer to take specified action within a specified period to rectify the failure (if appropriate)
- requires the alleged wrongdoer to inform the ABC Inspector of action taken to rectify the contravention
- advises the alleged wrongdoer 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 alleged wrongdoer that litigation action might be pursued and may be followed with a letter of caution, an undertaking or actual litigation (refer Chapter 22 – Enforcement and Chapter 23 - Litigation).

### **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 alleged wrongdoer to calculate the actual amounts owed to a complainant. When dealing with large organisations with payroll staff and automated payroll systems this may be straightforward. However, in cases where it is evident that an alleged wrongdoer 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 ABC Inspector to perform the calculations.

ABC 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 ABC Inspector should consider performing calculations if it is likely to produce a more accurate and timely result. ABC Inspectors also can provide calculations of amounts owed upon request of an alleged wrongdoer, if this assists in obtaining an outcome to the complaint. Providing a copy of calculations to the alleged wrongdoer and answering their questions is another way in which ABC Inspectors can educate employers on their responsibilities under the FW Act.

Any calculations sent by an ABC Inspector to an alleged wrongdoer should be marked “WITHOUT PREJUDICE.” If the alleged wrongdoer disputes these calculations, the alleged wrongdoer 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 ABC 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 ABC 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 ABC Inspector, in a format suitable for presentation to the court.

### **10.8. Voluntary compliance**

Voluntary compliance is explained in detail in Chapter 6 – Full investigations. In summary, voluntary compliance is the most common way in which complaints are finalised following a full investigation.

- Prior to finalising an investigation by voluntary compliance, ABC Inspectors should obtain a [record of payments made to employees form](#) signed by the alleged wrongdoer 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 alleged wrongdoer with the contravention letter.

### **10.9. Deeds of arrangement or deeds of release**

A deed of arrangement or deed of release is a document often created by the alleged wrongdoer (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. Alleged wrongdoers 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.

ABC Inspectors should not provide advice or an opinion if asked whether a complainant should sign a deed. ABC Inspectors should not provide pro forma or template deeds to alleged wrongdoers, complainants or other parties.

Where the ABC Inspector has determined that minimum entitlements are owed, the obligation on the alleged wrongdoer 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 the ABCC from pursuing litigation if such action is appropriate. However, in most cases, where the parties abide by the agreed terms of the deed, the ABCC's investigation will have been completed.

### **10.10. Where voluntary compliance is not achieved**

Circumstances may arise where the alleged wrongdoer will not voluntarily comply with the items listed in the contravention letter. An alleged wrongdoer 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 ABC Inspector in the contravention letter.

If the alleged wrongdoer does not comply in full with all items of the contravention letter, then voluntary compliance has not been achieved. In such cases, the ABC Inspector must consider the evidence and assess the enforcement options available. These are discussed in detail in Chapter 22 – Enforcement and Chapter 23 – 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 ABCC litigation.<sup>62</sup>

This decision is made in consultation with the ABC Inspector's Team Leader or at case conference during a formal investigative evaluation.

### 10.11. Offsetting

Sometimes an investigation will show that an alleged wrongdoer has underpaid a complainant on some entitlements (e.g. allowances, overtime) but paid above the minimum on others (e.g. the basic rate of pay). Alleged wrongdoers often wish to "offset" the above minimum payments (or overpayments) against the underpayments.

When considering any offsetting arrangement, ABC 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 ABC Inspectors may find that each step partly informs another. ABC 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 the ABCC does exercise discretion during this process (particularly during the enforcement stage), this discretion is not intended to allow alleged wrongdoers to subvert their obligations under Commonwealth workplace laws. Rather, the ABCC intends to identify contraventions, educate regarding obligations, and enforce the legislation where arrangements have resulted in a detrimental financial impact on a complainant.

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<sup>62</sup> Mediation might also be considered, in circumstances where enforcement and compliance

## **Stage One: Considering the possible underpayments**

During stage one, ABC Inspectors should focus on establishing whether an underpayment of wages or entitlements has occurred. ABC 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.

In addition to referring to this chapter, ABC Inspectors should also refer to Chapter 6 - Full Investigation and Chapter 12 - National Employment Framework to guide them in identifying an underpayment.

At this first stage, ABC 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, ABC Inspectors can then move to stage two, considering the arrangements in place.

## **Stage Two: Considering the arrangements in place**

If an alleged wrongdoer is seeking to offset payments, ABC 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.

### **10.11.1.1. Statutory arrangements**

Statutory arrangements refer to any arrangements under Commonwealth workplace law which may alter the payment of wages or entitlements to an employee.

#### **10.11.1.1.1. 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 ABC Inspector encounters an arrangement where an alleged wrongdoer has underpaid a complainant on some entitlements (e.g. allowances, overtime) but paid above the minimum on others (e.g. the basic 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 16 – Investigation of individually negotiated entitlements for more details on these arrangements).

When dealing with an offsetting matter where SNCE's are effective, ABC Inspectors should enforce the complainant's statutory entitlements and any enforceable SNCE's as the complainant's minimum entitlements. For further information, refer to Chapter 16 – Investigation of individually negotiated entitlements.

#### **10.11.1.1.2. Fair Work Instruments**

ABC 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

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options are not appropriate (refer Chapter 8 – Mediation).



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.

#### **10.11.1.1.3. Modern awards and transitional arrangements**

There are transitional arrangements in most modern awards that ABC 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.

#### **10.11.1.1.4. National Employment Standards (NES)**

ABC 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.

#### **10.11.1.2. Common law offsetting arrangements**

Once allowable statutory offsetting arrangements have been considered, and if an ABC 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, ABC Inspectors must compare the arrangement in place with the types of arrangements that are permitted at common law.

Importantly, ABC 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 ABC Inspector chooses any enforcement options. ABC Inspectors must refer to stage 3 before proceeding with any action on an offsetting matter.

##### **10.11.1.2.1. Common law offsetting principles**

When considering common law offsetting arrangements, there are two binding principles which an ABC 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.

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.

#### **10.11.1.2.2. Proper Offsetting Arrangements**

Any agreement to offset over-award payments must be clear and expressed (usually in writing).<sup>63</sup> The type of evidence ABC 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 alleged wrongdoer 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 accidentally, 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.

#### **10.11.1.2.3. Scope of Advice regarding common law offsetting arrangements**

ABC Inspectors may be asked how an employer can enter into a common law offsetting arrangement. ABC Inspectors should not give advice regarding whether a party should, or should not, enter into an offsetting arrangement with another party.

ABC 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.

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<sup>63</sup> Poletti v Ecob and the Textile, Clothing and Footwear Union of Australia v Givoni.

ABC 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.

### **10.11.2. Stage Three: Establishing contraventions and choosing the appropriate enforcement option.**

#### **10.11.2.1. Issuing a contravention letter**

The way the ABCC 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 alleged wrongdoer (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 alleged wrongdoer must be notified in writing using a contravention letter. However, the ABCC will exercise its discretion when it comes to enforcing these contraventions. The ABCC will only seek rectification of underpayments where the complainant has suffered an overall financial disadvantage over the period of the complaint.

In the case that a complainant has not suffered financial disadvantage over the period of the complaint, it is important to note that the ABCC is not discharging the alleged wrongdoer of any wrongdoing regarding the contraventions. Rather, the ABCC 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 the ABCC.

Importantly, when issuing a contravention letter, ABC 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 (eg. 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 a FWI should seek to recover represents the difference between what the complainant received over the period of the complaint, 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 (i.e. if the complainant received more than they otherwise would have under the applicable fair work instrument), then a FWI should still issue a contravention letter identifying the contraventions. However, the contravention letter should identify, that on this occasion, the ABCC has decided not to pursue any underpayments based on the fact that the complainant was not financially disadvantaged.

ABC Inspectors should ensure that the alleged wrongdoer 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 ABC 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.

### 10.11.2.2. Enforcement options

In choosing an appropriate enforcement option, an ABC Inspector must consider whether there has been financial disadvantage and any relevant public interest factors (see [Guidance Note 1 – ABCC Litigation Policy](#), paragraph 12).<sup>64</sup>

The key factor to consider is whether the complainant suffered financial disadvantage over the period of the complaint (i.e. globally). In contrast to the approach used in stage one, to determine a contravention, in stage three, ABC Inspectors consider underpayments not on a pay period by pay period basis but rather by reference to the whole period of the complaint, 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, ABC Inspectors must offset the above minimum payments (or overpayments) against the underpayments.

This does not necessarily mean that ABC Inspectors are required to perform onerous calculations. ABC Inspectors can request that an alleged wrongdoer provide evidence that the complainant has not been financially disadvantaged by the arrangements in place.

Where a complainant has suffered financial disadvantage, the ABCC will seek that the underpayments be rectified. This amount will represent the difference between what the complainant received over the period of the complaint, and what they should have received over the period of the complaint.

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.

For example, an alleged wrongdoer 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.

### 10.11.2.3. Offsetting arrangement in place

#### 10.11.2.3.1. 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, the employer (as an alleged wrongdoer) should be formally notified of the contraventions of the relevant fair work instrument via a contravention letter. The contravention letter would require the alleged wrongdoer to back pay any underpayments over the period of the complaint.

Where voluntary compliance fails, or is not possible, choosing an appropriate enforcement option is the next step. The ABC Inspector must consider which

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<sup>64</sup> The public interest factors are taken from Guidance Note 1 – Litigation.

enforcement option is appropriate considering the circumstances. Possible enforcement options include issuing a compliance notice or a referral to a small claims procedure.

#### **10.11.2.3.2. 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, then the complaint can be finalised as not sustained. A finalisation letter is issued to both parties.

#### **10.11.2.4. No offsetting arrangement in place**

##### **10.11.2.4.1. 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, the employer (as an alleged wrongdoer) should be formally notified of the contraventions of the relevant fair work instrument via a contravention letter. The contravention letter would require the alleged wrongdoer to back pay any underpayments over the period of the complaint.

Where voluntary compliance fails, or is not possible, choosing an appropriate enforcement option is the next step. The ABC Inspector must consider which enforcement option is appropriate considering the circumstances. Possible enforcement options include issuing a compliance notice or a referral to small a claims procedure.

##### **10.11.2.4.2. 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, as a minimum the employer (as an alleged wrongdoer) 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 the ABCC. 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 ABC 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 alleged wrongdoer's response to the contravention letter. For example, if an alleged wrongdoer had failed to respond to the contravention letter, another enforcement option may be more suitable.

If such low impact contraventions continue to occur, ABC Inspectors should consider case conferencing the matter. Possible outcomes may include referring the complainant to small claims.

Furthermore, an ABC Inspector could consider, in consultation with their Team Leader, whether or not the repeat contraventions warrant the possibility of seeking rectification of the full underpayments from the alleged wrongdoer. When

determining appropriate enforcement, ABC Inspectors , in consultation with their Team Leader, should consider [Guidance Note 1 - ABCC Litigation Policy](#).

### 10.11.2.5. Other considerations

ABC Inspectors should also refer to Chapter 22 – Enforcement and [Guidance Note 1 – ABCC Litigation Policy](#) when considering appropriate enforcement.

*Table: Enforcement outcomes*

	<b>Allowable offsetting arrangement in place</b>	<b>No allowable offsetting arrangement in place</b>
<b>Complainant suffers financial disadvantage</b>	<ul style="list-style-type: none"> <li>• Contravention has occurred – notify alleged wrongdoer</li> <li>• Enforce underpayment over the period of the complaint</li> </ul>	<ul style="list-style-type: none"> <li>• Contravention has occurred – notify alleged wrongdoer</li> <li>• Enforce underpayment over the period of the complaint</li> </ul>
<b>Complainant suffers no financial disadvantage</b>	<ul style="list-style-type: none"> <li>• No contravention has occurred</li> <li>• Finalise</li> </ul>	<ul style="list-style-type: none"> <li>• Contravention has occurred – notify alleged wrongdoer</li> <li>• ABCC exercises discretion to not enforce any underpayments.</li> </ul>

### 10.11.3. Types of payments that can be offset: illustrative examples

#### 10.11.3.1. 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 the ABCC 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, Kylie, 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 ABC 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



- 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 ABC 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 ABC 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 alleged wrongdoer's response to the contravention letter. For example, if an alleged wrongdoer had failed to respond to the contravention letter, another enforcement option may be more suitable.

#### **10.11.3.2. 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 ABC 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
- there are no other public interest factors to consider.

Helen's employer, Jessica 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 ABC Inspector would seek to enforce the quantum of the underpayment over the period of the complaint.

Where voluntary compliance fails, or is not possible, choosing an appropriate enforcement option is the next step. The ABC Inspector must consider which enforcement option is appropriate considering the circumstances of the matter. In this

case, the ABC Inspector may consider (for example) the issuing of a compliance notice or a referral to small claims procedures. In this situation, the alleged wrongdoer and complainant would also need to be informed that the complainant is able to seek remedy for the underpayments at common law.

#### **10.11.3.3. 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. The ABCC 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, the complaint may be finalised with no further action necessary. In the event that there are no other factors influencing the choice of enforcement option, a finalisation letter could be issued to both parties.

#### **10.11.3.4. 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 ABC 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 in place
- Julia has suffered financial disadvantage over the period of the complaint
- 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.

Where voluntary compliance fails, or is not possible, choosing an appropriate enforcement option is the next step. The ABC Inspector must consider which enforcement option is appropriate considering the circumstances. In this circumstance, the ABC Inspector may consider the relevant options, including issuing a compliance notice or a referral to small claims procedures.

#### **10.11.4. Reporting outcomes to FWO**

At the completion of all investigations involving the Fair Work Act, an outcomes report will be required for the notification of the Fair Work Ombudsman as per the requirements of the memorandum of understanding. To facilitate this process, the Fair Work Ombudsman has provided a "Reporting of Outcomes to FWO" spreadsheet to facilitate the reporting process.

#### **10.12. Paid Parental Leave**

The introduction of a national Paid Parental Leave Scheme (PPLS) has resulted in an additional role for the ABCC in ensuring compliance with parental leave payments. In conjunction with Centrelink, the ABCC has a role to ensure compliance with mandatory parental leave payments to employees within the building and construction industry. PPLS complainants are considered vulnerable as they have carer's responsibilities and in some cases, Parental Leave Pay may be their only current income. Paid Parental Leave (PPL) compliance is part of the ABCC investigation framework

In order to exercise this additional function, Fair Work Inspectors use their existing powers under the Fair Work Act 2009 (FW Act) for the purpose of determining whether a contravention of the Paid Parental Leave Act 2010 (PPL Act) has occurred.

The FWO and Centrelink have established a memorandum of understanding (MOU) 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 the PPL Act. The FWO will refer matters to the ABCC where the AVR process has failed or it is inappropriate for the AVR process to be conducted.

##### **10.12.1. The Paid Parental Leave Scheme**

The PPL Act received Royal Assent on 14 July 2010. This Act introduced the PPLS, a government-funded scheme that provides financial support for eligible primary carers (mainly birth mothers) of newborn and newly adopted children. Under the PPLS, eligible working parents of children born or adopted on or after 1 January 2011 are entitled to up to eighteen (18) weeks of Parental Leave Pay.

Parental Leave Pay is intended to complement and supplement existing entitlements to paid or unpaid leave in connection with the birth or adoption of a child. From 1 July 2011, all employers of employees accessing the PPLS will be responsible for providing Parental Leave Pay. The Family Assistance Office (FAO), within Centrelink, will provide Parental Leave Pay funds to the employer and the employer must pass these funds on to the employee. Before 1 July 2011 payments will be made to

eligible employees directly by Centrelink unless their employer “opts in” to provide the payments.

The FWO has a limited compliance role under the PPL Act. Where an employer is alleged to have contravened section 70 or Part 3-2 of the PPL Act, the FWO will investigate, and where appropriate, commence enforcement action. As these matters relate to employees within the Building and Construction industry, FWO will be referring such matters to the ABCC.

#### **10.12.2. PPLS investigation**

A FWO PPLS investigation commences when Centrelink refers a Paid Parental Leave matter to the FWO. An ABCC investigation will commence from when the FWO refer the matter but the complaint date will remain at when FWO received the complaint from Centrelink. A ‘Paid Parental Leave matter’ is any matter in which there has been an alleged contravention of section 70 or Part 3-2 of the PPL Act. This includes alleged contraventions in relation to:

- failing to keep or provide a record of Parental Leave Pay,
- failing to pass on Parental Leave Pay, and
- making unauthorised deductions from Parental Leave Pay.

All other compliance functions under the PPL Act, including in relation to eligibility, do not reside with FWO and therefore, no referral will be made to the ABCC relating to other compliance functions.

#### **10.12.3. Referral of matters from Centrelink to the FWO**

Centrelink will refer Paid Parental Leave matters to the FWO for investigation following the completion of Centrelink’s Dispute Resolution Process, usually 29 days after receiving the initial complaint. At the time of referral, the Family Assistance Office will become the paymaster for the complainant’s remaining Parental Leave Pay.

Referrals from Centrelink will contain contact details for the employer and employee, the amount of the alleged underpayment, details of the complainant’s application for Parental Leave Pay, notes from any conversations between Centrelink and both parties during Centrelink’s Dispute Resolution Process, and any other information that may be relevant.

Where the matter is referred to the ABCC, this information will also be provided to the ABCC by FWO.

#### **10.12.4. Paid Parental Leave Scheme investigation process**

FWO will only commence a PPLS investigation following a formal referral from Centrelink in accordance with the protocol set out in the Memorandum of Understanding. If a Fair Work Inspector receives enquiries about the PPLS from a complainant or employer during the course of a non-PPLS FWO investigation, that person should be referred to the Family Assistance Office for assistance. This process will also apply to ABC Inspectors.

#### **10.12.5. The AVR process (Information only to ABC Inspectors)**

The first stage of a PPLS investigation is a brief AVR phase, and represents the first ten (10) days from receipt of the referral. This phase is shorter than the FWO's usual AVR process as Centrelink has already attempted voluntary dispute resolution with the parties. This part of the process will be carried out by AVR Fair Work Inspectors.

During the PPLS AVR process, the AVR Fair Work Inspector should contact both the complainant and the alleged wrongdoer by phone and send a letter of demand to the alleged wrongdoer. The letter requests that the matter is rectified voluntarily within seven days.

If the matter is resolved by AVR within ten days, the Fair Work Inspector should send finalisation letters to both the complainant and alleged wrongdoer to acknowledge receipt of payment. At this point, the matter is finalised.

If a Parental Leave Pay matter has not been resolved within ten days from the date of the letter of demand, the matter must be escalated to the Paid Parental Leave Compliance Team in RST for an investigation.

#### **10.12.6. Investigation**

The Fair Work Inspector investigating a PPLS matter should issue a Notice to Produce (NTP) to the alleged wrongdoer. If the alleged wrongdoer does not comply with the NTP, the NTP contravention may be considered for litigation.

Following non-compliance with the NTP, the PPLS Fair Work Inspector should seek evidence of non-payment from the employee (e.g. bank statements), whilst making further attempts to obtain evidence from the employer. If the result of the investigation is a finding that there is no contravention of the PPL Act, then the Fair Work Inspector should notify the complainant and alleged wrongdoer by phone and in writing, to advise that no further action will be taken and the matter is finalised.

If a contravention of the PPL Act is found, the Fair Work Inspector should issue a compliance notice pursuant to section 157 of the PPL Act.<sup>2</sup>

#### **10.12.7. Enforcement**

Fair Work Inspectors should issue a PPL Act compliance notice where a relevant contravention of the PPL Act is identified. Unlike other FWO investigations, Fair Work Inspectors would not generally issue a contravention letter prior to issuing a compliance notice pursuant to section 157 of the PPL Act. A PPL Act compliance notice can be issued to a person, requiring that person to, within 14 days:

- take the action set out in the notice to rectify the contravention;
- produce reasonable evidence of the person's compliance with the notice.

The PPL Act compliance notice must contain the following information:

- the name of the person to whom the notice is given
- the name of the person who gave the notice
- brief details of the alleged contravention
- an explanation that a failure to comply with the notice may contravene a civil penalty provision; and

- any other matters prescribed by the PPL rules.

If the alleged wrongdoer complies with the PPL Act compliance notice within 14 days, the parties should be notified and the matter can be finalised.

Failure to comply with a PPL Act compliance notice is a civil remedy provision under the PPL Act. If the alleged wrongdoer fails to comply with the PPL Act compliance notice then the Fair Work Inspector should consult with their team leader to prepare the matter for litigation.

#### **10.12.8. Identifying non-PPLS contraventions**

During a PPLS investigation, a Fair Work Inspector may identify prima facie contraventions of Commonwealth workplace laws other than PPL Act contraventions. In these cases, the Fair Work Inspector should advise their team leader in the first instance.

In most cases, the recommended course of action will be to advise the complainant of the other suspected contraventions and seek their consent to investigate these other issues. As a matter of policy, Fair Work Inspectors should obtain written confirmation of a complainant's consent to initiate further investigation regarding non-PPLS matters. A PPLS complainant may have a preference for other prima facie contraventions to not be investigated at that time.

In this case, the Fair Work Inspector should add the complainant's details to the list of PPLS complainants where other prima facie contraventions have been identified. This list will be used to inform future audit programs (formerly known as local initiatives) in the same way that confidential complaints or follow-up audits are used.

If a PPLS complainant does consent to other prima facie contraventions being investigated, and the Fair Work Inspector has obtained this consent in writing, then the Fair Work Inspector may investigate those other contraventions in accordance with this Manual.

#### **10.12.9. Reporting outcome of PPLS Investigations to Centrelink**

The FWO is required by the PPL Act to inform Centrelink of the outcome of any compliance notice issued under the PPL Act. Additionally, FWO has formally agreed to provide information to Centrelink at the conclusion of every PPLS investigation.

The ABCC must, at the time of issuing a compliance notice, advise the Fair Work Ombudsman. Additionally, a report on the results of PPLS investigations that it conducts will be provided to the Fair Work Ombudsman in order to ensure that the assurance provided to Centrelink can be complied with.

## **Part B: Processes associated with Field Operations**

# ABCC Operations Manual

## Chapter 8

### Mediation

*(The ABCC will be establishing this function. It will not be implemented until mediators have been appointed)*

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### *25.1. Introduction*

Mediation is a formal process (as distinct from Assisted Voluntary Resolution or AVR) involving the use of ABC Inspectors who have been trained and appointed as ABCC mediators. The ABCC mediator's role is to assist the parties in a controlled environment, to develop their own resolution of the complaint. Mediation is another tool that may be considered by ABC Inspectors, as a method of resolving appropriate complaints. Mediation can be used at any time during the investigation process.

This chapter provides ABC Inspectors with an understanding of the formal process of mediation, and enables ABC Inspectors to identify those complaints that are suitable for referral to mediation.

### *25.2. Definition of ABCC mediation*

ABCC mediation is a form of Alternative Dispute Resolution (ADR) which may be used as an alternative to more formal enforcement mechanisms, including full investigation and/or litigation action. ABCC mediation is a voluntary process in which the parties to a complaint identify the disputed issues. An impartial ABCC mediator facilitates this process in order to develop options, consider solutions and if possible reach a settlement that will accommodate both parties' needs. The ABCC mediator may, throughout the process, offer suggestions to the parties for resolution of the matter but does not impose a decision.

ABCC mediation is separate and distinct from AVR, and may be used at any stage during the investigation of a complaint. Unlike AVR, ABCC mediation is a formal dispute resolution process that can only be undertaken by ABC Inspectors who have completed accredited mediation training. For further information regarding AVR, refer to Chapter 5 – Assisted Voluntary Resolution.

### *25.3. Considering the use of ABCC mediation*

ABC Inspectors often investigate complaints (e.g. disputes over hours of work, overtime and classification levels), where the matter is unable to be resolved. These circumstances may include investigations where ABC Inspectors are unable to obtain sufficient evidence to quantify the contraventions, due to conflicting stories or a lack of supporting documentary evidence. The absence of sufficient evidence may mean that these matters are generally not suitable for progression to litigation or small claims.

In any wages and conditions investigation, it may be appropriate for ABC Inspectors to consider mediation as a means of achieving an acceptable outcome. It is a process to give the parties the opportunity to put forward their views in a confidential and controlled environment, with the aim of encouraging the parties to find a solution, increases the likelihood of both parties being satisfied with the outcome.

Wages and conditions complaints can be mediated at any time, provided both parties agree to mediate. ABCC mediation can occur after receiving a complaint, during the investigation process and prior to commencing a litigation action. Ideally ABCC mediation should be attempted at the earliest possible stage of the investigation, and where possible prior to the commencement of a full investigation. However, the fact that a full investigation has begun does not preclude the commencement of ABCC mediation, unless the ABC Inspector has formed the view that the matter would be appropriate for ABCC litigation.



Legal Group may also engage in various alternative dispute resolution measures during the litigation process. However, this is distinct from the mediation to be conducted by ABC Inspectors. In short, ABC Inspectors and Team Leaders have the discretion to consider ABCC mediation at any stage during the investigation process.

#### *25.4. Complaints suitable for ABCC mediation*

Complaints that are suitable for ABCC mediation include those wages and conditions matters where the facts are in dispute and/or there is a lack of evidence to prove or disprove the complaint. Examples of matters suitable for ABCC mediation may include complaints relating to:

- hours and overtime – unable to readily determine an employee’s entitlements from an examination of available employment records
- meal breaks
- classification levels
- disputed leave entitlements.

Complaints that are generally not suitable for ABCC mediation include:

- those where the issues are straight forward and/or the evidence clearly identify contraventions
- matters involving serial alleged wrongdoers
- complex cases – complaints that include the characteristics of coercion, freedom of association, transfer of business, etc.
- matters that are appropriate for litigation.

#### *25.5. Referral of matters for ABCC mediation*

When an ABC Inspector forms the view that a particular complaint may be suitable for ABCC mediation, they must discuss the complaint with their Team Leader or State Director. In cases where the Team Leader or manager is also an ABCC mediator, discussions about referring the matter to ABCC mediation should occur directly with the State Director.

Together the ABC Inspector and Team Leader/State Director (except as discussed above) should assess whether the case is suitable for ABCC mediation and should be referred to an ABCC mediator using the [mediation referral template](#). On deciding the matter is suitable for ABCC mediation, the ABC Inspector should make an initial offer of ABCC mediation to both the complainant and alleged wrongdoer.

On referring the case to ABCC mediation, the originating ABC Inspector’s Team Leader should advise the ABCC mediator of the contact details of the parties and the issues in dispute only. The file must be kept by the ABC Inspector and any ABCC mediation documentation (such as the ABCC mediation agreement or deed of final agreement) must be forwarded to the ABC Inspector for placement on the file on completion of the ABCC mediation.

To ensure the ABCC mediation process is as objective and independent as possible, when an ABC Inspector, Team Leader is considering potential referral of a case to mediation, there must be no discussion of the case with any ABCC mediator. If an ABCC mediator receives a referral for a matter in which the mediator has had previous dealings, they must disclose this immediately and return the case to the

referring Team Leader. The Team Leader should then refer the matter to another ABCC mediator.

### *25.6. Principles of mediation in the ABCC context*

The ABCC has adopted a mediation model which incorporates the following principles:

- the ABCC mediator must be an ABC Inspector who has undertaken accredited mediation training.
- the ABCC mediator must not in any circumstance have any involvement in investigating the particular complaint either prior to or after the mediation.
- no person shall serve as an ABCC mediator in any dispute in which that person has any financial or personal interest in the result of the ABCC mediation.
- the ABCC mediation can only proceed if both the complainant and alleged wrongdoer indicate that they are willing to participate in the process.
- before the ABCC mediator can begin the mediation of any complaint both parties must agree to and sign the ABCC mediation agreement. The ABCC mediation must also sign the ABCC mediation agreement.
- the parties may bring a support person(s) to the ABCC mediation sessions. Such persons may attend only with the permission of all parties and with the consent of the ABCC mediator. The role of the support person is to provide support only. Therefore they are not permitted to be involved in the conduct of the ABCC mediation. Support persons (where such persons attend) must also sign the mediation agreement and are bound by its provisions.
- the ABCC mediation process is confidential. Information obtained in the course of the ABCC mediation is protected from disclosure in any subsequent legal proceedings, and cannot be used by the either party or the ABCC mediator outside of the ABCC mediation process. The ABCC mediator and the parties must not keep any transcript or record of the actual ABCC mediation. Any notes taken during the ABCC mediation must be destroyed at the conclusion of the ABCC mediation.

### *25.7. ABCC pre-mediation process*

#### *25.7.1. Seeking agreement from the parties*

In seeking agreement from the parties, the ABCC mediator should contact the parties by telephone to confirm an offer of ABCC mediation. This should then be followed by an [offer to mediate letter to the complainant](#) and an [offer to mediate letter to the alleged wrongdoer](#) which describes the ABCC mediation process and also encloses an ABCC [mediation pamphlet](#). A response from the complainant and the alleged wrong doer should be requested within five working days.

If either party indicates that they are not willing to participate in ABCC mediation, the ABCC mediator must refer the matter back to the Team Leader/State Director for returning to the originating ABC Inspector.

### 8.7.2 Preparing for the ABCC mediation

On acceptance by both parties to mediate the case using the ABCC mediation process, the ABCC mediation should be conducted as soon as practicable. The ABCC mediator should undertake the following prior to the mediation:

- identify a date, time and location which is suitable to both parties and confirm this by letters of [mediation of complaint to the complainant and alleged wrongdoer](#). An ABCC mediation can be conducted at any agreed location (but preferably at a neutral venue such as ABCC premises), provided the following facilities are available:
  - meeting room with appropriate tables and seating
  - separate breakout room
  - appropriate amenities (toilets, water, tea and coffee)
- advise the parties that all personal expenses of the parties in the ABCC mediation, including travel costs, shall be borne by the parties. If required, the costs of hiring a venue will be met by ABCC. Before confirming the hire of a suitable venue, the ABCC mediator must seek approval in writing from an SES1 Executive Director, in accordance with the Financial Delegations. On receipt of the invoice for the venue hire, the person who initially approved the expenditure must sign the invoice as approved and then the invoice should be forwarded to the Administration Officer in your state or territory for payment.
- clarify the attendance of any support person(s) and their role
- ensure the ABCC mediator, all parties and support person(s) sign the [ABCC mediation agreement](#) prior to the ABCC mediation commencing .

### 25.8. ABCC mediation process

The ABCC mediation should follow the process outlined in *Figure 5*, noting that there is significant scope for flexibility. A summary of the process is as follows:

- the ABCC mediator will open the mediation by explaining the process and the essential features of mediation. The ABCC mediator will then ask the parties to explain the issues from their perspective. The ABCC mediator will, assist the parties to identify and explore the most important issues in dispute. The ABCC mediator may, with the input of the parties, identify an agenda for the discussion.
- the parties will then be given the opportunity to discuss the key issues in some depth, clarify misunderstandings and begin to identify options that meet the needs of the parties.
- the ABCC mediator may meet with the parties separately to discuss any issues which were not raised in the previous joint session, discuss options and alternatives. The discussions with the mediator in private sessions are confidential, unless the party gives the mediator permission to disclose what they have raised with the mediator.
- the ABCC mediator will assist the parties to generate options which meet their needs (as far as possible). Should a settlement be reached, the terms of the settlement should be drafted into a [Deed of Final Agreement](#) at the mediation.

- the ABCC mediator should remain aware that only the ABCC Commissioner in his capacity as agency head can authorise agreements with parties to ABCC investigations about the nature of the ABCC's media statements. This provision applies to all matters at any of their stages, including all ABCC mediations.

As a general rule, ABCC mediators should aim for ABCC mediations taking no more than three hours although there is discretion for longer mediations if an agreement is likely.

#### *25.8.1. Terminating the ABCC mediation*

The ABCC mediation may be terminated by:

- a declaration by the ABCC mediator to the effect that further efforts at mediation are no longer worthwhile or
- a declaration by a party or parties to the effect that the ABCC mediation proceedings are terminated.

When deciding whether to exercise their discretion in making a declaration the ABCC mediator should have regard to the apparent likelihood of reaching a resolution if the ABCC mediation were to continue.

#### *25.8.2. Where ABCC mediation is successful*

For ABCC purposes, mediation will be considered "successful" where an agreed resolution is reached. However parties are not required to settle their dispute in the ABCC mediation.

Where a settlement is agreed, the ABCC mediator will draft a Deed of Final Agreement based on the terms of settlement reached between the parties and require both parties to sign the agreement. A copy of the completed Deed of Final Agreement will be given to each of the parties and an additional hard copy must be kept on file. However, as the contents of the [Deed of Final Agreement](#) are confidential, the completed document should not be saved in AIMS. The ABCC mediator must record the outcome in AIMS as "Mediated", the monies paid (if any) should be recorded on a [separate spread sheet](#) and the complaint closed. The monies paid are not recorded on AIMS.

The ABCC cannot enforce the [Deed of Final Agreement](#). Where either of the parties does not abide by any ABCC mediated outcome as recorded in the Deed of Final Agreement, it is the other party's responsibility to seek to resolve the matter (usually by legal action). The ABCC mediator should not act as an expert, adviser or arbitrator in any such action. A Deed of Final Agreement is not capable of being used as evidence in any future litigation (other than if the action is enforcing the actual deed).

#### *25.8.3. Where ABCC mediation is unsuccessful*

Where an agreed settlement is not achieved, the complaint should revert to an investigation and be reassigned to the original ABC Inspector. The ABCC mediator should record that the ABCC mediation was not successful, and should not participate in any further investigation or discussion of the complaint with the ABC Inspector.

# ABCC Operations Manual

## Chapter 9

# Overseas workers investigations

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### *25.1. Introduction*

This chapter gives ABC 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, ABC Inspectors should:

- recognise the relevant visas
- know the referral protocols between the ABCC and the Department of Immigration and Citizenship (DIAC)
- understand the role of the ABCC in overseas workers investigations.

### *25.2. 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.

The ABCC'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 the ABCC.

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), or International Students (573 visa).

As the bulk of the matters investigated by the ABCC relate to workers on 457 visas, this is the visa generally referred to in this chapter.

### *25.3. Terms and conditions of a visa*

#### *25.3.1. 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](#).

### *25.3.2. 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.

#### *25.3.2.1. 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).

#### *25.3.2.2. Relationship of the MSL to the entitlements under the FW Act*

There are two important points that ABC 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 ABCC currently has no investigation and/or enforcement powers concerning the payment of the MSL. This remains the responsibility of DIAC.

If there appears to be an underpayment of entitlements due to an overseas worker under Commonwealth workplace laws, then the ABC Inspector will proceed to investigate the matter. However, the ABCC can only enforce the Commonwealth workplace laws, and not the MSL nor other sponsor undertakings.

Where appropriate, the ABC Inspector will make a referral to DIAC if there appear to be contraventions of immigration law (see 9.5.2 for more information).

#### *25.3.2.3. Introduction of the market salary rate (from 14 September 2009)*

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.

#### *25.3.2.4. 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
- the ABCC 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 ABC Inspector will proceed to investigate the matter. However, the ABCC can only enforce the Commonwealth workplace laws, and not the market salary rate nor other requirements provided by immigration legislation.

#### *25.3.2.5. Additional powers for DIAC officers (from 14 September 2009)*

ABC 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 ABC 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).

#### *25.3.3. Other visas*

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](#).

### *25.4. The role of the Department of Immigration and Citizenship (DIAC) in 457 visas*

#### *25.4.1. 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 sponsor, DIAC imposes conditions on employers of 457 visa workers through sponsor undertakings.

#### *25.4.2. 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 the ABCC.

#### *25.5. Memorandum of Understanding between DIAC and the ABCC*

As of 22 March 2011, the ABCC and DIAC have entered into a [Memorandum of understanding](#) (MOU) which facilitates the sharing of information between the two agencies. The MOU also provides guidelines, subject to certain conditions, to the two agencies on how that information can be used. The MOU will be reviewed on an annual basis.

The contact officers for this MOU are as follows;

**DIAC**        **Mr Brendan Dowling**  
Director, Labour Agreements and 457 Policy Section  
6 Chan St, Belconnen, ACT 2617  
02 6264 2129  
02 6264 2632

**ABCC**        **Mr Murray Gregor**  
Executive Director – Field Operations (Eastern)  
Level 2, 553 St Kilda Road, Melbourne, Victoria, 3004  
03 8509 3014 (Telephone)  
02 6204 2159 (Facsimile)

#### *25.6. Referral of investigations between the ABCC and DIAC*

##### *25.6.1. Background*

A memorandum of understanding (MOU) is being considered between DIAC and ABCC 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. While an MOU has not yet been finalised, the ABCC has adopted as an interim measure with the following procedures in order to ensure best practice is followed.

##### *25.6.2. Referral of investigations from DIAC to the ABCC*

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 ABCC State Director or their nominated delegate (the ABCC contact officer) for investigation. These referrals are made by

the DIAC manager sending a completed DIAC referral template to the ABCC 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 the ABCC 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 the ABCC (e.g. pay slips, time sheets, relevant contracts, DIAC forms completed by the employer).

The relevant ABCC contact officer will acknowledge receipt within five (5) business days, by email to the relevant DIAC manager.

The relevant ABCC contact officer also will refer the matter for investigation to the appropriate ABCC office, within five (5) business days from the date of acceptance of the referral.

### *25.6.3. Referral of investigations from the ABCC to DIAC*

If an ABC Inspector identifies a prima facie contravention of immigration laws (normally underpayment of MSL or market salary rate) when investigating a complaint, the ABC Inspector should first consult with their Team Leader and then the relevant ABCC contact officer.

If it is decided the matter is to be referred to DIAC, the [ABCC Referral Template](#) to DIAC is to be completed by the ABC Inspector and forwarded to the relevant ABCC contact officer. The ABCC 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 ABCC 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 an ABCC investigation, the ABC Inspector should immediately raise them with their Team Leader with a view to referring the matters to DIAC.

Where matters are referred from the ABCC to DIAC, the ABC Inspector should discuss with their Team Leader whether the ABCC should continue to investigate alleged contraventions of Commonwealth workplace laws.

### *25.7. 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.

#### *25.7.1. Full investigation*

Subclass 457 visa workers are considered vulnerable workers by the ABCC due to the language and cultural barriers that they often face in the workplace.

In addition, the alleged underpayment of such workers may attract the attention of the media, unions or employer associations or members of parliament.

#### *25.7.2. Access to workers*

The ABCC 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 ABC 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 the ABCC.

#### *25.7.3. Cultural issues*

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.

#### *25.7.4. Access to interpreters and translators*

ABC 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. The preferred provider of accredited interpreters or translators is the Translating and Interpreting Service (TIS) administered by DIAC. TIS can be contacted on 13 14 50, or at [www.immi.gov.au](http://www.immi.gov.au) (see Chapter 10 – Procedural matters in investigations)

#### *25.7.5. Identifying the employer*

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 the ABCC 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.

#### *25.7.6. 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, ABC 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.

#### *25.7.7. Deductions from wages*

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](#),<sup>65</sup> 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 7 Wages and conditions investigations – section 7.6 Deductions.

### *25.8. Overseas workers investigation process*

#### *25.8.1. Receiving DIAC referrals*

The ABC Inspector's investigation will often begin on receiving a DIAC referral from the ABCC contact officer and team leader.

On receiving a DIAC referral, ABC Inspectors should ensure that the matter is registered in AIMS as a DIAC referral.

The ABC Inspector should retain a file with the relevant hard copies including the DIAC referral and any other correspondence with DIAC.

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<sup>65</sup> FW Act; s324

### *25.8.2. Dealing with confidential matters*

In any DIAC referral, the ABC Inspector must consider whether the affected 457 visa holders have agreed that their identity can be revealed to the employer (the alleged wrongdoer). DIAC referrals are likely to be the result of a site monitoring visit to the alleged wrongdoer and the visa holders are likely to be currently employed. ABC 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 alleged wrongdoer, the ABC 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 the ABCC will investigate the matter.

### *25.8.3. Use of interpreters*

The DIAC referral should indicate if either the alleged wrongdoer and/or the visa holder(s) need an interpreter and, if so, the required language. If there is a need for an interpreter, the ABC Inspector should follow the procedures detailed in Chapter 11 – Procedural matters in investigations.

### *25.8.4. Review and initial assessment*

If the ABC Inspector identifies a need for any further clarification and information from DIAC, this request should initially be made to the relevant State Director.

In assessing the referral, the ABC Inspector should consider whether the employing entity is covered under the Commonwealth workplace laws, and therefore within the ABCC's jurisdiction.

### *25.8.5. Interviewing the alleged wrongdoer*

In the case of a DIAC referral, the ABC Inspector should advise the alleged wrongdoer that the visit is as 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 alleged wrongdoer will be conducted as per a standard investigation (see Chapter 21 - Interviews) but with due consideration for any language difficulties the alleged wrongdoer may have with English.

The ABC Inspector should prepare a notice to produce as appropriate (in accordance with ABCC procedures as detailed in Chapter 20 - Evidence). In an overseas workers investigation, the ABC Inspector might consider seeking a broader range of documents than is usual (e.g. letters or contracts between the alleged wrongdoer/employee/migration agent, and records of sponsorship for 457 visa workers). The ABC 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 [FW Act](#).

#### *25.8.6. Interviewing witnesses*

Detailed information regarding interviewing of witnesses can be found in Chapter 21 – Interviews. Information regarding the preparation of witness statements can be found at Chapter 20 – Evidence.

#### *25.8.7. Investigation findings*

Detailed information regarding making investigation findings and issuing contravention letters to the alleged wrongdoer can be found in Chapter 6 – Full Investigations. Any request for an update of an investigation from DIAC is to be made through the relevant ABCC contact officer in accordance with the referral protocols of the draft MOU.

#### *25.8.8. Enforcement and litigation*

Detailed information regarding the consideration of enforcement options concerning an investigation can be found in Chapter 22 - Enforcement and Chapter 23 - Litigation. In accordance with the draft MOU, when the ABCC is taking litigation action against the alleged wrongdoer, the ABCC will notify DIAC within five (5) business days of the outcome of the litigation and shall provide copies of the court orders to DIAC.

#### *25.8.9. Report of investigation to DIAC*

Referrals to DIAC will be conducted within the guidelines prescribed in the [Memorandum of Understanding](#) between the two agencies and using the [DIAC referral template](#). ABC Inspectors should consult with their Team Leader on a case-by-case basis and obtain sign-off from their State Director before releasing a report to DIAC.

# ABCC Operations Manual

## Key Messages

## Chapter 10

## Procedural

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- The ABCC 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 the ABCC and DIAC
- Overseas workers investigations have certain differences and complexities that ABC InspectorABC Inspectors must consider



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### *10.1. Introduction*

Each investigation can be subject to various requests and circumstances that must be recognised and actioned by the ABC Inspector in the course of the investigation. These include:

- persistent complainants
- requests for information
- arrangements with other government agencies
- matters requiring legal advice
- use of interpreters
- dealing with aggressive people.

This chapter provides ABC Inspectors with tools and advice on the best practice for addressing these issues when they arise.

### *10.2. Persistent complainants*

Within the context of the ABCC's inspectorate and 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.

#### *10.2.1. Repeat complainants*

Where a complainant has two or more complaints within the same industry (but not the same alleged wrongdoer) in a 12 month period and the underpayments appear to be minor, the complainant may be categorised as a repeat complainant.

The rationale for this is that once the ABCC 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 alleged wrongdoer, 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 alleged wrongdoer is to be given priority.

#### *10.2.2. 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.

### *10.2.3. Limitations and guidance*

ABC Inspectors must take great care when categorising complaints and ensure that sufficient inquiries are undertaken prior to reaching this conclusion. A vulnerable person would not be categorised as a vexatious complainant.

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

### *10.2.4. Process when a person is a persistent complainant*

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

The ABC Inspector should make this decision in conjunction with the Team Leader and with the approval of their State Director on a case by case basis. In addition to the criteria listed above (sections 10.2.1 and 10.2.2), ABC 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 alleged wrongdoer
- 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 alleged wrongdoer 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 the ABCC, the ABC Inspector must:

- confirm the decision with the Team Leader and State 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 the ABCC at this time and advise the complainant of their options for seeking resolution, including through small claims where appropriate (see Chapter 22 – Enforcement and Chapter 23 - Litigation)
- advise the complainant that they may request an internal review of the decision through the ABC Commissioner.
- make a note on AIMS and include a hard copy on the file detailing the determination and the reasons
- finalise the complaint.

In reaching any decision regarding persistent complainants, ABC 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 which proscribe the manner in which ABC 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, ABC Inspectors must ensure that they comply with the APS Code of Conduct and Values.

### *10.3. Dealing with requests for information*

As an Australian Government agency the ABCC 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. **ABC Inspectors must be cognisant of the provisions of s65 of the BCII Act when dealing with requests for information.**

In some circumstances where a request for documents is made to the ABCC, the documents can be made available without an application being made under the FOI Act. Access to documents can be granted under the powers conferred on the ABCC.<sup>66</sup> However, granting access in this way is at the sole discretion of the ABCC. The ABCC 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.

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<sup>66</sup> FW Act; s718(2)

### 10.3.1. *Information access*

Under the [FW Act](#) the general disclosure powers have been consolidated into two discrete categories:

- a general disclosure power to any party where it is necessary or appropriate to do so or assist in the enforcement of a law of the Commonwealth or a state or territory<sup>67</sup> - such disclosure is delegated to ABC Inspectors as duly appointed FW Inspectors
- a disclosure power to the Minister<sup>68</sup> or a member of the Department<sup>69</sup> where the ABCC reasonably believes disclosure will assist the Minister in considering a complaint or issue in relation to a matter arising from the Act – such disclosure to the Minister or Department can only be made by Senior Executive Service (SES) level staff of the ABCC
- ABC Inspectors must be cognisant of the provisions of s65 of the BCII Act when dealing with requests for information.

The ABCC may receive requests for information from a number of sources. It is the expectation of the ABCC that each request is responded to in an efficient and timely manner, where appropriate providing access to certain information held by the ABCC. In particular, those seeking information where they are a party to a case under investigation i.e. a complainant, an employer or a third party authorised to access the details relating to the specific case.

On receiving a request for information from a party to a complaint, the ABC Inspector conducting the investigation is responsible for determining whether the requested documents can be released under either the [FW Act](#) or the [BCII Act](#)

In determining whether to grant a request under s718 of the [FW Act](#) or s65 of the BCII Act, the ABC Inspector will have regard to whether the disclosure of information is necessary and/or appropriate. This decision is made by the ABC Inspector responsible for the investigation in consultation with their Team Leader and State Director.

### 10.3.2. *Information that is available to be accessed*

#### 10.3.2.1. *Publicly available information*

Where a request relates to **publicly available information**, the ABCC will not require any party to apply under the [FOI Act](#).

#### 10.3.2.2. *Fact sheets and guidance information*

The ABCC provides access to publicly available information, such as complaint forms, fact sheets, guidance notes and media releases on our website at [www.abcc.gov.au](http://www.abcc.gov.au). The ABCC also provides links on our website to legislation relevant to our functions and decisions in matters the ABCC has litigated.

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<sup>67</sup> FW Act; s718(2)

<sup>68</sup> FW Act; s718(3)

<sup>69</sup> FW Act; s718(4)

#### *10.3.2.3. Approved information under the FW Act , BCII Act and the FOI Act*

Enabling access to information is intended to assist those parties involved in an investigation seeking to access relevant information on file which relates to a case.

The information typically requested and generally made available through an ABC Inspector is:

- information containing personal information about the applicant excluding personal details about others
- information from discussions or interviews where a record is made
- details relating to issues in dispute as provided by other parties
- evidence provided by the other party to the investigation, e.g. time sheets, statutory declarations, or formal statements pertaining to the party
- details of any tribunal or court decisions to make a determination.

**Importantly any information obtained by an ABC Inspector or any other person performing the duties for the ABCC cannot be disclosed without the authorisation of the ABC Commissioner or an authorised delegate.**

On receipt of an authorisation, the ABC Inspector will provide the person requesting documents with a letter approving the request (in full or in part) or rejecting the request, together with reasons for the decision. A copy of the letter sent by the ABC Inspector should be attached to the hard copy file and noted on AIMS.

#### *10.3.2.4. Exempt documents under the FOI Act*

Certain documents may be exempt from disclosure where the release of those documents could undermine the functions of government or damage third party or public interests. Categories of exempt documents include but are not limited to:

- documents relating to Commonwealth/state relations
- cabinet and executive council documents
- internal working documents
- documents affecting the enforcement of law and/or documents relating to protection of public safety
- documents relating to financial or property interest of the Commonwealth
- documents concerning certain operations of the ABCC
- documents containing personal information (of persons other than requesting party)
- legally privileged documents
- commercially sensitive documents relating to business affairs and research
- documents containing material obtained in confidence
- documents whose disclosure would be contempt of court.

In determining whether an exemption applies, the FOI contact officer will consider whether the document is sensitive or if harm may be caused by its disclosure. The ABCC will not simply claim an exemption because it is technically available.

### **10.3.3.** *Freedom of information (FOI) requests*

The [FOI Act](#) provides every person with the right to request access to certain information held by a Commonwealth agency. Individuals also have the right to ask for information about them to be changed if it is incomplete, out of date, incorrect or misleading. FOI requests can be made prior to a document request being made or after access to documents requested under the [FW Act](#) or the BCII Act have been refused.

For a request to be valid under the [FOI Act](#) it must:

- be in writing
- state that the request is an application for the purposes of the FOI Act
- contain sufficient information to enable the agency to identify the relevant documents
- give details of how notices under the FOI Act may be sent to the applicant (e.g. by providing an electronic address, such as an email or fax number, to which notices may be sent by electronic communications, or by providing a postal address).

The request can be sent to the ABCC in any of the following ways:

- delivery to an officer of the agency at the address of any central or non-metropolitan office of the agency specified in a current telephone directory; or
- postage by pre-paid post to an address mentioned above, preferably addressed to the:

Freedom of Information Officer  
The office of the Australian Building and Construction Commissioner  
GPO Box 9929  
Melbourne VIC 3001

Please note that if the request does not contain sufficient information concerning the document(s), that is information that would be considered reasonably necessary to enable the agency to identify the document(s), the ABCC may commence a formal consultation process with the applicant. For more information, refer to the [ABCC Freedom of Information Policy](#)

### **10.3.4.** *Dealing with representatives and third parties*

A third party request for information happens when an individual other than a complainant or alleged wrongdoer requests information regarding an investigation. It can also involve a complainant or alleged wrongdoer directing an ABC Inspector to liaise with another party on their behalf.

ABC Inspectors have a legal obligation to ensure they are complying with the [Privacy Act 1998 \(Cth\) \(the Privacy Act\)](#) when collecting and using personal information in the course of their work. This also relates to providing information to third parties in the course of an investigation.

#### *10.3.4.1. Categories of third party requests*

Third party requests for information can be divided into the following categories and treated accordingly:

- a parent or guardian seeking progress reports – if the complainant is a child under 18 years of age, a parent can act as a guardian and on their behalf, and in this instance, information on the complaint can be released.
- a legal guardian seeking progress reports – if the complainant is a vulnerable person and the guardian is acting on their behalf, the information can be released provided the complainant has provided written permission to the ABC Inspector that information can be released to this individual.
- a parent or guardian – if the complainant is over 18 years of age, information may only be released to the parent or guardian if the complainant has provided written permission to the ABC Inspector that information can be released to this individual.
- a complainant or alleged wrongdoer – if a complainant or alleged wrongdoer wishes to nominate someone to act on their behalf they must provide the ABC Inspector with written authorisation that they are able to disclose complaint information to that party.

#### *10.4. Arrangements with other government agencies*

The ABCC has standing arrangements with several other Australian government agencies providing for the release of information in appropriate circumstances. In some instances these arrangements are detailed in formal memoranda of understanding, whilst in others, the arrangements are in the form of a process agreed at the SES level.

ABC Inspectors must ensure that the release of information occurs in accordance with the arrangements between the agencies, the ABCC practice's (as detailed in this Manual), and legislative requirements.

##### *10.4.1. Australian Taxation Office (ATO)*

From time to time ABC Inspectors may have concerns that employers are not meeting their statutory superannuation guarantee contributions obligations under legislation administered by the Australian Taxation Office (ATO), and over which the ABCC has no formal jurisdiction.

Where complainants or alleged wrongdoers request information, ABC Inspectors should provide them with the ATO's Superannuation infoline number, **13 10 20**.

##### *10.4.1.1. Information required by the ATO*

When advising the ATO of superannuation guarantee concerns, ABC Inspectors must provide the ATO with the following information:

- employer name
- employer ABN
- nature of the referral – for example; super not paid, not enough super paid, super paid late etc
- number of employees who could be affected



- whether employees received a Payment Summary
- any evidence or allegation that cash wages are being paid
- the periods (dates) that superannuation non-compliance has been an issue.

The ATO will acknowledge receipt of all referrals, but due to privacy laws will not provide feedback on the results of the investigations, unless an employee lodges a referral, Section 45A of the *Superannuation Guarantee (Administration) Act 1992* (Cth) which allows the ATO to communicate the outcome of investigations to the employee.

#### **10.4.2.** *Department of Immigration and Citizenship (DIAC)*

The ABCC'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 the ABCC. However there are many aspects of these types of investigations that are unique. For this reason, this issue has been dealt with in detail in Chapter 9 - Overseas workers investigations.

The [memorandum of understanding between DIAC and the ABCC](#) provides a mechanism, subject to certain conditions for the sharing of information between the two agencies. It also provides guidelines on how that information can be used.

##### *10.4.2.1. Referral of investigations from DIAC to the ABCC*

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 ABCC director or their nominated delegate (the ABCC contact officer) for investigation. These referrals are made by the DIAC manager sending a completed DIAC referral template to the ABCC 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 the ABCC 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 the ABCC (e.g. pay slips, time sheets, relevant contracts, DIAC forms completed by the employer).

The relevant ABCC contact officer will acknowledge receipt within five (5) business days, by email to the relevant DIAC manager.

The relevant ABCC contact officer will also refer the matter for investigation to the appropriate ABCC office, within five (5) business days from the date of acceptance of the referral.

#### *10.4.2.2. Referral of investigations from the ABCC to DIAC*

If an ABC Inspector identifies a prima facie contravention of immigration laws (normally underpayment of Market Salary Rate (**MSL**) when investigating a complaint, the ABC Inspector should firstly consult with their Team Leader or State Director and then the relevant ABCC contact officer.

If it is decided the matter is to be referred to DIAC, the [ABCC Referral Template to DIAC](#) is to be completed by the ABC Inspector and forwarded to the relevant ABCC contact officer. The ABCC 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 ABCC 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 an ABCC investigation, the ABC Inspector should immediately raise them with their Team Leader or State Director with a view to referring the matters to DIAC.

Where matters are referred from the ABCC to DIAC, the ABC Inspector should discuss with their Team Leader or State Director whether the ABCC should continue to investigate alleged contraventions of Commonwealth workplace relations laws.

#### *10.5. Making requests for legal advice*

In the course of their investigations, ABC Inspectors sometimes encounter complex factual and legal issues. In the first instance the ABC Inspector should consult their Team Leader. If the ABC Inspector, together with their Team Leader, decides that legal advice is required the ABC Inspector should make a request for advice in accordance with the procedures outlined below.

##### *10.5.1. Procedure for requesting legal advice*

The following procedures have been developed to ensure that the legal advice provided to ABC Inspectors is accurate, complete and timely.

When requesting legal advice the ABC 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 ABC Inspector, their Team Leader and State 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 State Director approves the request it will then be forward to the ABCC Legal from which it is registered and allocated to a legal officer. The legal officer will then contact the ABC Inspector to clarify the requests and discuss a timeframe for delivering the advice.

Alternatively, for simple requests, ABC Inspectors may obtain ad hoc legal advice 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 ABC Inspector follow the formal procedure outlined above.

## **10.5.2.** *Using legal advices*

### *10.5.2.1. Legal professional privilege*

Legal advice provided by the Legal Group to ABC Inspectors is covered by legal professional privilege. This means that the advice is confidential and the ABCC is entitled to refuse to disclose that advice to other parties.

ABC 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 the ABCC. The courts have stated that even revealing the gist of legal advice is sufficient to waive privilege<sup>70</sup>.

Where an ABC 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 ABCC (i.e. complainants, the alleged wrongdoer, 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 ABC Inspector confidently state the decision which has been reached and explain why, without saying that legal advice has been obtained.

### *10.5.2.2. Legal advice*

Copies of the advices may be obtained from the Legal Group or from the ABC Inspector who requested them.

The ABC Inspector should note that each legal advice is provided having regard to the specific factual background set out in the request and/or the terms of the relevant industrial instrument. As such, while some advices may have a general application, ABC Inspectors should take extreme care in relying upon a legal advice in respect of matters that are not the subject of that advice. Instances of advices being misapplied to different factual situations may occur and must be avoided. If an ABC Inspector is unsure whether a particular legal advice meets their needs, they should contact the Legal Group.

## **10.6.** *Significant investigations*

Significant cases or special investigations involve complaints which have been referred to the ABCC by certain third parties (see below) or have been initiated as a

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<sup>70</sup> *Rich v Harrington* [2007] FCA 1987

result of media attention. Often the matter will be identified by ABCC Executive Committee or the Public Affairs Unit (PAU), who will refer the matter to the relevant director for delegation to an ABC Inspector for investigation.

A significant investigation is most commonly initiated for one of the following reasons:

- parliamentary statement alleging a contravention of Commonwealth workplace relations laws
- referral from a member of parliament (MP)
- referral from an industrial association or business organisation
- media article or statement alleging a contravention of Commonwealth workplace relations laws.

Characterisation of a complaint as “Significant” is at the discretion of a member of the ABCC ABCC Executive Committee or relevant State Director.

It is the responsibility of PAU to monitor the media and forward any reports containing allegations relating to contraventions within the ABCC’s jurisdiction to the appropriate state for investigation as a significant matter.

In addition, any investigation that is subject to **significant media attention** (whether or not it was identified as significant by ABCC Executive Committee, PAU or relevant State Director) will be treated by ABC Inspectors as a “Significant” investigation. If an ABC Inspector is contacted by the media about a case, this contact will be sufficient to categorise the matter as a significant investigation (whether an investigation already had been commenced or not).

#### **10.6.1.**            *Allocation of significant investigations*

Upon receipt of the referral of a significant case, the State Director decides the most appropriate ABC Inspector to investigate the matter (based on the nature of the allegation and resources available) and allocates the investigation accordingly.

When an ABC Inspector is allocated a Significant complaint they should discuss the appropriate priority to be afforded to the investigation with the Team Leader or State Director, as relevant. Such discussion should take place prior to commencing the investigation.

Given their specific role within the ABCC, the PAU, where practical will be involved in the planning, execution and finalisation of Significant investigations. Liaison between the PAU and the inspectorate should be through the ABC Inspector’s State Director (refer Chapter 18, paragraph 18.2.3).

#### **10.6.2.**            *Conducting Significant investigations*

Significant investigations offer an excellent avenue for the ABCC to receive coverage in relation to the way it protects and promotes compliance with Commonwealth workplace relations laws. This is both an opportunity and a risk.

Accordingly, significant investigations will be treated as priority investigations by the ABC Inspectors and State Directors involved. The ABC Commissioner expects that every matter deemed significant will be investigated comprehensively within 90 days of its receipt.

Further, ABC Inspectors must ensure that they conduct these investigations in accordance with the [FWO Standard](#) and this ABCC Operations Manual, and at all times represent the agency in a professional manner.

ABC Inspectors must be aware that significant investigations routinely attract greater scrutiny, particularly from the media.

ABC Inspectors are required to provide regular updates on significant investigations to their Team Leader and relevant State Director on the progress of the investigation. ABC Inspectors must also provide reports and materials to Parliamentary Policy located within the PAU as requested.

In order to ensure clear and accurate record keeping, ABC Inspectors must ensure that the matter is marked “Significant” in AIMS. This is done by accessing the enterprise details in AIMS, and selecting the tab marked “Significant Investigations”.

Prior to the closure of significant matters which have received media attention, the ABC Inspector (via the State Director) must contact Media and Stakeholder Relations within the PAU. In this way, the PAU can assist in ensuring:

- that the ABCC maximises the impact of the work of the Field Operations and Legal Group by publicly promoting the ABCC’s role, successes and compliance message
- that the appropriate stakeholder interests are managed.

### **10.6.3.**            *The role of the ABCC Public Affair Unit in Significant investigations*

It is the primary role of the PAU to ensure that the ABCC has the trust and confidence of the public, its stakeholders, and the Australian Government.

In addition to the referral of significant investigations to the State Director at the beginning of the matter, the PAU continue to play an important role throughout a significant investigation.

Firstly, a key task of the PAU is to provide detailed, timely advice to the Minister’s Office on the key happenings of the ABCC. Such briefings may be used to inform future policy or may assist our Minister in responding to queries raised at question time in parliament.

Secondly, the PAU fields all media enquiries, including those relating to significant investigations (see 19.2.4 below).

Finally, the PAU provides advice and assistance to the ABCC Executive in respect of significant investigations. In this capacity the PAU will provide updates to the Executive, and will liaise with the inspectorate in regard to implementing any suggestions or directions provided by ABCC Executive Committee about the progression of significant investigations.

Accordingly, when significant investigations are occurring, it is vital that the PAU receive key updates regularly throughout the life of the investigation so that they may provide accurate and strategic responses to the Minister’s Office, Executive Management and the media. As noted above, liaison between the PAU and the inspectorate generally occurs through the relevant State Director. Therefore it is important that ABC Inspectors conducting significant investigations brief their State Director on key developments in the investigation.

#### 10.6.4. *ABCC's interaction with the media*

The PAU has the responsibility of responding to contact from the media. Other staff of the ABCC (including ABC Inspectors) are **not** authorised to initiate contact with or to answer enquiries from the media, unless they have obtained express permission to do so. Such permission can only be granted by the ABC Commissioner or one of the primary media contacts.

The relevant primary media contacts for **all** media enquiries are:

- Executive Director, Public Affairs; and
- Senior Media Advisor, Public Affairs

In addition, ABC Inspectors should remain aware that only the ABC Commissioner in his capacity as agency head can authorise agreements with parties to ABCC investigations about the nature of the ABCC's media statements. This provision applies to all matters at any of their stages, and extends to matters that are mediated (however described) by any ABCC staff.

If an ABC Inspector provides a journalist with the details of a media contact (above), they **must** alert the media contact of this, along with any information about the journalist (e.g. name, media organisation and details) and the background to the inquiry, including the business or case being investigated and the relevant issues involved.

#### 10.6.5. *ABC Inspector's practice when approached by the media*

If an ABC Inspector is approached by the media they should follow the protocols based on the relevant situation (as outlined below):

##### 10.6.5.1. *Counter enquiries*

If a media representative or crew arrives at the front counter of an office, the ABC Inspector attending the counter should state that they are not authorised to comment, and advise the reporters that their inquiry will be referred to the ABCC primary media contacts. ABC 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 ABC Inspector or the ABCC in a particular light, while the ABC Inspector must remain professional and objective at all times. The ABC Inspector should obtain the following details from the media representative:

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

The ABC Inspector must advise their State Director, who will in turn advise the ABCC primary media contacts.

#### *10.6.5.2. Telephone enquiries*

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

ABC Inspectors should not provide any information directly to reporters, but should immediately advise their State Director, who will pass on the request to the primary media contacts.

#### *10.6.5.3. Enquiries in the field*

If approached while in the field by a TV crew or journalist regarding an investigation, ABC Inspectors must politely advise that they are unable to comment. The ABC Inspector should obtain relevant details from the journalist (as for counter enquiries) and inform them that their request will be passed onto the ABCC primary media contacts. In this situation, a reporter probably does not expect to obtain information immediately, but might use anything offered up by the ABC Inspector during the discussion.

Again it is important for the ABC Inspector to remain professional and objective and be mindful that the encounter may be recorded. When the discussion with the journalist has concluded, the ABC Inspector should advise their State Director, who will pass on the request to the ABCC primary media contacts.

#### *10.6.5.4. Written or text enquiries*

It is possible that an ABC 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 ABC Inspector should not respond to the media representative directly, but should advise their State Director of the contact and provide a copy of the text or document for the State Director to forward to the ABCC primary media contacts.

### *10.7. Complainants with special needs (vulnerable workers)*

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 sensitivity. This can often involve using different, high level investigative techniques.

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

#### *10.7.1. Definition of a vulnerable worker*

A vulnerable worker for ABCC 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 the ABCC definition of vulnerable workers, please refer to the [ABCC Litigation Policy](#).

#### **10.7.2.** *Assisting vulnerable workers with complaint lodgement*

The ABCC can liaise with the FWO Customer Contact South Australia (CCSA) on behalf of vulnerable workers to provide these workers with a specific wages and conditions complaint kit. This kit places less emphasis upon the vulnerable worker pursuing self resolution of the issue(s) prior to the ABCC escalating the matter to a full investigation.

The CSC will not usually advise the alleged wrongdoer that the complaint has been received, nor will they advise the vulnerable worker to contact the alleged wrongdoer to discuss the complaint. The complaint will be registered and referred to the relevant ABCC office for investigation.

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

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

The ABCC 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 the ABCC's decisions whether to litigate in respect of the complaint (refer [ABCC Litigation Policy](#)).



### 10.7.3. *Assisting vulnerable workers during the investigation process*

Where appropriate, ABC 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 22 – Enforcement, section 22.4 - Small claims action)
- 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 (refer Chapter 6 – Full investigations, section 6.4 – Confidential complaints), the ABC Inspector will contact the alleged wrongdoer 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 (see 19.3.4 below), and the National Relay Service for people who are deaf or have a hearing or speech impairment.

### 10.7.4. *Identifying the need for interpreters*

The need for an interpreter should be identified as early in the investigation process as possible. Once identified the ABC Inspector should seek the approval of their Team Leader to engage an interpreter. The Translating and Interpreting Service (TIS) ([www.immi.gov.au](http://www.immi.gov.au)) is the ABCC's preferred provider of accredited interpreters/translators. Fuller details are contained in 10.9 below.

### 10.8. *Use of interpreters*

Where a complainant, alleged wrongdoer, 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 (see Chapter 2 – The investigation process).

The need for an interpreter may be identified from the complaint form, a referral form, or from the ABC Inspector's initial contact with the person. Where such a need is identified the ABC Inspector should gain approval from their Team Leader or State Director to engage an interpreter.

The ABC Inspector should arrange for a government approved and recognised interpreter. The preferred provider of accredited interpreters and translators is the

Translating and Interpreting Service (TIS) administered by the Department of Immigration and Citizenship (DIAC).

TIS can be contacted on 13 14 50 or online at [www.immi.gov.au](http://www.immi.gov.au). TIS provides both on-site and telephone interpreting services. When using TIS services, ABC Inspectors will need to provide the ABCC. All invoices for TIS services should be forwarded to the ABC Inspector's appropriate administration officer.

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.

(Refer to Chapter 20 – Evidence and Chapter 21 – Interviews for more information on taking statements and conducting interviews.)

Where an interpreter is required for a witness in a litigation matter, the ABC Inspector should advise the Legal Group as early as possible so that suitable arrangements can be made with the court (refer Chapter 23 – Litigation).

### *10.9. Dealing with aggressive people*

Aggressive behaviour encompasses unacceptable, hostile behaviour directed against an ABC Inspector. It includes behaviour which creates an intimidating, frightening or offensive situation, and/or adversely affects the ABC Inspector's work performance. The issue of dealing with aggressive people is dealt with extensively in the ABCC's Human Resources document entitled the [Client Aggression Guide](#).

The Client Aggression Guide provides guidance in areas that ABC Inspectors may encounter, such as aggression over the telephone, at the ABC Inspector's office, and in the alleged wrongdoer's premises, as well as procedures for dealing with persons who threaten self harm.

As a summary, it is useful to note that ABC 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 ABC Inspector's ability to provide a service to others, consider asking the aggressive person to leave the premises or seek the assistance of the Team Leader
- 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).

#### *10.10. Unclaimed money*

Under the [FW Act](#) (s 559), an employer may make payment to the Commonwealth of the amounts owing to an employee, in specified circumstances. Therefore, the ABCC may be required to accept money on behalf of employees under certain circumstances.

##### *10.10.1. Where the ABCC accepts unclaimed money*

The [FW Act](#) specifies<sup>71</sup> that an employer may make payment to the Commonwealth where:

- an employee has left the employment of an employer 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 employer is unable to pay the amount to the former employee because the employer does not know the former employee's whereabouts.<sup>72</sup>

Where the employer exercises such option, the Commonwealth holds the amount in consolidated revenue (refer 10.10.3.1 below). Payment of the amount to the Commonwealth is a sufficient discharge to the employer, 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 employer. Such claim is made to the ABCC (on behalf of the Commonwealth) in accordance with the provisions of both the [FW Act](#)<sup>73</sup> and the [FW Regulations](#) (refer 10.10.3.2 below).

##### *10.10.2. 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
- the normal circumstances of banking public monies will be within 24 hours from receiving the funds

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<sup>71</sup> FW Act; s 559

<sup>72</sup> Similar provisions were contained in the *Workplace Relations Act 1996*, s 726.

<sup>73</sup> FW Act; s559(3)

- 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 the ABCC 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 the ABCC requires specific authorisation.<sup>74</sup>

The duties and responsibilities designated to the CPM, include:

- issuing receipts
- 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.

#### **10.10.3.** *Best practice and administrative procedures*

Best practice is for all current and former employees to directly receive the full entitlements owing to them, as due under Commonwealth workplace laws. Therefore, when the whereabouts of the former employee is known to the employer and/or the ABC Inspector, payment must be made to the employee. To assist in locating an employee, the [Checklist – Unclaimed Monies](#) is to be completed for each employee prior to monies being deposited into unclaimed monies.

However, there will be occasions when the ABCC's investigations will reveal that former employees are owed entitlements, and those employees are unable to be contacted or located to provide for direct payment to be made.

In such cases, ABC Inspectors should provide all relevant documentation to the ABCC Finance Unit. A copy of all documents sent to ABCC Finance Unit, is to be kept on the original physical file, and uploaded onto AIMS.

In addition, ABC Inspectors should carry copies of the [Deposit Certificate - Unclaimed Monies](#) ("the Certificate") to be used in circumstances where an employee is deemed untraceable.

In such cases, the following steps must be taken:

##### *10.10.3.1. Deposits of money from employers*

When an employer elects to discharge their obligations by making payment to the Commonwealth, the ABC Inspector is required to send the [Employer Letter](#) explaining the process, in conjunction with the Certificate.

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<sup>74</sup> Refer FMA Act; s12

The employer completes the [Deposit certificate - unclaimed monies](#) and provides the certificate and a cheque for the net amount of the unclaimed money to the ABC Inspector. The cheque must be made payable to the “Collector of Public Monies.”

Payments from employers by instalment can only be accepted if a schedule of payments is submitted and authorisation is granted by the Chief Financial Officer, or Executive Director, Human Services (as per section 34(1)(c) of the FMA Act 1997 (see [Financial Delegations](#)).

The ABC Inspector records the AIMS Investigation number on the Certificate.

The employer 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 ABCC Finance Unit for situations involving large numbers of employees.

#### *10.10.3.2. ABC Inspector to search for the employee*

There is a requirement that the ABC Inspector is satisfied that the whereabouts of the employee are unknown before monies can be deposited to the Collector of Public Monies, the [Checklist – Unclaimed monies](#) assist ABC Inspectors in undertaking a search for employees. This checklist must be completed by the ABC Inspector and signed off by a Team Leader.

Where an ABC Inspector believes that they may have found contact details for the employee, the ABC Inspector will send a letter ([Employee Letter](#)) requesting that the employee make contact with the ABCC to verify the identity of the individual.

The ABC Inspector should forward the certificate, checklist, documentation and cheque immediately to the 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 ABCC Finance Unit at the National Office. The ABCC Finance Unit will then ensure the cheque is receipted and deposited into the ABC Commissioner Other Trust Moneys Account. *[Please refer to the ABCC CFO with regard to draft procedures]*

#### *10.10.3.3. Payments of money to employees*

When the employee’s whereabouts are subsequently traced and their identity verified, the former employee may claim from the ABCC the money that was due to them which the employer has paid to the Commonwealth.

To make such a claim, the ABC Inspector must provide the employee with the [Form of Claim for Unclaimed Monies](#) (“Form of Claim”) to complete. The ABC 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 ABC Inspector receives the completed Form of Claim, they must verify the accuracy of the information.

In most circumstances, the ABC 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 ABC Inspector is unable to physically sight the two original pieces of identification, photocopies 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 ABC Inspector is able to sight the relevant pieces of identification, but is unable to make photocopies of those documents, the ABC 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 ABC 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 ABC Inspector from the relevant prison officials.

Once the ABC Inspector has verified the accuracy of the information provided by the employee, the ABC Inspector then needs to complete [the Unclaimed Monies Form](#). The ABC Inspector must ensure that there is sufficient information to enable ABCC Finance Unit 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 ABC Inspector will forward both forms (and the photocopies of identification or statements) to ABCC Finance Unit for verification that funds are available for the payment.

EL1 or EL2 officers within the ABCC Finance Unit have the financial delegation to approve payment of unclaimed monies, and approve payment once they are satisfied that all requirements have been met. [*Please refer to the ABCC CFO with regard to draft procedures*]. The Contact Officer named on the Payment of Unclaimed Monies Form will be contacted by the ABCC Finance Unit confirming that the payment has been processed.

## ABCC Operations Manual

### Chapter 11

# Review of investigations - *To be developed. This process is still under construction and will be included in the manual once it has been implemented*

## ABCC Operations Manual

### Chapter 12

## National employment framework

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# Part C: General protections and specific types of investigations

## Introduction

This chapter introduces the key components of the national employment framework. Some of these are transitional provisions that continue from the WR Act, while others are new provisions introduced by the [FW Act](#). By reading this chapter, ABC Inspectors should gain an understanding of various transitional provisions and instruments that continue in operation. ABC Inspectors should also become familiar with the effect of state referrals, the National Employment Standards (NES), modern awards, and enterprise agreements, and their status within the Commonwealth workplace relations environment from 1 July 2009 onwards.

The [FW Act](#) provides for a safety net protecting minimum wages and conditions, including the NES and modern awards (which took effect from 1 January 2010). In addition, Fair Work Australia (FWA) will set minimum wages for award/agreement free employees through national minimum wage orders.

The safety net consists of:

- ten National Employment Standards (NES). These are legislated minimum standards that apply to the employment of all “national system employees” (refer 12.2 below). The standards relating to parental leave and notice of termination also extend to all employees.
- modern awards that set minimum standards and conditions for national system employees in specific industries and occupations ([FW Act](#), part 2-3). Modern awards include guarantees relating to wages.
- national minimum wage orders ([FW Act](#), part 2-6) that set minimum wages for award/agreement free employees

In brief, the safety net provides for minimum employment entitlements and cannot be modified to the detriment of the employee by a contract. Further, the NES cannot be excluded by modern awards or enterprise agreements. Of course, employers are able to offer more favourable terms than those provided by the safety net.

### 25.1. Application to employees and employers

The first division of each part of the [FW Act](#) (other than part 1-1) defines the type of employees and employers to whom the part applies. In particular, each part of the [FW Act](#) defines its application to either:

- employees and employers within their “ordinary meanings” or
- “national system” employees and employers.

It is important to note that the ordinary meaning of employee and employer and national system employer, national system employee and outworker entity have been extended to enable states which are referring states (South Australia, Queensland, Tasmania and New South Wales) to refer certain matters to the Commonwealth.<sup>75</sup>

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<sup>75</sup> FW Act; s30C, 30D, 30E, 30F.

The question of whether an employer is a constitutional corporation no longer impacts on whether employers and employees are covered by the federal system in the referring states. It will, however, continue to impact on the type of workplace instrument that is in place for the employment relationship.

Part 1-3, Division 2A of the FW Act deals with the application of the FW Act in Victoria and Division 2B deals with the other referring states.

The parts of the [FW Act](#) relating to the NES, modern awards and enterprise agreements apply to national system employees and employers.

However, the [FW Act](#)<sup>76</sup> provides for the extension of the NES entitlements relating to parental leave and notice of termination of employment to non-national system employees and employers.

### **25.1.1. Definition of employee**

An employee (with its ordinary meaning) is a person employed or usually employed by an employer, and does not include a person on a vocational placement.<sup>77</sup>

It follows that a national system employee is a person employed or usually employed by a national system employer, and does not include a person on a vocational placement.<sup>78</sup>

### **25.1.2. Definition of national system employer**

A national system employer is defined within the [FW Act](#) as:

- a constitutional corporation so far as it employs, or usually employs, an individual; or
- the Commonwealth so far as it employs, or usually employs, an individual; or
- a Commonwealth authority so far as it employs, or usually employs, an individual; or
- a person so far as the person in connection with constitutional trade or commerce, employs, or usually employs, an individual as:
  - a flight crew officer; or
  - a maritime employee; or
  - a waterside worker
- a body corporate incorporated in a Territory so far as it employs, or usually employs, an individual; or
- a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual<sup>79</sup>
- any person in a State that is a referring State so far as the person employs or usually employs, an individual; and<sup>80</sup>
- a holder of an office to whom s30P(2) of the FW Act applies.<sup>81</sup>

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<sup>76</sup> FW Act; s59 and divisions 2 and 3 of Part 6-3

<sup>77</sup> FW Act; s15. For further information regarding vocational placement, refer FW Act; s12

<sup>78</sup> FW Act; s13

<sup>79</sup> FW Act; s14

<sup>80</sup> Fair Work Amendment (State referrals and Other Measures) Act 2009, s30N (1) (a).

### 25.1.3. State referral

Under the referral of powers by four states (South Australia, Queensland, Tasmania and New South Wales), all of these states have referred employees in the private sector. However, the state public sector will largely continue to be regulated at the state level. There are some other differences in referrals such as Victoria's broader coverage of the public sector and whether or not local government has been referred. Tasmanian local government employees are already under the national system. (Western Australia has not referred powers to the Commonwealth.)

The state referral laws provide for the referral to have effect under specified terms. It is necessary to look to each state's referral laws to determine whether there are any provisions or exclusions to the federal coverage of employers and employees in the relevant state.

The FW Act at s14(2) allows states and territories to declare (subject to Commonwealth Ministerial endorsement) that certain employers are not national system employers [\*The Fair Work \(State Declarations – employers not to be national system employers\) Endorsement 2009 \(the Endorsement\)\*](#) is the legislative instrument that sets out the names of those employers.

### 25.1.4. Definition of a constitutional corporation

In many investigations, the issue of whether an employer is a constitutional corporation will arise. There is no specific definition in the WR Act of a 'constitutional corporation'. However the [FW Act](#) states that the meaning of a constitutional corporation is "a corporation to which paragraph 51(xx) of the Constitution applies"<sup>82</sup>. This means that a constitutional corporation is either a foreign corporation, a trading corporation, or a financial corporation. (Also refer to Chapter 6 – Full investigations, section 6.5.2 of this Manual for further information.)

## 25.2. Transitional provisions

### 25.2.1. The Australian Fair Pay and Conditions Standard (AFPCS)

Under the WR Act there were five minimum employment entitlements provided by the Australian Fair Pay and Conditions Standard (AFPCS). These were:

- minimum wage rates
- annual leave
- parental leave
- personal/carer leave
- maximum ordinary hours of work.

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<sup>81</sup> Fair Work Amendment (State referrals and Other Measures) Act 2009, s30N (1) (b).

<sup>82</sup> FW Act; s12

### 25.2.2. The bridging period

As detailed elsewhere in this chapter, certain provisions of the [FW Act](#) (including the NES and modern awards) did not become operational until 1 January 2010. Accordingly, Schedule 4 of the Transitional Act allows for the operation of certain sections of the WR Act (in modified form) during the bridging period between the repeal of the WR Act (1 July 2009) and the commencement of the NES and modern awards.

The bridging period is defined the Transitional Act as being the period starting on the WR Act repeal day, and ending immediately before the fair work (safety net provisions) commencement day.<sup>83</sup> Therefore, the bridging period is the period from 1 July 2009 to 31 December 2009 (inclusive).

### 25.2.3. Transitional AFPCS (other than minimum wage rates)

In summary, the provisions that continue to apply during the bridging period are:

- four of the AFPCS provisions from Part 7, Divisions 3, 4, 5, 6 of the WR Act (relating to maximum ordinary hours of work, annual leave, personal leave, parental leave) and the related civil remedies under Part 7, Division 7.
- entitlements to meal breaks, public holidays and parental leave under Part 12 of the WR Act (except for ss 615 – 618 of the WR Act).
- specified notice of termination provisions of the WR Act.<sup>84</sup>

### 25.2.4. Transitional provisions relating to minimum wage rates

The provisions of the fifth AFPCS that deal with wages (Part 7, Division 2 of the WR Act) also continue to apply under the provisions of Schedule 9 of the Transitional Act. Schedule 9 details that an Australian Pay and Classification Scale (APCS), the standard and special Federal Minimum Wage (FMW), and the default casual loading continue as transitional provisions.<sup>85</sup>

Unlike the provisions of Schedule 4 (see 12.3.2 above), the effect of this continued application under Schedule 9 is **not limited** to just the bridging period.<sup>86</sup> However, it should be noted that a transitional APCS ceases to cover an employee when a modern award that covers the employee comes into operation.<sup>87</sup>

From 1 January 2010, a transitional national minimum wage order came into effect that set the national minimum wage, the special national minimum wage, and the casual loading for employees not covered by an award or agreement. Such order preserved these entitlements as being the transitional standard FMW, transitional special FMW, and transitional default casual loading that were in effect as at the day prior. In addition, from 1 January 2010, the transitional standard FMW, the transitional special FMW, and the transitional default casual loading ceased to cover any employees (as they were replaced by the transitional national minimum wage order).<sup>88</sup>

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<sup>83</sup> Transition Act; Schedule 2, Part 1, item 2.

<sup>84</sup> Transitional Act; Schedule 4, Part 2, items 2-4.

<sup>85</sup> Transitional Act; Schedule 9, Part 3, Division 1, item 5.

<sup>86</sup> Transitional Act; Schedule 9, Part 3, Division 1, item 5, note 1.

<sup>87</sup> Transitional Act; Schedule 9, Part 3, Division 2, item 11.

<sup>88</sup> Transitional Act; Schedule 9, Part 3, Division 3, item, 12.



### 25.3. Transitional instruments

The Transitional Act provides (in Schedule 3) that instruments made under the WR Act<sup>89</sup> continue in existence under the [FW Act](#). These WR Act instruments become transitional instruments from 1 July 2009, and can be classified as award-based transitional instruments and agreement-based transitional instruments.<sup>90</sup> An ITEA made during the bridging period is also considered an agreement-based transitional instrument.

#### 25.3.1. Coverage and application of transitional instruments

The [FW Act](#) makes an important distinction regarding the terms coverage and application,<sup>91</sup> and this is extended in the Transitional Act regarding transitional instruments.<sup>92</sup> The terms “coverage” and “application” are noted in Chapter 1 – Introduction, and are referred to during in this chapter regarding various provisions and their implications for employees and employers.

In relation to transitional instruments, the term “covers” is used to indicate the range of parties (such as employees and employers) to whom the instrument potentially applies. In turn, “applies” indicates the range of parties who are required to comply with (or who can enforce) the terms of the transitional instrument.<sup>93</sup>

It should be noted that an employee is not considered to be an award/agreement free employee for the purposes of the [FW Act](#) if a transitional instrument applies to the employee.<sup>94</sup>

#### 25.3.2. Relationship between transitional provisions and transitional instruments

The Transitional Act provides that the previous rules relating to the interaction between the AFPCS and the instruments under the WR Act continue to apply in relation to transitional instrument after 1 July 2009. However, the exception to this general rule is that an instrument can not prevail over the AFPCS after the bridging period. This exception means that an employee may become entitled to a higher rate of pay from 1 January 2010 if a transitional instrument prevailed during the bridging period but an applicable transitional AFPCS provides a higher rate than the transitional instrument.<sup>95</sup>

#### 25.3.3. Universal application of minimum wages to employees

Importantly, the Transitional Act also provides that from 1 January 2010, in the case where an agreement-based transitional instrument applies to an employee, the base rate of pay payable to the employee must not be less than:

- the base rate of pay that would be payable under the modern award (where the employee is covered by a modern award that is in operation); or

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<sup>89</sup> Refer 1.6.3 of this Manual or the Transitional Act, Schedule 3, Part 2, item 2(2), for a full list of the WR Act instruments.

<sup>90</sup> Agreement-based transitional instruments are further broken down as either collective agreement-based or individual agreement-based transitional instruments under the Transitional Act; Schedule 3, Part 2, item 5(c)-(d).

<sup>91</sup> See FW Act; ss 47-48, 52-53, 277.

<sup>92</sup> Transitional Act; Schedule 3, Part 2, item 3.

<sup>93</sup> Transitional Act; Schedule 3, Part 2, item 3(1) note 1, and s 3(2) note.

<sup>94</sup> Transitional Act; Schedule 3, Part 5, Division 3, item 32.

<sup>95</sup> Transitional Act; Schedule 3, Part 4, item 22.



- the base rate under the national minimum wage order (where the employee is not covered by a modern award that is in operation).<sup>96</sup>

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<sup>96</sup> Transitional Act; Schedule 9, Part 4, item 12.

#### **25.3.4. Effect of state referrals**

The effect of the state referrals of workplace relations powers in each state is summarised as follows:

##### **New South Wales**

All private sector employers in the NSW system are covered by the national system from 1 January 2010. In addition, state-owned corporations, subsidiaries of a state owned corporation, and non-profit organisations are regulated by the federal national system.

However, state public sector and local government employees (including Ministers and Members of Parliament, parliamentary staff, and law enforcement officers) will not be covered by the national system and will remain under the New South Wales state system.

##### **Queensland**

All private sector employers in the Queensland system will be covered by the national system from 1 January 2010.

The Fair Work (Commonwealth Powers) and other Provisions Act 2009 (the Queensland referral Act) provides for the national workplace relations system to apply to all of Queensland's private sector, government-owned corporations and certain specified public entities. However, state public sector employees, law enforcement officers and local government employees (as defined) will be excluded from the referral. Queensland public sector employees are excluded from the referral.

Government-owned corporations (and their chief executives) are not excluded from the referral. The Queensland Act also contains a schedule (Schedule 1) clarifying that certain entities are not public sector employers (and are therefore subject to referral).

The Endorsement additionally provides a list of employers that are not to be considered national system employers; this list includes for example several councils, tourism bodies, and cultural institutions.

The referral provides for the preservation of certain award wage rates arising from Queensland Industrial Relations Commission decisions affecting the community and disability services sector. Queensland wished to preserve certain award wage increases in this sector that had been handed down on the grounds of pay equity. Specifically, it is the intention that workers covered by Queensland Community Services and Crisis Assistance Award and the Disability Support Workers Award will have wage increases preserved.

In respect of apprentices and trainees, all existing orders prescribing entitlements of trainees and apprentices will continue to operate as federal transitional instruments, until FWA completes a comprehensive review of all apprentice and trainee arrangements.

The Queensland government has the power to apply to FWA to end industrial action in government owned corporations in specified circumstances.

In order to ensure that certain provisions are retained by Queensland employees on transition into the federal system, the Queensland referral Act provides that certain entitlements contained in the Industrial Relations Act 1999 (QLD) (QLD IR Act) are to be treated as provisions of an industrial instrument. This effectively preserves these entitlements as part of the relevant Division 2B award (discussed further below).

The amendments to the QLD IR Act preserve the following entitlements:

- Sections 9 and 9A – hours of work, overtime, rest breaks, meal breaks and shift loadings.
- Section 10 – sick leave.
- Sections 11 to 14 – payment of annual leave, annual leave loading and payment for annual leave on termination of employment.
- Section 14A – jury service leave
- Section 15 – Public Holidays.
- Part 3 – long service leave.
- Part 2 – family leave (other than section 38C) and encompasses parental leave, carer's leave, bereavement leave and cultural leave.

Note, however, whether or not the entitlement from the state legislation is applicable will still depend on whether it is detrimental when compared with the NES.

### **South Australia**

All private sector, non government, community sector, private school and university employers in the South Australian state system will be covered by the national system from 1 January 2010. SA Water and TransAdelaide will also be covered.

The entire state public sector (as defined), law enforcement officers and local government (as defined) and almost all government business enterprises will be covered by the state system. Matters relating to Ministers (and their personal staff), MPs, parliamentary officers, judicial officers or members of tribunals established by or under a law of the State, persons appointed under s.68 of the *Constitution Act 1934* or by the Governor or a Minister, persons holding office or employed under the *Courts Administration Act 1993* have also not been referred. Government Business Enterprises will transition to the state system.

The *Statutes Amendment (National Industrial Relations System) Act 2009* amends various legislation to ensure that 11 named entities will not be national system employers.

The Endorsement provides further employers that are not to be considered national system employers; this list includes for example several councils and management authorities.

### **Tasmania**

All private sector employers in the Tasmanian state system will be covered by the national system from 1 January 2010.

Tasmania has referred matters relating to local government employment and employment in the community sector, but not public sector employment which will be retained under state jurisdiction. In relation to local government, the Tasmanian government considers that this reflects the status quo since local government employment in Tasmania is stated by the Tasmanian government to be already under the federal jurisdiction.

The Tasmanian Referral Act provides that Tasmanian public sector employees, persons engaged by the Minister or Member of Parliament, and law enforcement officers are not included in the referral. No employers have been declared not to be a national system employer in the Endorsement.

### **Australian Capital Territory and Northern Territory**

All employees and employers in the Australian Capital Territory and Northern Territory are already under the national workplace relations system. The *FW Act* applies to all employees and employers in the territories.

### **Victoria**

Victoria has been under the national system since 1996 and extended the referral under the *Fair Work Amendment (State Referrals and Other Measures) Act 2009* by inserting Division 2A into Part 1-3 of the *FW Act*. The *FW Act* has applied to employers and employees in Victoria since 1 July 2009.

In addition to all private sector employers being covered by the national system, Victoria has referred workplace relations matters in relation to most of its public service. The referral therefore generally covers public sector and local government, subject to certain limitations set out in section 5 of the *Fair Work (Commonwealth Powers) Act 2009* (Vic), for example in relation to executives and high level managerial employees in the public sector. Also excluded from reference are matters pertaining to:

- the number, identity or appointment (other than terms and conditions of appointment) of employees in the public sector and law enforcement officers;
- the number or identity of employees in the public sector dismissed or to be dismissed on the grounds of redundancy;
- certain other matters in relation to law enforcement officers;
- Ministers, MPs, judicial officers or members of administrative tribunals;
- persons holding office in the public sector to which the right to appoint is vested in the Governor in Council or a Minister;
- persons employed as executives within the meaning of the *Public Administration Act 2004* or persons employed at higher managerial levels in the public sector;
- persons employed as Ministerial officers under Part 6 of the *Public Administration Act 2004*.
- persons holding office as Parliamentary officers (but not persons employed as Parliamentary officers under Division 3 of Part 3 of the *Parliamentary Administration Act 2005*) or persons employed as Department Heads within

the meaning of the *Parliamentary Administration Act 2005*, including the Secretary of the Department of Parliamentary Services;

- the transfer of employees between public sector bodies as a result of a restructure by or under an Act;
- the redundancy of employees of a public sector body as a result of a restructure by or under an Act;
- various matters in relation to the provision of essential services or a state of emergency.
- various matters in relation to terms and conditions of employment under the *Public Sector Employment (Award Entitlements) Act 2006*.

## **Western Australia**

Western Australia has not joined the national system. Some employers (essentially incorporated entities) and their employees are covered by the national system, but sole traders, partnerships, other unincorporated entities and non-trading corporations and their employees will continue to operate under the WA state system (though some of these may be covered by transitional awards (AT) until 27 March 2011).

If you have any doubt about whether an employer is a national system employer, speak to your team leader or manager.

### **25.3.5. State Reference Transitional Awards**

State reference employers who were bound to a federal award (by citation, membership or succession) prior to 27 March 2006, continue to be covered by the provisions of the award in the federal system (despite not being a constitutional corporation).

The operation of this notionally created Transitional Federal Award continues subject to certain transitional arrangements defined in the WR Act.

Under the state referral legislation these instruments are now renamed State Reference Transitional Awards. State Reference Transitional Awards are included in the category of an award-based Transitional instrument under the FW Act and are treated under the same conditions as other award-based transitional instruments.

In Western Australia where no referral has occurred, Transitional Federal Awards have been renamed Continuing Schedule 6 Instruments and are subject to different rules.

### **25.3.6. Transitional arrangements for referring states**

Generally, 12-month transitional arrangements apply to incoming state employees on state awards (See below for enterprise awards).<sup>97</sup> State awards and state employment agreements are preserved as federal instruments, generally in the same terms as the state instrument.

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<sup>97</sup> State enterprise awards don't automatically terminate after 12 months. They can be replaced by a modern enterprise award before 31 December 2012.

These instruments are known as Division 2B state awards and Division 2B state employment agreements.<sup>98</sup>

ABC Inspectors should note that NAPSAs have evolved separately to the former state awards and differ significantly when compared with the Division 2B award that has the same name. The prefix codes used for Division 2B awards are RA and RE for Division 2B Enterprise Awards. NAPSAs use the AN prefix code.

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<sup>98</sup> Because Victoria referred its powers in 1996, Division 2B instruments will not operate in that state. Employees and employers from Victoria are Division 2A State reference employees and employers.

### 25.3.7. Division 2B state awards and Division 2B state employment agreements

- These operate on a 'no-detriment' basis with the National Employment Standards. In other words, the NES applies for incoming state employers and employees and prevails over any terms of the Division 2B state instrument to the extent that they are detrimental in comparison with an entitlement of the employee under the NES.
- Division 2B State employment agreements and Division 2B State awards are transferable instruments for the purposes of the FW Act transfer of business provisions (new items 14-16 of Schedule 11 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, and item 74 of Schedule 2).
- A Division 2B State award generally **continues to apply as a federal instrument for 12 months**. After that time, a relevant modern award will cover the relevant employees and employers and the state award will terminate. State enterprise awards will undergo a separate enterprise award modernisation process (see Schedule 6 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*) (essentially they will continue and be replaced by a modern enterprise award before 31 December 2013).
- During the 12 month transitional period, Fair Work Australia will be required to consider whether a **modern award should be varied to provide appropriate transitional arrangements** for incoming state employees and employers. Any such variation will be subject to rules about what may be included in modern awards (except that FWA are not restricted from including terms that contain state-based differences). Terms included in a modern award in accordance with this process cease to have effect at the end of 5 years after 1 January 2010, unless the term is expressed to cease at an earlier time.
- Further, **FWA can make remedial take-home pay orders** where the take-home pay of one or more employees is reduced as a result of the termination of the Division 2B state award and the movement to the modern award. There are similar provisions for outworkers.
- Division 2B State employment agreement continues to operate as a federal instrument until terminated in accordance with the provisions of the Act or, in the case of a collective Division 2B state employment agreement, replaced at any time by a new enterprise agreement or workplace determination under the FW Act.
- The Act provides that a model dispute resolution clause (to be prescribed by the regulations) is deemed to be included in each Division 2B State award. Dispute resolution terms in State employment agreements will continue as terms of the Division 2B State employment agreements derived from them. However, there are rules about what happens where that clause confers dispute resolution powers on a state industrial body.
- Where transferring employees are covered by a Division 2B state instrument, the new transfer of business rules in the FW Act will apply where the relevant 'connection' in the 'transfer of business' definition occurs on or after the referral commencement. Division 2B State instruments are transferable instruments for the purposes of the FW Act transfer of business provisions. As a general rule, proceedings in relation to an entitlement or obligation that

arose before the referral commencement under a state industrial law and relevant conduct that occurred before the referral commencement remain subject to State laws and be dealt with in State systems.



### 25.3.8. Personal/carer's leave

In some states (e.g. Queensland), employers and employees coming from the state system may have increased entitlements to personal/carer's leave under the NES.

All accrued entitlements for paid annual leave and personal leave become entitlements under the NES. Any service with the employer prior to the NES commencement counts as service for entitlements under the NES.

### 25.3.9. Long service leave

Regarding long service leave (LSL):

- Incoming State reference employees who derive their LSL entitlement from a State LSL law will continue to derive their entitlement from that law because of the existing saving of State LSL laws in s27 of the FW Act.
- At the Division 2B referral commencement, some State reference employees may have entitlements under federal transitional awards made in reliance on the conciliation and arbitration power. Section 113 of the FW Act has been amended so that LSL entitlements from these instruments are included as part of the LSL NES (items 125-128 of Schedule 2).
- Modern awards cannot deal with LSL but some incoming State system employees may have LSL entitlements under State awards. FWA has power to make orders preserving those LSL entitlements from 1 January 2010, which operate alongside the modern award that covers an affected employee (new item 30 of Schedule 3A of the Transitional Act, item 54 of Schedule 2).
- These State-award based LSL entitlements are preserved for a maximum period of 5 years from 1 January 2010, pending the development of a national uniform LSL NES.<sup>99</sup>

## 25.4. 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 12.6 below) and enterprise agreements (refer 12.7 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 apply from 1 January 2010.

### 25.4.1. 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)

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<sup>99</sup> Inquiry Into the Provisions of the Fair Work Amendment (State Referrals and Other Measures) Bill 2009, Submission to the Senate Standing Committee on Education, Employment And Workplace Relations, Department of Education, Employment and Workplace Relations, page 19, retrieved from [http://www.aph.gov.au/Senate/committee/eet\\_cte/fair\\_work\\_state/submissions.htm](http://www.aph.gov.au/Senate/committee/eet_cte/fair_work_state/submissions.htm) 11/11/2009.

- 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.<sup>100</sup>

#### 25.4.1.1. 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 ABC Inspectors should refer to the [FW Act](#) for the full entitlements provided for by each standard.

- **Requests for flexible working arrangements**

Under this entitlement, employees with at least 12 months service, who are parents or have carer's responsibilities for children under school age, will be able to request in writing flexible arrangements to assist them in caring for children under school age.

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 12.5.1.3 below).

- **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**

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<sup>100</sup> FW Act; s59 and divisions 2 and 3 of Part 6-3

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 ABC 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 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. Essentially these are the same as the previous provisions under s661 of the WR Act, but ABC Inspectors will now be able to enforce notice provisions as an 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 but this does not apply to small businesses or where an employee's service is less than 12 months.

- **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 FWA and FWO
- other matters as prescribed by regulation.

#### **25.4.1.2. 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 ABC 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 12.3.3 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 12.6 below) and enterprise agreements (refer 12.7 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 12.5.1.3 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 12.6 below) and enterprise agreements (refer 12.7 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.

### 25.4.1.3. 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 the FWO. The role of the FWO 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.

#### **25.4.1.4. Considerations regarding terminations that span the WR Act and the FW Act**

ABC 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 Transitional Act details the applicable provisions.

The [FW Act](#) (ss 117-118) provides for notice of termination to be given under the NES, and operates 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.<sup>101</sup>

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.

(For other considerations relating to the termination of employment and relevant remedies, refer Chapter 20 – Termination and contractors).

#### **25.4.1.5. Interaction between the NES and transitional instruments (from 1 January 2010)**

The Transitional 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.<sup>102</sup> This provision is called the "no net detriment rule" and will be an important rule for ABC 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 Transitional Act<sup>103</sup>. 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.<sup>104</sup> 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, FWA (but not the FWO) 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.<sup>105</sup>

### **25.5. Modern awards**

#### **25.5.1. Introduction**

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<sup>101</sup> Transitional Act; Schedule 4, Part 3, item 9 (also refer 12.3.2 of this Manual chapter).

<sup>102</sup> Transitional 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.

<sup>103</sup> Transitional Act; Schedule 3, Part 5, Division 1, items 23(2) and 24

<sup>104</sup> See the Explanatory Memorandum to the Transitional Act, paragraph 83.

<sup>105</sup> Transitional Act; Schedule 3, Part 5, Division 1, item 26

The stated objectives of the award modernisation project are to provide a fair and relevant safety net. Modern awards commence from 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 commence from 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. ABC 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 has 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 12.7 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).

### **25.5.2. 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 take leave (s139(1)(h))
- superannuation (s139(1)(i))
- procedures for consultation, representation and dispute settlement (s139(1)(j)).

### **25.5.3. 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<sup>106</sup> terms. If the modern awards 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 FWA considers that certain allowances should be varied when the wage rate changes, a term covering automatic variation must be included (s149).

#### **25.5.4. Terms that must not be included in a modern award**

The [FW Act](#) provides that a modern award must not include an objectionable term.<sup>107</sup> 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.<sup>108</sup>

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 year limit or when FWA makes or varies another modern award that will cover some or all classes of employees who were originally covered. FWA cannot extend the coverage for those not originally covered. (ss 154 (1), 154(2))
- terms dealing with long service leave (s155).

#### **25.5.5. Review of modern awards**

FWA is responsible for conducting the reviews of modern awards at least every 4 years (s156), during which FWA may vary, revoke or make a new award.

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<sup>106</sup> For a definition of pieceworker, see FW Act; s21.

<sup>107</sup> FW Act; s150

<sup>108</sup> FW Act; s12



To vary the 'minimum wage' of a modern award FWA 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.

#### **25.5.6. Interaction between modern awards and transitional instruments**

The Transitional Act details that a transitional APCS ceases to cover an employee when a modern award that covers the employee comes into operation.<sup>109</sup> The Transitional Act also details the specific interaction between modern awards and transitional instruments.

Several operational rules apply, as detailed below:

##### **25.5.6.1. 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.<sup>110</sup>

However, the ABC 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 12.4.3 above).<sup>111</sup>

##### **25.5.6.2. 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.<sup>112</sup>

The provisions above also apply in relation to outworker terms in awards.

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<sup>109</sup> Transitional Act; Schedule 9, Part 3, Division 2, item 11.

<sup>110</sup> Transitional Act; Schedule 3, Part 5, Division 2, item 28.

<sup>111</sup> Transitional Act; Schedule 9, Part 4, item 12.

<sup>112</sup> Transitional Act; Schedule 3, Part 5, Division 2, item 29.

## 25.6. Enterprise agreements

### 25.6.1. 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.<sup>113</sup>

Enterprise agreements are negotiated by the parties through collective bargaining in good faith, primarily at the enterprise level.<sup>114</sup> 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.<sup>115</sup>

ABC 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).

### 25.6.2. 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 FWA making certain orders (refer 12.8 below).

### 25.6.3. The approval of enterprise agreements

In order to attain legal force under the [FW Act](#) enterprise agreements must be approved by FWA. In order to approve an enterprise agreement, FWA must be satisfied that:<sup>116</sup>

- the agreement has been genuinely agreed to by the employees covered by the agreement (excepting greenfields agreements)<sup>117</sup>
- 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 s 55 of the [FW Act](#) regarding the interaction between enterprise agreements and the NES

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<sup>113</sup> FW Act; ss 55 and 169

<sup>114</sup> FW Act; s171

<sup>115</sup> FW Act; s172

<sup>116</sup> FW Act; ss 186-187

<sup>117</sup> FW Act; s188

- the agreement passes the BOOT<sup>118</sup>
- the group of employees covered by the agreement was fairly chosen (if not all employees are covered, FWA must take into account whether the group is geographically, operationally or organisationally distinct)
- the agreement must not contain unlawful terms<sup>119</sup> or designated outworker terms
- the agreement must include a dispute settlement term<sup>120</sup>
- the agreement must contain a specified nominal expiry date of not more than 4 years from the date of approval<sup>121</sup>
- 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<sup>122</sup> and consultation of matters about major workplace change that is likely to have significant effect on employees.<sup>123</sup>

There are some limited exceptions to these criteria. For example, FWA can approve an enterprise agreement that does not pass the BOOT if it is not contrary to the public interest.<sup>124</sup> FWA can also approve an enterprise agreement with undertakings.<sup>125</sup>

There are specific approval requirements for particular employee groups<sup>126</sup> including shift workers, pieceworkers, school based apprentices and trainees, and outworkers.

#### **25.6.4. Operation of enterprise agreements**

For a ABC 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 FWA approval procedures) is in operation.

Once approved by FWA, 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.<sup>127</sup>

The [FW Act](#) also details the circumstances under which an enterprise agreement ceases to operate, or ceases to apply to an employee.<sup>128</sup> Once an enterprise agreement has ceased to operate, that particular enterprise agreement can never operate again.<sup>129</sup>

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<sup>118</sup> FW Act ;s193. The BOOT applies from 1 January 2010. During the bridging period, the No Disadvantage Test still applies (Transitional Act; Schedule 7, Part 2, Division 1,item 2)..

<sup>119</sup> FW Act; s194

<sup>120</sup> FW Act; s186

<sup>121</sup> FW Act; s186

<sup>122</sup> FW Act; s202

<sup>123</sup> FW Act; s205

<sup>124</sup> FW Act; s189

<sup>125</sup> FW Act; s190

<sup>126</sup> FW Act; ss 196-200

<sup>127</sup> FW Act; s54(1)

<sup>128</sup> FW Act; ss 54(2) and 58

<sup>129</sup> FW Act; s54(3)

### **25.6.5. The content of enterprise agreements**

Enterprise agreements may be made about permitted matters as defined in the [FW Act](#)<sup>130</sup> 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.<sup>131</sup>

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.<sup>132</sup>

### **25.6.6. 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.

### **25.6.7. 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).

### **25.6.8. Relationship between transitional AFPCS and an enterprise agreement**

The Transitional 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.<sup>133</sup>

### **25.6.9. 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.<sup>134</sup> ABC 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.

## **25.7. Good faith bargaining**

### **25.7.1. Introduction**

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<sup>130</sup> FW Act; s172

<sup>131</sup> FW Act ss 55 and 253

<sup>132</sup> FW Act; s206

<sup>133</sup> Transitional Act; Schedule 7, Part 6. item 27(7).

<sup>134</sup> FW Act; s253

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.<sup>135</sup>

There is a significant onus on the employer to both recognise and bargain with another bargaining representative.

### **25.7.2. 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.<sup>136</sup> These requirements are:

- 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.<sup>137</sup>

An employer can initiate bargaining, agree to another party's request to bargain, or be compelled by FWA 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.<sup>138</sup> An employer can only be compelled to participate in negotiations where a bargaining representative for an employee applies to the FWA for a majority support determination. In so doing the FWA must be satisfied that a majority of employees at an enterprise want to bargain.<sup>139</sup>

Unions are often the bargaining representative for employees, but employees can choose another party as bargaining representative. An employer must not refuse to

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<sup>135</sup> FW Act; s176

<sup>136</sup> FW Act; s228(1)

<sup>137</sup> FW Act; s228(2)

<sup>138</sup> FW Act; s173

<sup>139</sup> FW Act; ss236 and 237

recognise or bargain with another bargaining representative once this choice has been made.

### **25.7.3. Bargaining orders**

Where there is a breakdown 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 the FWA for a 'bargaining order'.<sup>140</sup>

If FWA 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](#)<sup>141</sup> Where there is contravention of a bargaining order, a bargaining representative may make an application to FWA for a serious breach declaration.<sup>142</sup> 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 FWA will make a bargaining related workplace determination.<sup>143</sup>

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 FWA to deal with a dispute.<sup>144</sup>

### **25.7.4. The role of the ABC Inspector**

The ABC 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 a ABC Inspector can also take action against a bargaining representative for breaches of any bargaining orders issued by FWA.

The ABC 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.

## **ABCC Operations Manual**

### **Chapter 13**

## **Workplace rights and adverse action**

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<sup>141</sup> FW Act; s233

<sup>142</sup> FW Act; ss 234 and 235

<sup>143</sup> FW Act; s269

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## 25.1. Introduction

This chapter provides ABC Inspectors with an understanding of the ABCC processes applicable to inquiries and complaints regarding Division 3 of Part 3-1 of the [FW Act](#), which protects workplace rights and the exercise of those rights.

The [FW Act](#) provides certain “general protections” for employees and prospective employees in Part 3-1.<sup>145</sup> 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, ABC Inspectors should be able to:

- understand the types of workplace rights inquiries and complaints dealt with by the ABCC
- identify issues concerning workplace rights in their day-to-day investigations that may warrant escalation.

The BCII Act also contains a range of protections against coercion, duress and discrimination in relation to certain workplace rights. These provisions are dealt with in Chapter 15.

## 25.2. 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 workplace right by another person.

Further, action taken by a person against another person (the second person) because a third person has or proposes to exercise a workplace right for the benefit of the second person is also prohibited.<sup>146</sup>

## 25.3. Workplace rights

### 25.3.1. 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 or, 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 or inquiry:

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<sup>145</sup> FW Act; Part 3-1

<sup>146</sup> FW Act; s 340



- to seek compliance with that workplace law or instrument or
- in relation to their employment

In addition, workplace rights are extended not only to employees (and employers), but also prospective employees as well as independent contractors and those who engage them.

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.<sup>147</sup>

### **25.3.2. 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)”<sup>148</sup>*

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.<sup>149</sup>

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 ABC Inspectors will be expected to investigate contraventions of state or territory laws as such. Rather ABC 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 ABC Inspector will not necessarily be the actual contravention of the state or territory law, but, for example, the consequence(s) to the employee of highlighting the contravention.

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<sup>147</sup> FW Act; s341(1)(a)

<sup>148</sup> FW Act; s12

<sup>149</sup> FW Act; s12

## 25.4. Adverse action

### 25.4.1. 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.<sup>150</sup> Coverage extends to a prospective employer refusing to employ a prospective employee, or discriminating in the terms and conditions offered to a prospective employee.<sup>151</sup>

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.

The following table (from s342 of the [FW Act](#)) sets out circumstances in which a person takes **adverse action** against another person.

<b>Meaning of adverse action</b>		
<b>Item</b>	<b>Column 1 Adverse action is taken by ...</b>	<b>Column 2 if ...</b>
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 <i>principal</i> ) 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

<sup>150</sup> FW Act; s 342(1) item 1

<sup>151</sup> FW Act; s 342(1) item 2

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**Meaning of adverse action**

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<b>Item</b>	<b>Column 1 Adverse action is taken by ...</b>	<b>Column 2 if ...</b>
		(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 <i>principal</i> ) 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 (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).

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**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.

### 13.5 Investigation, causation and proof

When considering a workplace rights complaint, ABC Inspectors should investigate whether:

- the complainant has or had a workplace right (which may or may not have been exercised); and
- the alleged wrongdoer 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 ABC Inspector is not required to prove the causation aspect. Rather, upon the ABC 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 alleged wrongdoer.

### 13.6 Process for matters involving dismissal

The [FW Act](#) provides different processes for contraventions 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 FWA to deal with the general protections dispute. Such application should be made **within 60 days** after the dismissal took effect. Applications may be lodged after this time only if FWA is satisfied there are exceptional circumstances.

***When providing information about remedies involving dismissal, ABC Inspectors should advise the person of this 60 day time limit, in addition to the time limits relating to unfair dismissal applications.***

If the application is rejected by FWA 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 ABCC (refer 13.9 below).

### **25.5. Process for matters not involving dismissal**

In the case of a contravention not involving a dismissal, the person alleging the contravention can apply to FWA to deal with the dispute. However, FWA 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](#).

### **25.6. ABCC 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 FWA in the first instance unless the complaint specifically alleges unlawful discrimination (refer Chapter 14 – Discrimination). Where the statutory 60 day period for lodgement with FWA 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 FWA outside of this timeframe. ABC Inspectors can not provide advice as to whether an “out of time” application to FWA will be accepted.

In certain circumstances, the complainant might also ask an ABC Inspector if there are remedies available under other provisions of the [FW Act](#), relating to unfair dismissal or unlawful termination (refer Chapter 19 – Termination and contractors, and sections 19.6 Unfair dismissal and 19.7 Unlawful termination in particular). 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.<sup>152</sup>

ABC Inspectors should not provide advice to potential complainants regarding which type of application to lodge with FWA. Rather complainants who are uncertain of the appropriate application to lodge should be referred to FWA 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 FWA in the first instance. In addition, where the complaint is of alleged discrimination (whether involving dismissal or not), the ABCC will consider the complaint according to the procedures outlined in Chapter 14 – Discrimination.

### **25.7. Where FWA is not dealing with the complaint**

If the complainant is not pursuing a remedy through FWA (e.g. because the application to FWA has been rejected because of time limits), other remedies may be available to the complainant. In particular:

- the complainant may seek a remedy at common law through the courts or another tribunal of competent jurisdiction; or
- the complainant may ask the ABCC to investigate the complaint.

Where the complaint is not being dealt with (or has not been dealt with) by FWA, the courts, a tribunal or another body, then the ABCC is able to investigate any alleged

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<sup>152</sup> FW Act; s 723.

contraventions of the [FW Act](#), in accordance with the relevant sections of this ABCC Operations Manual.

In addition, the ABCC 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 the ABCC.<sup>153</sup> In these cases, the ABCC 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 act itself through another body.

## ABCC Operations Manual

### Chapter 14

## Discrimination

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<sup>153</sup> FW Act; s 341(1)(c). Also see the Explanatory Memorandum to the FW Act (paragraph 1369).

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## 25.1. Introduction

This chapter specifically discusses protections in relation to discrimination under s351 of the FW Act. Specific discrimination complaints requiring investigation will be allocated to ABC Inspectors in the normal way, however, all ABC Inspectors need to be aware that contraventions of the discrimination provisions of the FW may arise in any investigation, and are relevant for ABCC educational activities.

After reading this chapter, ABC Inspectors should be able to:

- identify potential discrimination matters
- understand the process adopted by the ABCC in the investigation of discrimination matters.

## 25.2. Discrimination provisions under the FW Act

Protection from discrimination for employees and prospective employees is provided for by the [FW Act](#).<sup>154</sup> The provisions in s351 prohibit adverse action on discriminatory grounds, subject to some limited exceptions<sup>155</sup> (adverse action generally is discussed in Chapter 13 – Workplace rights and adverse action).

### 25.2.1. Application and coverage

In relation to discrimination, the terms employer and employee have their ordinary meaning, and references to these terms are not limited to national system employers and employees.

Part 3-1 of the FW Act regarding general protections regulates the conduct of all employers and employees and a range of other persons, but ***only in so far as the action or conduct is connected to an entity covered by the [FW Act](#)***.<sup>156</sup>

In the referring states, coverage of Part 3-1 of the FW Act is also extended to those employers and employees who are covered by Commonwealth workplace laws due to the referral of state powers from 1 January 2010 (see Chapter 12 – National employment framework for further information on state referrals).<sup>157</sup>

In practice, whether Part 3-1 applies to particular actions or conduct may be an intricate assessment.

### 25.2.2. Elements of an alleged contravention of discrimination provisions

There are four elements of an alleged contravention of s351 of the [FW Act](#):

- the unlawful discrimination action must be taken by an “employer”
- the action must be taken by the employer “against a person who is an employee or prospective employee of the employer”
- it must be an adverse action (refer Chapter 13 – Workplace rights and adverse action)
- the action must be taken because of the employee or prospective employee’s 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.

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<sup>154</sup> FW Act; s351

<sup>155</sup> FW Act; s351(2)

<sup>156</sup> Refer FW Act; ss 338 – 339

<sup>157</sup> FW Act; s30G and 30H



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.

Importantly, s351(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:

- lawful (or not unlawful) under any state, territory or commonwealth anti-discrimination law 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.

As noted in Chapter 13– Workplace rights and adverse action of this ABCC Operations Manual, s342 of the [FW Act](#) also provides protection against discrimination to proposed independent contractors. Accordingly, discrimination matters may also arise in relation to proposed independent contractors under other provisions of the FW Act (but not under s351).

### **25.2.3. Remedies under the FW Act**

The discrimination provision of the [FW Act](#) (section 351) is a civil remedy provision. In discrimination cases, there may not be an underpayment or contravention of a fair work instrument. Accordingly, the ABC 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. 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 ABCC litigation, the matter must meet the requirements of the [ABCC Litigation Policy](#) and undergo both prospects and public interest assessment prior to proceeding to litigation.

### **25.2.4. Further considerations**

Discrimination is a complex area of law and the [FW Act](#) does not provide an exhaustive definition of discrimination. Accordingly, 14.3 below provides an overview of common law discrimination concepts to assist ABC Inspectors in identifying unlawful discrimination.

The [FW Act](#) does not grant the ABCC exclusive jurisdiction over discrimination complaints. ABC Inspectors must remain aware of the other bodies that may have the ability to deal with the specific complaint they are investigating. These bodies are discussed in 14.4 below.

Although it is not necessary for the discrimination ground to be the sole or dominant reason for the action, there must be a nexus between a discrimination attribute under s351 of the FW Act and the adverse action under s342 of the FW Act. For example, being treated less favourably than a like employee because of a physical disability can be considered adverse action. In discrimination matters, there is a reversal of the onus of proof (also refer Chapter 13 – Workplace rights and adverse action). Accordingly, if the ABC Inspector has established that a person has protection from discrimination under s351 of the [FW Act](#) and that a discrimination-based adverse action (as per s351) has occurred, the burden of proving that the adverse action was not taken because of the discriminatory reason falls upon the alleged wrongdoer.

There is some potential overlap between the discrimination and unlawful termination protections available, and 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. For further information related to dismissal and termination, please refer to Chapter 19 – Termination and contractors.

### **25.3. Overview of key concepts in Australian discrimination law**

In addition to the provisions of the [FW Act](#) there are various state, territory and commonwealth laws dealing with discrimination (refer 14.4). 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. Further, anti-discrimination laws prohibit discrimination only in certain areas of activity, such as employment, education, accommodation, and the provision of goods or services. However, the ABCC only has the ability to investigate alleged unlawful termination as it relates to employment or prospective employment.

#### **25.3.1. Definition of discrimination**

Discrimination occurs when a person, or a group of people, are treated less favourably than another person or group. However, not all unfair or unfavourable treatment is unlawful discrimination. Each relevant legislative instrument specifically defines actions that constitute unlawful discrimination as opposed to unfair treatment. In the case of the FW Act, it is less favourable treatment of a person or group on the basis of grounds or attributes (or features of such attributes) as listed in s351 that comprise unlawful discrimination (see 14.2.2 above).

Discrimination can be direct, indirect or systemic. The various anti-discrimination laws generally provide similar definitions of direct and indirect discrimination, but there is no legislative definition of systemic discrimination.

It should be noted that the [FW Act](#) makes no distinction between indirect, direct or systemic discrimination, and all types of discrimination are currently deemed by the ABCC to be covered by the provisions of s351. However, the distinct concepts will arise in practice and ABC Inspectors should become familiar with them.

### 25.3.2. 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 establishing discrimination has occurred, it is not enough to show the less favourable treatment or the existence of the protected ground. Rather it must be shown that the less favourable treatment occurred because of a discriminatory ground. Examples of direct discrimination would be:

- deciding not to employ a person because they are from a particular ethnic background
- refusing to hire a woman because she may become pregnant.

### 25.3.3. Indirect discrimination

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 a disproportionate detrimental impact on persons of the status of the complainant and which are unreasonable.<sup>158</sup> Examples of indirect discrimination would be:

- where the design of a workplace prevents a person with a disability from accessing the equipment needed to do the job
- where an employer only gives training to full-time workers, which would indirectly discriminate against women, as most part-time workers are women
- where minimum height requirements apply for jobs in a resort, for no rational operational or business ground, which would indirectly discriminate against women or people from certain ethnic backgrounds, as they may not be able to meet the requirement.

The identification of indirect discrimination is complex and requires a substantially different approach to presenting the factual material than with complaints of direct discrimination. Indirect discrimination requires a detailed examination of the facts to determine whether the operation of the policy or practice appears to apply equally to all persons, but in fact disadvantages a particular group of nominated persons.<sup>159</sup>

### 25.3.4. Systemic discrimination

Systemic discrimination is a term used to describe situations where practices of an organisation, although they may appear to be neutral on the face of it, have the practical effect of causing discrimination or continuing the ongoing effects of discrimination. The discriminatory practices may result from a series of procedures or protocols working together, and may be accepted and entrenched in the organisation's culture. There might not be an intention of the parties to cause discrimination.

Systemic discrimination may be either direct or indirect discrimination. It is usually not easy to detect because the discrimination may not be apparent or obvious without a detailed investigation of the matter.

Systemic discrimination has been described as “patterns or practices of discrimination that are the result of interrelated policies, practices and attitudes that are entrenched in organisations or in broader society. These patterns and practices create or perpetuate disadvantage for certain groups.”<sup>160</sup>

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<sup>158</sup> C Ronalds, *Discrimination Law and Practice*, The Federation Press, Leichardt, 2008, 3<sup>rd</sup> edition, p.32

<sup>159</sup> C Ronalds, *Discrimination Law and Practice*, The Federation Press, Leichardt, 2008, 3<sup>rd</sup> edition, p.43

<sup>160</sup> J Gardner, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report*, 2008 p. 11

## 25.4. Overview of current anti-discrimination bodies and legislation in Australia

In Australia, there are also other commonwealth and state anti-discrimination laws, with several bodies that administer them. The national anti-discrimination information gateway ([www.antidiscrimination.gov.au](http://www.antidiscrimination.gov.au)) provides a single point of contact for these agencies.

### 25.4.1. The Australian Human Rights Commission (AHRC)

Federally, the Australian Human Rights Commission (AHRC)<sup>161</sup> is a commonwealth body that investigates complaints of unlawful discrimination, harassment, bullying and human rights abuses. The AHRC investigates and conciliate complaints of unlawful discrimination lodged under four Commonwealth Acts:

- [Racial Discrimination Act 1975](#)
- [Sex Discrimination Act 1984](#)
- [Disability Discrimination Act 1992](#)
- [Age Discrimination Act 2004](#).

In relation to employment, and under these four acts, a person can make a complaint to the AHRC if they think they have been:

- refused employment
- dismissed
- denied promotion, transfer or other benefits associated with employment
- given less favourable terms or conditions of employment; and/or
- denied equal access to training opportunities

because of the following grounds:

- race - including colour, descent, national or ethnic origin
- sex - including pregnancy, family responsibilities, marital status and sexual harassment
- disability or medical condition - including temporary and permanent disabilities; physical, intellectual, sensory, psychiatric disabilities, diseases or illnesses; medical conditions; work related injuries; past, present and future disabilities; and association with a person with a disability
- age.

If a person makes a complaint to the AHRC under these laws and the complaint cannot be resolved through conciliation, enforcement action is not available to the AHRC. The complainant may choose to pursue the matter in the Federal Court or Federal Magistrates Court.

The AHRC also investigates and conciliates complaints of discrimination lodged under the [Human Rights and Equal Opportunity Commission Act 1986](#). Under this law, a person can make a complaint if they think they have been discriminated against in their employment because of their: sexual preference; religion; criminal record; political opinion or trade union activity. This law does not have the same enforcement rights as the other laws. If the complaint cannot be conciliated, the complainant is not able to take the matter to court. However, the AHRC can report

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<sup>161</sup> The AHRC was formerly known as the Human Rights and Equal Opportunity Commission (HREOC).

the matter to the federal Attorney-General who must table the report in the Parliament.<sup>162</sup>

The grounds for discrimination covered by the AHRC are broadly similar to those under the FW Act, with only minor differences.<sup>163</sup>

#### 25.4.2. State and territory bodies

Each state or territory in Australia also has bodies that handle complaints in the area of anti-discrimination under relevant state or territory law. The principal anti-discrimination law in each state and territory is as follows:

- the [Anti-Discrimination Act 1977](#) of New South Wales
- the [Equal Opportunity Act 1995](#) of Victoria
- the [Anti-Discrimination Act 1991](#) of Queensland
- the [Equal Opportunity Act 1984](#) of Western Australia
- the [Equal Opportunity Act 1984](#) of South Australia
- the [Anti-Discrimination Act 1998](#) of Tasmania
- the [Discrimination Act 1991](#) of the Australian Capital Territory
- the [Anti-Discrimination Act](#) of the Northern Territory.

There is significant overlap between commonwealth and state laws in some areas of discrimination. Even though there are commonwealth laws which cover discrimination on the grounds of race, sex, disability, and age, all state and territory laws cover the same grounds. In some cases, state laws provide broader grounds for discrimination than commonwealth laws (e.g. the commonwealth system does not cover religious discrimination).

Under the current commonwealth and state systems, a person who wishes to make a complaint of discrimination is usually faced with the choice of which jurisdiction to use. This choice is based on a number of factors including: time limits for complaining; the risk of paying legal costs; the availability of a remedy; the possible amount of compensation; the willingness to participate in conciliation; and the time delays in having a complaint actioned.

Consistent with the complaint process of the AHRC, a person alleging discrimination must lodge a written complaint with the appropriate government body before any action can occur. The state and territory laws all emphasize conciliation as a means of resolving complaints, which is a confidential process that cannot be relied upon in any subsequent case before a tribunal or court. If the complaint is not resolved through conciliation, the complaint may be referred to a tribunal for a judicial inquiry (e.g. in NSW this is the Equal Opportunity Division of the Administrative Decisions Tribunal).

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<sup>162</sup> [http://www.hreoc.gov.au/complaints\\_information/infosheet\\_employment.html](http://www.hreoc.gov.au/complaints_information/infosheet_employment.html) (retrieved 23/12/2008)

<sup>163</sup> The AHRC's published summary information does not specify carer's responsibilities or social origin as discrimination areas directly, while the FW Act does not specify criminal record or trade union activities as areas under discrimination, although other provisions under the WR Act and the FW Act do provide some protection to people concerning their trade union activities.

## 25.5. The role of the ABCC in discrimination cases

### 25.5.1. Scope of inquiries

ABCC Inspectors will answer inquiries that relate to compliance with the discrimination provisions of the [FW Act](#). This includes inquiries about:

- whether an alleged discrimination is within the ABCC 's jurisdiction
- how discrimination complaints are handled by the ABCC (including the investigation process)
- the role of the ABCC
- progress of current discrimination complaints (for the complainant)
- education and targeted campaign activities including current ABCC targeted campaigns
- the powers of ABC Inspectors.

### 25.5.2. Preliminary consideration for the ABCC

The actions undertaken by the ABCC will be decided after consideration of three preliminary issues:

- whether the alleged discrimination is direct, or indirect and/or systemic
- whether the alleged discrimination involves termination or not
- whether the alleged discrimination involves an individual or a group.

It should be noted that in addition complaints involving potentially systemic discrimination should be escalated to the relevant State Director.

Figure 9 below provides a table detailing the relevant considerations.

**Figure 9:** Preliminary assessment of a discrimination complaint

	<b>Direct Discrimination</b>	<b>Indirect / Systemic discrimination</b>
Individual	Termination	Termination
	<b>ABCC Vetting / Triage</b> Likely referral to FWA Possible ABCC investigation	<b>ABCC Vetting / Triage</b> Possible referral to FWA Possible ABCC investigation
	Non-termination	Non-termination

	<b>ABCC Vetting / Triage</b> Possible ABCC investigation	<b>ABCC Vetting / Triage</b> Likely ABCC investigation
Group	<b>ABCC Vetting / Triage</b> Likely ABCC investigation	<b>ABCC Vetting / Triage</b> Likely ABCC investigation

## 25.6. Referral of complaints

Having considered these preliminary points, the relevant Team Leader will decide on whether the complaint will be referred to another agency because the ABCC lacks jurisdiction (refer 14.6.1 below)

- whether the complaint will be referred to FWA (refer 14.6.2 below)
- whether no further action will be taken (refer 14.6.3 below)
- whether the matter will be investigated further by the ABCC (refer 14.7 below).

### 25.6.1. Referral of complaints to an external agency where the ABCC lacks jurisdiction

Some complaints alleging discrimination will fall outside of the discrimination jurisdiction of the ABCC, but may be able to be investigated by other agencies. These would generally include alleged discrimination matters:

- that occurred prior to 1 July 2009
- that do not concern the 'area' of employment
- that are not covered by the 'grounds' identified in s 351 of the [FW Act](#)
- that are not connected to national system employers and national system employees (refer 14.2.1 above)
- that are not covered by the referral of state powers from 1 January 2010.

If discrimination matters are outside the jurisdiction of the ABCC, the ABCC will write to the complainant to:

- explain the role of the ABCC
- 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 the ABCC's referral (e.g. the matter might lie within the jurisdiction of more than one external agency), the complainant might 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.

### 25.6.2. Referral of complainants to FWA

Where the complainant is an employee to whom Part 3-1 of the FW Act applies who alleges termination because of discriminatory reasons, the complainant can make application to FWA to deal with the dispute through the general protections provisions. If the complaint is within the relevant timeframe (refer Chapter 13 – Workplace rights and adverse action), the complainant will be referred to FWA (according to the terms of any MOU). The ABCC will monitor the matter and at the conclusion of the FWA process will decide what action (if any) will be taken by the ABCC. In the case where FWA proceedings have resulted in the finalisation of the matter, the ABCC will not take any further action.

Where the complainant is an employee to whom Part 3-1 of the FW Act does not apply who alleges termination because of discriminatory reasons, they do not have access to the general protections provisions. However, they may have a remedy under the unlawful termination provisions of the [FW Act](#) (refer Chapter 19 – Termination and contractors). If the complaint is within the relevant timeframe (refer section 19.6 of that chapter), the complainant will be referred to FWA (according to the terms of any MOU). However, the ABCC will not monitor the matter further, as the ABCC does not investigate unlawful termination complaints in general.

### 25.6.3. Where no further action will be taken

In certain circumstances, the ABC Inspector will assess that no further action will be taken. Such circumstances will include:

- where the alleged discrimination occurred over 12 months prior to the date the complaint was lodged with the ABCC
- 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 of proceedings before a court or other tribunal of competent jurisdiction (refer 4.5.2)
- where it is determined that there has been no discrimination.

In these cases, the complainant will be advised that the ABCC is unable to investigate the matter further, and the relevant reason.

Where the only reason for the ABCC not investigating the complaint is the lodgement outside of twelve months, the complainant will be advised that they may be able to seek a review of this decision to not investigate their complaint. Any such review will be considered in the first instance by a Team Leader who was not involved in the original investigation.

ABC Inspectors should consider that if a discrimination complaint has been addressed by another body, but the completed processes of that body did not resolve the complaint, the ABCC may be able to consider the matter further in certain circumstances. In practice, this may be a difficult assessment to make, and ABC Inspectors should seek the advice of their Team Leader before proceeding with the investigation in these cases. The decision regarding the action to be taken (or not taken) should be detailed in a [case decision record \(CDR\)](#).



## **25.7. Where the matter will be investigated by the ABCC**

Where the assessment determines that the matter is appropriate for the ABCC, the complaint will be distributed to the relevant ABC Inspector, in accordance with where the work which is the subject of the complaint was performed.

The complaint will be investigated in accordance with the procedures set out in this ABCC Operations Manual, with additional consideration being given to the points set out in 14.8 below.

### **25.7.1. Referral of another ABCC complaint for consideration of possible contraventions of discrimination provisions**

An ABC Inspector may identify during the investigation of a wages and conditions complaint (or other investigation activity) that there may also be matters relating to discrimination under the [FW Act](#). In such case, the ABC Inspector should advise their Team Leader, and together they should consider whether the discrimination component of the investigation is within the ABCC's jurisdiction.

If the matter is within the ABCC's jurisdiction it may be beneficial for the ABC Inspector to discuss the further action to be taken with an ABC Inspector who is experienced in discrimination claims. A case decision record ([CDR](#)) should be completed by the ABC Inspector.

The consideration may result in:

- the complaint being referred to an ADT/designated ABC Inspector
- the discrimination elements of the complaint being referred to the ADT Inspector/designated ABC Inspector, and the other aspects being investigated by the original ABC Inspector
- the ADT Inspector/designated ABC Inspector determining that there are no discrimination aspects for the ABCC to action, and returning the complaint to the original ABC Inspector.

A further [case decision record \(CDR\)](#) should detail the decision reached regarding the ABC Inspector(s) who will investigate the complaint and the discrimination matters.

### **25.7.2. Wages and conditions matters arising in discrimination complaints**

On occasion, a complainant may complete a complaint form regarding alleged workplace discrimination, but it appears in the investigation process that the complaint may not have received their full entitlements to wages or conditions applicable to their employment, even though the complainant may not have raised this specific allegation. In these cases (consistent with section 4.6.5 of this ABCC Operations Manual), the wages and conditions matters should also be investigated, typically by referral of the wages and conditions matters for investigation by an ABC Inspector (refer Chapter 2 – The investigation process, section 2.11.5 for more detailed information).

A [CDR](#) should be made that details the wages and conditions matters and discrimination matters to be investigated and the decision reached regarding the ABC Inspector(s) who will investigate each of the matters.

## **25.8. ABCC investigation of discrimination complaints**

### **25.8.1. Initial contact is with the complainant only**

All discrimination complaints are treated as confidential until permission is given by the complainant to contact the alleged wrongdoer and any witnesses. Therefore, on receipt of the complaint, <insert appropriate body>will send an acknowledgement letter to the complainant only. Prior to any contact with the alleged wrongdoer, the ABC Inspector will conduct a record of conversation with the complainant.

### **25.8.2. Planning the investigation**

As a result of the record of conversation, and with confirmation of complainant's permission to contact parties, the ABC 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, or employment policies. (Refer Chapter 20 – Evidence and Chapter 21 – Interviews for further information).

### **25.8.3. Considering ABCC mediation of the complaint**

ABCC mediation will only be offered in cases where discussion at case conference has determined that the complaint is suitable for ABCC mediation. Should an ABC Inspector believe that ABCC mediation may be suitable, they should also advise the State Director who will consider whether it is a matter that the ABCC can mediate,

ABCC mediation can only be conducted where both parties to the complaint agree to the process (refer Chapter 8 – Mediation). Where the mediation does not result in the parties reaching agreement, the complaint will progress to full investigation. Where mediation does result in the parties reaching agreement, the ABCC (in discrimination complaints only) will assess whether litigation action is also appropriate (refer Chapter 23 – Litigation).

**Chapter  
Undue  
coercion**

**Key Messages**

- ABC Inspectors need to be able to understand and identify the general protections under the FW Act, including protection from discrimination.
- The ABCC will refer complainants with discrimination matters relating to the dismissal to FWA in the first instance.
- Complaints and inquiries regarding alleged discrimination will be actioned by the Anti-Discrimination Team and ABC Inspectors.

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## 25.1. Introduction

This chapter introduces some complex subjects which may arise in many investigations, including those that appear (on the face of things) to be investigations of straightforward wages and conditions complaints. Undue influence or pressure, duress and coercion investigations are conducted by ABC Inspectors. ABC Inspectors should remain vigilant to the possibility that a complainant may have been subjected to undue influence or pressure, duress and/or coercion during the course of a separate alleged contravention of Commonwealth workplace laws.

This chapter provides a clear statement of the ABCC's position with respect to undue influence or pressure, duress and coercion; and details nationally consistent processes and practices to be followed when investigating these types of matters.

The aim of this chapter is to alert ABC Inspectors to some of the common indicators that may assist them in recognising potential allegations of undue influence or pressure, duress and coercion and to provide clear guidance on when (and to whom) to escalate a matter.

After reading this chapter, ABC Inspectors should be able to:

- understand the common indicators that may assist them in recognising potential undue influence or pressure, duress and coercion matters
- understand the approach to be taken when undue influence or pressure, duress and coercion matters are investigated
- understand the applicable escalation steps which should be taken in investigations of this type.

## 25.2. Duress

### 25.2.1. *Duress provisions under the WR Act*

Where the investigation involves duress which occurred prior to 1 July 2009, ABC Inspectors must have regard to the relevant provisions of the WR Act. Specifically, s400(5) of the [WR Act](#) which made it unlawful to apply duress in connection with individual employment agreements (AWAs and ITEAs).<sup>164</sup>

The [FW Act](#) makes no specific provisions relating to duress, but some of the concepts relating to agreements are covered by other [FW Act](#) provisions, such as those relating to undue influence and pressure (refer 15.5 below).

### 25.2.2. *Characterising duress*

Duress is not defined in either the [WR Act](#) or the [FW Act](#), however, common law definitions and case law can be used to guide ABC Inspectors, litigators and the courts in determining whether or not specific conduct may amount to duress.

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<sup>164</sup> The WR Act in s400(5) formerly referred to AWAs (from 27 March 2006), but was later amended (27 March 2008) to make reference to ITEAs instead.

In brief, at common law:

- duress involves use of “illegitimate” pressure to prevent a free decision being made
- the illegitimate pressure must involve actual or threatened conduct that is unlawful
- there must be an intention to coerce by the illegitimate, unconscionable or unlawful pressure.

In summary, when considering the question of duress under Commonwealth workplace laws, ABC Inspectors must determine whether illegitimate pressure has been applied in connection to the making of the agreement.

### *25.2.3. Illegitimate pressure*

Determining the existence of duress involves characterisation of the behaviour of the parties in order to determine whether “illegitimate pressure”<sup>165</sup> has been applied. Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct..

### *25.2.4. Duress arising in transmission of business*

In the context of a transfer or transmission of business (refer [Chapter 18 – Transfer of business](#)), there are specific matters to which ABC Inspectors should have regard. When considering duress in this context, the ABC Inspector should consider whether a transmission of business has in fact occurred and, if so, seek to characterise the conduct of the “new employer.”

The ABC Inspector should consider that requiring a person to make an AWA or ITEA as a condition of employment in the context of transmission of business (pre 1 July 2009) may amount to duress under s400(6A) of the WR Act.

## *25.3. Coercion*

### *25.3.1. Chapter 6 – Discrimination, coercion and unfair contracts of the Building and Construction Industry Improvement Act 2005 (BCII Act)*

ABC Inspectors need to be cognisant of the BCII Act provisions of Chapter 6 – Discrimination, coercion and unfair contracts. S43 of the BCII Act makes it unlawful to engage in certain conduct which relates to the engagement of building employees and building contractors.

S44 of the BCII Act makes it unlawful to engage in certain conduct which may coerce a person to make, vary or terminate industrial agreements.

S45 of the BCII Act makes it unlawful to engage in conduct which may discriminate against an employer on the basis of what industrial instrument his workforce is covered by.

S46 of the BCII Act makes it unlawful to engage in conduct which may coerce an employee to nominate a particular superannuation fund or for an employee to coerce a building employer to pay into a particular superannuation fund.

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<sup>165</sup> *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40

### *25.3.2. Coercion under the WR Act*

Where the investigation involves coercion which occurred prior to 1 July 2009, ABC Inspectors must have regard to the relevant provisions of the WR Act. Specifically, s400(1) of the WR Act makes it unlawful to engage in specific types of conduct with the intention of coercing a specific action relating to collective agreements.

### *25.3.3. Coercion under the FW Act*

Where the investigation involved coercion which occurred after 1 July 2009, ABC 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 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. Further, s348 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 action.

### *25.3.4. Characterising coercion*

Coercion is not defined in either the WR Act, BCII Act or [FW Act](#). However, as with duress, 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 similarly to duress 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 AWAs and ITEAs). The most useful approach is for the ABC 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?
- where the conduct was by an industrial organisation; was the behaviour part of industrial action (that was not “protected action” within the meaning of s435 of the [FW Act](#)).
- where the conduct was by an industrial organisation: was the behaviour intended to coerce the employee or employer into taking action with respect to a collective agreement?
- where the conduct was by the employer: was the behaviour intended to cause the employee to refrain from requesting a bargaining agent?
- In relation to the BCII Act, does it relate to building work as defined in that Act?

As a guide, when considering the question of coercion, ABC Inspectors must determine whether or not alleged wrongdoers have participated in behaviour intended to coerce parties to act in a certain way.

#### *25.4. Exceptions relating to duress and coercion*

Participating in industrial action which is “protected action” as defined in s435 of the WR Act and s408 of the [FW Act](#) does not amount to duress or coercion, but the industrial action must meet the criteria of “protected action” in order to be exempt from these provisions. Whether or not the industrial action meets the definition of “protected action” will depend in part upon the date at which the action took place (i.e. pre or post 1 July 2009). For more information on industrial action, refer Chapter 17 – Industrial activities.

#### *25.5. Undue influence or pressure under the FW Act*

Where alleged or apparent undue influence or pressure occurred after 1 July 2009, ABC 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
- 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 in duress and coercion) for the ABC 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 duress or coercion. The Explanatory Memorandum to the Fair Work Bill 2008 (which later became the FW Act)<sup>166</sup> explains this lower threshold recognises that there should be higher obligations on employers who seek to modify employees’ safety net conditions of employment.

#### *25.6. ABCC practices for investigating undue influence or pressure, duress or coercion matters*

##### *25.6.1. Steps for ABC Inspectors*

- Identify the alleged “illegitimate pressure”<sup>167</sup>
- Determine whether there is any actual or threatened conduct that is “unlawful”<sup>168</sup>

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<sup>166</sup> Explanatory Memorandum to the Fair Work Bill 2008; paragraph 1396.

<sup>167</sup> *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40

<sup>168</sup> *ANZ Banking Group Ltd v Karam* [2003] NSWCA 344 (10/10/05)

- Determine whether the alleged pressure resulted in the employee being prevented from making a “free” decision<sup>169</sup>

#### *25.6.1.1. Proofs*

Generally, ABC Inspectors should firstly confirm that the employer is subject to the WR Act (i.e. that they are an “employer” as defined in the WR Act), BCII Act or the [FW Act](#) (as a “national system employer”).

Where the alleged undue influence or pressure or duress relates to agreement making or the use of bargaining agents, ABC Inspectors should obtain:

- any relevant correspondence between the employer and the employee
- any relevant correspondence between the employer and 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).

#### *25.6.1.2. 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 duress or coercion.

Irrespective of the finding, the ABC Inspector should consider whether the contravention gives rise to any other contraventions (such as false and/or misleading statements – refer 15.6.2.4).

#### *25.6.1.3. Guidance points*

Intent is only important in the context of allegations of a contravention of s400(1) of the WR Act or s343(1) of the [FW Act](#). In these instances there must be an intention to coerce by illegitimate, unconscionable or unlawful means.

#### *25.6.1.4. Misrepresentations*

There may also be allegations other than duress or coercion. For example, false or misleading statements may have been made under s401 of the WR Act (pre 1 July 2009). These provisions prohibit a person from recklessly making false or misleading statements that cause another person to make, approve, lodge, vary, or terminate a workplace agreement (or to not do these things).

From 1 July 2009, ss 345 and/or 349 of the [FW Act](#) prohibit a person from recklessly making false or misleading representation with regard to workplace rights (s 345) and industrial activity (s349).

ABC Inspectors should take care when considering these types of contraventions, as there are specific elements that may present difficulty, including that the conduct

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<sup>169</sup> *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40



must be reckless; and (if under s401 of the WR Act) the conduct must cause the other person to act or not act.

*25.6.2. Statements and affidavits*

In undue influence and pressure, duress and coercion investigations it will usually be necessary for the ABC Inspector to conduct interviews (refer Chapter 21 – Interviews), take written statements and/or arrange for affidavits to be sworn. Detailed instructions on the drafting of these can be found in Chapter 20 – Evidence. However for ease and convenience, a template for taking a statement is attached to the end of this chapter. An affidavit is a more formal record of the witness’s account.

A template for making an affidavit has not been included, as where a matter proceeds to a hearing, the form of the affidavit will be set by the rules of the court in which the matter is being heard.

The general purpose behind a witness statement is to establish what the person has witnessed. The witness statement will form part of the evidence that the ABC Inspector will consider in seeking to establish whether there are contraventions of Commonwealth workplace laws.

- (a) Detailed instruction with respect to obtaining and properly recording witness statements and obtaining affidavits are contained within Chapter 20 - Evidence.

**ABCC Operations Manual**  
Key Messages

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- ABC Inspectors need to be able to identify undue influence or pressure, duress and coercion under Commonwealth workplace relations laws.
- Matters of undue influence or pressure, duress and coercion may arise in wages and conditions complaints and should be actioned appropriately.
- Investigations that reveal these characteristics should be referred to a Team Leader and state director for assessment.

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## 25.1. *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 ABC Inspectors understand the relevant provisions of the FW Act in relation to IFAs, including the role of the ABCC 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 give ABC 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.

## 25.2. *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.<sup>170</sup>

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.

### 25.2.1. *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.<sup>171</sup>

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).<sup>172</sup>

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<sup>170</sup> FW Act; s144(1) and s202(1).

<sup>171</sup> FW Act; s144(4).

<sup>172</sup> FW Act; s144(5).

Importantly, the ABC Inspector also needs to review the flexibility terms of the modern award, as some modern award flexibility terms have additional requirements. For example, the General Retail Industry Award 2010 requires that an employer seeking to enter into an IFA must provide a written proposal to the employee, and that where the employee's understanding of written English is limited, the employer must take measures, including translation into an appropriate language, to ensure the employee understands the proposal.

### *25.2.2. Enterprise agreements and flexibility terms*

Similar provisions to those regarding modern awards apply to the flexibility terms of an enterprise agreement, with the additional requirements 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, and
- must not include a term that would be an unlawful term if the IFA were an enterprise agreement.<sup>173</sup>

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.<sup>174</sup> 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.<sup>175</sup>

### *25.3. 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.<sup>176</sup>

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.<sup>177</sup> Accordingly, where a ABC Inspector identifies a contravention of an IFA (made pursuant to flexibility clause 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 an IFA.

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.<sup>178</sup>

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<sup>173</sup> FW Act; s203(2)(b).

<sup>174</sup> FW Act; s203(7)(b).

<sup>175</sup> FW Act; s202(4). The model flexibility term is found in the FW Regulations, Regulation 2.08 and Schedule 2.2.

<sup>176</sup> FW Act; s144(2).

<sup>177</sup> FW Act; s45.

<sup>178</sup> FW Act; s144(3).

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.<sup>179</sup>

IFAs in relation to modern awards can have effect from 1 January 2010.

#### *25.4. 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.<sup>180</sup>

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.<sup>181</sup> The FW Act further prescribes that the IFA does not have any effect other than as a term of the enterprise agreement.<sup>182</sup> 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.<sup>183</sup>

Where a ABC 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.<sup>184</sup>

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.<sup>185</sup> This ensures that an employee retains any benefits they are receiving under the arrangement.<sup>186</sup>

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.

#### *25.5. Transferring instruments*

ABC Inspectors should also note that the FW Act makes explicit that where a modern award or enterprise agreement is transferred, the transferring modern award or enterprise agreement (known as a transferable instrument) includes any IFA that had effect as a term of the transferable instrument.<sup>187</sup> This provision is subject to any order of FWA.<sup>188</sup>

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<sup>179</sup> FW Act; s145(2).

<sup>180</sup> FW Act; s202(2).

<sup>181</sup> FW Act; s50.

<sup>182</sup> FW Act; s202(3)(b).

<sup>183</sup> Fair Work Bill 2008 - Explanatory Memorandum; paragraph 862.

<sup>184</sup> FW Act; s202(3)(a).

<sup>185</sup> FW Act; s204(2).

<sup>186</sup> Fair Work Bill 2008 - Explanatory Memorandum; paragraph 873.

<sup>187</sup> FW Act; s313(2).

<sup>188</sup> FW Act; s313(3).

## 25.6. 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 terms of an IFA, the matter would be investigated as a failure to comply with a term of the modern award or enterprise agreement.

It is expected that there may be certain areas of concern to employees regarding the operation of an IFA that may be brought to the ABCC'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 ABC Inspectors in relation to these items are detailed below.

### 25.6.1. 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."<sup>189</sup> The FW Act itself does not define "genuine agreement" and it is a phrase which bears its ordinary meaning.<sup>190</sup>

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.*<sup>191</sup>

In cases where one or both parties to the IFA dispute that there was genuine agreement to the terms of the IFA, the ABC 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.

#### 25.6.1.1. 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.<sup>192</sup> 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.<sup>193</sup>

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<sup>189</sup> FW Act; s202(3). Also see FW Act; s144(4)(b).

<sup>190</sup> Fair Work Bill 2008 - Explanatory Memorandum; paragraph 867.

<sup>191</sup> The suggestion was from Vice President Ross of the AIRC in a decision regarding the *Toys'R'Us (Australia) Pty Limited Enterprise Flexibility Agreement 1994* [Print L9066].

<sup>192</sup> FW Act; ss 343-344; also see Fair Work Bill 2008 - Explanatory Memorandum; paragraph 874.

<sup>193</sup> Fair Work Bill 2008 - Explanatory Memorandum; paragraph 1396 – illustrative example.



In cases where it appears that coercion, undue influence or undue pressure may have formed part of the process of making the IFA, ABC Inspectors will investigate the matter according to the principles and practices as detailed in Chapter 15 – 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,<sup>194</sup> and that a person must not have action taken against them because of their workplace right.<sup>195</sup> This has the effect of also preventing a prospective employer from making an offer of employment conditional on the prospective employee entering an IFA.<sup>196</sup> In cases where it appears that the process of making or terminating an IFA or offering employment has contravened these general protections provisions, ABC Inspectors will investigate the matter according to the principles and practices as detailed in Chapter 13 - 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.<sup>197</sup>

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.

#### *25.6.1.2. 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 ABC Inspector would proceed as if the IFA did not exist and enforce the modern award or enterprise agreement.*

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<sup>194</sup> FW Act; s341(2)(g).

<sup>195</sup> FW Act; s340.

<sup>196</sup> FW Act; s341(3) note.

<sup>197</sup> FW Act; s45 and s50.

## *25.6.2. Better off overall*

### *25.6.2.1. 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.<sup>198</sup> Although similar in name, this employer guarantee is distinct from the better off overall test (or BOOT) that FWA apply to an enterprise agreement when it is lodged (refer Chapter 3 – Inquiries and registration). In fact, when applying the BOOT to an enterprise agreement, the FWA does not consider the effects of an IFA.<sup>199</sup>

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.<sup>200</sup> 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 Fair Work Australia 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.<sup>201</sup>

### *25.6.2.2. The approach to the investigation*

In the case where an employee disputes that they are better off overall, the ABC Inspector would adopt the following approach.

The ABC 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 ABC Inspector would also advise the employer that the flexibility term of the modern award or enterprise agreement further requires that the employer details how the employee will be better off overall.

The ABC Inspector would review the IFA to seek information regarding how the IFA specifies that the employee will be better off overall. The ABC 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 ABC 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 ABC Inspector will advise the employer of this contravention (such as via a [contravention letter](#)).

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<sup>198</sup> FW Act; s144(4)(c) and s203(4).

<sup>199</sup> FW Act; s193(2).

<sup>200</sup> FW Regulations, Schedule 2.2, item 3(d)(iii).

<sup>201</sup> AIRCFB 550, 20 June 2008 – Request from the Minister for Employment and Workplace Relations – 28 March 2008: Award Modernisation, paragraph 180.

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 ABC 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 ABC Inspector.

#### *25.6.2.3. Actions to ensure an employee is better off overall*

Even where an employer (as an alleged wrongdoer) has contravened the relevant flexibility term or the FW Act, an ABC Inspector has no power to create or terminate an IFA. However, the ABC Inspector would advise the alleged wrongdoer 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 ABC Inspector that they are looking to terminate an IFA, the ABC 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,<sup>202</sup> and that a person must not have action taken against them because of their workplace right. ABC Inspectors should ensure that complainants are advised of this provision and that complaints of this nature will be investigated.

#### *25.6.2.4. Payments to an employee who was not better off overall*

In addition to any termination of the IFA, the alleged wrongdoer 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 ABC 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 alleged wrongdoer’s response to the contravention letter.

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<sup>202</sup> FW Act; s341(2)(g).

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.<sup>203</sup>

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.

### *25.7. 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 whether 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, ABC 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.

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. ABC 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.<sup>204</sup> Accordingly, the intention of the parties will be an important consideration in determining whether an arrangement is itself an IFA.<sup>205</sup> 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<sup>206</sup> and/or form part of a common law agreement or safety net contractual entitlement (SNCE).

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<sup>203</sup> FW Act; s545(2)(b). Such order would need to be sought through the Federal Court or Federal Magistrates Court. In the case of a ABCC litigation, an ABC Inspector has standing to seek such an order (see Chapter 23 – Litigation).

<sup>204</sup> FW Act; s145(1)(a) and s204(1)(a).

<sup>205</sup> The FW Bill 2008 – Explanatory Memorandum makes the comment that the provisions of s204 “provides for what happens when an employer and employee agree what they intend to be” an IFA (paragraph 872).

<sup>206</sup> For example, the FW Act provides for flexible working arrangements for parents or carers of a child under s65 of the FW Act that are not IFAs.

### **25.8.** *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 ABC Inspectors are dealt with in two different Parts of the FW Act and the Transitional Act:

- for the use of compliance powers during an investigation, see s706(2) of the FW Act (ABC Inspectors should note that s706(2) is extended through the operation of sub-item 14(e) of Part 3 of Schedule 18 to the Transitional Act); and
- for enforcement, see s541 of the FW Act (ABC Inspectors should note that s541 is extended through the operation of sub-item 16(1)(e) of Schedule 16 to the Transitional Act).

### **25.9.** *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 ABC 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 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 a 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, ABC 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.

### *25.10. 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 contract that sets out the entitlement does not have to be made after 1 January 2010; it can be made at any time. However, the provisions in the FW Act about SNCEs do not take effect until 1 January 2010. This means that entitlements in a contract of employment cannot be investigated or enforced under the framework in the FW Act as a SNCE until then.<sup>207</sup> So the contravention must have occurred post 1 January 2010.

### *25.11. 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

### *25.12. Terms that may be included in modern awards*

The terms that may be included in modern awards are:

- minimum wages, and
  - 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

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<sup>207</sup> FW Act, section 12 and Transitional Act, Schedule 16, Item 18.

### *25.13. Examples of statutory contraventions*

Before a ABC Inspector can exercise their compliance powers in relation to an allegation that a SNCE has not been provided, ABC Inspectors 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 Transitional 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 ABC Inspectors to understand when the ABCC can and cannot use their compliance powers or seek to enforce common law contracts under the SNCE provisions of the FW Act.

#### *25.13.1. 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 a ABC 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 ABC 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 ABC 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.

#### *25.13.2. 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 Transitional Act and therefore a ABC 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.

#### *25.13.3. 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 ABC 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 ABC Inspector reasonably believes that Super Chef had not complied with the relevant statutory obligation, referred to in s706(2) of the FW Act or sub-item 14 (e) of Part 3 to Schedule 18 of the Transitional Act, that applied to Mark.

However, if an ABC Inspector reasonably believed that Super Chef had not paid Mark his annual leave entitlement at the appropriate base rate of pay, the ABC Inspector would be able 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.<sup>208</sup>

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<sup>208</sup> Fair Work Bill 2008 Explanatory Memorandum, paragraph 2620 – illustrative example.



#### *25.14. Conducting a SNCE investigation*

SNCE investigations will be conducted within the ABCC 's investigative processes. The investigation may proceed through the AVR phase, full investigation phase and the enforcement phase. Allegations of SNCE contraventions will be wages and conditions investigations. These investigations will follow investigative procedures as set out in Chapter 6 – Full investigations and Chapter 7 – Wages and conditions investigations. However, there are some particular considerations that arise in these investigations, as detailed below.

Importantly, an ABC Inspector can only exercise compliance powers in relation to a SNCE if the ABC Inspector has a reasonable belief that the employer has not complied with one or more of the listed statutory obligations.<sup>209</sup> However, the SNCE does not need to be the same subject matter as the statutory entitlement.<sup>210</sup> In the absence of exceptional circumstances, conducting SNCE audits and investigating confidential SNCE complaints as audits will not be possible.

#### *25.15. Full 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 Transitional Act, before investigating the SNCE contravention.<sup>211</sup> In the situation where an ABC 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 Transitional Act.

If the ABC 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 ABC Inspector could not issue such an 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 Transitional Act.

Due to this restriction, if an ABC 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 Transitional Act.

If an ABC 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 Transitional Act, the ABC 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 an 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 ABC

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<sup>209</sup> FW Act; s706(1)(b).

<sup>210</sup> See the illustrative example in the Fair Work Bill 2008 Explanatory Memorandum, pg 328.

<sup>211</sup> It is important to note that contraventions of provisions or terms of an instrument listed in FW Act, subsection 706(2) and sub-item 14(e) of Part 3 of Schedule 18 to the Transitional 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.

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 Transitional 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 Transitional Act that may not have been requested through the original NTP.

ABC 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 by the complainant the ABC 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 Transitional Act. In such a case, a single NTP can be issued to request documents in relation to both elements of the investigation.

#### *25.16. 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, ABC 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, ABC 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.<sup>212</sup>

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 ABC Inspector.

#### *25.17. Making a determination*

ABC Inspectors should refer to Chapter 6 – Full investigations, section 6.8 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 ABC Inspectors in finalising matters where appropriate.

#### *25.18. 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 regarding 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, ABC Inspectors should make reference to the investigation procedures where no contravention is established (section 6.8.2 of this Manual).

#### *25.19. Contravention letters*

Once it has been established that an employer has contravened a provision or term of an instrument listed in s706(2) of the FW Act and/or sub-item 14(e) of Part 3 to Schedule 18 of the Transitional Act, and that they have contravened a SNCE, ABC Inspectors are authorised to issue a contravention letter. ABC Inspectors should refer to Chapter 6 – Full investigations, section 6.9 for guidance on issuing a contravention letter.<sup>213</sup> In any case where a contravention letter is issued regarding a SNCE contravention, the ABC Inspector must ensure that the contravention of the statutory entitlement (NES, modern award etc) is listed, and not just the SNCE contravention alone.

#### *25.20. Compliance notices*

Issuing a compliance notice is not possible for a SNCE contravention.<sup>214</sup>

#### *25.21. Mediation*

Mediation may be used as an alternative to normal investigation techniques. Mediation may be used by ABCC to resolve SNCE contraventions. For further guidance on mediation please refer to Chapter 8 - Mediation.

#### *25.22. 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 22 - 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 ABCC litigation should be considered instead).

#### *25.23. Enforceable undertaking*

The ABCC cannot accept an enforceable undertaking for a SNCE contravention alone. Enforceable undertakings can only be used for a contravention of a civil remedy provision.<sup>215</sup> Contravention of a SNCE is not a civil remedy provision.<sup>216</sup> 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

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<sup>213</sup> ABC Inspectors are authorised to issue such letters under regulation 5.05 of Chapter 5 of the FW Regulations.

<sup>214</sup> FW Act; s716.

<sup>215</sup> FW Act; s715

<sup>216</sup> FW Act: s539

entitlement, the enforceable undertaking could contain additional terms, including terms that address the SNCE contravention.

#### **25.24. *Small claims***

A person may use small claims procedures under the FW Act to recover monies owed under a SNCE.<sup>217</sup> In small claims proceedings, the court may not award more than \$20,000 (refer Chapter 22 – Enforcement). A person may use other appropriate legal action where the claim exceeds what can be recovered under small claims.

#### **25.25. *Enforcement***

The FW Act (s541) stipulates that an ABC 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).<sup>218</sup>

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.<sup>219</sup>

ABC Inspectors should refer to Chapter 23 – 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.<sup>220</sup> This is in addition to the right to pursue breaches of contract of employment under the common law in a state or territory court.

## **ABCC Operations Manual**

### **Chapter 17**

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<sup>217</sup> FW Act; s548(1A)(a)(ii)

<sup>218</sup> FW Act; s541(3) and Transitional Act, Schedule 16, Item 16 (1) (e).

<sup>219</sup> This is because ss 564 and 568 of the FW Act provide that the general powers of the federal courts are not displaced by the FW Act. See also paragraph 2147 of the Fair Work Bill 2008 Explanatory Memorandum

<sup>220</sup> FW Act; s543

# Industrial activities

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## *25.1. Introduction*

This chapter deals with industrial activities in a number of forms. Industrial activities encompass matters under both the BCII Act and 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 influential participants in the workplace relations arena, and it is important that ABC 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. FWA has an obligation under the [FW Regulations](#) to provide certain information to ABCC on a regular basis, enabling ABCC to fulfil its functions with respect to industrial activities. These matters form a discrete body of investigative work within the complex case area.

## *25.2. 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.<sup>221</sup> 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 employer's permission), or seeking office as a representative of employees.

### *25.2.1. 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:

#### *25.2.1.1. 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.

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<sup>221</sup> FW Act; s346.

#### *25.2.1.2. 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.

#### *25.2.1.3. Inducements*

Under s350, an employer, 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.

#### *25.2.1.4. 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.

#### *25.2.1.5. Coverage by particular instruments*

Under s354, a person must not discriminate against an employer due to the type of workplace instruments that cover or do not cover, or purport to cover or not cover, the employees of the employer.

#### *25.2.1.6. 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.

#### *25.2.2. Role of the ABC Inspector in stand down disputes*

In limited circumstances, employers may stand down their employee(s) without pay.<sup>222</sup> Under the [FW Act](#), ABC Inspectors may make application to FWA to formally deal with a dispute about stand down.<sup>223</sup>

ABC Inspectors may also find in the course of wages and conditions investigations that employers have stood down employees without pay for various circumstances. If the reason for the stand down is not authorised by the [FW Act](#) or by the applicable enterprise agreement or contract of employment, then the employer would not be

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<sup>222</sup> FW Act; s524

<sup>223</sup> FW Act; s526



entitled to stand down employees without pay, and the employees would be entitled to payment for the period of the unlawful “stand down”.

### *25.3. Freedom of association (FOA)*

ABC 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, ABC Inspectors are expected to consider the possibility for contravention of the FOA provisions in all investigations.

In summary, the ABCC 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.

#### *25.3.1. 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 employers, 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.

#### *25.3.2. 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”<sup>224</sup> 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.

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.<sup>225</sup> 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,<sup>226</sup> to be represented

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<sup>224</sup> FW Act; s342. Also refer Chapter 13 – Workplace rights and adverse action of this Manual.

<sup>225</sup> e.g. FW Act; ss 334 and 336.

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 13 – Workplace rights and adverse action), and by provisions relating to industrial action (refer 17.3 below).

### *25.3.3. Operational guidance*

Where an ABC Inspector encounters what they believe may constitute an FOA matter they should consult their team leader. As with other adverse action matters, there is a reversal of the onus of proof in FOA matters (refer Chapter 13 - Workplace rights and adverse action).

Under the [FW Act](#) an ABC Inspector can initiate litigation for enforcement of the FOA provisions of the FW Act (refer Chapter 22 – Enforcement and Chapter 23 – Litigation).

## *25.4. Industrial action*

### *25.4.1. Definition of industrial action under the FW Act*

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 employer of the employees (with a lockout being defined as an employer preventing the employees from performing work under their contracts of employment without terminating those contracts).

The ABC Inspector should be aware that industrial action does not include:

- action by employees that is authorised or agreed to by the employer of the employees
- action by an employer that is authorised or agreed to by, or on behalf of, employees of the employer
- 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 employer to perform other available work, whether at the

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<sup>226</sup> For a definition of industrial association, see FW Act; s12.

same or another workplace, that was safe and appropriate for the employee to perform.<sup>227</sup>

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. Employers can also engage in response action under the [FW Act](#).

#### *25.4.2. Definition of Building Industrial Action under the BCII Act*

Chapter 5, Part 1, Section 36 of the BCII Act defines Building Industrial Action as;

- (a) the performance of [building work](#) in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to [building work](#), the result of which is a restriction or limitation on, or a delay in, the performance of the work, where:
  - (i) the terms and conditions of the work are prescribed, wholly or partly, by an [industrial instrument](#) or an order of an [industrial body](#); or
  - (ii) the work is performed, or the practice is adopted, in connection with an [industrial dispute](#) ;
- (b) a ban, limitation or restriction on the performance of [building work](#), or on acceptance of or offering for [building work](#), in accordance with the terms and conditions prescribed by an [industrial instrument](#) or by an order of an [industrial body](#); or
- (c) a ban, limitation or restriction on the performance of [building work](#), or on acceptance of or offering for [building work](#), that is adopted in connection with an [industrial dispute](#) (within the meaning of subsection (4)); or
- (d) a failure or refusal by [persons](#) to attend for [building work](#) or a failure or refusal to perform any work at all by [persons](#) who attend for [building work](#);

but does not include:

- (e) action by employees that is authorised or agreed to, in advance and in writing, by the employer of the employees; or
- (f) action by an employer that is authorised or agreed to, in advance and in writing, by or on behalf of employees of the employer; or
- (g) action by an employee if:
  - (i) the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and
  - (ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe for the employee to perform.

#### *25.4.3. Definition of protected industrial action under the FW Act*

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

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<sup>227</sup> FW Act; s19

- it is action taken by employers 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.<sup>228</sup>

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).<sup>229</sup>

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 FWA orders made under ss 424-426 of the FW Act is not a civil remedy provision.

It is only where unprotected industrial action contravenes a civil remedy provision of the FW Act (and can therefore be enforced by the ABCC) that an ABC 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 FWA order, and the unlawful payment or acceptance of wages for the period of industrial action (refer 17.3.3 and 17.3.4 below).

The ABCC investigates and enforces compliance with the [FW Act](#) in relation to unlawful industrial action. The ABCC takes allegations of unlawful industrial action seriously and ABC Inspectors are expected to treat these types of investigations as operational priorities (particularly those involving contravention of FWA orders).

ABC Inspectors should remain aware that the FW Act contains provisions relating to industrial action taken by employee and employer associations as well as by individuals. These actions are largely within the jurisdiction of FWA, but they may arise as peripheral issues in ABCC investigations.

Industrial action investigations are conducted using the same principles and practices outlined in the [FWO Standard](#) and relevant chapters of the ABCC Operations Manual. In addition, certain strategies and considerations specific to IA investigations are detailed later in this chapter.

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<sup>228</sup> FW Act; ss 409-411

<sup>229</sup> FW Act; ss 409-414

## Definition of protected industrial action under the BCII Act

Protected industrial action is addressed in the BCII Act under Chapter 5, Part 3, Section 40 and it states that;

### Action involving extraneous participants

- (1) Building industrial action in relation to a proposed [building enterprise agreement](#) is not [protected industrial action](#) if:
  - (a) the action is engaged in in concert with one or more [persons](#) who are not protected [persons](#) for the action; or
  - (b) the organisers include one or more [persons](#) who are not protected [persons](#) for the action.
- (2) In this section:

***protected person*** means:

- (a) an [employee organisation](#) that is a [bargaining representative](#) for the proposed agreement; or
- (b) a member of such an [organisation](#) who is employed by the employer and who will be covered by the proposed agreement; or
- (c) an [officer](#) or employee of such an [organisation](#) acting in that capacity; or
- (d) an employee who is a [bargaining representative](#) for the proposed agreement.

#### *25.4.4. Specific contraventions of the legislation which the ABCC can enforce*

ABC 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](#).

ABC Inspectors are able to investigate alleged unlawful industrial action as prescribed in Chapter 5, Part 2 of the BCII Act. Breaches of unlawful industrial action attract a Grade A Civil penalty. For unlawful industrial action to occur, the action has to be;

- Industrial motivated;
- It is constitutionally-connected action; and
- It is not excluded action

#### *25.4.4.1. Industrial action before the nominal expiry date of an enterprise agreement or workplace determination*

Under s417 of the [FW Act](#) industrial action can not 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 an employer can lawfully organise or engage in industrial action.

In order to pursue a contravention of s417, the ABC 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 alleged wrongdoer 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.

#### *25.4.4.2. Industrial action that contravenes an FWA order*

FWA can issue orders to stop or prevent industrial action under ss 418-420. FWA can make an order of its own volition or on the application of a party to the industrial dispute (usually the employer), 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 ABC Inspector to gather sufficient evidence to prove the following:

- there is an order that was made by FWA
- the order binds the alleged wrongdoer
- the order was served on the alleged wrongdoer effectively and/or that the alleged wrongdoer is aware of the order, its terms and effect
- the alleged wrongdoer contravened the order.

The ABC Commissioner (pursuant to s72 of the BCII Act) may, by giving written notice to the General Manager of FWA, make a submission in a matter before the FWA that arises under the FW Act or the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 and involves:

- (a) a building industry participant; or
- (b) building work.

#### *25.4.4.3. Payments relating to periods of industrial action*

Sections 470-475 of the FW Act deal with the issue of payment for periods of industrial action. Section 42 of the BCII Act adopts these provisions but adds a further set of provisions such as “Industrial motivation” and “a constitutionally connection”. It also increases the penalty for a corporation to 1000 penalty units.

In general, s470 specifies that it is unlawful for an employer 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 FWA 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 an employer 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 employer 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 an employer, for the period of unprotected industrial action.

In order to establish such a contravention of s470, the ABC 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 employer made a payment in relation to the protected industrial action.

In order to establish such a contravention of s473 by an employee, the ABC Inspector must gather sufficient evidence to establish:

- there was protected industrial action
- the employee asked the employer for or accepted payment from the employer for the period of industrial action
- the actual payments made to employees
- whether any payment that was made came from the employer.

In order to establish such a contravention of s473 by an employee organisation (or its officers or members), the ABC Inspector must gather sufficient evidence to establish:

- there was protected industrial action
- the employee organisation (or its officers or members) asked the employer 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 employer.

In order to establish such a contravention of s474, the ABC 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 employer made a payment in relation to the unprotected industrial action.

In order to establish such a contravention of s475 by an employee, the ABC Inspector must gather sufficient evidence to establish:

- there was unprotected industrial action
- the employee asked the employer for or accepted payment from the employer for the period of industrial action
- the actual payments made to employees
- whether any payment that was made came from the employer.

In order to establish such a contravention of s475 by an employee organisation (or its officers or members), the ABC Inspector must gather sufficient evidence to establish:

- there was unprotected industrial action
- the employee organisation (or its officers or members) asked the employer 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 employer.

#### *25.4.4.4. 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 15 – Undue influence or pressure, duress and coercion investigations).

Chapter 5, Part 4, Section 42 of the BCII adopts these provisions and increases the penalties to not exceeding 1000 penalty units

#### *25.4.5. Other provisions*

Other civil remedy provisions related to industrial action, for which ABC 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 FWA in respect of a protected action ballot.

#### *25.4.6. 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 the ABCC. Usually, the ABCC acts on its own volition to investigate such alleged instances, after having sourced or received information from parliament, members of the public, employees, or employers. The media is monitored daily by the ABCC to identify any industrial action matters.

On occasion, an ABC Inspector in the course of their work may also become aware of industrial action that has or is likely to occur. In such cases, the ABC Inspector should advise their State Director of the matter, providing as much information as possible. The State Director will decide the appropriate action that is to be taken, including whether an ABC Inspector is required to commence an IA investigation.

#### *25.4.7. 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 the ABCC in an unlawful industrial action investigation.

Notwithstanding the opportunity to gather information and evidence at a rally or meeting, ABC Inspectors have an obligation to act fairly and openly in the execution of their duties. Accordingly, the attendance of ABC 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 ABC Inspector.

ABC 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 of the meeting organiser's behalf.

In seeking permission, ABC Inspectors should make it known to the meeting organiser they are attending in an official capacity as an ABC Inspector from the ABCC. 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, ABC 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. ABC 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. The [ABCC's Client Aggression Guide](#) provides further guidance to ABC Inspectors in regard to these considerations.

Any ABC 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 Team Leader or State Director.

#### *25.4.8. Compliance options*

If the ABC 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 ABC Inspector determines that the contravention of the civil remedy provision is inadvertent or relatively minor.

A recommendation for enforceable undertaking (including via the potential litigation summary) may be made where the ABC Inspector views that it is in the public interest for the ABCC to accept an enforceable undertaking in lieu of litigation.

The FW Act also allows that an ABC Inspector (and other parties) can seek an injunction in relation to various matters relating to industrial action, including:

- under s417(3), a ABC 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 ABC 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.

Litigation itself will be recommended by the ABC Inspector (via the potential litigation summary) where appropriate in consideration of the public interest, the characteristics of the alleged wrongdoer and the [ABCC 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 the ABCC 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 the ABCC has previously investigated allegations of unlawful industrial action at the particular workplace and/or
- the wilfulness or otherwise of any breaches of an FWA order.

For further information on letters of caution, enforceable undertakings, injunctions and litigation, refer Chapter 22 – Enforcement and Chapter 23 – Litigation.

#### *25.4.9. Where no further action is taken*

As with any ABCC 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 17.3.7 above.

Where the ABC 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.

## **25.5. Right of entry (ROE)**

### **25.5.1. Definition of right of entry**

An official (which includes an officer or an employee) of an industrial organisation who holds a valid and current right of entry permit has the right to enter a premises for purposes related to their representative role. The permit holder must provide an entry notice or exemption certificate as required by the [FW Act](#) to the occupier of premises and/or the employer.<sup>230</sup> ([Right of Entry Flowchart](#))

A permit holder is able to enter premises (including sites) during working hours in the following circumstances:

- to investigate suspected contraventions of the [FW Act](#) or a fair work instrument (s 481)
- to hold discussions with one or more (s484)
- to exercise state or territory occupational health and safety (OHS) rights (s494).

### **25.5.2. Entry for the purpose of investigating suspected contraventions**

When entering premises to investigate a contravention, all of the following requirements must be met:

- the entry holder reasonably suspects that the contravention has occurred
- the contravention relates to or affects a member of the permit holder's organisation or a (whether a member or not) whose industrial interests the organisation is entitled to represent
- the member performs work on the premises.

### **25.5.3. Entry for the purpose of holding discussions with employees**

When entering to hold discussions, the employees must be persons whose industrial interests the permit holder's organisation is entitled to represent (whether members or not) and who perform work on the premises. These discussions may only be held during meal times or other breaks.<sup>231</sup>

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<sup>230</sup> FW Act; ss 487 and 495

<sup>231</sup> FW Act; s490

#### 25.5.4. *Requirements for permit holders*

A permit holder seeking entry to investigate suspected contraventions or hold discussions with employees must provide an entry notice during working hours to the occupier of the premises and/or any affected employer. The entry notice must be given during working at least 24 hours, but no more than 14 days, before the entry. In the case where the permit holder has an exemption certificate 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.<sup>232</sup> For beaches that may occur, a [Right of Entry Incident Report form](#) is available and should be used.

A permit holder is not authorised to enter any part of premises of the employer that is used for mainly residential purposes.<sup>233</sup>

A permit holder must:

- produce the permit holder's authority documents 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)<sup>234</sup>
- comply with any reasonable request of the occupier to comply with an OHS requirement that applies to the premises<sup>235</sup>
- 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.<sup>236</sup>

#### 25.5.5. *Entry for OHS purposes*

There are some different provisions that apply in the case of right of entry for OHS purposes. A right to enter premises (or to inspect or otherwise access an employee record) is a state or territory OHS right if the right is conferred by a state or territory OHS law and either of the following applies:

- the premises to which entry is sought are occupied by a constitutional corporation, a body corporate incorporate in a territory, the Commonwealth, a Commonwealth authority
- the premises are in a located in territory
- the premises are (or are located in) or Commonwealth place
- the right relates to a requirement to be met, action taken, or activity controlled, by a constitutional corporation, a body corporate incorporated in a territory, the Commonwealth or a Commonwealth authority
- the right relates to a requirement to be met, action taken, or activity controlled, by an employee of or independent contractor providing services for a constitutional corporation, a body corporate incorporated in a territory, the Commonwealth or a Commonwealth authority
- the exercise of the right will have the direct effect on a constitutional corporation, a body corporate incorporated in a territory, the Commonwealth or a Commonwealth authority (in their capacity as an employer)

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<sup>232</sup> FW Act; s487

<sup>233</sup> FW Act; s493

<sup>234</sup> FW Act; s489

<sup>235</sup> FW Act; s491

<sup>236</sup> FW Act; s492

- the exercise of the right will have the direct effect on an employee of or independent contractor providing services for a constitutional corporation, a body corporate incorporated in a territory, the Commonwealth or a Commonwealth authority (in their capacity as an employer).

ABC Inspectors will need to consult the [FW Regulations](#) in order to determine whether a law is prescribed as a state or territory OHS law.<sup>237</sup>

The ABC Inspector should consider whether OHS reasons have been disingenuously cited in order to mask unlawful industrial action. The onus of proof lies with the party taking the action to produce evidence in support of their OHS concerns. In determining the relevance of OHS in an industrial action investigation, the available evidence should be considered with the Legal Group.

#### *25.5.6. Access to records*

A permit holder is entitled to access, and to inspect and copy, any record or document (other than a non-member record or document) that is directly relevant to the suspected contravention of the [FW Act](#) or fair work instrument.<sup>238</sup> There are also provisions for later access to a record or document, or to seek an order from FWA for access to non-member records.

Access to records may also be exercised by a permit holder who has such a right under an OHS law and has complied with the notice of entry requirements (refer 17.4.5 above).

#### *25.5.7. Prohibitions*

The [FW Act](#) sets out certain prohibitions in relation to the exercise of a permit holder's right of entry to a workplace and an occupier's or employer's conduct where such rights are exercised.<sup>239</sup>

A permit holder must not:

- intentionally hinder or obstruct any person, or otherwise act in an improper manner when exercising or seeking to exercise their rights under [FW Act](#) (s500).

In addition, any person must not:

- refuse or unduly delay entry to a permit holder entitled to enter the premises (s501)
- intentionally hinder or obstruct a permit holder who is exercising entry rights (s502)
- misrepresent themselves by intentionally or recklessly giving the impression that they are authorised to do things that are not authorised to do (s503)
- disclose or use information or a document obtained in the investigation of a suspected contravention for an unauthorised purpose (s504).

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<sup>237</sup> FW Act; s494(3)

<sup>238</sup> FW Act; s482

<sup>239</sup> FW Act; ss500-503

#### 25.5.8. *The role of the ABC Inspector*

The rights and privileges of the entry permit may be revoked by FWA under certain circumstances, particularly where the right has been misused. The [FW Act](#) provides that an application to impose conditions, suspend or revoke an entry permit can be made by an ABC Inspector or a person prescribed by the regulations.<sup>240</sup>

When investigating an alleged misuse of the right of entry, an ABC Inspector should make inquiries to:

- satisfy themselves that the person holds a current valid permit which has not been revoked, suspended or had conditions imposed (this may be done by accessing the [FWA](#))
- determine 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
- 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
- determine whether the permit holder has complied with the relevant notice and timing provisions
- check whether the permit holder has met the requirements of the relevant entry provision (e.g. if entry is for 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, determine whether the permit holder has complied with requests of the occupier/employer. The reasonableness of the request is a matter for FWA not the ABCC
- if relevant, determine whether the permit holder, employer or other person has contravened sections of the [FW Act](#)
- determine whether the permit holder has acted in accordance with any permit conditions.

#### 25.5.9. *Powers of FWA regarding right of entry*

FWA is empowered to deal with disputes and makes orders in relation to the right of entry.<sup>241</sup> In brief, FWA has power to:

- deal with disputes about the operation of ROE provisions (including whether a request is reasonable)
- 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
- make orders in relation to the provisions above.

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<sup>240</sup> FW Act; s507

<sup>241</sup> FW Act; ss 505-509

# ABCC Operations Manual

## Chapter 18

### Transfer of business

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### *25.1. Introduction*

Transfer of business under the [FW Act](#) (and transmission of business under the WR Act) is a highly complex area of investigation. This chapter provides ABC 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 condition 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. For example, some industrial instruments will provide that no redundancy pay will be due to an employee terminated if there has been a transfer or transmission of business.

It is worth noting that the [FW Act](#) (s309 (a) and (b)) states in relation to the transfer of business 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; if there is a transfer of business from one employer to another employer.

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 matter 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.

### *25.2. 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 ABC Inspector must ask is, “when did the alleged transfer take place?” Where the transfer took place after 1 July 2009, the ABC Inspector should refer to Section 18.3 of this Manual.

Where a complaint involves a transfer/transmission of business that occurs during on or near 1 July 2009, ABC Inspectors should take particular care. The Transitional 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.



### 25.2.1. *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 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 has the effect that the transfer of business provisions of Part 2-8 of the FW Bill will apply to this transaction because there is a transfer of business as described in subclause 311(1) of the FW Bill 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.

ABC 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 current workplace relations laws. 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 ABC 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 15 – Undue influence or pressure, duress and coercion investigations). ABC Inspectors are encouraged to consider these issues as early as is practicable within the investigation, and seek guidance from their Team Leader and the Legal Group.

### 25.3. Post 1 July 2009 transfer of business

#### 25.3.1. 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 are satisfied:

- an employee of an old employer is employed by the new employer within 3 months of the termination or transfer
- the employment of an employee of the old employer was terminated
- 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 (eg: 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 insourced or
- the new and old employers are associated entities.

##### 25.3.1.1. Illustrative example

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 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 – because Carbone is an associated entity of the new employer.

#### 25.3.2. Obligations of employers<sup>242</sup>

Under Commonwealth workplace relations laws, both the old and new employers are subject to certain obligations which include notifying transferring employees of the instrument that will apply in their employment with the new employer and any specific entitlements in relation to continuity of entitlements. If the new employer is not obliged to provide or recognise the accrued entitlements, the old employer may be under an obligation to pay the affected employees their accrued entitlements (such as notice periods, annual leave and/or redundancy). ABC Inspectors must consider the terms of any applicable industrial instrument as well as the legislation when a transfer of business occurs.<sup>243</sup>

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<sup>242</sup> FW Act; ss 91 and 122

<sup>243</sup> For employers' requirements regarding employment records of transferring employees, see Chapter 7 – Wages and conditions investigations and FW Regulations; Chapter 3, Part 3-6, Division 3, Reg 3.41.

### *25.3.3. Broader definition of transfer of business*

From 1 July 2009, transfer of business matters will potentially arise in a wider range of investigation 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 the FW Act there are no civil remedy provisions for ABC 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).

### *25.3.4. Powers of FWA*

FWA is permitted to make certain orders including orders relating to:

- instruments covering the new employer and transferring employees<sup>244</sup>
- instruments covering the new employer and non-transferring employees<sup>245</sup>
- variation of transferrable instruments<sup>246</sup>

In relation to instruments covering a new employer and transferring employees, FWA can only make an order if the application for the order is made by the following:

- the new or likely new employer
- a transferring employee or the likely transferring employee
- if the application relates to an enterprise agreement – an employee organisation that is or is likely to be covered by the agreement.

The ABCC and ABC Inspectors are unable to make applications in respect of these orders.

### *25.4. Pre 1 July 2009 transmission of business*

Having determined the transmission event occurred prior to 1 July 2009, the ABC Inspector must apply those workplace laws pertaining to the WR Act.

#### *25.4.1. 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, transferee 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.

#### *25.4.2. 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.<sup>247</sup> 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

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<sup>244</sup> FW Act; s318

<sup>245</sup> FW Act; s319

<sup>246</sup> FW Act; s320

<sup>247</sup> Also see Transitional Act; Schedule 11, Part 2 regarding employer obligations for transmissions of business that occur before 1 July 2009.

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. ABC Inspectors should consider the applicable industrial instrument and the terms of the legislation in determining the obligations of employers.

#### *25.4.3. 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 recently in the decision of *Health Services Union of Australia & Anor v Gribbles Radiology Pty Ltd*.

##### *25.4.3.1. 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.

##### *25.4.3.2. Government*

Special considerations apply when one government agency succeeds to the activities of another.

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.

#### 25.5. *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 ABC Inspectors seek advice from the Legal Group.

#### 25.6. *Guidance points*

The courts continue to rely on distinctions between government and non-government employers and that there are 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"<sup>248</sup> 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.<sup>249</sup>

Further advice as to characterisation of specific investigations should be sought from your Team Leader and/or State Director.

## ABCC Operations Manual

### Chapter 19

## Termination and contractors (includes Sham Contracting)

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<sup>248</sup> *PP Consultants Pty Limited v Finance Sector Union of Australia* (2000) 176 ALR 205

<sup>249</sup> *Stellar Call Centres Pty Ltd v CPSU & Another* [2001] FCA 106 (21 February 2001)

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## *Introduction*

This chapter provides ABC 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 below.

## *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.

For relevant provisions of the [FW Act](#) relating to unfair dismissal, see 19.6 below. Similarly, for provisions relating to unlawful termination and adverse action, see 19.7 below.

The ABCC 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 7 – Wages and conditions investigations).

## *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 FWA. The employee must lodge their application with FWA within 14 days of the date of termination. In the ordinary course of its work the **ABCC itself does not investigate unfair dismissal**, and an ABC Inspector is unable to make an application to FWA or the courts regarding unfair dismissal (except under s 405 where previous orders made in respect of unfair dismissal have been contravened).

However, ABC Inspectors are well placed to assist dismissed employees by providing impartial, objective and timely information about the remedies available to them through FWA.

### *25.1.1. 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 FWA 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).

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, the FWA 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 the FWA considers relevant.

### *25.1.2. 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.

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).<sup>250</sup>

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<sup>250</sup> FW Act; s 23



### *25.1.3. 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 (refer 19.6.2 above).

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.

### *25.1.4. Applications for remedy for an alleged unfair dismissal*

As noted above, the ABCC does not investigate complaints of alleged unfair dismissal. However, the FW Act provides that a person may apply to the FWA for relief in respect of an unfair dismissal.

The application for an unfair dismissal remedy must be lodged with FWA **within 14 days** after the day the dismissal took effect. Applications may be lodged after this time only if the FWA is satisfied there are exceptional circumstances. **When providing information about unfair dismissal remedies, ABC Inspectors should advise the person of the 14 day time limit.**

An application fee is payable upon lodgement of the application. The fee may be waived for grounds of serious hardship by FWA 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.

### *25.1.5. FWA procedures regarding unfair dismissal*

When the unfair dismissal application is received, before assessing the merits of the case, FWA 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, FWA will conduct a conference (s592) or (if appropriate) a hearing (s593). Representation by lawyers and paid agents is by permission of FWA, and then subject to certain terms (s596).

### *25.1.6. Remedies*

If the FWA find that the dismissal was unfair, FWA 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 FWA can only award compensation if it is satisfied it is appropriate.

#### *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 the CES (later Centrelink) 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.

### *25.1.7. 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<sup>251</sup> requiring an employer to notify Centrelink of certain terminations, namely where the terminations relate to 15 or more employees.<sup>252</sup> The requirement of an employer to provide notice of termination or pay in lieu to national system employees<sup>253</sup> are also extended to have application to all employees<sup>254</sup>.

In addition, certain provisions relating to the termination of employees are encompassed under Part 3-1 of the [FW Act](#) (refer Chapter 13 – 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.<sup>255</sup>

#### **25.1.8.** *Eligibility for unlawful termination applications*

Any employee may make an application for relief if they have been dismissed on certain grounds.<sup>256</sup> These applications are to be made to FWA by either the employee or their industrial association.<sup>257</sup>

However, certain employees are excluded<sup>258</sup> from lodging claims in relation to contraventions of the provisions regarding notification to Centrelink.

Entitlements for notice or payment in lieu thereof are provided for by the National Employment Standards (refer Chapter 12 – National employment framework), and could be pursued in the same means as other employment entitlements.

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<sup>251</sup> FW Act; s785

<sup>252</sup> Similar provisions in relation to notifying Centrelink of certain dismissals concerning national system employees are also found in s 530 of the FW Act.

<sup>253</sup> FW Act; s117

<sup>254</sup> FW Act; s759

<sup>255</sup> FW Act; s723

<sup>256</sup> FW Act; s772

<sup>257</sup> FW Act; s773

<sup>258</sup> FW Act; s789

### *25.1.9. Processes for seeking remedies for unlawful termination*

Several options are available under the [FW Act](#) to seek remedy for an alleged unlawful termination.

#### *25.1.9.1. Making an application for remedy to FWA*

A person may apply to FWA for relief in respect of a termination that is allegedly unlawful.

The application must be lodged with FWA **within 60 days** after the day the termination took effect. Applications may be lodged after this time only if the FWA is satisfied there are exceptional circumstances. **When providing information about unlawful termination remedies, ABC Inspectors should advise the person of the 60 day time limit.**

An application fee is payable upon lodgement of the application. The fee may be waived for grounds of serious hardship by the FWA 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.

#### *25.1.9.2. FWA procedures regarding unlawful termination*

If an application for an unlawful termination is made, the FWA will conduct a conference in private.<sup>259</sup> If FWA 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.

#### *25.1.9.3. General protection from adverse actions*

In addition to the provisions regarding unlawful termination (detailed in 19.4.1 above), the [FW Act](#) provides certain workplace protections to specified employees, including protection from adverse action<sup>260</sup> taken in relation to certain prohibited reasons (refer Chapter 13 – Workplace rights and adverse action and Chapter 14 - 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.<sup>261</sup>

The remedy for adverse action under the [FW Act](#) is either to FWA (to deal with the dispute) or to the courts (for an order). As for unfair dismissal, any application to FWA regarding an adverse action involving dismissal must be made within 60 days of that dismissal, and accompanied by an application fee.

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<sup>259</sup> FW Act; s776

<sup>260</sup> FW Act; s342

<sup>261</sup> FW Act; s723

It remains open that a complaint might also be made to the ABCC in regard to these matters (see 19.4.5 below).

#### *25.1.10. Complaints to the ABCC alleging unlawful termination or adverse action*

Persons whose employment was terminated on grounds that may be unlawful or which constitutes adverse action under the FW Act are able to make a complaint to the ABCC in respect of their termination.

Under the FW Act, an ABC 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<sup>262</sup> or where employment was terminated without notification being provided to Centrelink.<sup>263</sup> In relation to the general protections, an ABC 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 the ABCC to investigate such complaints, provided that the complainant is not seeking remedy through the FWA, court or other tribunal of competent jurisdiction (refer Chapter 4 – Investigation overview, section 4.5.2 - Existing court or Fair Work Australia action).

##### *25.1.10.1. Considerations for the ABC Inspector*

Where the complaint is alleged unlawful termination or adverse action involving dismissal, the complainant should be referred to FWA 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 the FWA outside of this time frame. ABC Inspectors can not provide advice as to whether an “out of time” application to FWA will be accepted.

In cases of alleged discrimination, remedy through one of several other agencies also may be available (refer Chapter 14 – Discrimination).

However, if the complaint is within the ABCC’s jurisdiction, and the complainant is not pursuing remedy through the FWA, courts or other tribunal of competent jurisdiction, then the ABCC may investigate the complaint.

#### *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 or tax liability.

Part 3-1, Division 2 of the [FW Act](#)<sup>264</sup> provides that it is a contravention to:

- misrepresent an employment relationship or a proposed employment relationship as an independent contracting arrangement

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<sup>262</sup> FW Act; s772

<sup>263</sup> FW Act; s785

<sup>264</sup> 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.

- 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.

ABC Inspectors can seek the imposition of penalties for contraventions of the [FW Act](#) in relation to sham contracts. ABC 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 22 – Enforcement, section 22.7 - Injunctions).

#### *25.1.11. Investigating alleged sham contracts*

When investigating allegations of sham contracting, ABC 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 (refer Chapter 7 – Wages and conditions investigations, section 7.4 – Confirming the employment or contractor status). 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 alleged wrongdoer
- witness statements from employees
- invoices issued by the complainant(s)
- documents detailing payments made to the complainant(s) by the alleged wrongdoer
- contracts entered into between the parties
- documents detailing payment arrangements between the parties
- ABN details for the complainant(s)
- job advertisements
- directions or instructions on work or performance
- legal advices and activities relevant to the defence.

The following table can be used as a guide to assessing whether or not a person is a contractor or an employee. However, please be aware that the test is only an **indicative test** and should not be relied upon as a conclusive determination of the status of terms of engagement (employee or sub-contractor).

<b>Summary of Common Law Test *</b>		
<b>Factor</b>	<b>Indicative of Employment</b>	<b>Indicative of Independent Contracting</b>
Do I have control over the way I perform a task?	No	Yes

Summary of Common Law Test *		
Do I supply/maintain my tools or equipment?	No	Yes
Do I work standard hours?	Yes	No
Am I paid according to task completion, rather than receiving wages based on time worked?	No	Yes
Do I incur any loss or receive any profit from the job?	No	Yes
Do I accept responsibility for any defective or remedial work which was my doing?	No	Yes
Am I free to work for others at the same time?	No	Yes
Do I accept that work lasts for the term of each particular task or contract?	No	Yes
Do I have the right to employ or subcontract any aspect of my work to another person?	No	Yes
Do I have the right to employ an apprentice or trainee in the execution of contracts?	No	Yes
Do I understand the arrangement between us as a contract for services?	No	Yes
Is tax deducted by the hirer from my pay?	Yes	No
Do I provide my own public liability and sickness and accident insurance cover?	No	Yes
Do I receive paid holidays or sick leave?	Yes	No
Do I render tax invoices for payment?	No	Yes
Do I file GST returns?	No	Yes

\* The outcome of this test is not determined by adding the number of factors and no one factor will be conclusive. If in doubt, it is strongly recommended that you seek independent legal advice.

### **25.1.12.** *Statutory defence to alleged sham contracting*

A statutory defence exists in relation to the [FW Act](#) (misrepresenting an actual or proposed employment relationship).<sup>265</sup> 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).<sup>266</sup>

<sup>265</sup> FW Act; s 357(1)

While it is the alleged wrongdoer's responsibility to establish a defence, ABC Inspectors should bear this statutory defence in mind before recommending litigation in respect of an alleged contravention of the FW Act.<sup>267</sup> Accordingly, the ABC 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 possible, ABC Inspectors should interview company directors, managers and/or 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.

### *Prohibited conduct regarding contractors*

The role of the ABCC in regard to compliance under the IC Act<sup>268</sup> 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, the ABCC may take action seeking that a penalty be imposed by the court.

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<sup>266</sup> FW Act; s 357(2)

<sup>267</sup> FW Act; s 357

<sup>268</sup> IC Act; ss 33-34



The ABCC also investigates freedom of association issues relating to independent contractors (refer Chapter 17 – Industrial activities).

## **Part D: Evidence, enforcement and litigation**

### **ABCC Operations Manual**

#### **Chapter 20**

## **Evidence**

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### 25.1. *Introduction*

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 ABCC matters, evidence can be any records, statements, testimony or other material which is relevant to prove or disprove an alleged contravention of Commonwealth workplace laws.

The nature and quality of the evidence gathered by an ABC Inspector during an investigation plays an important role in determining whether or not the matter can proceed to ABCC litigation action. Further, the evidence gathered during an investigation will also inform the ABC 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 chapter will assist ABC 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 chapter outlines the different types of evidence that ABC Inspectors may deal with and explains the relevant burden and standards of proof in ABCC litigation matters.

The chapter also sets out best practice procedures for ABC Inspectors in obtaining, handling and storing evidence. This chapter should be read in conjunction with Chapter 22 – Enforcement and Chapter 23 - Litigation.

### 25.2. *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 ABC 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 ABC 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.

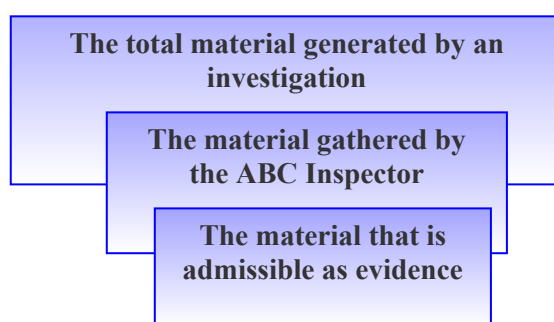
ABC Inspectors should aim to gather material that will later be admissible as evidence if the matter proceeds to litigation. In accordance with the [FWO Standard](#), ABC Inspectors are advised to gather all legally obtainable material in the first instance. Subsequently, ABC Inspectors can utilise the 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. ABC 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<sup>269</sup>



#### 25.2.1. *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 the ABCC and the alleged wrongdoer (e.g. the alleged wrongdoer may not dispute that the complainant was employed during a certain period, or performed certain duties).

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

#### 25.2.2. *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

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<sup>269</sup> ACPO; Centrex; National Centre for Policing Excellence (UK), *Practice Advice on Core Investigative Doctrine*, 2005. Figure 2 (p45)

not excluded on the ground that it is irrelevant (it may be very relevant), but because it is considered to be untrustworthy.

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.

#### *25.2.2.1. 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.

ABC 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 ABC Inspector.

#### *25.2.3. Exclusionary rule - opinion evidence*

The opinion rule provides that a witness' 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, ABC Inspectors may be considered experts on certain aspects of Commonwealth workplace relations law and compliance.

### *25.3. Types of evidence*

#### *25.3.1. 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 ABCC 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 ABC 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<sup>270</sup>, the ABCC 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.

#### *25.3.2. 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.

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<sup>270</sup> Commonwealth Attorney General's Department – [Legal Services Directions 2005](#)

### 25.3.3. *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.

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 ABC 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 ABC Inspectors should not limit the investigation by focusing only on this type of material.

### 25.3.4. *Testimonial evidence*

Testimony usually refers to the evidence given by a person who appears before the court as a witness. In ABCC 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 ABC Inspectors in the course of an investigation are important as they will ordinarily form the basis of the affidavit evidence prepared for court.

### 25.3.5. *Physical evidence*

Physical evidence is any tangible item which tends to prove or disprove a fact in issue. It is unlikely an ABC Inspector would be required to collect physical evidence in the course of a normal investigation, but ABC 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.

#### 25.4. *The evidential burden and standard of proof*

As part of the ABCC's role as a regulator, the ABCC initiates litigation (where appropriate) in relation to non-compliance with Commonwealth workplace laws. As it is the ABCC who makes the allegation, it is the ABCC 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 the ABCC 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 ABC Inspector that bears the burden of supplying sufficient evidence to the Legal Group to establish a case against the alleged wrongdoer.

The exceptions to this general proposition arise in matters of adverse action and discrimination. In both of these instances, once the ABC Inspector has established, on balance, certain aspects of the contravention the onus shifts to the alleged wrongdoer to establish that the action did not occur for the prohibited reason. For more information on these matters, refer Chapter 13 – Workplace rights and adverse action, Chapter 14 – Discrimination and Chapter 17 – Industrial activities.

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

#### 25.5. *Obtaining evidence*

It may be difficult in the early stages of an investigation for an ABC 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, ABC Inspectors should gather all legally obtainable,<sup>271</sup> potentially relevant material in the first instance, even where there is doubt as to its value or admissibility. ABC Inspectors may subsequently utilise the investigative and evidential evaluation techniques (discussed in Chapter 6 – Full investigations, Chapter 22 – Enforcement and Chapter 23 - Litigation) 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 ABC Inspectors to backtrack should litigation become necessary.

To facilitate the efficient collection of material, ABC 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, alleged wrongdoers, third parties, government agencies, the work premises, and employer and non-employer 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 20.8 below)

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<sup>271</sup> Refer 20.5.1 of this Manual (below) for further information.



- critically consider the material obtained to determine if it reveals further lines of inquiry.

#### *25.5.1. Limitations to the power to collect evidence under the FW Act*

ABC 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:

- Under the FW Act, ABC Inspectors do not have coercive investigatory powers. This means that while ABC Inspectors have the power to interview any person,<sup>272</sup> the person being interviewed is not required to answer questions.
- ABC Inspectors can only enter premises “without force” (s 708(1) of the FW Act). This means that ABC Inspectors can be refused entry. To enter when permission has been refused can be considered entry with force. Similarly, if an ABC Inspector is asked to leave, it is inconsistent with their powers to remain on the premises.

ABC 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 ABCC litigation action. This would not only jeopardise the case, but would also breach the ABCC’s model litigant obligations<sup>273</sup>, and may render the ABC Inspector personally liable to legal action.

#### *25.5.2. Limitations to the power to collect evidence under the BCII Act*

ABC Inspectors should also remain conscious of the limits of their legal power to obtain material under the [BCII Act](#). Whilst the powers prescribed in the FW Act are similar to that prescribed in the BCII Act, nevertheless there are a number of differences. Of particular note are the facts that:

- The BCII Act does not provide a civil penalty for failing to comply with a Notice to Produce, either under [s59\(5\)\(e\)](#) or [s59\(6\)](#).
- The BCII Act does provide a Grade A civil penalty for anybody that refuses or unduly delays an ABC Inspector’s right to enter premises (Refer s59(14) of the BCII Act).
- ABC Inspectors can only enter premises “without force” pursuant to the provisions of sections 59(3) and 59(9) of the BCII Act. This means that ABC Inspectors can be refused entry notwithstanding that this may be an offence under s59(14) of the BCII Act. To enter when permission has been refused can be considered entry with force. Similarly, if an ABC Inspector is asked to leave, it is inconsistent with their powers to remain on the premises.

As with the FW Act, ABC Inspectors must ensure that they gather evidence in accordance with the provisions of the [BCII Act](#). Evidence obtained in contravention of the BCII Act may render that evidence as inadmissible in any ABCC litigation action. This would not only jeopardise the case, but would also breach the ABCC’s model litigant obligations<sup>274</sup>, and may render the ABC Inspector personally liable to legal action.

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<sup>272</sup> FW Act; s709(b)

<sup>273</sup> Commonwealth Attorney General’s Department – [Legal Services Directions 2005](#)

<sup>274</sup> Commonwealth Attorney General’s Department – [Legal Services Directions 2005](#)

Note: Under the BCII Act, the ABC Commissioner can exercise coercive investigatory powers under s52 of that Act. This is a power available to the ABC Commissioner and not ABC Inspectors. For the ABC Commissioner to invoke these powers, it is ABCC policy that the ABC Inspector provides evidence to the ABC Commissioner that all avenues of enquiry have been exhausted and that the invoking of these powers is an exercise of last resort.

#### *25.5.3. Non Compliance with a s.59(5)(e) and/or a s.59(6) Notice*

A zero tolerance approach is to be adopted within Field Operations to non compliance with a s59(6) 'Notice to Produce'. The new procedure is as follows:

1. Serve [s.59\(5\)\(e\) Requirement to Produce Documents](#) on premises as per the BCII Act.
2. Where s.59(5)(e) is not complied with:
  - a. document the failure to comply in the [Written Record](#);
  - b. subject to the Team Leader approval, serve a [s.59\(6\) Notice Requiring Production of Documents](#) on premises as per the BCII Act. This Notice allows 14 days for compliance.
3. Where s.59(6) is not complied with - on **DAY 15**:
  - a. Document the failure to comply in the [Written Record](#);
  - b. Bring matter to the attention of the relevant State Director and Executive Director; and
  - c. Subject to State Director Approval, issue a s.59(6) [Non Compliance letter](#);
4. Where cooperation is still not forthcoming the relevant Executive Director (or Group Manager) will make a personal intervention.
5. Where cooperation is still not forthcoming, a recommendation will be made about the use of s.52 powers and/or referral to the Commonwealth Director of Public Prosecutions (CDPP) about a breach of s.149.1 of the *Criminal Code 1995* - Obstruction of a Commonwealth Officer.
6. The Executive Directors Field Operations and Legal should be consulted prior to finalisation of the brief of evidence and referral to Legal. A [specific Brief of Evidence template](#) has been created for this purpose.

#### *25.5.4. Best practice in obtaining evidence*

The ABCC strives to comply with best practice in obtaining evidence. ABC Inspectors must ensure that:

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

When using a formal request such as a notice to produce (refer 20.6 below), an ABC Inspector should:

- keep accurate records (in the form of file notes) providing the rationale behind the issuing of the formal request
- use the ABCC'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 team leader or manager prior to recommending enforcement action for failure to comply with a notice to produce.

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

- ensure that ABCC 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.

### *25.6. Obtaining documentary evidence*

Best practice means that the ABC Inspector should obtain original documents where required, although in most investigations 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.

In obtaining records or documents, ABC Inspectors have the power to require production of original records or documents<sup>275</sup> and to keep such records or documents for such period as is necessary,<sup>276</sup> but they have no legal authority to seize such documents.

As noted above, ABC Inspectors should consider whether evidence can be obtained by informal methods. In particular, ABC Inspectors are empowered to require production of a record or document whilst on employer premises<sup>277</sup>. It is ABCC policy that wherever possible this requirement be reduced to writing for evidentiary purposes.

Contravention of this requirement does not render the alleged wrongdoer liable to either civil penalty or penalty infringement notice, and as such this requirement can be viewed as a "first step" in the process of obtaining evidentiary material (refer 20.6.3 below). Where informal methods have failed or are not appropriate, ABC Inspectors have a formal (enforceable) mechanism for requiring the production of records or documents, namely the notice to produce.<sup>278</sup>

#### *25.6.1. Notice to produce under the FW Act*

A notice to produce (NTP) is a formal request authorised by s712 of the [FW Act](#). This section enables ABC Inspectors to require any person, not just the employer, to produce to them any record or document relevant to determining if there has been a contravention of Commonwealth workplace laws.

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<sup>275</sup> FW Act; s712

<sup>276</sup> FW Act; s714

<sup>277</sup> FW Act; s709(d)

<sup>278</sup> Prior to 1 July 2009, there was provision for Workplace Inspectors to use the Workplace Relations Regulations to obtain records via a "request for records." These provisions are no longer in effect for ABC Inspectors under the FW Act and FW Regulations, and can not be used from 1 July 2009.

The range of records or documents obtainable using an NTP is broad.<sup>279</sup> Documents and records obtained via an NTP can be retained by the ABC Inspector for such period as is necessary.<sup>280</sup>

#### *25.6.2. Notice to produce under the BCII Act*

The BCII Act has two provisions available to ABC Inspectors that require building industry participants to produce documents. Section 59(5)(e) does not require that the requirement be made in writing but does impose a requirement that the ABC Inspector has to be on the premises when making the requirement. There is no legislative time frame provided to produce the documents, rather the legislation only requires that it be produced “within a specified period”.

The issuing of a [Section 59\(6\) of the BCII Act Requirement Notice](#) is conditional on the failure to comply with a requirement issued under subsection 59(5)(e) of that Act. This Requirement Notice must be in writing and must be complied with within a specified period not less than 14 days. This requirement does not have to be served whilst on premises.

Neither of these two sections has a civil penalty attached for failure to comply with the requirement.

#### *25.6.3. Records or documents that can be obtained using a FW Act notice to produce and a BCII Act Requirement to Produce*

An NTP can legally only be issued for one or more of the following compliance purposes:

- determining whether the [FW Act](#) or the BCII Act is being, or has been, complied with
- determining whether 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 ABC 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 regulations that confers functions or powers on ABC Inspectors
- the purposes of a provision of another Act that confers functions or powers on ABC Inspectors.

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).<sup>281</sup> Where the ABC Inspector is investigating 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 investigate compliance with the FW Act, FW Regulations or the BCII

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<sup>279</sup> FW Act; s712

<sup>280</sup> FW Act; s714

<sup>281</sup> The guiding case law is *Thorson v Pine* [2004] FCA 1320; 139 FCR 527.

Act, the NTP should specify the relevant part of the FW Act, FW Regulations or BCII Act being investigated.

For example, if the investigation relates to alleged sham contracting, the NTP should seek “records and documents relevant to determining whether Part 3-1 of the *Fair Work Act 2009* is being or has been observed.” In general, it is not necessary to specify the individual sections of the FW Act. However, an NTP must, on its face, identify the specific purpose for which the NTP is issued.

Where a person is asked to produce documents that are kept electronically, the information is to be provided in a form that is capable of being understood by the ABC Inspector.<sup>282</sup>

#### *25.6.4. Using the requirement and notice to produce provisions*

There are different provisions for obtaining documents and records available depending upon the section of the FW Act under which the records or documents are being requested. In order to ensure that the requirement is properly expressed and/or the NTP is validly issued and served, it is critical that ABC Inspectors understand these provisions.

Using the requirement under s709(d) FW Act (an “on-premises” requirement) or S59(5)(e) BCII Act is appropriate when the ABC Inspector is on a premises or place of business. The legislation permits a requirement to produce records or documents under s709(d) FW Act or s59(5)(e) BCII Act to be verbal. The ABC Inspector should specify that they require the person having custody of, or access to, a relevant record or document, to produce the record or document to the ABC Inspector within a period specified by the ABC Inspector. The time period for production of the records or documents is either while the ABC Inspector is on the premises, or within a specified period.<sup>283</sup>

Accordingly, this requirement would be of particular benefit where a return visit to the premises is logistically difficult (such as in remote locations), in circumstances where the ABC Inspector believes urgent access to the records or documents is required (such as high profile/significant investigations), or where there are concerns that records or documents may be destroyed if not obtained while on the premises. The ABC Inspector should make notes detailing the records or documents that were sought under s709(d) FW Act or s59(5)(e) BCII Act, as well as the documents or records that were received. The ABC Inspector should also complete and issue a specific [evidence receipt](#) for the records or documents received under the s709(d) FW Act or S59(5)(e) BCII Act requirement provisions.

An NTP under s712 (an “off-premises” notice or NTP) should be used when the ABC Inspector is not on the premises or place of business. This NTP requires production of the records or documents to the ABC Inspector within a specified period (which is defined as being of at least 14 days).<sup>284</sup>

A s59(6) Requirement to Produce can only be issued after there has been a failure to comply with the S59(5)(e) Requirement to Produce. There are no penalty provisions

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<sup>282</sup> Refer s25A of the *Acts Interpretation Act 1901* (Cth).

<sup>283</sup> This “specified period” (if production while on the premises is not appropriate) is not defined in s709(d), but best practice indicates that an NTP under s712 (providing at least 14 days) would be used where production while on the premises was not required.

<sup>284</sup> For the reckoning of time, refer s36 of the *Acts Interpretation Act 1901* (Cth).

for non compliance of either a s59(5)(e) or a s59(6) BCII Act Requirement to Produce.

An important consideration for the ABC Inspector in choosing the appropriate provision is that it is only failure to comply with NTPs under s712 of the [FW Act](#) that attracts a civil remedy (refer 20.6.8 below). ABC Inspectors should exercise their judgement and serve the relevant NTP as appropriate to the investigation.

For example, if the alleged contravention is minor and the employer is assisting the investigation, it is reasonable to assume that referral of the matter to litigation is unlikely (in the first instance) and the ABC Inspector may use the requirement under s709(d) of the FW Act to obtain records while on the premises. However, if the employer is unhelpful, or it is reasonable to assume the full records and documents sought will not be produced, the ABC Inspector should serve the NTP under s712.

Regardless of which provision has been used, the ABC Inspector has the power to inspect, and make copies of, the record or document. The ABC Inspector can also keep the record or document for such period as is necessary, subject to the provisions of s714 of the [FW Act](#) or s59(7)(b) of the BCII Act.

#### *25.6.5. When to serve a notice to produce*

A notice to produce should be issued as soon as it becomes apparent that the ABC Inspector will need to request certain records or documents by formal 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 employer (such as an accountant), or where the required records or documents are not limited to records required to be kept under the [FW Regulations](#). This power is broad, but ABC Inspectors must ensure that the records or documents are requested only for the purposes permitted under the [FW Act](#) or the BCII Act

When completing the NTP, ABC Inspectors must ensure the person named in the NTP is the appropriate person. Where the employer is a company, the NTP should be addressed to to “The Proper Officer”. Further, ABC Inspectors should clearly identify the records or documents required and specifically state what they are seeking to inspect.

#### *25.6.6. Service of a notice to produce*

The FW Act (s712) 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.<sup>285</sup> With respect to the service of a [s59\(6\) BCII Act Requirement to Produce](#), the provision states that the requirement must be in writing and must be served on the person. It is silent on how that service may be affected.

Service of a s712 Notice in person is authorised under the [FW Act](#) If the ABC Inspector elects to serve in person, the following issues should be taken into consideration:

- personal service can be slower and less practical for ABC Inspectors; and

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<sup>285</sup> Refer *Acts Interpretation Act 1901* (Cth), s28A regarding service in person or by post.

- if the business entity is in a remote location, personal service can be difficult to effect.

However, personal service ensures that the ABC Inspector has some certainty as to who within the employer organisation was served, and when service was effected. Where personal service by the ABC Inspector is impractical, a process server may be utilised to effect “personal” service by the ABCC (in this case, ABC Inspectors must ensure to obtain a receipt confirming service from the process server).

The FW Act allows an off-premises NTP to be served by fax. Service by fax is fast and efficient. If the ABC Inspector elects to serve an NTP by fax, the ABC Inspector must retain a copy of fax transmission report. ABC Inspectors should closely monitor NTPs served by fax. Where the NTP has been served by fax, and the ABC Inspector has requested acknowledgement of receipt in writing; and the person named in the NTP has neither acknowledged receipt nor complied within 7 days from the service date; the ABC Inspector should immediately consider the additional step of serving the NTP in person.

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 ABC Inspector. Although sending the item by pre-paid post is acceptable for simple service,<sup>286</sup> using the best practice method detailed above provides the ABC 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 ABC Inspector in considering the action to be taken if the records or documents sought in the NTP are not provided.

#### 25.6.7. *Guidelines for service on entities*

The FW Act and the BCII Act authorises ABC Inspectors either ABC Inspectors as duly appointed as FW Inspectors or ABC Inspectors respectively or to serve a s712 FW Act NTP or a s59(6) Requirement to Produce notice on any person who may hold records or documents relevant to compliance purposes (refer 20.6.1). ABC Inspectors must ensure that the person (which may include a corporation) named in the NTP or the Requirement to Produce notice:

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

In addition, the following service guidelines apply:

Type of entity	Manner of service
Company	- Served personally; or by fax, or by post (in accordance with s209X of the <i>Corporations Act 2001</i> (Cth)) to the registered company address.
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 post.

<sup>286</sup> *Acts Interpretation Act 1901* (Cth), s28A.

Sole trader	- Served personally to the person named in the notice, being the sole trader; or by fax to that person, or by post.
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When the employer is a company and the ABC Inspector intends to serve the company by leaving a copy of it at the company's registered address, the ABC Inspector must ask the person served:

**“Are you able to accept this document on behalf of the company?”**

**If yes, also ask: “What position do you hold within the company?”**

ABC Inspectors should then make a contemporaneous note of the responses given to these questions.

When serving a NTP, the ABC Inspector should advise (either verbally or in writing) the person served that a failure to comply with the NTP without reasonable excuse may result in civil proceedings.

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

- the time and date of service
- the method of service
- the person served
- the location of the service
- who effected the service
- where relevant, the names of any witnesses to the service

This record should be appropriately signed and dated by the ABC Inspector to ensure the integrity and admissibility of any evidence obtained through the NTP.

*25.6.8. Where an extension of time is sought*

**Under no circumstances** is it appropriate to grant an extension of time for an NTP, and ABC 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 ABC Inspector should consider issuing a new NTP, and rely upon their discretionary powers not to enforce the original NTP.

With regard to s59(6) Requirement to Produce notices under the BCII Act, as there are no civil penalty provisions for failing to comply and therefore not enforceable, ABC Inspectors should seek the advice of their Team Leader in determining whether or not an extension can be approved.

*25.6.9. Penalties for non-compliance with a requirement or notice to produce*

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

Where a requirement under s709(d) of the FW Act is not complied with, there is no specified remedy available under the FW Act. Accordingly, in such cases, the ABC Inspector should look to issue an NTP under s712 of the FW Act.



Where an NTP issued under s712 of the FW Act (either issued as by itself or following a requirement under s709(d)) is not complied with, there is a civil remedy available under s712(3) of the FW Act. The maximum penalty for non-compliance with an NTP issued under s712 of the FW Act is 60 penalty units for an individual and 300 penalty units for a body corporate (currently \$6,600 for an individual and \$33,000 for a body corporate respectively).

If the ABC Inspector (in consultation with their team leader) believes that seeking a penalty for failure to comply with an NTP issued under s712 of the FW Act is appropriate, then the matter should be progressed for litigation, as detailed in Chapter 22 – Enforcement and Chapter 23 - Litigation.

### *25.7. Obtaining testimonial evidence*

The majority of witness testimony in ABCC litigations is provided by affidavit. An affidavit is a written statement containing the witness' 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' knowledge (usually a solicitor or Justice of the Peace).

Affidavits are normally only prepared by ABC Inspectors in conjunction with the Legal Group once the matter proceeds to litigation. If an ABC Inspector is required to prepare an affidavit for a court matter they should consult with the Legal Group.

Witness testimony gathered by the ABC 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 ABC 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' 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.

#### *25.7.1. Covert Recording*

The use of electronic recording equipment, including video equipment, which is concealed will be allowable only in exceptional circumstances, in accordance with legislative constraints, and then only with the approval of the Commissioner. The

exception to this is where an investigator is in a threatening situation where the possibility of assault is likely.

The Commissioner may authorise a covert recording in exceptional circumstances such as where an investigator is subject to corrupt behaviour involving a bribe or similar conduct. A decision to proceed with a covert recording would only be made after obtaining advice and in consultation with a Law Enforcement Agency. Recordings made by way of a covert recording device may constitute a breach of State/Territory legislation.

#### 25.7.2. *Taking witness statements*

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

In identifying and gathering evidence, the ABC 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 ABC 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. Witness interviewing including recording of the interview is dealt with in Chapter 21 – Interviews.

Where a witness requires an interpreter, the ABC Inspector should arrange for a government approved and accredited interpreter through the Translating and Interpreting Service (TIS). Further information can be found in Chapter 10 – Procedural matters in investigations.

ABC 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 ABC Inspector based on the individual's behaviour. For example, silence or a lack of eye contact in some cultures may denote guilt or something to hide, while in other cultures this behaviour denotes respect.

Witnesses who are considered **vulnerable** as defined in the [ABCC Litigation Policy](#) should be offered the opportunity to have a support person or interview friend present when being interviewed and signing their witness statement (see Chapter 21 –Interviews).

In some circumstances vulnerable persons may be incapable of providing a reliable and accurate account of the incident under investigation. ABC 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 ABC 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 ABC 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 ABC Inspectors take these measures as they are in the best interest of both the ABCC and the witness.

An ABC 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, ABC Inspectors should also ask witnesses not to discuss their statement or evidence with other potential witnesses such as co-workers.

#### *25.7.3. Form of witness statements*

When drafting a witness statement, ABC 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.

#### *25.7.4. 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 20.2.2.1 above)
- avoid opinion evidence unless the witness is a qualified expert (see 20.2.3 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 ABC Inspector should consult their team leader or the Legal Group.

#### *25.7.5. 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 ABC Inspector. The internal management of witness statements differs depending upon the type of matter under investigation.

##### *25.7.5.1. Witness statements in wages and conditions investigations*

In wages and conditions investigations, the statement will be taken and signed by the witness at the time of making the statement (or as close to this time as is practicable). On obtaining the statement, the ABC Inspector and team leader must review the statement to ensure they are satisfied that all relevant matters have been addressed. Where it becomes apparent that additional information will be required, the ABC Inspector should liaise with the witness to obtain a supplementary statement as a matter of urgency.

##### *25.7.5.2. Witness statements in complex investigations*

In complex investigations (refer Chapter 2 – The investigation process, section 2.11), including workplace discrimination, ABC Inspectors should consult with the Legal Group in preparing for the interview. This will help ensure that questions are appropriate and on point. **The interview must be recorded electronically unless the witness declines (see Chapter 21 – Interviews, section 21.6 for more information).**

If a matter is likely to proceed to litigation (where the witness statement will form part of the required evidence), the interview will need to be transcribed by an accredited

transcription service and the transcription will need to be marked “for the purpose of legal advice or assistance or use in reasonably anticipated legal proceedings.” The ABC Inspector and a member of the Legal Group will review the transcribed interview to identify any evidentiary gaps. If gaps are identified a further record of interview with the witness will need to be undertaken and transcribed. The transcribed interviews themselves will then be used to prepare a formal witness statement to be marked “draft: prepared for the purpose of legal advice or assistance or use in reasonably anticipated legal proceedings” and supplied to the witness.

Once the witness has reviewed the draft witness statement they may then advise the ABCC of any amendments required. If the amendments required by the witness are typographical or minor, the statement should be amended accordingly and the draft wording removed. The witness should then be invited to read and sign the settled statement. (However, if the amendments required by the witness are material or extensive, the Fair Work Inspector should seek the advice of the Legal Group.)

The review and finalising of witness statements must be expedited so as to minimise the time lag between the statement being taken and its final sign off. It is important to remember in the drafting and reviewing of witness statements that the statement must reflect the witness’s own evidence. The ABC Inspector and the reviewer should ensure that the witness’s evidence covers all relevant matters in a coherent and logical manner, but should not edit, or attempt to better that evidence to suit the ABCC’s case. As a model litigant, the ABCC has an obligation to place all relevant evidence before the court, irrespective of whether or not it supports the ABCC’s case.

#### *25.7.5.3. Business Records*

### **Annexing business records to statements**

Statements annexing business records should be made in the following form:

- a. I am employed by (business/company) Pty Ltd as (e.g. payroll officer) \_\_\_\_\_ and have held that position since \_\_\_\_\_. My responsibilities include \_\_\_\_\_.
- b. Annexed hereto and marked “A” are copies of (e.g. wage records) containing records of payments to A and B over the period \_\_\_\_\_ to \_\_\_\_\_.
- c. The documents annexed are copies of records which are, or form part of, the records belonging to, or kept by, (name of company/business) in the course of, or for the purposes of, its business.
- d. The entries in the documents annexed were made or recorded in the course of, or for the purposes of, the business.
- e. The representations contained in the documents annexed were made either:
  - I. by a person who had or might reasonably be supposed to have had
  - II. personal knowledge of the asserted facts; or
  - III. on the basis of information directly or indirectly supplied by a person or persons who had, or might reasonable be supposed to have had, personal knowledge of the asserted facts.
- f. (Computer Records: s.146 *Evidence Act 1995*) the documents annexed are copies of documents that have been produced by a computer used by (name of

company/business) as part of its business. The computer is a device that is of a kind that, if properly used, ordinarily produces reproductions of data on it.

#### *25.7.5.4. Signing of witness statements*

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 ABC 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 ABC Inspector to also sign or initial each page of the statement. The ABC Inspector's signature block should appear on the last page and should note the date the statement was obtained, where and by whom.

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

#### *25.7.6. 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 ABC Inspector must treat that person as a significant witness. ABC Inspectors are most likely to deal with significant witnesses in duress or other complex matters.

ABC 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. ABC 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 the ABCC's case (known as a 'Jones v Dunkel' inference).

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

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

#### *25.7.9. ABCC Guide to Witness Management*

Litigation is extensively used by the ABCC in pursuing its objectives. The ABCC's reputation can be harmed when cases are not managed well by the ABCC.

Achieving good outcomes in its litigation relies upon the ABCC maintaining a good relationship with the witnesses it intends to call. It is very common during the course of the ABCC's litigation that witnesses experience doubts or anxiety about giving evidence or may even wish to avoid giving evidence. More frequent contact with witnesses will help allay these concerns or identify witnesses who have changed their attitude towards assisting the ABCC.

Though obtaining a detailed and accurate statement is important, it is easy to overlook the significance of ongoing witness management during litigation. Essential elements of proper witness management are frequent communication, the ability to identify and deal with the anxiety that a witness may feel and assisting the witness to properly prepare for the giving of evidence.

#### *25.7.10. Affidavits*

During the litigation process, you may be asked by the relevant ABCC legal officer to obtain an affidavit from a witness. It is the investigator(s) responsibility to contact the witness and make the necessary arrangements to do this.

Given that the witness is likely to be familiar with the ABCC investigator, it is recommended that the investigator be present and assists in the taking of the affidavit.

It is preferable that contact with ABCC witnesses be made by the same investigator(s) to achieve consistency and make use of the rapport that has developed. Though there may be reasons to depart from this, contact with witnesses by other staff or representatives is discouraged. If the relevant ABCC investigators are not available, then the relevant Team Leader will identify the most suitable alternative investigator to continue the relationship.

#### *25.7.11. Examinations*

Investigators should make contact with a witness before an examination to explain the procedures, identify any needs of the witness and answer any questions they may have.

Wherever possible, contact by the investigator should be made on a continuing basis as with any other witness.

This will include informing the witness that litigation has commenced and that they may be called as a witness in that litigation.

#### *25.7.12. Court Case Conferences*

Prior to the matter proceeding to court, Counsel or the prosecuting lawyers may request a case conference where witnesses are required to attend. It is expected that all arrangements for attendance of witnesses are made via the investigator(s). In the absence of the relevant investigator(s) then arrangements will be made via the Team Leader. Investigator(s) should attend with their witness.

#### *25.7.13. Court*

When the respondents to the litigation have been served, the Legal Officer is to inform the Investigator and Team Leader. The Investigator should make contact with the witness as soon as possible in order to update the witness, obtain unavailable dates and answer any questions the witness may have about the process.

The Legal Officer must keep the Investigator informed of future court dates, who is required to communicate this to a witness.

When a witness is required to attend Court, a subpoena will usually be issued requiring the witness to attend. The ABCC Investigators may be asked to assist in, or arrange, the service of the subpoena.

Prior to the witness' attendance to give evidence, the ABCC Investigator may be asked to arrange for the witness to attend a conference with the ABCC's Counsel.

On the day of the attendance, the ABCC Investigator should make arrangements to meet the witness at Court prior to them giving evidence. The ABCC Investigator should also endeavour to stay with the witness whilst awaiting their turn to give evidence and deal with any concerns or questions they might have.

#### *25.7.14. After Court*

It is important that the witness does not feel abandoned after giving evidence and the ABCC Investigators should be aware of the possibility that the witness may be subjected to mistreatment or intimidation. Failure to manage this properly could impact on future ABCC investigations and litigations.

It is recommended that the Investigator follow up with the witness within a month to ascertain whether the witness has experienced any particular issues as a result of giving evidence. The Investigator must also inform a witness of any court result.

#### *25.8. The evidence matrix*

In order to facilitate planning and set the direction and focus of the investigation, ABC Inspectors may utilise an evidence matrix. Evidence matrices are of particular use in investigations that have multiple aspects, numerous complainants or are complex in nature.



An evidence matrix will assist ABC Inspectors in clearly identifying the objectives of the investigation, the elements of particular contraventions and the proofs of each element. Identifying these issues early in the investigation process will enable ABC Inspectors to effectively plan the investigation and identify avenues of inquiry and potential sources of evidence.

The benefits of evidence matrices are that they can:

- facilitate planning
- set the direction and focus of an investigation
- be used to evaluate the sufficiency of evidence at any stage in the investigation
- be used as a briefing tool for team leaders and senior management
- be used in the review process.

An evidence matrix will develop as an investigation progresses. An evidence matrix can provide direction, but should not limit the scope of the investigation. If it becomes apparent that other issues need to be addressed in a matter (i.e. additional employees or further contraventions) an evidence matrix can be added to or expanded in the course of the investigation.

In building an evidence matrix, ABC Inspectors should refer to the [Evidence matrix template](#). An evidence matrix can be individualised to suit the nature of each investigation or the ABC Inspector's style. However, as a minimum, the evidence matrix should include:

- the elements of the contravention
- the evidence required to prove those elements
- a plan for when and how that evidence is to be obtained
- the outcome.

### *25.9. Evidence management*

When collecting or handling evidence, ABC 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.

However, ABC 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.

#### *25.9.1. The chain of evidence*

Where a matter results in litigation it is important that the ABC Inspector can demonstrate a chain of evidence or continuity. That is, the ABC Inspector must be able to show a continuous chain of possession and storage from the time a piece of evidence came into the ABCC'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 ABC Inspector who collected it to some other person, the ABC 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 ABC 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 23 - Litigation) provided to the Legal Group should not contain original evidence.

The following procedures for documentation, storage and disposal are designed to assist the ABC 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 ABC Inspector must maintain records detailing the circumstances in which the evidence was collected and a register of its storage and disposal.

#### *25.9.2. Documenting receipt of evidence*

When evidence is collected or received, an [evidence receipt](#) is to be provided by the ABC 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 ABC 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.

ABC 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 ABC Inspectors at the earliest opportunity.

#### *25.9.3. Storage of evidence*

To ensure the hard copy file can stand alone, ABC 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, ABC 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 ABC 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. ABC Inspectors should consult their team leader about the most appropriate storage space available to them.

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.

#### *25.9.4. 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 ABC 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.

## **ABCC Operations Manual**

### **Chapter 21**

## **Interviews**

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## **25.1. Introduction**

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

At the conclusion of this chapter, ABC Inspectors will have a framework for conducting interviews that is supported by the ABC Inspectors' investigation training program. The framework maximises the quality, reliability and admissibility of information and evidence gathered during the investigation process.

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

This chapter is not intended to deal with the process or procedures to be used in conducting compulsory examinations under s52 of the BCII Act. Further detail in relation to s52 examinations is provided in Chapter 25 (to be developed).

## **25.2. Purpose of interviews**

An interview is a planned conversation with the purpose of obtaining information and evidence to ascertain the facts 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 ABC Inspector's investigation. In most cases, an ABC Inspector would interview the complainant and/or the alleged wrongdoer. 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 ABC 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 ABC Inspector may still conduct the interview without recording it electronically, and make a written or typed record of the interview.

Any person has the right to refuse to be interviewed by an ABC Inspector and a person cannot be compelled to either participate in an interview or to answer questions. If a person does not agree to being interviewed, the ABC Inspector can continue the investigation with the other information and evidence at hand. Where an interview is refused, ABC Inspectors should make an appropriate note on the investigation file. If a complainant refuses to be interviewed by an ABC 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.

## 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 alleged wrongdoers across the full range of investigations by ABC Inspectors.

### ***Principle 1\****

The role of investigative interviewing is to obtain accurate and reliable information from complainants, alleged wrongdoers 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, ABC 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.

### ***Principle 4\****

The investigative interviewer is not bound to accept the first answer given. Questioning is not unfair merely because it is persistent.

### ***Principle 5\****

Even when an alleged wrongdoer declines to answer a question or refuses to be interviewed, ABC Inspectors still have a right to continue to ask questions (even if they are not answered). However, the ABC Inspector should ensure that the alleged wrongdoer understands that they cannot be compelled to answer any question.

### ***Principle 6\****

When conducting an interview, ABC Inspectors are free to ask questions in order to establish the truth.

### ***Principle 7\****

Vulnerable people, whether complainants, witnesses or alleged wrongdoers must be treated with particular consideration at all times. Records must include how particular vulnerabilities were addressed.

*\*Note: Amended from Home Office Circular 22/92 (UK)*

### 25.3. The interview framework



#### 25.3.1. Planning the interview

Planning an interview will enhance the likelihood of a successful outcome. Issues that should be considered by the ABC 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 ABC Inspector will need to have a thorough knowledge of the relevant legislation. For example, if the complaint relates to underpayment for weekend work under an award, the ABC Inspector will need to be conversant with the relevant award provisions regarding work performed on weekends, including whether the work performed would be considered ordinary work or overtime, the rates of pay applicable for that work (including any loadings, allowances or penalties), and the relevant clauses that prescribe these entitlements. In this way, the ABC Inspector can 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 ABC 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 an alleged wrongdoer 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.

### **25.3.2. Pre-interview**

Prior to conducting any interview, the ABC 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 ABC 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.

Before the interview, the ABC Inspector should give an overview of how the interview will be run and obtain the interviewee's acknowledgement. Initial contact with an interviewee is discussed in more detail in the rapport stage of the process (see 21.3.5 below).

### **25.3.3. Interview plan**

The ABC 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 ABC Inspector intends to discuss with the interviewee.

In relation to alleged wrongdoers, the interview plan should set out each of the formal allegations which the ABC Inspector intends to discuss. Each allegation should be clear, unambiguous and as concise as possible. Each allegation should cover the supposed involvement of the alleged wrongdoer 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 ABC Inspector is investigating in respect of the alleged wrongdoer and (in each instance) should be directly related to the evidence the ABC Inspector hopes to obtain from the alleged wrongdoer.

For each of the alleged contraventions, the ABC Inspector should include questions that cover each component of the contravention. The ABC 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 alleged wrongdoer may not wish to proceed in the direction that the ABC Inspector has planned. This can arise for a number of reasons including confusion, a difference in thinking or a conscious effort on the alleged wrongdoer'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 plan and interview template](#) is available on the intranet.

#### **25.3.4. Location of interview**

Some interviews may be carried out at a place other than ABCC premises. If this is the case, ABC Inspectors should always consider the appropriateness of the surroundings (including the ABC 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 ABC 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 ABC Inspector should take into account access to any exhibits that may be required for the interview.

The FW Act provides that an ABC Inspector has the power to interview any person at premises<sup>287</sup> where the work was performed or the relevant documents are kept, in investigating certain prescribed matters under the Act. The FW Act further provides ABC Inspectors with the power to ask for certain details, such as the person's name and address<sup>288</sup>.

There are times when an ABC Inspector will choose to interview a witness at their workplace. These instances may arise when the ABC 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 ABC 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 ABC 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 an alleged wrongdoer).

#### **25.3.5. 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 ABC Inspector to minimise any anxiety felt by the interviewee, regardless of whether they are a complainant, another witness, or an alleged wrongdoer.

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<sup>287</sup> FW Act; s709

<sup>288</sup> FW Act; s711

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 alleged wrongdoer, an ABC Inspector will consider how the alleged wrongdoer 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 ABC Inspector to formally write to the alleged wrongdoer with an invitation to participate in a record of interview in relation to the alleged contraventions being investigated. ABC Inspectors should seek the advice of their team leader.

### **25.3.6. Explaining the procedure**

To support the interviewee and create an environment where they are comfortable in speaking, ABC 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.

### **25.3.7. 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 ABC 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.

### **25.3.8. 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.

### **25.3.9. Statements that set the scene**

ABC 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 ABC Inspector spends on setting the scene without actually leading the interviewee, the more information

the interviewee will give. To set the scene, the ABC 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.

### **25.3.10. Obtaining an uninterrupted account**

By now the scene is set for the interview to continue. The ABC 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 ABC 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 ABC 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 ABC 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.

### **25.3.11. Using open questions**

The ABC 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 ABC 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 ABC 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.

#### **25.3.12. 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.

#### **25.3.13. 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. ABC 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 ABC Inspector asking minimal questions.

#### **25.3.14. Summarising**

The ABC 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 ABC Inspectors the opportunity to check their 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 ABC 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 ABC Inspector as the interview progresses. Summaries also have the benefit of affording the interviewee a break as the ABC 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 ABC Inspector may need to summarise the interviewee's responses before the end of the topic and later summarise the whole topic before moving on.

#### **25.4. Record of conversation**

A record of conversation is the notes of a conversation between an ABC 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 an alleged wrongdoer). 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 ABC 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 (see Chapter 20 - Evidence). 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 an alleged wrongdoer.

#### **25.5. Record of interview**

A [record of interview](#) is a formal record of a conversation between an ABC Inspector and an alleged wrongdoer in respect of the matters under investigation.

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

ABC Inspectors should understand and adhere to fundamental practices when interviewing alleged wrongdoers, regardless of the type of investigation being conducted. ABC Inspectors must ensure that they pay particular attention to rules regarding voluntariness, fairness, and reasonableness.

The alleged wrongdoer 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 alleged wrongdoer must speak on their own behalf. If the support person accompanying the alleged wrongdoer is a witness in the same case, the ABC Inspector should advise the interviewee to seek another support person.

## **25.6. Methods of recording the interview**

### **25.6.1. Location and method**

Records of interview should be conducted on ABCC 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 are used. In the case of triple decks, ensure that each disk used is new. The ABC 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 ABC 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 ABC Inspector's notebook), in case the electronic recorder fails to operate.

Sometimes, the alleged wrongdoer is not prepared to be recorded electronically, but is nonetheless prepared to talk to the ABC Inspector. In such cases, the ABC Inspector should inform the alleged wrongdoer 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 ABC Inspector should inform the alleged wrongdoer 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 ABC Inspector's notebook, have the alleged wrongdoer 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.

### **25.6.2. Providing a copy of the interview**

Regardless of how the interview is recorded, the person being interviewed must be provided with a copy.

If an interview with a witness is electronically recorded and the matter is likely to proceed to litigation, the interview should be transcribed by an accredited transcription service and a review undertaken to ensure there are no evidentiary gaps. See Chapter 20 – Evidence for more details.

In the case of an interview with an alleged wrongdoer, there is no review process that applies to the interview. The alleged wrongdoer is to be given a copy of the interview itself at the first opportunity. With an electronic recording, this copy should be provided immediately following the interview or if not practicable, within seven days. If a transcript of the electronically recorded interview is made, this also should be provided to the alleged wrongdoer within seven days of its production. If the interview

was not recorded electronically, the alleged wrongdoer should nonetheless be provided with a copy of the written or typed record of their interview within seven days.

### **25.7. Challenging an interviewee**

The challenge phase of an interview primarily occurs when interviewing alleged wrongdoers. 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 an alleged wrongdoer 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 alleged wrongdoer continue with their account. The ABC Inspector may find that the interviewee was not lying but just mistaken. Even if the alleged wrongdoer is being intentionally untruthful, still allow them to continue talking. In this way, the alleged wrongdoer may provide assistance to the investigation if the ABC Inspector is able to disprove the alleged wrongdoer'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 alleged wrongdoer 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 alleged wrongdoers are tricked into making admissions (see Chapter 20 – Evidence).

### **25.8. 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 ABC 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 ABC Inspector does the better they should become.

### **25.9. Witnesses**

A person becomes a witness when an ABC 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 alleged wrongdoer occurred and who can advise the ABC 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.

#### **25.10. 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 ABC 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 (see Chapter 20 – Evidence).

#### **25.11. Best practice**

As is detailed in the [FWO Standard](#), best practice provides that all interviews conducted by an ABC Inspector should be conducted in accordance with the *Investigative Interviewing Model*. Such model applies regardless of how the interview is recorded or who is the subject of the interview (alleged wrongdoer or witness). For further information, refer to the [FWO Standard](#), 5.3 Investigative Interviewing.

#### **25.12. Introducing exhibits**

During the course of the questioning, the ABC Inspector may show exhibits to the interviewee (such as documents that the interviewee has allegedly signed). The ABC 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. For further detail regarding exhibit management, refer to Chapter 20 – Evidence.

### **25.13. Conducting the interview**

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

### **25.14. 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 alleged wrongdoer, completing the interview plan, and ensuring that exhibits to be referred to in the interview are readily available and appropriately marked for identification.

### **25.15. 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 alleged wrongdoer during the course of the interview, including noting the identifying number and the point in the interview when the exhibit was shown to the alleged wrongdoer.
- 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 alleged wrongdoer. This is more easily accomplished where the alleged wrongdoer 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.

## **25.16. Disclosure and admissions**

Procedural fairness must be given to the alleged wrongdoer before and during the interview. This includes informing the alleged wrongdoer 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 ABC Inspector to explain that the fullest appropriate information has been provided to the interviewee.<sup>289</sup> The Legal Group will guide ABC Inspectors as to the level of disclosure. In addition, ABC Inspectors should have regard to the provisions within the FW Act dealing with disclosure of information, particularly Section 718.

An admission by an alleged wrongdoer 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, ABC Inspectors should seek further details to help confirm the accuracy of the account. Further, ABC 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.

ABC Inspectors are encouraged to read the [FWO Standard](#) for more information on investigative interviewing.

## **25.17. Interviewing vulnerable people**

The definition of a vulnerable person as applied within the ABCC can be found in the [ABCC 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 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 alleged wrongdoer may also be considered a vulnerable person.

Special considerations for interviewing vulnerable people are detailed below.

### **25.17.1. Interviewing minors**

If the witness is under eighteen (18) years of age, the ABC 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 also likely to be a witness in the same matter, another responsible adult should be present with the junior witness.)

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<sup>289</sup> See Ord, Brian, Shaw, Gary and Green, Tracey, *Investigative Interviewing Explained (Second Edition)*, Chatswood NSW: LexisNexis Butterworths, 2008 p 85.

### **25.17.2. 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.

### **25.17.3. Support persons or interview friends**

Where an ABC Inspector determines a witness is vulnerable, the ABC Inspector should consider whether a support person could assist the witness during the interview. If so, the ABC 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 potential wrongdoer, the complainant, or another actual or potential witness in the same investigation.

It is appropriate to offer an Aboriginal person or Torres Strait Islander the opportunity to have an interview friend.

The ABC 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. The ABC Inspector should consider in each situation whether a support person could assist, and seek the advice of the team leader as needed.

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

## **ABCC Operations Manual**

### **Chapter 22**

## **Enforcement**

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## Introduction

This chapter sets out the range of enforcement options available to ABC Inspectors and provides guidance on the appropriate use of each type of enforcement action and the processes involved in each. Litigation is dealt with in Chapter 23 of this Manual.

When an ABC Inspector has determined that a contravention of Commonwealth workplace laws has occurred and that contravention:

- has not been rectified through assisted voluntary resolution (AVR) or voluntary compliance
- cannot be rectified through voluntary compliance (i.e. complex matters)
- is sufficiently serious to warrant enforcement action, regardless of any voluntary compliance,

then the ABC Inspector, in consultation with their Team Leader State 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 ABC Inspector are:

- referral to alternative dispute resolution mechanisms, such as mediation (refer to Chapter 8 – Mediation)
- the issuing of a [contravention letter](#)<sup>290</sup> (see Chapter 6 - Full investigations 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 (or written undertakings)
- the issuing of a [compliance notice](#)
- seeking an injunction
- ABCC litigation.

Not all of these enforcement options are mutually exclusive. An ABC Inspector may, where appropriate, use a variety of actions in any one matter. For example, in relation to a single complaint an ABC Inspector may issue a PIN in respect of record keeping contraventions, issue a contravention letter in respect of underpayments, and (if the underpayment is not rectified or the contravention is sufficiently serious) recommend the matter for ABCC litigation.

Conversely, it should be noted that where an enforceable undertaking is in place, the ABC Inspector may not issue a compliance notice with respect to the same contravention,<sup>291</sup> nor may an undertaking be agreed where a compliance notice has been issued.<sup>292</sup> Similarly, ABC Inspectors cannot issue a PIN in relation to a contravention where an enforceable undertaking has been accepted.

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<sup>290</sup> Authorised by FW Regulations; Chapter 5, Division 3; Reg 5.05

<sup>291</sup> FW Act; s716(4)

<sup>292</sup> FW Act; s715

A Case Decision Record (CDR) should be included on the file each time a relevant decision is made in the investigation, particularly in relation to enforcement decisions.

### **Penalty infringement notices (PINs) [Under development]**

A penalty infringement notice (PIN) is a monetary penalty or fine imposed under Chapter 4, Division 4; Reg 4.04 of the [FW Regulations](#)<sup>293</sup> as an alternative to litigation action in respect of particular contraventions. The maximum penalty payable under the PIN 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 PIN process is 3 penalty units for an individual or 15 penalty units for a body corporate.

The PIN provisions allow ABC Inspectors to impose a penalty on a party for failing to meet his or her obligations relating to record keeping and payslips under the FW Act.<sup>294</sup> In accordance with the requirements of the [FW Act](#), the form and content of employee records and payslips are 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 ABC Inspectors to more efficiently and effectively undertake their compliance function.

A PIN may be issued by an ABC Inspector in respect of certain contraventions including:

- failing to make or keep time and wage type records<sup>295</sup>
- failing to comply with the contents requirements for records<sup>296</sup>
- failing to issue pay slips within one working day of paying an amount<sup>297</sup>
- failing to comply with the contents requirements for pay slips.<sup>298</sup>

In some instances, contraventions of the requirements to keep and provide employee records and payslips may render the alleged wrongdoer liable to a civil penalty under the FW Act, as an alternative to issuing the PIN.<sup>299</sup>

### **Procedures prior to issuing a PIN**

Where an ABC Inspector suspects that there has been a contravention of a provision for which a PIN may be issued, the ABC Inspector should take the steps detailed in 22.2.2 to 22.2.5 below prior to issuing a PIN.

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<sup>293</sup> FW Regulations; Chapter 4, Division 4, Reg 4.04

<sup>294</sup> FW Act, ss 535(1); 535(2); 536(1) and 536(2)

<sup>295</sup> FW Regulations; Chapter 4; Division 4; Regs 4.03 and 4.04; and FW Act; s535(1)

<sup>296</sup> FW Regulations; Chapter 4; Division 4; Regs 4.03 and 4.04; and FW Act; s535(2)

<sup>297</sup> FW Regulations; Chapter 4; Division 4; Regs 4.03 and 4.04; and FW Act; s536(1)

<sup>298</sup> FW Regulations; Chapter 4; Division 4; Regs 4.03 and 4.04; and FW Act; s536(2)

<sup>299</sup> FW Act; ss 535 and 536



## Collect evidence of the contravention

ABC Inspectors must gather documentary and/or testimonial evidence before issuing a PIN in order to demonstrate that they have reasonable grounds to believe that the contravention has occurred.

Such evidence may include:

- copies of time and wage records showing deficiencies
- pay slips showing deficiencies
- admission from the employer or his/her representative that the records are or are not kept in the prescribed form
- witness statements that records are or are not given, or that they have or have not been altered
- inability of the employer to produce records when required to do so (this is particularly relevant where it is alleged that no records exist).

The ABC Inspector must advise the alleged wrongdoer at the time of the inspection that they intend to record a contravention (specifying the regulation/provision that they consider has been contravened), and that the alleged wrong-doer may receive a PIN or face other legal action as a result.

The ABC Inspector should be mindful that if a PIN is not paid, it may be withdrawn and the contravention may instead be the subject of litigation action (see Chapter 24 - Litigation). As such, it is important that the evidence collected is capable of proving each element of the contravention. Refer to Chapter 20 - Evidence for further information on collecting documentary and testimonial evidence.

## Determine if a PIN is appropriate

The contraventions for which a PIN may be issued are strict liability provisions. Simply put, this means regardless of what was intended by the alleged wrongdoer, if the physical elements of the contravention have occurred, liability exists and a PIN can be imposed. Nonetheless ABC Inspectors have discretion in issuing a PIN and there may be instances in which the ABC Inspector determines that either a warning in the form of a contravention letter or litigation action is more appropriate than a PIN. In addition, ABC Inspectors must not issue a PIN where the ABCC has accepted an undertaking in relation to the contravention.<sup>300</sup>

The ABC Inspector should consider whether a PIN is appropriate having regard to the following:

### 25.1.1.1. First time wrongdoers

If it is the first time that the person has contravened an infringement notice provision, it may be appropriate that the person be issued with a [contravention letter](#), which should include a warning that any future contravention may lead to the issuing of a PIN or the ABCC litigating.

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<sup>300</sup> FW Regulations; Chapter 4, Division 4, Reg 4.04(4).

#### **25.1.1.2. Wilful contravention**

Based on the evidence before the ABC Inspector, if it appears that the person's behaviour is wilful and intended to avoid their obligations under the regulations, it may be necessary, with the approval of the State Director, to issue a PIN or to consider ABCC litigation. This would apply regardless of whether the person has previously contravened an infringement notice provision.

#### **25.1.1.3. PIN or contravention letter?**

An ABC Inspector has the option of either issuing a contravention letter or PIN for an alleged contravention.

The ABC Inspector should take into account the alleged wrongdoer's history of compliance with all Commonwealth workplace laws when determining what action to take.

It may be appropriate in the case of a first time alleged wrongdoer to issue a contravention letter prior to the issuing of a PIN, to give the alleged wrongdoer an opportunity to remedy any non-compliance. In these circumstances it will be appropriate to schedule a follow-up inspection within six months to check for ongoing compliance.

A warning in the form of a contravention letter would not be appropriate where the alleged wrongdoer's actions are considered wilful or repetitive or have jeopardised the ABC Inspector's or a complainant's ability to recover entitlements which may be payable through the alleged wrongdoer's refusal to keep or produce records.

#### **25.1.1.4. PIN or ABCC litigation?**

When considering whether to issue a PIN, it is important to consider that Regulation 4.09 prevents the ABCC from initiating legal action in relation to an offence for which a PIN has been issued **and** the penalty paid.

For example, if a PIN was issued to an alleged wrongdoer for failing to issue pay slips over a particular pay period, and the employer paid the penalty specified in the notice, then the ABCC would not later be able to initiate litigation action against that alleged wrongdoer for failing to issue pay slips for that same period. However, if the alleged wrongdoer continued not to issue pay slips, then litigation could be initiated (or another PIN given) for failure to issue pay slips for any subsequent period.

Where an alleged contravention is seen as particularly serious, wilful or repetitive the ABC Inspector should discuss the option of pursuing ABCC litigation instead of a PIN with their Team Leader or State Director.

It should be noted that a PIN must be issued within 12 months of the day on which the alleged contravention occurred - not from the day on which the complaint was received or the contravention detected. For example, a PIN 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.

#### **25.1.1.5. If the contravention is of the WR Regulations (pre- 1 July 2009)**

ABC Inspectors cannot issue a PIN in relation to contraventions of the WR Regulations. Therefore, where the ABC Inspector detects a pre-1 July 2009 contravention relating to employee records or pay slips (under Part 19 of the WR Regulations), the ABC Inspector is unable to issue a PIN in relation to this contravention. Instead, the ABC Inspector should issue the alleged wrongdoer with a contravention letter and provide the relevant fact sheet showing the current record keeping or pay slip requirements under the FW Act.

In addition, where the alleged wrongdoer is still operating post-1 July 2009, the ABC Inspector should undertake follow-up action with the alleged wrongdoer regarding their current practices in relation to employment records and/or pay slips. Such follow-up may take the form of an audit as part of a local initiative, or (in more serious cases) a new investigation of the alleged wrongdoer's practices. If the ABC Inspector's follow-up identifies contraventions of s535 or s536 of the FW Act that occurred on or after 1 July 2009, the ABC Inspector can take relevant enforcement action, including issuing a PIN for these contraventions of the FW Act.

#### **Determine if multiple PINS are appropriate**

In the event of multiple contraventions it is possible for an ABC Inspector to issue a separate PIN for each penalty provision contravened.

An ABC Inspector:

- can give a person two or more PINs when the contraventions relate to two or more different penalty provisions, i.e. one PIN for failing to make and keep records (FW Act; s535(1)) and another PIN for not issuing pay slips (FW Act; s536(1))
- cannot give a person two or more PINs where the contraventions relate to the same penalty provision, e.g.. where the employer's records do not include the name of the employee (regulation 3.32(a)) or the date on which employment began (regulation 3.32(e)) only one PIN can be issued because both contraventions relate to the same penalty provision (FW Act; s535(2))
- cannot issue two or more PINs for contravening the same penalty provision in respect of multiple employees, as both contraventions relate to the same penalty provision.

An ABC Inspector can issue further PINs for subsequent contraventions of the same penalty provision. Before issuing a PIN for subsequent contraventions, ABC Inspectors should seek guidance from the Legal Group.

In the case of multiple penalty provision contraventions, a separate PIN should be completed for each separate contravention.

#### **Seek approval to issue a PIN**

Before an ABC Inspector can issue a PIN they must obtain prior approval from an Executive Level 1 (EL1) officer or above. ABC Inspectors should obtain the identity of the authorised approver for their location from their Team Leader.

While approval may be granted verbally, particularly in circumstances where the ABC Inspector is in the field, the approval must be documented on the file as soon as possible (including the details of the authorising officer, time and date of approval).

Failure to document the approval will not invalidate the PIN, but the action may be inconsistent with the APS Code of Conduct in that it may amount to a failure to comply with a reasonable direction. The relevant State Director is responsible for ensuring compliance with this procedure.

### **Complete the PIN form**

Each office has a penalty infringement notice book (PIN book), which contains sequentially numbered PIN 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 ABC Inspector believes has contravened the infringement notice provision
- 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 a PIN form the ABC 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 PIN 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 alleged wrongdoer, copies of records obtained, deficiencies evident in the records, etc).

As a matter of policy, an ABC Inspector will always complete the PIN for the maximum penalty that is able to be imposed via the PIN process i.e. 3 penalty units (currently \$330) for an individual or 15 penalty units (currently \$1650) for a body corporate. This is to ensure consistency in the penalties that are issued by ABC Inspectors via PINs throughout the ABCC.

If an error is made while completing the PIN form (prior to issue), the PIN should be cancelled by writing cancelled across the form and all copies must remain in the PIN book.

### **Serve the PIN**

It is preferable that a PIN be given to the alleged wrongdoer (if an individual) or an appropriate officer of the company (if a corporation) in person. Alternately a PIN may be served by registered post or by a process server. A PIN should not be served by fax or email.

The ABC Inspector should ensure that the recipient's name and position is recorded on the PIN, and ask the recipient to sign the PIN in the space marked "signature acknowledging receipt" in order to confirm service of the PIN. If the recipient refuses to sign the PIN, the ABC Inspector should make notes detailing this on file, including the response given by the recipient when asked to sign the PIN.

### **Record the PIN in AIMS**

The issuing of a PIN should be recorded in AIMS, setting out the contravention, the penalty, the date of issue, the PIN date and any other relevant details.

The issuing of a PIN needs to be recorded on AIMS so that any payment received can be tracked and matched to the appropriate PIN.

As soon as the penalty is paid the ABC Inspector should note this in AIMS.

### **Payment of a PIN**

The recipient of a PIN has 28 days<sup>301</sup> after the PIN is served to pay the penalty specified in the PIN, unless the ABCC agrees to an extension of time to pay. The payment details appear on the reverse of the PIN form and include Easypay or Bpay.

#### **25.1.1.6. Where the person seeks to pay by another method**

If the recipient of the PIN contacts the ABCC to advise he or she is unable to use the payment options, the ABC Inspector should contact the ABCC 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.

#### **25.1.1.7. Where the person seeks an extension of time to pay the PIN**

The recipient of a PIN may apply to the nominated person (usually the relevant State Director) for an extension of time to pay<sup>302</sup> or for withdrawal<sup>303</sup> of the PIN, provided the application is made within 28 days of the issuing of the PIN. The extension and withdrawal details also appear on the reverse of the PIN form.

Where the recipient of the PIN 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 PIN 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 PIN 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 PIN
- if the recipient of the PIN 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.

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<sup>301</sup> FW Regulations; Chapter 4; Division 4; Reg 4.06

<sup>302</sup> FW Regulations; Chapter 4; Division 4; Reg 4.07

<sup>303</sup> FW Regulations; Chapter 4; Division 4; Reg 4.08

#### **25.1.1.8. When the PIN is paid**

Once the PIN 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 PIN is not to be considered an admission of guilt or a conviction, and the ABC Inspector is not precluded from continuing to investigate the original complaint, provided it was not the subject of the PIN.

#### **Failure to pay a PIN**

If the PIN is not paid the ABC 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 PIN recipient (such as proven illness, family tragedy or incapacity to pay). In the case that the ABC Inspector and Team Leader consider that litigation will not be recommended, the ABC Inspector should seek the written approval of the nominated person to withdraw the PIN (as per 22.2.11.2 below).

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.<sup>304</sup>

#### **Withdrawing a PIN**

When litigation is recommended the PIN must be withdrawn to avoid the possibility of the PIN being paid while the litigation is being prepared or after it is filed in court. The payment of the PIN in these circumstances would discharge the liability for the contravention and prevent the ABCC proceeding with the litigation.

The [FW Regulations](#) detail several circumstances under which a PIN may be withdrawn by the nominated person or an ABC Inspector, under Regulations 4.08(2) and 4.08(4).

#### **25.1.1.9. Withdrawal by the 'nominated person'**

If a PIN is withdrawn in accordance with 4.08 (2) the nominated person must issue a notice withdrawing the PIN in accordance with 4.08(2)(b). Arrangements would need to be made to refund any penalty that has been paid in relation to a withdrawn PIN in accordance with Regulation 4.10.

A party will generally make the request directly to the nominated person. However, if the request is made through the ABC 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 PIN and obtain facts from the ABC 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 PIN should not be the same person who approved the issuing of the PIN.

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<sup>304</sup> FW Act, s539(2), item 29; and s546(2).

If the nominated person has not made a decision to withdraw or refuse to withdraw the application, the PIN 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 State Director, or  
the Executive Director, Field Operations.

#### **25.1.1.10. Withdrawal by the ABC Inspector**

Regulation 4.08(4) provides that an ABC Inspector may also withdraw a PIN 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 a PIN, or legal action being commenced, may be grounds for an ABC Inspector to withdraw a PIN.

In such cases the ABC Inspector should follow the procedures for withdrawal set out below.

#### **25.1.1.11. Procedures for withdrawal**

If a PIN is withdrawn after being issued, whether withdrawn by the nominated person or the ABC Inspector, a notice withdrawing the PIN must be served on the recipient of the PIN (Regulation 4.08(3)).

The ABC Inspector or nominated person must:

- write to the person notifying them that the PIN has been withdrawn – this notice must include:
  - the full name, or surname and initials, and address of the recipient of the PIN
  - the date that the PIN was issued
  - the reference number
  - the person who approved the withdrawal, and
  - the reasons for the withdrawal
- annotate the PIN 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
- tick the withdrawal button and place a note on AIMS - the note should quote the reference number, the person who approved the withdrawal and the reasons for the withdrawal
- arrange for the return of the refund of the penalty (if applicable).

## **Are there any appeal rights for recipients of a PIN?**

There is no election to go to court in the FW Act, only an election for the PIN to be withdrawn.

As discussed above, the recipient of the PIN 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 ABCC, as a federal government agency.

## **Letters of caution**

A letter of caution is a formal warning issued to an alleged wrongdoer in respect of a contravention where the ABC Inspector has determined that there is sufficient evidence to start ABCC 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 23 - Litigation and in detail in the [ABCC 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 ABCC litigation should be considered instead).

## **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 the ABCC has determined that it is not in the public interest to start litigation against the alleged wrongdoer (this is the primary difference between a contravention letter and a letter of caution)
- issues a formal caution to the alleged wrongdoer to comply with its obligations in future
- warns the alleged wrongdoer that in the event of future non-compliance the issuing of the letter of caution will be relevant to the ABCC'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.

## **Process for issuing a letter of caution**

The ABC Inspector should draft a letter of caution when the ABC Inspector has determined, in consultation with their Team Leader, that there is sufficient evidence to prove a contravention, but it is not in the public interest to start ABCC 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 ABC Inspector should refer to the template [ABCC letter of caution](#).



## AIMS recording

The issuing of a letter of caution should be noted in AIMS. The outcome should be recorded as sustained – no further action.

## 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.<sup>305</sup> A small claims action is not an action taken by the ABCC<sup>306</sup>. There is no penalty available under small claims procedures and any judgment awarded will be limited to recovery of the amount owed.<sup>307</sup> As an action taken under the FW Act, it is taken in a “limited costs” jurisdiction (subject to s 570 of the FW Act). In suitable cases, small claims action is an effective way of achieving a result for a complainant and finalising a matter.

Where a complainant takes their own legal action in a Magistrate’s court or the Fair Work Division of the Federal Magistrates 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)<sup>308</sup>
- 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.

When explaining small claims actions to complainants, ABC Inspectors 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 ABCC litigation (see the [ABCC Litigation Policy](#) there is insufficient evidence to support ABCC litigation)
- it would otherwise be inconsistent with the [ABCC Litigation Policy](#) to start ABCC litigation.

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<sup>305</sup> 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 ABC Inspector would not be involved in such an action.

<sup>306</sup> The Workplace Relations Act 1996 did provide for Workplace Inspector initiated small claims action. The FW Act does not explicitly include or exclude ABC Inspectors in this regard. However, current ABCC position is that such actions are not commenced by an ABC Inspector.

<sup>307</sup> Some courts may make an order that includes recovery of the filing fee and/or interest in addition.

<sup>308</sup> The rules of some state or territory Magistrate’s courts may prescribe a lower maximum limit.

## Referrals to small claims action

An ABC Inspector may only recommend small claims to a complainant in circumstances where:

- an investigation conducted by the ABCC has found that there are one or more contraventions of Commonwealth workplace laws, resulting in an underpayment to the complainant, and
- the alleged wrongdoer has been asked to rectify the contravention(s) by the ABCC (via a contravention letter), but has failed to make payment of outstanding entitlements to the complainant.

Where an ABC Inspector considers (after consultation with their Team Leader) that a matter is suitable for small claims action, the ABC Inspector should contact the complainant to discuss the option of taking a small claims action. The ABC 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 independent legal advice.

The ABC 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 the ABCC 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 ABC Inspector may provide further assistance to the complainant, as detailed below.

## Providing assistance to complainants in small claims actions

It is important that ABC Inspectors understand that in assisting a complainant in a small claims matter, they are not representing them. ABC Inspectors should explain to the complainant that the ABC Inspector's role is to assist the court in arriving at the correct decision.

ABC Inspectors should record assisted small claims actions in AIMS. The outcomes of the assisted small claims action (where known) should also be recorded.

The ABCC has adopted a three-tier process for determining the level of assistance to be provided by ABC Inspectors in the small claims process:

### 25.1.1.12. Tier 1 - Small claims referral

There are occasions where an ABC Inspector finds that although there are contraventions identified, there is little evidence to enable the ABC Inspector to quantify the amount of underpayment. Such circumstances may arise where the alleged wrongdoer 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 ABC Inspector finds that the complainant's allegations of underpayment can not 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 the ABCC is not in a position to quantify the alleged underpayment, and that the ABCC'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" and, once complete, enables the ABC Inspector to close the investigation file.

The ABC Inspector may provide the complainant with a basic information pack, which provides general information about the small claims process under the FW Act and in the complainant's state or territory. The ABC Inspector may provide a report on the investigation completed, which will identify the conclusions that the ABCC was able to reach based on the evidence considered in the investigation. However, the ABC Inspector will not produce any calculations of alleged underpayments. The ABC 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 10 – Procedural matters in investigations, section 10.2 - Persistent complainants.)

#### **25.1.1.13. 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 ABC 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 alleged wrongdoer has contravened Commonwealth workplace laws (refer [ABCC Litigation Policy](#))

In such cases, the complainant will be provided with a detailed small claims kit (see 22.4.3 below), containing specific information provided by the ABC Inspector, including a report on the investigation conducted, and calculations of the amounts owing to the complainant (based on the evidence available to the ABC Inspector).

The ABC 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 ABC 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.

#### **25.1.1.14. Tier 3 - Small claims procedure with maximum assistance**

In some investigations, the ABC 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 ABCC litigation under the [ABCC 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 ABC 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).

#### **25.1.1.15. Consideration where the complainant is a vulnerable person**

Where the complainant has been identified as a vulnerable person (as defined in the [ABCC Litigation Policy](#)), the ABC Inspector (in conjunction with their Team Leader) 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, ABC Inspectors should also consider whether ABCC litigation would better serve public interest considerations.

The ABC 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 ABC Inspector's report.

#### **Where a complainant chooses to pursue small claims against ABCC 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 ABC 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 the ABCC is unable to assist the complainant.

Such circumstances where the ABCC could not assist a complainant would include:

- where the investigation has been completed and the complaint was not sustained
- where the investigation of the ABCC is still ongoing
- where the statute of limitations under the FW Act has expired.

Where appropriate, the ABC Inspector should advise the complainant that the FW Act has small claims procedures, but that the ABCC 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" in AIMS, the complainant should be advised that the view of the ABCC 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 the ABCC's findings, the ABC Inspector must advise the complainant that the ABCC is unable to assist them in this regard.

Where the complaint is ongoing, the complainant should be advised that the ABCC 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, the ABCC's investigation may be suspended until such time as the court of competent jurisdiction has made its findings. In these circumstances, the ABC Inspector should seek the advice of their Team Leader 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.<sup>309</sup>

### Small claims information pack

A small claims information pack is a brief of materials compiled by the ABC Inspector to assist the court in arriving at a decision. A small claims information pack may include:

- a report summarising the ABC Inspector's findings
- calculations (note: the ABCC 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
- 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).
- copies of the completed court documents
- a witness statement from the complainant in relation to their complaint (see Chapter 21 – Interviews for information).

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 alleged wrongdoer and the court on the first court date.

### Appearing as a friend of the court

In cases where maximum assistance is provided (see Tier 3 above), ABC Inspectors will appear as a friend of the court (or *amicus curiae*), where the court permits. When addressing the magistrate, the ABC 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 the ABCC as such.

In their capacity as a friend of the court, an ABC 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 ABC Inspector's findings or calculations
- if requested, summarising the matter for the court
- clarifying any questions from the court or the alleged wrongdoer about the relevant fair work instrument or the FW Act
- guiding both parties (complainant and alleged wrongdoer) through the process.

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<sup>309</sup> 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.

A friend of the court does not represent either party. ABC Inspectors must remain impartial in assisting complainants and may equally be required to assist the alleged wrongdoer 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.

### **Small claims procedures**

Small claims actions can be heard by state Magistrate's 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. ABC Inspectors should consult their Team Leader for guidance about the applicable court procedures in their jurisdiction.

### **Enforceable undertakings [*Legal considering this in view if written undertaking*]**

An enforceable undertaking is an option available to the ABCC in cases where the ABC Commissioner reasonably believes that a person has contravened a civil remedy provision. An ABC Inspector is not able to enter into an enforceable undertaking. The ABC Inspector only may recommend that an approved delegate of the ABCC does so, in accordance with the practice below.

An enforceable undertaking is a written deed executed between the alleged wrongdoer and the ABCC which contains:

- an admission of contraventions
- an agreement by the alleged wrongdoer 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 the ABCC).

An enforceable undertaking is an alternative to the ABCC taking litigation action (see Chapter 23 - Litigation). The purpose of an enforceable undertaking is to focus the alleged wrongdoer on rectifying the contravention and on preventing similar contraventions in the future. The acceptance of a suitable enforceable undertaking can save the ABC Inspector and the ABCC the time and resources required to litigate a matter.

Acceptance of an enforceable undertaking should be considered as an alternative to ABCC litigation action where:

- the contravention is of a character that would ordinarily be considered suitable for litigation
- the contravention is admitted and the alleged wrongdoer is willing to cooperate with the ABCC
- it is in the public interest to accept the enforceable undertaking.

## Public interest

In cases where the alleged wrongdoer acknowledges the contravention and is cooperative with the ABCC, the ABC 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 23 – Litigation and in detail in the [ABCC Litigation Policy](#)

## Process for entering into an enforceable undertaking

An ABC Inspector does not enter into an enforceable undertaking. However, they should include in the potential litigation summary (see Chapter 23 - Litigation) a brief assessment of whether an enforceable undertaking would be suitable and in the public interest, taking into account factors such as the alleged wrongdoer's level of cooperation, attitude, compliance history, and the seriousness of the contravention.

Taking into account the ABC Inspector's recommendation, the relevant State Director should approve either:

- litigation action or
- enforceable undertaking.

Once the State Director and ABC Inspector have decided 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 State Director and ABC Inspector must ensure:

- a compliance notice has not been issued in respect of the contravention (as an undertaking can not be accepted in these circumstances)
- the ABCC 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 the matter will be referred back to the State Director to approach the alleged wrongdoer and, if the alleged wrongdoer is agreeable, negotiate the terms of the [enforceable undertaking](#).

All enforceable undertakings must be accepted and signed by the Group Chief Counsel, Legal.<sup>310</sup>

The acceptance of an enforceable undertaking should be noted in AIMS. The outcome should be recorded as sustained – resolved – voluntary compliance.

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<sup>310</sup> See the "[Delegation of Powers and Functions](#)" issued by the ABC Commissioner on 2 July 2009.

## Failure to comply with an enforceable undertaking

In the event that the alleged wrongdoer fails to comply with the enforceable undertaking, the ABC Inspector should refer the matter for ABCC litigation (refer to Chapter 23 - Litigation).

While an undertaking is in place and the parties are complying, the ABCC'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.

## Whether civil remedies can be sought

An ABC 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 ABC Inspector) to apply for an order in relation to the contravention remain.

In addition, the ABCC can not 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 the ABC Commissioner's consent (s715(3)).<sup>311</sup> This provision allows the alleged wrongdoer 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 ABC Inspector or the ABCC 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 ABCC in the case where an enforceable undertaking is not complied with is the application to the court for orders as detailed in 22.5.3 above.

## Compliance notices

A compliance notice provides ABC Inspectors with another option to address non-compliance without pursuing court proceedings from 1 July 2009.

## Compliance notices and contravention letters

As detailed previously, ABC Inspectors are able to use a contravention letter to detail an alleged wrongdoer's non-compliance and the remedial action required (refer Chapter 6 – Full investigations, section 6.10 – [Contravention letters](#)).

The issuing of a compliance notice (which may follow a contravention letter) provides another means of notification of the non-compliance. A compliance notice is a more

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<sup>311</sup> As with the acceptance of an enforceable undertaking, it is only the Chief Counsel, Group Manager, Field Operations, that can provide consent to withdraw or vary an undertaking as per s715(3) on behalf of the ABCC. See the "Delegation of Powers and Functions" (insert link) issued by the ABC Commissioner on 2 July 2009.



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 can not be used in all circumstances, as detailed in 22.6.2 below. Where a compliance notice can not be used to detail the contraventions, the ABC Inspector will need to rely on the [contravention letter](#) as the primary means of detailing the contraventions to the alleged wrongdoer.

### **Appropriate use of a compliance notice**

A compliance notice can be used by an ABC 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 Transitional 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.<sup>312</sup>

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 ABC 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.<sup>313</sup>

If there is uncertainty as to whether a compliance notice can be issued in relation to a contravention, the ABC Inspector should seek the advice of their Team Leader.

### **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

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<sup>312</sup> Transitional Act, Schedule 18, Part 3, item 14(a).

<sup>313</sup> Transitional Act, Schedule 18, Part 3, item 14, as detailed in the Explanatory Memorandum to the Transitional Act, paragraph 672

- 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 ABC Inspector to specify the particular employee who they reasonably believe has 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.

### **Process for issuing a compliance notice**

Where a ABC Inspector has identified a contravention of the FW Act and an alleged wrongdoer has not complied with a contravention letter, ABC Inspectors must determine the appropriate enforcement mechanism for the contravention, which may be the issuing of a compliance notice.

If the contravention is related to an entitlement provision, and the contravention can be rectified by taking a specific action, then the ABC Inspector may recommend that a compliance notice be issued. In wages and conditions investigations this means:

- the contravention is in relation to a single employee
- there is sufficient evidence to calculate the quantum of the underpayment
- accurate calculations of the underpayments have been performed.

Compliance notices must only be issued where the ABC Inspector is satisfied that there is sufficient evidence to prove a contravention. This would follow a process of investigative evaluation which involves the ABC Inspector liaising with their Team Leader to decide on the most appropriate course of action, and consideration of all the evidence obtained in order to determine a contravention.<sup>314</sup>

As a matter of best practice, a compliance notice should be served by hand, or sent by registered post with a receipt attached to confirm service. A cover letter is attached to the compliance notice, which provides further information about the determination and the alleged wrongdoer’s options to resolve the matter.

An alleged wrongdoer is provided with 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 alleged wrongdoer fails to take the steps identified in the compliance notice, the ABCC is able to seek an order for the contravention of the compliance notice. If this does occur, ABC Inspectors should prepare a brief of evidence.

If an employer chooses to comply with the compliance notice, the contravention is taken to be nullified and the ABCC 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.

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<sup>314</sup> Refer Chapter 2 – The investigation process, section 2.9 – Investigative evaluation. The process of investigative evaluation is also undertaken to determine contraventions before the issuing of a contravention letter (Chapter 6 – Full investigations, section 6.9 – Making a determination and Chapter 7 – Wages and conditions investigations, section 7.7 – Making a determination).

### **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.

### **Withdrawal of a compliance notice**

There are also certain circumstances where the ABCC may wish to withdraw a compliance notice that has been issued by an ABC 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.<sup>315</sup>

The policy of the ABCC is that where an error is discovered (either by the ABC Inspector or the recipient) in the wording or issuing of a compliance notice, the ABCC 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 alleged wrongdoer has failed to comply with the notice and the matter is proceeding to litigation, the ABCC may withdraw a compliance notice to avoid an alleged wrongdoer 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 ABCC officer at the level of EL1 or above (such as the ABC Inspector's State Director or Team Leader). 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 the letter should advise that the ABCC 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 ABC Inspector must make notes detailing the reasons for withdrawal of the compliance notice, and the officer who approved the withdrawal.

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<sup>315</sup> 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.

## Injunctions

### General provisions

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.

The BCII Act provides a provision for the ABC Commissioner to apply for an injunction against unlawful industrial action and upon application; the court can either issue an interim injunction or an injunction.

For an interim injunction to be granted, the circumstances must be;

- occurring;
- threatening, impending or probable

Additionally, if, in the opinion of the court it is desirable to do so, the court may grant an interim injunction pending determination of an application to be made on a later date.

Where an ABC Inspector believes that an injunction may be appropriate, they should discuss the matter with their Team Leader, and formally detail the reasons that an injunction is appropriate as part of a recommendation to litigate (refer Chapter 23 – Litigation).

### Provisions relating to industrial action

In addition to the general provisions, the FW Act also allows that an ABC Inspector (and other parties) can seek an injunction in relation to various matters relating to **industrial action**.

In particular:

- under s417(3), an ABC 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 ABC 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.

## Key Messages

- There are a range of possible enforcement actions that may be recommended by Fair Work Inspectors , including penalty infringement notices , letters of caution, small claims action , enforceable undertakings, compliance notices, and injunctions
- Fair Work Inspectors should consult with their team leader, state director and general manager in deciding the appropriate enforcement action to take
- When the appropriate enforcement action is decided upon, the Fair Work Inspector should apply the prescribed procedures to enable that action to be taken

# ABCC Operations Manual

## Chapter 23

### Litigation

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## 25.1. Introduction

Litigation, initiated for the purpose of enforcing Commonwealth workplace relations laws within the building and construction industry, is a legislated function of the ABC Commissioner. ABCC litigation is the most significant enforcement tool available to ABC Inspectors.

Litigation taken by the ABCC seeks the imposition of a civil penalty in addition to other orders which may include, for example, permanent injunctions and the recovery of any underpayments or other compensation. Litigation can arise under the BCII Act and the FW Act. The current maximum penalties for a body corporate are \$110,000 (BCII Act) and \$22,000 (FW Act). The maximum penalties for an individual are \$33,000 (BCII Act) and \$6600 (FW Act) respectively for an individual. ABC Inspectors should have regard to the ABCC's Guidance Note 1 – Litigation Policy (also known as the [ABCC Litigation Policy](#)).

ABCC 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. The ABCC retains the discretion to initiate litigation regardless of any voluntary compliance that may have occurred.

The BCII Act and the [FW Act](#) provide a very broad range of powers where there has been a civil contravention. These powers include orders for penalty payments, compensation, injunctions and sequestration of asset orders. (s49 BCII Act and ss 545 – 547 FW Act). Depending on the contravention (see s48 BCII Act), penalties can be sought from the Federal Court, the Federal Magistrates Court or an eligible state or territory court.

It also should be noted that ABCC litigation can only be taken in respect of civil penalty provisions under the BCII Act and the [FW Act](#) and [FW Regulations](#). Where an ABC Inspector believes that a criminal offence has occurred, enforcement action can only be commenced on the recommendation of the CDPP (refer to 23.10 below).

## 25.2. Deciding whether to recommend a matter for ABCC 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, the ABCC 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 ABC Inspector must, in consultation with their Team Leader, State Director or Executive Director, undertake a two step evaluation as follows.

### 25.2.1. Evidential evaluation

The ABC Inspector should objectively assess the available evidence and be satisfied that the evidence gathered is sufficient to prove each element of the contravention so that a court is more likely than not to accept the complaint alleged.

In performing the evidential evaluation the ABC 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 alleged wrongdoer
- whether there are any lines of defence which are plainly open to or have been indicated by the alleged wrongdoer
- what, if any, further evidence may be obtained to strengthen the case
- any other factors which could affect a successful litigation.

For further guidance on evidential evaluation please refer to [ABCC Litigation Policy](#).

### **25.2.2. Public interest evaluation**

Once the ABC Inspector is satisfied that sufficient evidence exists to support litigation, the ABC Inspector must consider whether in all the circumstances the litigation is in the public interest.

The public interest evaluation requires the ABC 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. ABC Inspectors 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 the [ABCC 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)
- the characteristics and culpability of the alleged wrongdoer (including their compliance history and their level of cooperation and contrition)
- 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 alleged wrongdoer)
- the availability and efficacy of alternatives (such as small claims action, enforceable undertakings, and letters of caution).

A decision whether or not to recommend 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 ABC Inspector (personally or professionally), the alleged wrongdoer, 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. The ABCC 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 the [ABCC Litigation Policy](#)

### **25.3. Brief of evidence**

A brief of evidence is a collection of documents that sets out:

- the alleged contraventions
- the details of the alleged wrongdoer
- 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 ABC Inspector in consultation with their Team Leader when a decision is made to recommend the matter for litigation.

The brief of evidence should, in the first instance, be forwarded to the relevant State Director for consideration. If the State Director agrees with the ABC Inspector's recommendation, the brief of evidence should be provided to ABCC Legal.

A brief of evidence is likely to be viewed by Team Leaders, internal and external lawyers and, in some instances, the alleged wrongdoer's legal representatives. Therefore a brief of evidence needs to be both comprehensive and comprehensible to 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 the ABCC'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 ABC 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 that are poorly structured, sloppy or disorganised are more difficult to understand and assess and may, where necessary, be returned to the ABC Inspector with a request that they be recompiled.

The following information regarding form and content is a guide to assist ABC Inspectors to compile a brief of evidence. It should be noted that a standard format may not suit every case. ABC Inspectors may need to adapt their approach to suit their particular matter.

### **25.3.1. Form of the brief of evidence**

For ease of use the brief of evidence should:

- A [Brief of Evidence template](#) is to be used
- be assembled in a ring binder or folder
- contain a comprehensive index
- use separate numbered dividers or tabs to order and identify documents
- be labeled (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 ABC Inspector, and should not be provided to ABCC Legal unless specifically requested (to maintain the chain of evidence – see Chapter 20 - Evidence). Original documents should be inserted into a clear plastic pocket and should not be hole punched, marked or paginated.

The ABC Inspector may attach to the paper brief a CD containing a copy of all Word documents and Excel spreadsheets 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.

### **25.3.2. Number of copies**

The ABC Inspector must prepare three complete copies of a brief of evidence:

- original copy, containing any original documents or exhibits, to be retained by the ABC Inspector
- an ABCC Legal copy, to be retained by the lawyer allocated the file
- a copy to be sent to the external legal provider via ABCC Legal.

### **25.3.3. Content of a brief of evidence**

A brief of evidence should include:

- a cover sheet setting out the basic details of the brief including;
  - *the alleged wrongdoer,*
  - *each alleged contravention (including legislative provisions)*
  - *any relevant clauses in an industrial instrument; and*
  - *the name and contact details of the ABC Inspector*
- an index listing all the documents in the brief and providing tab or page references for quick navigation
- a [Potential Litigation Summary](#) containing the details of the case and the ABC Inspector's recommendation to litigate

- a witness list (in alphabetical order by surname), providing the names, addresses and contact details of each witness
- an exhibits list setting out all the exhibits included in the brief of evidence in a logical order and providing a short description of each exhibit and how it was obtained
- the exhibits or documentary evidence supporting each contravention

#### **25.3.4. The potential litigation summary**

The [potential litigation summary](#) (formerly the litigation/undertaking minute) is the document by which the ABC Inspector makes their recommendation that the matter be considered for litigation or an undertaking. The potential litigation summary includes a comprehensive overview of the case, the investigation and the reasons to litigate. ABC Inspectors should refer to the potential litigation summary template when making a recommendation for litigation action (or when recommending the acceptance of an enforceable undertaking - see Chapter 22 - Enforcement).

The potential litigation summary should, where relevant, include:

- an outline of the nature of the contraventions alleged
- details of the alleged wrongdoer
- 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 that the matter addresses all relevant parts of the the [ABCC Litigation Policy](#) including evidentiary 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), and
- any matters relevant to the success of the proceedings, including strength of evidence, possible defences, and the witness credibility, demeanour and likely cooperation
- a recommendation regarding orders to be sought from the court to remedy the contravention.

It is necessary for the ABC Inspector to provide an electronic copy of the potential litigation summary to their State Director. The potential litigation summary (signed off by the State Director) will need to be submitted to ABCC Legal.

## 25.4. 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 20 – Evidence.

The categories of exhibits and types of documents that commonly appear in a brief of evidence include:

### ABC Inspector's details

- ABC Inspector's appointment
- ABC Inspectors identity card

### Testimonial evidence

- record of interview transcript
- statutory declarations
- completed witness statements

### Alleged wrongdoer's details

- current ASIC searches and company extracts
- ABN search results
- business name records
- White Pages or internet search results

### Underpayment details

- calculation spreadsheet
- bank statements
- wage records
- time sheets
- rosters
- employee time records
- log books
- pay slips
- group certificates
- Centrelink documents
- tax file number declarations
- separation advice

### 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
- award citation checks

### Correspondence

- notices to produce records or documents and related correspondence
- penalty infringement notices issued/withdrawn
- contravention letter
- compliance notice
- other relevant correspondence

### Miscellaneous

- ABC Inspector's file notes
- AIMS summaries
- case conference submissions

- media articles

### **25.5. Preparation of advice for the Litigation Committee**

In preparing referring advice and recommendations to the Litigation committee, it is required that this advice and/or recommendation is co-signed by both the Case Lawyer and the Field Operations investigator.

This will ensure that advice and any recommendation on whether or not to litigate is jointly agreed upon by both Legal and Operations. If either party cannot agree, the matter is to be referred to the relevant Team Leader, State Director, Executive Director and if necessary Group Managers for consideration prior to referral to the Litigation Committee.

### **25.6. Progressing a matter to court**

Each brief of evidence is reviewed by ABCC Legal to assess whether there is a case to answer. Where a case is evident, the brief of evidence and the assessment of the brief will be provided to external counsel for independent advice on the ABCC's prospects of success. This is consistent with Commonwealth prosecution policy.

Where the prospects of success are not assessed to be good, the lawyer may refer the brief of evidence back to the ABC 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 the ABCC Litigation Advisory Committee. The ABCC Litigation Advisory Committee comprises the ABC Commissioner, Chief Counsel, Group Manager – Field Operations 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 the ABC Commissioner who must authorise commencement of any litigation.

If litigation is authorised, the ABCC 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.

The ABC Inspector's role in the matter does not end with the progression to litigation – see 23.8.

### **23.6 The appropriate court**

The court in which the ABCC starts litigation will depend upon the nature of the action. For wages and conditions matters the ABCC litigates in the Federal Court of Australia, the Federal Magistrates Court and local or magistrates courts (as applicable) in each state.

All other cases may be commenced in the Federal Magistrates Court, except that coercion allegations can only be litigated in the Federal Court of Australia.

ABCC Legal will also take into consideration issues such as costs, delays, procedure, the ABCC's experience of particular jurisdictions and the specific nature of the case before making a recommendation on which court is appropriate for each matter.

If a matter is complex or raises issues that should be resolved by a superior Court, then litigation is also likely to be commenced in the Federal Court of Australia.

### **23.7 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 processes of the relevant court and on the alleged wrongdoer's response to the case.

Generally speaking, when the court documents are filed a first hearing date (commonly referred to as a mention or directions hearing) is nominated by the court. This first hearing is a procedural step for the court to determine how the case will move forward and to set a timetable for the steps up to final hearing. The steps involved in litigation up can be broadly characterised as follows:

- Phase 1: attempting to define the issues in dispute
- Phase 2: filing evidence on the issues in dispute
- Phase 3: preparing for hearing
- Phase 4: hearing on contravention
- Phase 5: hearing on penalty (where contravention is found or admitted)

In many cases the alleged wrongdoer will admit the contraventions after the proceedings start. When this occurs the ABCC will work with the alleged wrongdoer, or their representatives, to prepare an agreed statement of facts detailing the circumstances of the contravention. The case can then progress straight to phase 5, where the parties will present arguments on what, if any, penalty should be imposed.

### **23.8 The ABC Inspector's role in litigation matters**

An ABC Inspector's involvement in a case does not end with the preparation of a brief of evidence. While the nature and extent of a ABC Inspector's role will vary from case to case a ABC Inspector can reasonably expect, where required, to:

- gather further necessary evidence to support the case
- prepare or revise calculation spreadsheets
- 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 ABCC Legal)
- attending liability and penalty hearings
- appearing as a witness.

#### **23.8.1 Appearing as a witness**

Ordinarily, by the time a matter reaches the hearing stage (phase 4 or 5) the ABC Inspector will have provided an affidavit containing all of their relevant evidence. Where that evidence is disputed by the alleged wrongdoer the ABC 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 ABC Inspectors discuss the court procedures and what is expected of them with ABCC Legal before their court appearance.

In the general course of events, ABC 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 or affirm 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 the ABCC's legal representatives (e.g. "is this your affidavit?")
- the alleged wrongdoer's representative will then cross-examine the witness by asking additional questions
- the ABCC's legal representatives may ask further questions of the witness to clarify their evidence in cross-examination, 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.

The following are some helpful tips when appearing as a witness:

- read through your affidavit before attending court
- bring your affidavit, notes or documents with you to court
- when you get to court, tell the ABCC legal representative what you have brought with you
- wear tidy business clothes
- arrive early to find the courtroom and to meet with ABCC legal representatives
- before entering the courtroom turn off electronic equipment, including mobile phones and remove hats or sunglasses (unless required for medical or religious reasons)
- 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'

- 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
- address the judicial officer as 'Your Honour'
- speak clearly, as the microphone in the witness box only records your voice, it does not make it louder
- listen carefully and consider each question before you answer
- address your answers to the judicial officer, not the person questioning you, as you are providing evidence to the court, not having a conversation with the person asking questions
- if you do not understand a question say so
- if you did not hear the question ask for it to be repeated
- take your time so you can give a complete answer
- do not guess - if you are not sure about an answer, just say so
- if you need to refer to your notes or your affidavit to answer a question ask permission of the judicial officer to do so
- 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
- be prepared to wait, as delays often occur
- do not discuss your evidence with other witnesses
- if the ABC Inspector, or any of the witnesses requires an interpreter, or allowances to be made for a disability or special needs, the ABC Inspector should discuss the appropriate accommodations with ABCC Legal before the hearing.

### **23.9 AIMS recording**

The referral of a matter for ABCC litigation should be recorded in AIMS. The outcome of any litigation should also be recorded by ABCC Legal.

### **23.10 Commonwealth Director of Public Prosecutions (CDPP) referrals**

The ABCC does not undertake its own prosecution of criminal offences. These prosecutions are referred to the CDPP. Despite this, ABC Inspectors should be aware that alleged wrong-doers 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<sup>316</sup> (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)

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<sup>316</sup> An ABC Inspector is a 'Commonwealth public official'



Where there is evidence of one or more of the above having occurred the ABC Inspector should consider referring the matter to the CDPP for enforcement action.

To refer a matter to the CDPP the ABC 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 State Director for approval.

If their State Director approves the referral, the criminal brief will be cleared by ABCC Legal 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 ABC Inspector should work with the CDPP and ABCC Legal 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 standard of proof for criminal matters is higher than in civil penalty litigation, as offences alleged by the CDPP must be proved beyond reasonable doubt.

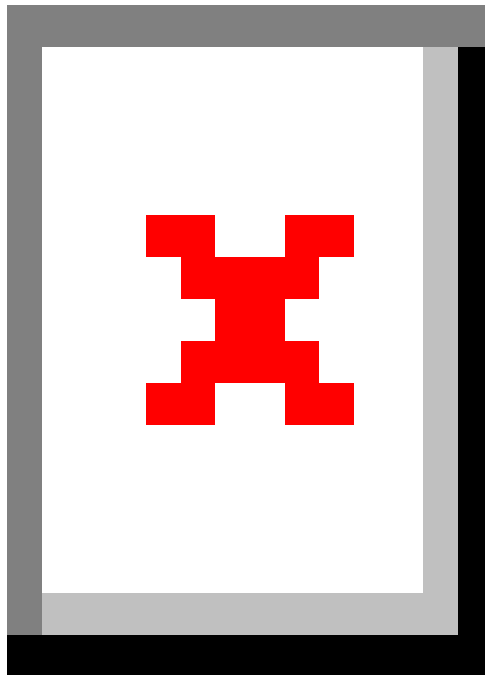
### **23.10.1 AIMS recording**

The referral of a matter for CDPP prosecution should be recorded in AIMS. The outcomes of any CDPP prosecution should also be recorded.

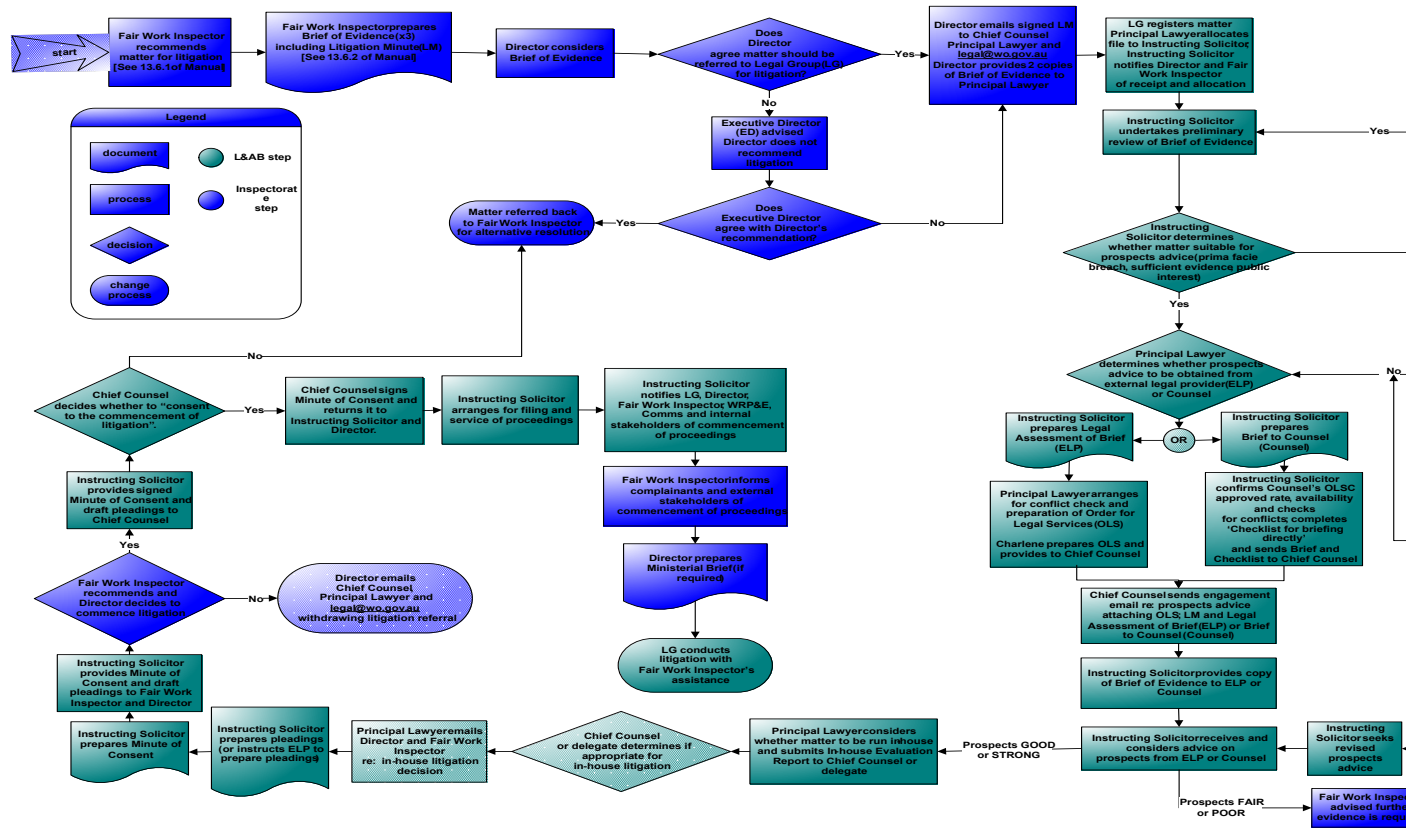
#### **Key Messages**

- The primary litigation action that may be recommended by Fair Work Inspectors is FWO litigation, but CDPP referrals are possible for criminal matters
- Fair Work Inspectors should consult with their team leader, director and executive director in deciding the appropriate enforcement action to take
- When the appropriate litigation action is decided upon, the Fair Work Inspector should apply the prescribed procedures to enable that action to be taken
- Litigation activity is an important aspect of the FWO's enforcement function. Fair Work Inspectors should be aware of the procedure for referring a matter for litigation, and their ongoing role in litigation activity

**Appendix A: Litigation process flow chart**



## Appendix B: The litigation combined process for ABCC Legal and the inspectorate



# ABCC Operations Manual

## Chapter 24

# Insolvent employers

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## 25.1. Introduction

Legislation that is outside the ABCC's jurisdiction can affect the status of a party to an investigation and impact on the ABCC's capacity to investigate a complaint. This chapter provides a background on some considerations that ABC Inspectors should regard when investigating a complaint, particularly in relation to the ABCC's role when an alleged wrongdoer 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 ABC Inspector.

Some additional situations that can affect the timely resolution of an investigation are also considered at the end of the chapter.

## 25.2. 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 alleged wrongdoer 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 ABC Inspector can take during the investigation. In certain circumstances, the insolvency of the alleged wrongdoer may result in the investigation being closed.

Where this is the case, an ABC Inspector should use one of the following finalisation letters:

- [Full investigation \(trustee/liquidator\)](#) – This letter is to the trustee/insolvency practitioner where a full investigation 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 finalising 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 ABC Inspectors who need to finalise complaints where the company has entered into a deed of arrangement, the company has been deregistered, or where the ABC Inspector is unable to locate office holders.

## 25.3. Confirming the status

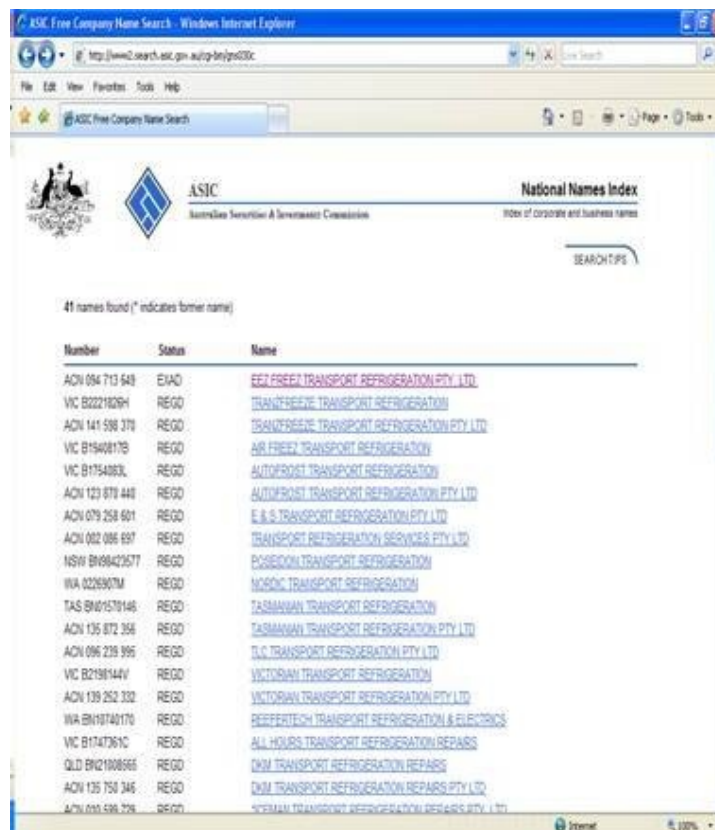
It is important for an ABC Inspector to identify when an alleged wrongdoer is insolvent, as this will dictate the action (if any) that the ABC Inspector can take in relation to the investigation.

Accessing the alleged wrongdoer's details via the free searches on the [ABN](#) and [ASIC](#) sites will indicate the status of the alleged wrongdoer. 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 12 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 13 below).

**Figure 14: Example of registered company**



**Figure 15: Example of company under external administration**



Where the free search indicates that the alleged wrongdoer is insolvent, an ABC 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, the ABCC will no longer be able to pursue a complaint due to an alleged wrongdoer'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 ABCC investigation.

## 25.4. 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.

### **25.4.1. 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 alleged wrongdoer has entered into a debt agreement or personal insolvency agreement under the *Bankruptcy Act 1966* with creditors, the ABC Inspector can still continue to investigate a complaint as per the processes detailed in Chapter 6 - Full investigations and Chapter 7 – Wages and conditions investigations of this Manual. This would include seeking that the alleged wrongdoer pays any outstanding entitlements to employees.

### **25.4.2. Bankruptcy**

#### **25.4.2.1. 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.



#### **25.4.2.2. The ABCC's role regarding bankruptcy**

In investigating a complaint against a bankrupt, the ABC 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 ABC 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 ABC Inspector should confirm with the trustee how employees of the bankrupt can make a claim to the trustee for their outstanding entitlements.

If an ABC Inspector has sufficient evidence to identify that a contravention exists (such as employment records), the ABC Inspector should advise the trustee of the contraventions. This information may assist the trustee in their considerations. The ABC 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 a "without prejudice" estimate of the complainant's entitlements, based on the records and documents available to the ABC Inspector.

However, if the ABC Inspector has not yet identified a contravention (e.g. an alleged wrongdoer goes into bankruptcy prior to the ABCC commencing an investigation) 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.

The ABC 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 team leader, the case can be finalised. The ABC Inspector will need to write to the complainant with a finalisation 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
- the ABCC's investigation is now finalised.

#### **25.5. 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.

### **25.5.1. 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), the ABCC 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 ABC Inspector should contact the administrator in the first instance. In any case, if an administrator is controlling the company at the time of an ABCC 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 ABC Inspector would investigate the complaint as per the processes detailed in Chapter 6 - Full investigations and Chapter 7 – Wages and conditions investigations of this Manual.

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).

### **25.5.2. 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, ABC 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 ABC Inspector to investigate the complaint. In such cases, the ABC Inspector should investigate the complaint as per the processes detailed in Chapter 6 - Full 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 the ABCC will litigate or not.

### **25.5.3. Liquidation**

#### **25.5.3.1. 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.

### **25.5.3.2. The ABCC's role regarding liquidation**

Where a company has a liquidator appointed, or has been liquidated, then the ABCC cannot take any further action, and the ABC Inspector should confirm with the liquidator how employees of the company can make a claim to the liquidator for their outstanding entitlements.

If an ABC Inspector has sufficient evidence to identify that a contravention exists (such as employment records), the ABC Inspector should advise the liquidator of the contraventions. This information may assist the liquidator in their considerations. The ABC 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 a "without prejudice" estimate of the complainant's entitlements, based on the records and documents available to the ABC Inspector.

However, if the ABC Inspector has not yet identified a contravention (e.g. an alleged wrongdoer goes into liquidation prior to the ABCC commencing an investigation), 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.

The ABC 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 team leader, the case can be finalised. The ABC Inspector will need to write to the complainant with a finalisation 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
- the ABCC's investigation is now finalised.

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 moneys.

### **25.5.4. 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. The ABCC 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 paid 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 the ABCC from investigating alleged contraventions of Commonwealth workplace laws. If a receiver and manager are controlling the company at the time of an ABCC 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.

## **25.6. The role of the ABCC regarding the actions of trustees or administrators**

On occasion, complainants contact the ABCC 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, ABC Inspectors must advise the complainant that the ABCC does not have the power to direct trustees, administrators, liquidators or receivers to recognize people as creditors or to pay dividends, and that they should raise their complaints with the relevant agency (i.e. ITSA or ASIC).

However, the ABC Inspector may be able to provide correspondence to the complainant that details the amount of underpayment the ABCC believes was owing to the complainant based on the evidence available during the investigation. This is the ABCC's practice in the case of alleged wrongdoers in bankruptcy and liquidation (as detailed above) and can be used in the case of administration, deed of company arrangement, receivership or deregistration where 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 ABCC 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, but that it is not the role of the ABCC to seek the insolvency of a person or company.

## **25.7. Background information on GEERS**

For the information of ABC Inspectors, some additional detail on the payment to employees under the GEERS scheme is supplied below.

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 twelve (12) months from the date of termination to lodge an application with GEERS.

Under GEERS, employees may be eligible to receive payment for eligible entitlements that are provided for in legislation, an award, a statutory agreement (such as an Australian Workplace Agreement or Collective Agreement), a written contract of employment, or otherwise evidenced in writing, for amounts outstanding for:

- unpaid and underpaid wages in the three-month period prior to the appointment of the insolvency practitioner (including amounts deducted from wages, but not forwarded; e.g. voluntary superannuation contributions made by the employee, but not passed on to a superannuation fund)
- all unpaid annual leave
- all unpaid long service leave

- all unpaid pay in lieu of notice
- up to a maximum of sixteen (16) weeks' redundancy pay.

As noted above, in cases of bankruptcy or liquidation, the ABC Inspector's finalisation 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 the employee is eligible or not.

## **25.8. 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.

### **25.8.1. Strike-off action**

An investigation may reveal that a company is being struck off the register of companies. This is the process immediately prior to deregistration.

If an ABC Inspector encounters a company in which strike-off action is in progress, the ABCC can write to ASIC to request that deregistration is deferred pending the outcome of the ABCC's investigation. ABC Inspectors should seek advice from their team leader 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.

### **25.8.2. Deregistration**

The ABCC 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.<sup>317</sup> Accordingly, where an ABC Inspector discovers that a company has been deregistered, the ABC Inspector normally will finalise 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 ABC Inspector can apply to ASIC to request that the company deregistration is overturned. If a company has been deregistered, the ABC Inspector should consult with their team leader to determine if the matter is of sufficient merit to apply to ASIC to seek the re-registration of the company.

It should be noted that ASIC does not always comply with the ABCC's requests regarding the deferral of a strike-off or the re-registration of a company.

### **25.8.3. Deregistered business names**

On occasion, the ABC Inspector may find that a business name of an alleged wrongdoer 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 ABC 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).

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<sup>317</sup> 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.

## **25.9. Other situations that impact an investigation**

In addition to the formal circumstances as described above, there are other situations regarding an alleged wrongdoer that impact the ABC Inspector's ability to practically investigate a complaint. These include:

- where the alleged wrongdoer is deceased
- where a company has no officeholders
- where the officeholders cannot be located.

### **25.9.1. Deceased estates**

At times, an ABC Inspector may investigate a complaint where the alleged wrongdoer 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 alleged wrongdoer's business.

ABC Inspectors should exercise discretion when dealing with these matters, and be aware of the emotions of those involved. If the alleged wrongdoer has died shortly before or during the course of the investigation, it may be appropriate for the ABC 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 ABC 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, it may be unable to be resumed in practical terms, 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.

Accordingly, after a short time, the ABC Inspector will continue the investigation. The ABC 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).

### **25.9.2. Companies with no officeholders**

In rare circumstances, an ABC 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 ABC 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 ABC Inspector to take further action. Except in cases where the ABC Inspector is aware that appointment of a new officeholder is imminent, it would be appropriate for the case to be finalised, and for the complainant to be advised of the reasons for the finalisation. 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 team leader, the case will be closed.

**25.9.3. Where the officeholders cannot be located**

As in the circumstance where a company has no officeholders, it is difficult for an ABC Inspector to take practical action unless a person with authority can be located. The ABC 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 ABC Inspector to finalise the case, and advise the complainant of the reasons for finalisation. With confirmation of the team leader, the case will be closed.

(Also see Chapter 4 – Investigation overview, section 4.6 for some other peripheral issues that may need to be considered in an investigation).

	<b>Key Messages</b>	
	<ul style="list-style-type: none"> <li>• The insolvency of an alleged wrongdoer can limit the practical actions that an ABC Inspector can take in investigating a complaint.</li> <li>• The ABC Inspector should confirm the status of the alleged wrongdoer using relevant searches.</li> <li>• Where the insolvency of an alleged wrongdoer means an ABC Inspector cannot investigate a complaint, then the case can be finalised and the complainant advised of this outcome.</li> <li>• Complainants with outstanding entitlements are advised to make a claim to the trustee or liquidator and to General Employee Entitlements and Redundancy Scheme (GEERS).</li> </ul>	
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## 25.1. Introduction

*This chapter provides the process for the ABC Commissioner to intervene in matters before Fair Work Australia which involve building industry participants*

## 25.2. Intervention

The Building and Construction Industry Improvement Act 2005 ([BCII Act](#)) provides for the ABC Commissioner to intervene in proceedings in a court ([s.71](#)) and to make submissions to Fair Work Australia (FWA) ([s.72](#)). Any decision to intervene in a proceeding must be made by the ABC Commissioner or his delegates. Where for whatever reason, the ABC Commissioner is unavailable to authorise an intervention, the Deputy Commissioner is delegated to exercise the power. In turn, the Group Chief Counsel or the Group Manager Operations also hold delegations.

## 25.3. Court Interventions

Under [s.71](#) of the BCII Act, the ABC Commissioner may intervene in the public interest in civil court proceedings. The proceedings must relate to a matter that arises under the [BCII Act](#), the [Independent Contractors Act 2006](#) or the [Fair Work Act 2009](#) which involves a building industry participant or building work.

The Act does not prescribe the process for notification of intention to intervene however, the ABC Commissioner generally writes to the Registrar of the relevant court to notify of his intention to exercise his power under [s.71](#). Notification to the court of the ABC Commissioner's intervention will be completed by the ABCC's solicitor on the record.

Where the ABC Commissioner intervenes in court proceedings, he becomes a party to the proceedings and has all the rights, duties and liabilities of such a party.

Generally the ABCC will engage an external law firm as solicitor on the record and a barrister is usually briefed to appear.

## 25.4. Submissions to Fair Work Australia

Under [s.72](#) of the BCII Act, the ABC Commissioner may, by giving written notice to the General Manager, Fair Work Australia, make submissions in a matter before FWA that involves a building industry participant or building work. In order for the ABC Commissioner to make submissions to FWA, the matter must arise under the FW Act.

The ABC Commissioner will exercise his right to intervene in any matter before FWA where he considers that intervention would advance the objectives of the BCII Act.

The ABC Commissioner makes submissions to ensure that the parties and FWA are fully aware of the impact of the federal legislation. For example, a matter may involve a possible contravention of the BCII Act, in addition to the FW Act or the ABC Commissioner may wish to make submissions that FWA should make a particular order, such as an order that workers on strike return to work.

The ABC Commissioner is represented in such proceedings by the ABCC's advocate or another member of the ABCC's Legal Unit. Occasionally, external legal representation is engaged either because of the complexity of the case or the unavailability of internal ABCC resources.

## 25.5. ABCC Notification

### 25.5.1. Fair Work Australia

[Section 74 of the BCII Act](#) requires the General Manager, Fair Work Australia to notify the ABC Commissioner of applications lodged with FWA under the FW Act where that application relates to a matter that involves a building industry participant or building work. This ensures the ABC Commissioner is alerted to proceedings in which he may wish to consider submissions.

### 25.5.2. Courts

Different notification arrangements apply in relation to court proceedings. [Section 78\(2\)\(d\) of the BCII Act](#) and [Regulation 8.1\(1\) of the Building and Construction Industry Improvement Regulations 2005](#) provide that a building industry participant must notify the ABC Commissioner of an application made to a court under the BCII Act, the Independent Contractors Act or the FW Act if the application is made by, or otherwise involves, the building industry participant. Building industry participants must also notify the ABC Commissioner of the outcome of such applications.

## 25.6. Investigator Role-Interventions

The ABC Commissioner may intervene in proceedings in a court or before FWA regarding a matter which is already under investigation or will come under investigation by the ABCC. Where the ABC Commissioner makes submissions to FWA or intervenes in court proceedings, information obtained by Investigators will assist the framing of submissions presented by the ABC Commissioner.

Early indications of hearings are critical to ensure interventions are lodged within the allotted timeframe. This applies to both FWA and court proceedings. Applications for orders to stop industrial action ([s.418 Fair Work Act](#)) must be determined within 2 days. The earlier the ABCC is made aware of an impending hearing and has become acquainted with the facts of the matter, the better placed the ABC Commissioner will be to give consideration to exercising his rights under [ss.71](#) or [72](#).

Investigators should note that the ABC Commissioner will not usually exercise [s.52](#) powers in respect of a matter in which he has intervened. As an intervenor (party) in a court proceeding, the exercise of [s.52](#) powers by the ABC Commissioner about a matter relevant to those proceedings, could be considered by the court as an improper use of [s.52](#) powers. Where a matter under investigation by the ABCC becomes the subject of proceedings before a court, the ABC Commissioner 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 [s.52](#) powers are likely to be used.

Investigators can assist the intervention process in a number of ways. These include:

- keeping informed of developments and in particular those which are likely to give rise to FWA or court proceedings;
- maintaining up to date records of events so that they can provide details to the ABCC representatives who will be appearing in proceedings;
- ensuring investigations are progressed without unnecessary delay; and

- assist in the briefing of ABCC representatives who will be appearing in the proceedings. This is particularly important where the ABCC has engaged external representation.

## 25.7. Appearing as a witness in proceedings

### 25.7.1. ABCC Contact

Notifications of matter before Fair Work Australia that involve building participants are received by the Manager, Legal Administration in Melbourne Victoria. An assessment is made before any matters are referred to the Group Chief Counsel for further consideration.

## Glossary and acronyms

### A

<b>ABCC</b>	Office of the Australian Building and Construction Commissioner
<b>ABC Inspector</b>	An inspector appointed under section 57 of the <i>Building and Construction Improvement Act 2005</i>
<b>Admissibility (of evidence)</b>	The acceptability of evidence, whether it meets evidentiary requirements to allow it to be considered by the Court
<b>Adverse action</b>	An action taken by a person against another in relation to a workplace right as defined by section 340 of the FW Act
<b>AFPC</b>	Australian Fair Pay Commission
<b>AFPCS</b>	Australian Fair Pay and Conditions Standard
<b>AHRC</b>	Australian Human Rights Commission
<b>AIRC</b>	Australian Industrial Relations Commission
<b>Allegation</b>	An assertion of wrongdoing contained in a complaint.
<b>Alleged wrongdoer</b>	A person, entity, or a representative of the entity (e.g. the manager) suspected of committing a contravention.
<b>APS</b>	Australian Public Service
<b>ASIC</b>	Australian Securities and Investment Commission

**ATO** Australian Taxation Office

**AVR** Assisted voluntary resolution (also see 'voluntary resolution')

**AWA** Australian Workplace Agreement

## **B**

**BCII Act** The *Building and Construction Improvement Act 2005 (Cth)*

**BCII Regulations** The *Building and Construction Improvement Regulations 2005 (Cth)*

<b>Better Off Overall Test (BOOT)</b>	The test applied by FWA to determine whether an enterprise agreement should be approved. See further section 193 of the FW Act.
<b>Brief of evidence</b>	A written summary and collation of the evidence gathered in an investigation that will be relevant in court to proving the allegation.
<b>Burden of proof</b>	The requirement that the party commencing litigation prove by weight of evidence each element of their case (Civil burden of proof is on the balance of probabilities while in criminal matters the burden of proof is beyond a reasonable doubt.)
<b>C</b>	
<b>Case conference</b>	The process by which the ABCC reviews a case and makes a decision as to how to take it forward.
<b>Code</b>	National Code of Practice for the Construction Industry 1997
<b>Commonwealth workplace laws</b>	Collective term encompassing the <i>Building and Construction Industry Improvement Act 2005 (Cth)</i> , <i>Fair Work Act 2009 (Cth)</i> , <i>Fair Work (Transitional and Consequential Amendments) Act 2009 (Cth)</i> , <i>Independent Contractors Act 2006 (Cth)</i> , and underlying regulations.
<b>Complainant</b>	The person or entity alleging a contravention of Commonwealth workplace laws.
<b>Complaint</b>	A submission alleging a contravention of Commonwealth workplace laws that may result in an investigation.
<b>Compliance notice</b>	A written notice given by an ABC Inspector, to a person who is believed to have contravened an entitlement provision, requiring them to take a specified action and produce evidence of their compliance (FW Act s716)
<b>Contravention</b>	A breach of a Commonwealth workplace law.
<b>Contravention letter</b>	A letter issued to a party or group informing them of the nature of the contravention(s) alleged and steps required for rectification.

## D, E

<b>DEEWR</b>	Department of Education, Employment and Workplace Relations
<b>DIAC</b>	Department of Immigration and Citizenship
<b>Discriminatory term</b>	An unlawful term of an enterprise agreement that has the effect of discriminating against an employee on the grounds of 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. See FW Act (ss 194-195)
<b>Element</b>	An essential requirement to a contravention. Each contravention is made up of a basic set of elements which must be proved.
<b>Enforceable undertaking</b>	A written undertaking, enforceable in court, given to the ABCC by a person in relation to a contravention of a civil remedy provision).
<b>Enterprise agreement</b>	An agreement (single or multi-enterprise) as to the terms and conditions of employment that is negotiated at the workplace level and approved by FWA.
<b>Evidence</b>	Material presented to a court which is intended to prove that a Commonwealth workplace law was contravened.
<b>Evidence matrix</b>	A tool by which to document the various elements proofs and evidence required to establish a contravention.
<b>Exhibit</b>	A document or object introduced in a court as evidence.

## F, G, H

<b>FOA</b>	Freedom of association
<b>FOI</b>	Freedom of information
<b>FOI Act</b>	<i>Freedom of Information Act 1982 (Cth)</i>
<b>FW Act</b>	<i>Fair Work Act 2009 (Cth)</i>
<b>FW Regulations</b>	<i>Fair Work Regulations 2009 (Cth)</i>
<b>FWA</b>	Fair Work Australia



<b>FW Inspector</b>	Fair Work Inspector
<b>FWO</b>	Office of the Fair Work Ombudsman
<b>ABCC Operations Manual</b>	Document providing procedural guidance on ABCC policy and the conduct of workplace relations investigations.
<b>GEERS</b>	General Employee Entitlements and Redundancy Scheme
<b>Genuine redundancy</b>	A termination of employment on operational grounds that complies with section 389 of the FW Act
<b>Good faith bargaining</b>	Requirements that all parties negotiating an enterprise agreement must adhere to. See further section 228 of the FW Act.
<b>Hearsay</b>	Evidence that is offered by a witness of which they do not have direct knowledge but, rather, their testimony is based on what others have said to them.

## I, J, K

<b>Independent contractor</b>	A person engaged under a contract for services. Refer to guide to assessing independent contractors.
<b>Interview</b>	A formal conversation designed to elicit the facts and information of which a person is aware of in respect of complaint under investigation.
<b>Investigation</b>	An inquiry designed to ascertain and assess the facts relevant to a complaint.
<b>Investigation plan</b>	Articulation of steps in the investigative process. There is also a document called the " <a href="#">investigation plan</a> " which can assist the Fair Work Inspector in this regard.
<b>ITEA</b>	Individual Transitional Employment Agreement
<b>KPIs</b>	Key performance indicators

## L, M, N

<b>Litigation</b>	A lawsuit or other resort to the courts to determine a legal question or matter.
<b>Litigation Advisory Committee (LAC)</b>	The committee responsible for deciding whether a matter shall proceed to litigation.
<b>MO</b>	Minister's Office (Minister for Education, Employment and Workplace Relations)
<b>Modern award</b>	An industrial instrument made under the FW Act that outlines sets minimum terms and conditions of employment
<b>MOU</b>	Memorandum of understanding
<b>MP</b>	Member of Parliament
<b>NAPSA</b>	Notional Agreement Preserving a State Award
<b>NES</b>	National Employment Standards
<b>NTP</b>	Notice to produce (authorised by s52 of the BCII Act)

## O, P, Q

<b>OH&amp;S / OHS</b>	Occupational health and safety
<b>Penalty infringement notice (PIN)</b>	A notice which can be issued by a Workplace Inspector imposing a penalty for infringement, as authorised by Regulation 4.04 of the FW Regulations (a fine).
<b>Prima facie</b>	At first appearance, on the face of it.
<b>Probative (evidence)</b>	Evidence tending to prove something.

## R, S

<b>Record of conversation</b>	The notes of a conversation between an ABC Inspector and witness in respect of a complaint under investigation; does not require formal caution.
<b>Record of interview</b>	A formal record of a conversation between an ABC

Inspector and person of interest in respect of the complaint under investigation; should be preceded with a formal caution.

A chronological log of actions taken in the course of an investigation.

**Running sheet**

**State referral**

In December 2009, the Commonwealth passed the *Fair Work Amendment (State Referrals and Other Measures) Act 2009*. This Act enabled states to refer certain matters to the Commonwealth so that a national workplace relations system could be established

**Statement**

A written declaration of an event(s) relating to a complaint.

**Statute**

A law enacted by parliament.

## T, U, V

<b>Time and wage records</b>	The records an employer is required to keep under the FW Act (s535) and FW Regulations relating to the employment of each employee.
<b>Transitional Act</b>	<i>Fair Work (Transitional and Consequential Amendments) Act 2009</i>
<b>Unfair dismissal</b>	A dismissal that is harsh, unjust or unreasonable
<b>Voluntary resolution</b>	Agreement reached by the complainant and employer on a voluntary basis, allowing the ABCC involvement in the complaint to be finalised
<b>Vulnerable workers</b>	includes (but is not limited to): young people, trainees, apprentices, people with a physical or mental disability or literacy difficulties, recent immigrants and people from non-English speaking backgrounds, the long-term unemployed and those re-entering the workforce, outworkers, people with carer responsibilities, indigenous Australians, employees in precarious employment (e.g. casual employees) and people residing in regions with limited employment opportunities and/or with financial and social restraints on their ability to relocate to places where there may be greater job opportunities.

## W, X, Y, Z

<b>Witness</b>	A person, who sees, hears or experiences an event(s) and can provide evidence which is relevant and admissible before a court.
<b>WPA</b>	The Workplace Authority
<b>WR Act</b>	<i>Workplace Relations Act 1996 (Cth)</i>
<b>WR Regulations</b>	<i>Workplace Relations Regulations 2006 (Cth)</i>