

**Senate Standing Committee on Education Employment and Workplace
Relations**

**QUESTIONS ON NOTICE
Budget Estimates 2012-2013**

Agency - ABCC/FWBII

DEEWR Question No. EW0114_13

Senator Cameron asked in writing

Refers to previous DEEWR Question No EW0994_12

Question

ABCC – Prosecutorial fairness in administrative proceedings

In answer to question EW0994_12, the ABCC said that Commissioner Johns requested a review of the ABCC's requirements to act fairly. Presumably this was in relation to the ABCC Guidance Note on Litigation Policy.

Questions:

1. What was the outcome of the review?
2. Has the ABCC amended Guidance Note No. 1 – Litigation Policy?
3. Can the ABCC table the Guidance Note as it currently stands?

Answer

Fair Work Building & Construction has provided the following response.

1. Guidance Note 1 was developed and implemented.
2. Yes. A Statement Professional and Ethical Standards was included as Annexure A.
3. Guidance Note 1 is included at **ATTACHMENT A**.

Guidance Note 1 - FWBC Litigation Policy

Guidance Note No. 1

Guidance Note Title Litigation Policy of the Office of the Fair Work Building Industry Inspectorate

Relevant legislation or materials

Fair Work (Building Industry) Act 2012

FWBC Statement of Professional and Ethical Standards

Publication History

First edition 12 June 2012

1. The purpose of FWBC Guidance Notes

1.1. Guidance Notes are a means by which the Office of the Fair Work Building Industry Inspectorate, operating under the name “Fair Work Building & Construction” (**FWBC**) publishes information on the interpretation of the laws it enforces or about its internal policies and procedures.

1.2. FWBC will publish Guidance Notes from time to time on a range of subjects concerning the *Fair Work (Building Industry) Act 2012* (**FWBI Act**), the *Independent Contractors Act 2006* (**IC Act**), the *Fair Work Act 2009* (**FW Act**), a Commonwealth industrial instrument and any building code issued under section 27 of the FWBI Act (**Building Code**) or other matters over which it has jurisdiction (collectively referred to as **Building Industry Laws**). The general public are welcome to suggest subjects for future Guidance Notes..

2. This Guidance Note

2.1. This Guidance Note sets out guidelines to be followed by FWBC in deciding whether to commence proceedings in relation to a contravention or threatened contravention of Building Industry Laws. It is to be referred to as:

- (a) Guidance Note 1; or
- (b) The FWBC Litigation Policy.

2.2. This Guidance Note addresses the following topics:

- (a) The purpose of FWBC Guidance Notes (paragraph 1);
- (b) This Guidance Note (paragraph 2);
- (c) About the Director (paragraph 3);
- (d) Litigation as a compliance tool (paragraph 4);
- (e) Nature of contraventions (paragraph 5);
- (f) Persons involved in contraventions (paragraph 6);
- (g) Direction to Inspectors and Consent to Litigation (paragraph 7);
- (h) Director's independence and discretion (paragraph 8);
- (i) Consideration of provisions of the Civil Dispute Resolution Act 2011 (paragraph 9);
- (j) The decision to commence proceedings – the two step process (paragraph 10);
- (k) Sufficient evidence (paragraph 11);
- (l) Public interest (paragraph 12);
- (m) Relevant public interest factors (paragraph 13);
- (n) Determination of appropriate enforcement related option (paragraph 14);
- (o) The commencement and conduct of FWBC proceedings (paragraph 15);
- (p) Breach bargaining (paragraph 16);
- (q) Discontinuance of proceedings (paragraph 17);
- (r) Submissions on penalty (paragraph 18);
- (s) Notification of decision in relation to enforcement activity (paragraph 19);
- (t) Publishing and utilising enforcement activity (paragraph 20); and
- (u) Intervention in Court and Fair Work Australia proceedings (paragraph 21).

2.3. The purpose of this Guidance Note is two-fold. First, it operates as a guide for Fair Work Building Industry Inspectors and staff of FWBC in the performance of their duties and, in particular, in assisting the Director (the **Director**) to exercise his functions and powers to commence, or intervene in, proceedings in accordance with the Building Industry Laws.

2.4. Secondly, it aims to provide the community, and building industry participants in particular, with a better understanding of the manner in which the Director exercises those functions and powers.

2.5. This Guidance Note sets out the general guidelines under which decisions about the commencement of litigation by the FWBC will be made. It does not prescribe mandatory requirements to be followed in every case. In particular, the contents of this Guidance Note are not directions for the purposes of sections 59F or 59G of the FWBI Act. The contents of this Guidance Note are necessarily subject to various legal obligations or requirements that apply to the FWBC, including:

- (a) the FWBI Act and other Building Industry Laws;
- (b) the Legal Services Directions 2005 (including Appendix B: obligation to act as a model litigant);
- (c) any directions made under sections 59F or 59G; and
- (d) any recommendations of the Advisory Board to the Director made under section 24 of the FWBI Act.

3. About the Director

3.1. The Director is a statutory office holder pursuant to section 9 of the FWBI Act.

3.2. The Director and staff of the FWBC together constitute a statutory agency for the purposes of the Public Service Act 1999. However, the FWBC is not a separate legal entity from the Commonwealth.

3.3. The FWBC commenced on 1 June 2012.

3.4. In broad terms, the Director and his office:

- (a) promote harmonious, productive and cooperative workplace relations in the building industry;
- (b) monitor and promote compliance with designated building laws and the Building Code by building industry participants;
- (c) inquire into and investigate any act or practice by building industry participants that may be contrary to designated building laws, safety net contractual entitlements or the Building Code ;
- (d) commence proceedings in a Court or making applications to FWA to enforce designated building laws and safety net contractual entitlements as they relate to building industry participants;
- (e) provide assistance and advice to building industry participants;

(f) represent building industry participants who are, or might become, parties to a proceeding in a court or FWA under a designated building law, if the Director considers that providing the representation would promote compliance with those laws ;

(g) disseminate information; and

(h) make submissions to the Independent Assessor of Special Building Industry Powers.

3.5. The Director appoints Fair Work Building Industry Inspectors who are empowered to investigate compliance by building industry participants with Building Industry Laws, including :

(a) provisions of the FW Act, including:

(i) general protections, including workplace rights, freedom of association and discrimination;

(ii) right of entry by permit holders;

(iii) underpayment of wages and entitlements;

(iv) coercion in relation to a workplace right;

(v) sham contracting arrangements (misrepresentations that an employee is an independent contractor);

(vi) unprotected industrial action during the currency of an agreement;

(vii) payments in relation to periods of unlawful industrial action; and

(viii) employee records and pay slip requirements.

(b) enterprise agreements (including agreement-based transitional instruments such as pre-reform certified agreements, pre-reform Australian Workplace Agreements and workplace agreements made prior to 1 July 2009);

(c) federal awards (including modern awards, division 2B state awards and award-based transitional instruments); and

(d) minimum pay and conditions standards, such as the National Employment Standards.

4. Litigation as a compliance tool

4.1. The enforcement of Building Industry Laws is a means by which the FWBI Act aims to achieve its main object, namely to provide a balanced

framework for cooperative, productive and harmonious workplace relations in the building industry.

4.2. The functions of the Director are specified in section 10 of the FWBI Act and include:

(a) promoting harmonious, productive and cooperative workplace relations in the building industry;

(b) monitoring and promoting compliance with designated building laws and the Building Code by building industry participants;

(c) inquiring into and investigating any act or practice by building industry participants that may be contrary to designated building laws, safety net contractual entitlements or the Building Code ;

(d) commencing proceedings in a Court or making applications to FWA to enforce designated building laws and safety net contractual entitlements as they relate to building industry participants;

(e) providing assistance and advice to building industry participants;

(f) representing a building industry participant who is, or might become, a party to a proceeding in a court or FWA under a designated building law, if the Director considers that providing the representation would promote compliance with those laws ;

(g) disseminating information; and

(h) making submissions to the Independent Assessor of Special Building Industry Powers.

4.3. Litigation by the Director is part of a regulatory system to promote harmonious, productive and cooperative workplace relations in the building industry and bring about compliance with Building Industry Laws. Litigation may also be appropriate when there is a need for judicial clarification of a Building Industry Law.

4.4. As a part of FWBC's regulatory system the FWBC offers advice, information and education to encourage voluntary compliance with Building Industry Laws. If compliance is not obtained through such means (or voluntary compliance is not possible having regard to the nature of the suspected contraventions), the FWBC may commence a formal investigation of suspected contraventions and will consider commencing proceedings to enforce the law where the investigation provides sufficient evidence.

4.5. Proceedings might be commenced if the Director considers such proceedings to be the appropriate means of dealing with the alleged contravention or deterring others from contravening Building Industry Laws. This may occur even if there has been subsequent voluntary compliance.

5. Criminal Offences and Civil Liability

5.1. The majority of contraventions of the FW Act are not offences. In this context "offence" means criminal offence and is to be distinguished from civil penalty liability. The FW Act instead attaches civil liability to "civil remedy provisions". FWBC's role is to investigate contraventions of civil remedy provisions. However, the FWBI Act provides that various acts in relation to compliance with examination notices are offences.

5.2. For example failure to comply with an examination notice served under section 50 of the FWBI Act to:

- (a) give information to the Director or an assistant;
- (b) produce documents to the Director or an assistant; or
- (c) attend before the Director or an assistant to answer questions as specified in the notice,

is an offence and may give rise to a penalty of imprisonment.

5.3. Failure to:

- (a) take an oath or affirmation to verify information or answers given to the Director under subsection 51(4) of the FWBI Act; or
- (b) answer questions relevant to an investigation while attending as required before the Director or an assistant,

is also an offence and may also give rise to a penalty of imprisonment.

5.4. However, a court can, if it considered it appropriate, instead of, or in addition to imprisonment, impose a maximum \$3 300 fine for breaches, and five times that for a body corporate convicted of an offence. This is provided for under subsections 4B(2) and (3) of the Crimes Act 1914.

5.5. In a criminal case, the prosecution must prove each element of the offence "beyond reasonable doubt". However, the elements of a civil contravention need only be proved "on the balance of probabilities": see section 140 of the Evidence Act 1995. Stricter proof is generally required to satisfy this test in civil penalty proceedings (such as those commenced by the Director) than in ordinary civil cases, to take account of the gravity of the matters alleged in civil remedy cases.

5.6. Criminal prosecutions are generally initiated by the Commonwealth Director of Public Prosecutions (**CDPP**). Where the FWBC believes an offence has occurred under the FWBI Act it will, in the ordinary course, refer a brief of evidence to the CDPP. The CDPP decides whether to commence or not commence a prosecution, and has the conduct of any resulting prosecution. Where information gathered in the course of an investigation

discloses suspected criminal behaviour in relation to other state, territory or Commonwealth laws, FWBC may also refer the matter to relevant policing authorities.

5.7. In some circumstances, injunctive relief (including interim relief) may be sought to restrain a person from engaging in conduct in contravention of the FW Act or other applicable Building Industry Laws .

6. Persons involved in contraventions

6.1. Section 550 of the FW Act provides that:

a person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.

6.2. The term “involved in” requires that a person has:

- (a) aided, abetted, counselled or procured the contravention; or
- (b) induced the contravention, whether by threats or promises or otherwise; or
- (c) been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
- (d) conspired with others to bring about the contravention.

6.3. Section 363 of the FW Act provides that industrial associations are responsible for the conduct of their officers who act in that capacity in contravention of Part 3-1 of the FW Act (General Protections).

6.4. FWBC takes seriously the need to enforce Building Industry Laws. Accordingly, holding individuals and industrial associations accountable for acts that they are involved in or responsible for is an appropriate compliance tool.

6.5. Therefore, in each instance of a suspected contravention of a civil remedy provision of the FW Act, FWBC will consider whether any other person should be proceeded against as an accessory. FWBC then applies the two-step process described in paragraph 10 below in determining whether to commence such a proceeding.

7. Direction to Inspectors

7.1. The Director, acting under sections 59F or 59G of the FWBI Act, may issue directions to Fair Work Building Industry Inspectors which sets out the process of making a decision to commence legal proceedings.

8. Director’s independence and discretion

8.1. Section 11 of the FWBI Act provides that the Minister may give written directions to the Director in relation to the performance of his powers and functions, as well as the policies, programs and priorities of the Director.

8.2. However, any direction given by the Minister under subsection 11(1) of the FWBI Act must not relate to a particular case (subsection 11(2) FWBI Act).

8.3. In this respect the independence of the Director in the exercise of his discretion to commence a proceeding is unfettered.

8.4. Further, the FWBII Advisory Board may make recommendations to the Director about policies to guide the performance of the Director's functions and exercise of the Director's powers, the priorities of, and the programs to be implemented by, the Director, and any matter that the Minister requests the Advisory Board to consider.

8.5. The Director discretion to commence a proceeding may or may not be fettered by future policies guiding the Director's performance of functions and exercise of powers that the Advisory Board has recommended.

9. Consideration of provisions of the *Civil Dispute Resolution Act 2011*

9.1. The *Civil Dispute Resolution Act 2011* (**CDR Act**) and Civil Dispute Resolution Regulations 2011 commenced on 1 August 2011.

9.2. The FW Act, and therefore litigation arising under it, is expressly excluded from the operation of the CDR Act..

9.3. Although it is unlikely that any litigation issued by FWBC will be subject to the provisions of the CDR Act, the Act's encouragement of genuine steps to resolve disputes is consistent with the approach of this Guidance Note 1.

10. The decision to commence proceedings - the two-step process

10.1. Effective law enforcement is a key means by which FWBC aims to achieve the main object of the FWBI Act. The key aim of FWBC's enforcement proceedings is to achieve compliance with Building Industry Laws and thereby promote cooperative, productive and harmonious workplace relations in the building industry.

10.2. A decision by the Director to commence (or not commence) a proceeding is an important one. Great care is taken in making the decision to commence proceedings. A wrong decision about whether or not to commence a proceeding may undermine the confidence of the building industry participants in the Australian Government's workplace relations system and in FWBC as the national regulator of Building Industry Laws.

10.3. All FWBC litigation should be lawful, accountable, constructive and effective. In addition, all FWBC litigation should be targeted, proportionate,

consistent and fair, and commenced and conducted in accordance with the requirements of the Legal Service Directions, and, if appropriate, the *Civil Dispute Resolution Act 2011*.

10.4. Decisions to commence a proceeding should satisfy a two-step test:

- (a) first, there must be sufficient evidence to prosecute the case; and
- (b) secondly, it must be evident from the facts of the case, and all the surrounding circumstances, that commencing the proceeding would be in the public interest

10.5. A similar two-step process will also be applied to decisions FWBC makes about the institution of appeals in the sense that FWBC will consider:

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

11. Sufficient evidence

11.1. In determining whether there is sufficient evidence to commence a proceeding FWBC will consider if there:

- (a) is admissible, substantial and reliable evidence of a contravention of Building Industry Laws;
- (b) are available, competent and credible witnesses (where relevant);
- (c) are admissions made by the alleged wrongdoer;
- (d) are any lines of defence which are plainly open to, or have been indicated by, the alleged wrongdoer; and
- (e) are any other factors which could affect the likelihood or otherwise of success.

11.2. Having regard to the evidentiary considerations FWBC will consider whether there:

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

11.3. Under the Legal Services Directions, FWBC must not (except in urgent circumstances, for example, when an application is made for an interlocutory injunction) commence a proceeding unless it has received written legal advice

from an external legal provider indicating that there are reasonable grounds for starting the proceedings. Legal advice of this nature is covered by legal professional privilege.

12. Public Interest

12.1. Once satisfied that the evidence justifies the commencement of a proceeding, the Director will usually proceed to litigation unless, having regard to the whole of the circumstances, the public interest dictates that litigation should not be commenced.

12.2. It is not the rule that all contraventions brought to the attention of FWBC must be the subject of litigation.

12.3. Generally speaking, the more serious the civil remedy provision alleged to have been contravened:

(a) the more likely it will be that the public interest will require that a proceeding be commenced; and

(b) the more compelling the reasons would have to be for a proceeding not to be pursued if the evidence is strong and the prospects good.

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

12.5. The factors which can properly be taken into account in deciding whether the public interest requires that a proceeding be commenced will vary from case to case.

12.6. However, a decision whether or not to commence a proceeding should not be influenced by:

(a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged wrongdoer or any other person involved;

(b) personal feelings concerning the alleged wrongdoer or the victim;

(c) possible political advantage or disadvantage to the Government or any political group or party;

(d) the possible effect of the decision on the personal or professional circumstances of those responsible for the decision to commence litigation;

(e) whether there has been or will be media attention (except to the extent that it is relevant to general deterrence); or

(f) possible advantage or disadvantage to any individual, employer, employer group, industrial or other association or union, or an office holder or member of such a group or any other building industry participant.

13. Relevant public interest factors

Factors which may arise in considering whether the public interest dictates that a proceeding not be commenced include the following:

13.1. Nature and circumstances of the alleged contravention

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

It would only be in the most unusual circumstances that allegations of coercion in relation to making an enterprise agreement, industrial action prior to the nominal expiry date of an enterprise agreement, payment during periods of industrial action or allegations of contraventions of the general protections in relation to freedom of association would be trivial or technical allegations.

For example, it can be expected that, in most circumstances, there will likely be a determination that there is public interest in commencing a proceeding seeking a civil penalty in respect of:

1. any allegation of coercion under section 355 or 348 of the FW Act; and
2. any allegation of industrial action prior to the nominal expiry date of enterprise agreements under section 417 of the FW Act or a breach of orders made by Fair Work Australia or a court in respect of industrial action.

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

(c) the prevalence within the industry of the alleged contravention;

(d) mitigating or aggravating circumstances.

For example:

(i) mitigating factors might include where:

1. there is evidence that the building industry participant had a genuine misunderstanding (having made reasonable attempts to understand its legal obligations) and, when it was brought to the building industry participant’s attention, the building industry participant readily rectified the contravention and put in place systems to ensure that no contraventions will occur in the future;

2. the building industry participant has approached FWBC to make admissions of contraventions and worked with FWBC to readily rectify the

contraventions and put in place systems to ensure that no contraventions will occur in the future;

(ii) an aggravating circumstance might be that the alleged wrongdoer refused or impeded attempts at voluntary compliance, such as ignoring a prior warning; and

(e) any other relevant circumstances. For example, it would be relevant if the offending conduct can more appropriately be dealt with by another agency, such as the police .

13.2. Characteristics of the alleged wrongdoer

(a) the degree of culpability of the alleged wrongdoer in connection with the alleged contravention;

For example:

(i) the relevant compliance history of the alleged wrongdoer; and

(ii) the attitude of the alleged wrongdoer to future compliance (including any relevant proactive measures taken to comply with Building Industry Laws).

(b) relevant personal history and other relevant characteristics of the alleged wrongdoer (e.g. age, intelligence, physical health, mental health, special infirmity, etc);

(c) whether the alleged wrongdoer is willing to co-operate in the investigation or litigation, including the investigation and prosecution of others, or the extent to which the alleged wrongdoer has done so;

(d) the level of contrition demonstrated by the alleged wrongdoer; and

(e) the degree of involvement of senior management in the alleged contravention, or the degree of involvement by office holders or members of a registered organisation or other association.

13.3. Level of industry or public concern

(a) whether the nature of the alleged contravention is of considerable industry or public concern. FWBC assumes that, in all cases, the public and the industry is concerned about compliance with Building Industry Laws. However, there will be circumstances in which the level of such concern is of heightened importance.

13.4. Impact of the alleged contravention

(a) the attitude to the commencement of a proceeding which is held by the person who was injured or otherwise adversely affected by the alleged contravention;

- (b) the impact of the alleged contravention on such persons;
- (c) the impact of the alleged contravention on any other relevant persons (e.g. family members); and
- (d) any other relevant impact of the alleged contravention.

13.5. Deterrence

- (a) the likely impact of proceedings on:
 - (i) general deterrence (i.e. reducing the likelihood that other building industry participants will commit similar contraventions or otherwise contravene Building Industry Laws); and
 - (ii) specific deterrence (i.e. reducing the likelihood that the alleged wrongdoer will commit a further contravention of such laws).

13.6. Effect of litigation

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

13.7. Public Administration considerations

- (a) the necessity to maintain public confidence in the administration of Building Industry Laws;
- (b) the likely length and expense of litigation, having regard to FWBC's available budget ;
- (c) whether the commencement of a proceeding would be perceived as counter-productive, for example, by bringing the law into disrepute; and
- (d) the staleness of the alleged contravention.

14. Determination of appropriate enforcement related option

14.1. Options

After consideration of all the relevant criteria (i.e. sufficient evidence and public interest), an FWBC investigation will result in:

- (a) the commencement of litigation;

- (b) the issuing of a Compliance Notice;
- (c) the giving of an Enforceable Undertaking by the wrongdoer;
- (d) the issuing of a letter of caution;
- (e) a referral to small claims procedures;
- (f) a referral to other dispute resolution mechanisms (i.e. mediation); or
- (g) no further action.

14.2. Commencement of litigation

Where sufficient admissible evidence exists of a contravention, the commencement of proceedings is in the public interest, and the subject matter of the proposed proceeding is not the subject of settled, discontinued proceedings between building industry participants, FWBC will commence a proceeding.

14.3. Undertaking

Where it is in the public interest, the Director may accept a written undertaking under section 715 of the FW Act, if:

- (a) he reasonably believes that the person proposed to be subject to the undertaking has contravened a civil remedy provision of the FW Act;
- (b) it is in the public interest and appropriate in all the circumstances to resolve the matter through a formal enforcement outcome; and
- (c) the contravention is admitted and the person proposed to be subject to the undertaking is willing to cooperate with FWBC.

Such an undertaking may be accepted in lieu of commencing litigation. All undertakings will be published on the FWBC website.

As part of the undertaking, the wrongdoer must admit the contravention, remedy the contravention in the manner specified, (where appropriate) acknowledge that application may be made to the court for orders against them if they fail to comply with the undertaking and take any other action agreed to in the undertaking.

For example, the undertaking might contain a broad range of commitments, including regular audits and compliance plans, training for managers and staff, management plans for work systems and keeping FWBC informed of ongoing steps taken to ensure compliance with Building Industry Laws. The undertaking may require a public notice by the wrongdoer about the contraventions and the remedial action they have agreed to carry out.

An enforceable undertaking is an alternative to litigation. Its purpose is to focus the wrongdoer on the tasks to be carried out to remedy the alleged contravention and prevent a similar contravention of Building Industry Laws in the future.

However, if the undertaking is not complied with, the Director may apply to the court for an order directing the wrongdoer to comply with the terms of the undertaking and such other orders as the court considers appropriate.

Contravention of an undertaking may also result in the Director initiating proceedings for a contravention of Building Industry Laws seeking penalties and remedies. It will also be a factor taken into account in any future dealing with that party.

14.4. Letter of caution

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

14.5. No further action

No further action will be taken, where:

(a) external legal advice is that proceedings would not have a reasonable prospect of success; or

(b) it would not be in the public interest to commence a proceeding, accept a written undertaking, or issue a letter of caution.

15. The commencement and conduct of FWBC litigation

15.1. In many cases the evidence will disclose a number of potential contraventions of Building Industry Laws. FWBC (namely the Fair Work Building Industry Inspector and their State Director in consultation with relevant Field Operations Executive Directors and the Chief of Field Operations) will take care to identify the contraventions which adequately reflect the nature and extent of the offending conduct and which will provide the court with an appropriate basis for deciding upon a penalty.

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

15.3. All litigation commenced by the Director will be conducted honestly, fairly, consistently and in accordance with The Commonwealth’s Obligation to Act as a Model Litigant (Appendix B to the Legal Service Directions). In addition, FWBC staff, including FWBI Inspectors, will at all times act in

accordance with the FWBC Statement of Professional and Ethical Standards, which appears at Annexure A to this Guidance Note.

16. Breach bargaining

16.1. Breach bargaining involves negotiations between the respondent and FWBC (namely the Fair Work Building Industry Inspector and their State Director in consultation with relevant Field Operations Executive Directors and the Chief of Field Operations) in relation to the contraventions to be proceeded against. A breach bargaining decision may only be made with the consent of the Director or an authorised SES officer.

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

16.3. Before such an agreement is reached, FWBC needs to be satisfied that:

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

16.4. In many cases, the interests of justice will be served if a respondent admits to contraventions in the circumstances described above and the community is not put to the burden of funding a long and expensive hearing.

16.5. Accordingly, in appropriate circumstances, FWBC will promptly consider any proposal and put its position to the defendant/respondent. However, the process is not one of “negotiation”. FWBC is concerned with appropriately reflecting its perception of the public interest and its position in relation to disposition of the matter generally.

16.6. A proposal by a respondent that it will agree to particular contraventions or accept a lesser number of contraventions may include a request that the Director not oppose a submission made by the respondent to the court that the penalty falls within a nominated range. FWBC will consider such a request provided the range of penalty nominated is considered to be within acceptable limits having regard to FWBC’s desire to balance its aims of general and specific deterrence with those circumstances which, in individual cases, constitute relevant penalty considerations.

16.7. Under no circumstances will FWBC entertain a breach bargaining proposal if the respondent maintains their innocence with respect to the contraventions it has offered to concede. The respondent must genuinely accept wrongdoing and be prepared to admit that publicly and to the court.

16.8. If the breach bargaining might affect the substantive interests of the person who was injured or otherwise affected by the contravention, then, where practicable, they will be consulted before any breach bargaining decision is made.

17. Discontinuance of proceedings

17.1. Consistent with the objective of ensuring that only appropriate cases are brought before the courts, FWBC will discontinue a proceeding if appropriate.

For example, if a wrongdoer who is a first time “offender”, agreed to make good a small underpayment (e.g. less than \$1,000) to an employee after proceedings are commenced and agreed to reimburse FWBC’s legal costs, FWBC would consider discontinuing the proceedings.

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

17.2. The decision whether or not to discontinue a proceeding rests with the Fair Work Building Industry Inspector and their State Director in consultation with relevant Field Operations Executive Directors and the Chief of Field Operations (subject to the need to obtain consent from the Director an authorised SES officer).

17.3. Where appropriate the person who was injured or otherwise affected by the contravention will be consulted before any decision is made to discontinue proceedings.

18. Submissions on penalty

18.1. Where a proceeding results in a finding that a respondent has Building Industry Laws have been contravened the court will move to consider what penalty, if any, should be imposed.

18.2. Where appropriate, FWBC will seek penalties that balance its aims of general and specific deterrence with those circumstances which, in individual cases, constitute relevant penalty considerations. The Director will also, where allowed, seek to recover legal costs.

18.3. FWBC notes that where wrongdoers have co-operated with FWBC and also made admissions early in the course of an investigation or soon after the commencement of proceedings it is appropriate to allow a discount on penalty. However, consistent with the decision in *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 (at 74 - 76 per Stone and Buchanan JJ),

“...the benefit of such a discount should be reserved for cases where it can be fairly said that an admission of liability:

(a) has indicated an acceptance of wrongdoing and a suitable and credible expression of regret; and/or

(b) has indicated a willingness to facilitate the course of justice”.

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

“[22] It is also relevant to note that the maximum penalty has been increased very significantly in the last two years. It was raised from \$10,000 to \$33,000, an increase of 230 per cent.

*In view of this large increase the following comments of Merkel J in a slightly different context at [72] in *Finance Sector Union v Commonwealth Bank of Australia* [2005] FCA 1847 are apposite – also noting that the maximum penalty for each contravention that Merkel J was considering was \$10,000*

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

18.5. Respondents should note that an eligible court will be guided, but not bound, by any submission or agreement FWBC makes in relation to penalty.

18.6. Paragraph 545(2)(b) of the FW Act also provides that an appropriate court may, where a respondent has contravened a civil remedy provision, make an order awarding a specified amount to another person as compensation for loss suffered by the other person as a result of the contravention.

18.7. FWBC will, prior to commencing any proceeding, liaise with those persons who were injured or otherwise affected by the contravention to,

where practicable, determine the loss they suffered as a result of the contravention. Where such loss can be determined, FWBC will seek the making of orders by the court requiring the respondent to pay compensation to the affected persons.

19. Notification of enforcement activity

19.1. When a decision is made by FWBC as to what, if any, action will be taken following an investigation (i.e. litigation, undertaking, letter of caution or no further action) the following persons will (where practicable and subject to paragraph 19.2 below), be notified in writing of the decision:

- (a) the alleged wrongdoer, and their representative(s);
- (b) any person who was injured or otherwise affected by the contravention;
- (c) witnesses who have provided formal statements or been the subject of a subpoena to give evidence; and
- (d) any other interested party whom it is appropriate to notify.

19.2. Disclosure to the persons referred to in paragraph 19.1(b), (c) and (d) will not occur where, in the opinion of the Director or an authorised SES officer, disclosure is not appropriate, taking into account privacy considerations, confidentiality obligations or other relevant matters.

20. Publishing and utilising enforcement activity

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

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

For example, FWBC may:

- (a) in respect of a litigation matter, publicise the decision to commence a proceeding, the lodgement of court processes, directions hearings, decisions (whether the litigation results in a penalty being imposed or not), penalty hearings and the final penalty, if FWBC determines that publicising any (or all) of these stages will support compliance with Building Industry Laws;
- (b) publish information about its enforcement activities to enhance specific and general deterrence;

(c) inform workplace participants in the same and similar industries of the nature and outcome of enforcement activities and provide advice in relation to how to prevent similar contraventions; and

(d) utilise information from enforcement activities to inform future inspection activity particularly on a systemic level..

21. Intervention in proceedings by the Director

21.1. Under section 71 of the FWBI Act, the Director may intervene in the public interest in a civil proceeding before a court that arises under the IC Act or the FW Act and involves a building industry participant or building work.

21.2. Under section 72 of the BCII Act, the Director may, following the giving of written notice, make submissions in a matter before Fair Work Australia that arises under the FW Act and involves a building industry participant or building work.

21.3. The public interest considerations referred to in this FWBC Litigation Policy are equally applicable to the decision to intervene in proceedings or the making of submissions to FWA.

21.4. However, under section 73 of the FWBI Act, the Director must not continue to participate in court proceedings in which he has intervened, where the building industry participants have settled and discontinued the proceedings.

Leigh John
Acting Director
Fair Work Building & Construction
12 June 2012

ANNEXURE A

Statement of Professional and Ethical Standards

The Office of the Fair Work Building Industry Inspectorate is an independent statutory agency of the Commonwealth. It operates under the name Fair Work Building & Construction (FWBC).

The functions and powers (including the power to commence civil penalty proceedings) are conferred on a Fair Work Building Industry Inspector by the Fair Work Act 2009.

FWBC adopts the highest professional and ethical standards in the exercise of its functions and powers. These standards are contained in a number of sources, including:

the law, such as relevant legislation and judicial guidance;

FWBC guidance notes and policies; and

the Legal Services Directions 2005 (including Appendix B - obligation to act as a model litigant).

IN CARRYING OUT INVESTIGATIONS, WE WILL:

1. Seek to discover the truth about matters under investigation.
2. Act without bias, partiality, personal interest or pre-judgement toward the outcome.
3. Gather evidence from a variety of sources (including by seeking to interview all relevant persons) and only act on the basis of logically probative evidence.
4. Inform any person who may be subject to an adverse finding of the nature of potential finding, the basis for the finding and their right to seek a review of the finding. We will also give any person who may be subject to such a finding an opportunity to show cause why the particular finding should not be made, including by:
 - 4.1. Denying any adverse allegations
 - 4.2. Presenting alternative explanations for particular matters
 - 4.3. Putting forward arguments supporting their position
 - 4.4. Providing evidence in support of their position
5. Disclose to all parties to an investigation the identity of the other parties to the investigation, the fact that there is an investigation (including the alleged contravention) and the material obtained in the course of the investigation unless doing so is unlawful, will compromise the integrity of the investigation or other circumstances exist which justify non-disclosure.
6. Advise any person who is issued a notice requiring them to produce documents to the FWBC of their right to seek independent legal advice.
7. Advise any person questioned during an investigation that they are not bound to answer questions (unless compelled to do so under the Fair Work (Building Industry) Act 2012) and that they may seek legal advice.

IN COMMENCING OR CONDUCTING LITIGATION, WE WILL:

1. Act in accordance with the FWBC Litigation Policy, including only commencing proceedings where there are reasonable prospects of success and the proposed litigation is in the public interest.
2. Act honestly, fairly, consistently and in accordance with the Commonwealth's obligation to act as a model litigant, assisting the court in ensuring that justice is done.
3. In accordance with FWBC's obligation of fairness, we will:
 - a. Not argue any proposition of fact or law which the relevant lawyer does not believe on reasonable grounds is capable of contributing to the success of the litigation and carries weight;
 - b. Ensure that all material witnesses who are available to give evidence in a liability hearing are called by FWBC to give that evidence;
 - c. Endeavour to establish the whole truth, presenting evidence with fairness and detachment.; and
 - d. Make timely disclosure of all material matters which affect the case relied upon by FWBC, whether those matters strengthen or weaken FWBC's case or assist the case of the respondents (including providing statements and other relevant material obtained in the course of the investigation, whether or not FWBC proposes to rely on those statements or relevant material).